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 DEFENDANT'S MOTION TO EXCLUDE ALLEGEDLY "IRRELEVANT, MISLEADING, AND CONFUSING" REGULATORY AND POLICY EVIDENCE

As the Court is well aware, CACI made its borrowed servant defense the center of its case at the April 2024 trial. CACI no doubt will do so again if this Court denies Plaintiffs' motion *in limine* to preclude the borrowed servant defense as a matter of law. Yet CACI's motion, which rests on a grossly distorted factual record, imagines that introduction of precisely the same evidence Plaintiffs introduced at the first trial would somehow create chaos and prejudice. The motion reflects hyperbole rather than law.

First, the evidence CACI seeks to exclude—including even CACI's operative contract with the Government—is of the kind that is routinely offered and accepted by courts in evaluating the viability of a borrowed servant defense (and, of course, *respondeat superior* liability). Second, CACI's motion is premised on the false notion that Plaintiffs will offer nearly every one of the wide range of documents cited in Plaintiffs' pending motion *in limine* that was offered to preclude the borrowed servant defense and in the amicus brief proffered by experts in military law and

policy. While all of those documents are relevant to that motion *in limine* in order to show the depth and breadth of the federal regulatory field that military law occupies so as to displace the common law borrowed servant defense, they are not all necessary for purposes of contesting the merits of CACI's borrowed servant defense (if it is ultimately allowed at trial). Thus, CACI ignores that Plaintiffs only intend to offer only the handful of "regulatory and policy" documents that were on Plaintiffs' exhibit list or that were marked as exhibits during the April 2024 trial—material that CACI has known about for years, that the jury was able to review at the prior trial, and that courts routinely consider as relevant to a borrowed servant dispute.

Finally, because Plaintiffs' evidence will be cabined in this way, there is no basis to support CACI's claimed need to "respond in kind" with a deluge of unspecified (and likely irrelevant) regulations and policy documents that were never on CACI's exhibit list or introduced at the prior trial. CACI has not previously identified such documents and only now does upon realizing its vulnerability on this question. CACI cannot be permitted to artificially manufacture chaos and then complain about the confusion it seeks to produce. In sum, CACI's motion should be denied.

BACKGROUND

Plaintiffs have moved *in limine* to preclude CACI's borrowed servant defense because, *inter alia*, the federal interests embedded in military law and policy foreclose, as a matter of law, the defense's application to this case involving allegations of violations of black-letter law of the most serious type—torture and cruel, inhuman and degrading treatment—in the context of contractors working with the military. *See generally* ECF Nos. 1718, 1718-1; *see also* ECF Nos. 1739-1, 1743-1 (proposed amici of Experts in Military Law and Policy). In the event that the Court nevertheless permits CACI to present the borrowed servant defense, Plaintiffs recognize that there would be a different ***factual*** question at issue, and Plaintiffs have no intention of relitigating

the merits of that question of ***law*** before the jury. Indeed, while CACI apparently is operating under the misimpression that Plaintiffs plan on presenting a bevy of new "regulatory and policy" evidence at trial, *see* ECF No. 1745 at 1, Plaintiffs will offer no such evidence beyond a subset of the material ***already identified*** on their exhibit list or marked as exhibits during the April 2024 trial—a grand total of ***two*** documents, to provide the necessary context for the jury's consideration of the borrowed servant defense (and relatedly, *respondeat superior* liability). These are: (1) Army Field Manual 3-100.21 (100-21), Contractors on the Battlefield (2003) (the "Army Field Manual"); and (2) Army Regulation 715-9, Contractors Accompanying the Force (1999) ("AR 715-9").[1]

Plaintiffs will, of course, rely as well on CACI's contract with the Government, among other documents and testimony that do not constitute the regulatory or policy evidence that CACI challenges on this motion. Plaintiffs raise CACI's contract with the Government specifically because, even though CACI's motion is ostensibly directed only to "regulatory or policy" material, CACI maintains in its motion that this contract, which specifically governed the work that CACI and its employees performed at Abu Ghraib, is somehow irrelevant to the borrowed servant analysis and appears to seek its preclusion. *See* ECF No. 1745 at 13-14.

[1] These documents were marked as PTX 207 and PTX 227. Although the documents are self-authenticating under Federal Rule of Evidence 902(5), *see, e.g.*, *Smith v. Halliburton Co.*, 2006 WL 1342823, at *2 (S.D. Tex. May 16, 2006) (Army Field Manual 3-100-21 and AR 715-9 "are official publications and therefore are self-authenticating" pursuant to Rule 902(5)), Plaintiffs have obtained certified copies of these two documents from the Government to resolve any dispute that CACI might raise regarding authenticity.

Prior to the April 2024 trial, Plaintiffs also identified (as PTX 208) the document entitled Joint Publication 4-0, Doctrine for Logistic Support of Joint Operations (2000) ("Joint Publication 4-0"). Plaintiffs reserve their right to use Joint Publication 4-0 depending on how CACI presents its case.

The Army Field Manual and AR 715-9

The Army Field Manual, which was in operation during the relevant period of CACI's work at Abu Ghraib, was "intended for commanders and their staff at all echelons, program executive officers/program managers, and others," including contractors, as a "guide" to "understanding how contractors will be managed." Ex. 1 (PTX 207) at 4. The Army Field Manual "reflects relevant doctrine, incorporates lessons learned from recent operations, and conforms to Army doctrine and policy." *Id.* at 5. That "doctrine and policy" includes:

- "[C]ontractor management does not flow through the standard Army chain of command. … It must be clearly understood that commanders do not have direct control over contractor employees (**contractor employees are not government employees**); only contractors directly manage and supervise their employees." Ex. 1 (PTX 207) at 57 (emphasis in original); *see id*. at 15 (reiterating same and emphasizing that "[m]anagement of contractor activities is accomplished through the responsible contracting organization, not the chain of command").

- While military Contracting Officer Representatives "provide[] a vital link between the military and the contractor," Contracting Officer Representatives were "prohibited from …[i]nterfering with the contractor's management prerogative by 'supervising' contractor employees or otherwise directing their work efforts." *Id*. at 90-91.

- Because "[c]ontractor employees are not subject to military law" under the Uniform Code of Military Justice, "***[m]aintaining discipline of contractor employees is the responsibility of the contractor's management structure, not the military chain of command…. It is the contractor who must take direct responsibility and action for his employees' conduct***." *Id.* at 68 (emphasis added).

Consistent with this doctrine, AR 715-9—an undisputedly binding regulation setting forth the "policies, procedures, and responsibilities" of the Army, Ex. 2 (PTX 227) at 3—provided that contractors "will perform the necessary supervisory and management functions of their employees" because "***[c]ontractor employees are not under the direct supervision of military personnel in the chain of command***." *Id.* at 16 (emphasis added); *see also id.* at 17 (contractors "***shall not be supervised or directed by military or Department of the Army (DA) civilian personnel***") (emphasis added).

Contrary to CACI's self-serving assertion, these were not mere paper policies and regulations evincing a "total divide" from military doctrine and the "realities" on the ground. ECF No. 1745 at 4. Relevant players at Abu Ghraib—including the military Contracting Officer Representatives who served as the primary liaisons between the military and CACI during the relevant time period—have explained in sworn declarations and testimony their reliance on and attempts to adhere to the Army Field Manual and other field manuals and regulations governing the work of civilian contractors. For example:

- Lieutenant Colonel Eugene Daniels, who served as the Army's Contracting Officer Representative as to CACI during a portion of the relevant period, explained that if he "had any questions about how to interact with commercial contractors such as CACI" during the performance of his duties in Iraq, he "***would have looked to the Army Field Manual on the use of commercial contractors for guidance.***" ECF No. 528-22 ¶¶ 3-4 (emphasis added). Daniels stated that he was "bound by regulations governing the use of commercial contractors such as CACI" and "did not intend to, and did not depart from those regulations." *Id.*

- Colonel William Brady, who succeeded Lieutenant Colonel Daniels, testified that field manuals reflect "current doctrine" and that he would defer to such "military field manual guidance" in his own practice. Ex. 4 (Brady Dep. Tr.) 131:8-12, 132:8-11.

- Mark Billings, CACI's director and project manager of CACI's work at Abu Ghraib, admitted during his cross-examination at the April 2024 trial that, having served in the Army for 22 years and then worked in military contracting for several years thereafter, he views the Army Field Manual as "an official publication issued by the U.S. Army that ***instructs*** personnel about ***the appropriate ways to do things***." ECF No. 1625 (Apr. 18, 2024 Tr.) 57:14-58:9 (emphasis added). Unsurprisingly, CACI does not like this testimony; hence, it improperly replaced the word "instructs" with "non-binding advice" in its brief. ECF No. 1745 at 4. Billings also previously testified in this case that he "had gone through the regulations for deploying forces into a combat zone" and supposedly made sure that such regulations were "complied with." Ex. 5 (Billings Dep. Tr.) 76:3-7.

The Contract

The contract between the Government and a civilian contractor is a vital document in understanding the contractor's work and the allocation of responsibilities, including supervisory and management responsibilities over its employees, between the contracting parties. Indeed, the Army Field Manual and AR 715-9 make clear that the military's management of the contractor is

"exercised … through the contract" between the Government and the contractors. Ex. 1 (PTX 207) at 15; *see* Ex. 3 (PTX 208) at 16 ("Similar to the military chain-of-command, command and control of [contractors] will be defined by the terms and conditions of the contract."). Accordingly, the Fourth Circuit has emphasized this point in this case, relying on the very sources that Plaintiffs seek to offer. *See Al Shimari v. CACI Int'l, Inc*., 679 F.3d 205, 242 (4th Cir. 2012) (Wilkinson, J., dissenting) ("What the chain of command does for military officers, contract law does for military contractors." (citing Ex. 1 (PTX 207) at 15); *see also id.* (citing AR 715-9 for the proposition that contractors "are not formally part of the operational chain of command" but are "managed in accordance with the terms and conditions of the contract" (internal quotation marks omitted)).

Again, contrary to CACI's self-serving attempt to foreclose a disputed factual question, the terms and conditions of CACI's contract were not divorced from the services that CACI provided, or sought to provide, ***on the ground***, including when the alleged misconduct occurred.[2] As non-exhaustive examples: First, CACI's Billings, who had management responsibility for the performance of the contract, explained that it was "[a]bsolutely" important for CACI to "ensure," as CACI was required to under the contract, "that [it] provided resident experts to the military at Abu Ghraib." ECF No. 1625 (April 18, 2024 Tr.) 38:24-39:8. Second, CACI provided, as it was required to, monthly status reports about its employees' work to the military. Ex. 6 (Mudd Dep. Tr.) 75:1-12. Third, while CACI insists in its brief that it's "beyond a shadow of a doubt" that CACI "had no visibility whatsoever into the day-to-day performance of its employees," ECF No.

[2] CACI seeks to improperly convert this Court's comment qualifying CACI's repeated assessment of the command/control issue during the testimony of a CACI former employee into a factual finding. ECF No. 1745 at 4 (quoting Dkt. #1634, 4/19/24 Trial Tr. at 51:1-6). Of course, the Court was not engaged in fact-finding on the question of command and control or any asserted distinction between "operational" or "administrative" control, which are questions that must be evaluated by the jury afresh.

1745 at 2, the record shows otherwise. While CACI wishes this statement was true, it clearly was not. CACI's Rule 30(b)(6) corporate designee (and former CACI Chief Legal Officer) testified that, as required under the contract, "we were responsible for providing supervision to all our contractor personnel." CACI sought to satisfy this contractual requirement by providing "two CACI supervisors who had responsibility for in-country supervision," one of whom was "Dan Porvaznik," the "***operational*** supervisor." ECF No. 1591, Ex. C (emphasis added), 171:25-172:3, 172:14-172:24; *see also id.*, Ex. A (Monahan Dep. Tr.) 19:11-19. These individuals conducted performance evaluations of CACI interrogators, including by "discuss[ing] each of his interrogators' performance with those working in the hard site, and consider[ing] … [the site lead's, i.e., Porvaznik's] own personal knowledge in evaluating [these] interrogators' performance," ECF No. 1634 (April 19, 2024 Tr.) 58:2-59:2, and conducted "counseling sessions" with CACI employees in connection with their job performance. How could CACI have completed performance evaluations without knowing the day-to-day activities of its interrogators? Even CACI management in the United States met regularly with the military to discuss the performance of CACI employees at Abu Ghraib. Ex. 6 (Mudd Dep. Tr.) 80:1-12, 82:14-18.

CACI may not like it, but the record also shows that Porvaznik reviewed "the vast majority of CACI interrogation plans"; would have objected (but as, the record shows, did not object) to any plan that he found problematic; and had the ability (and responsibility) to stop (but, as the record shows, did not stop) CACI employees from engaging in abuse in connection with interrogations, even if the abuse were approved or authorized by the military (which Plaintiffs do not contend it was). *See* Ex. 7 (Porvaznik Dep. Tr.) 143:13-144:1 (testifying that he "[a]bsolutely" would have stopped any interrogation involving abuse as part of his professional responsibilities as site manager); *id.* at 307:11-308:4 (testifying that he would have instructed CACI personnel not

to engage in conduct approved in interrogation plans if that conduct "crossed the line and abused a prisoner"); *id.* at 164:7-13. CACI interrogators, for their part, were also required to comply with direct instructions from ***Porvaznik***, and were required to come to ***CACI*** with any concerns about the permissibility or legality of their interrogation conduct. Ex. 7 (Porvaznik Dep. Tr.) 185:11-14; ECF No. 1591, Ex. A (Monahan Dep. Tr.) 65:18-66:06; Ex. 6 (Mudd Dep. Tr.) 149:20-150:5.

Thus, CACI's contention that the reality on the ground did not reflect the mandates of its contract with the Government is specious.

ARGUMENT

I. THE LIMITED REGULATORY EVIDENCE THAT PLAINTIFFS WILL OFFER IS HIGHLY RELEVANT

CACI insists that the "borrowed servant inquiry" is "fact-sensitive" and "does not examine whether the borrowing employer's exercise of control," if the requisite complete control existed, "was lawful or good policy." ECF No. 1745 at 7-8. Setting aside the distinct question that the borrowed servant defense in the circumstances of this case alleging intentional torts involving civilians working alongside the military in a theater of conflict is foreclosed as a matter of law, where the borrowed servant doctrine is available, Plaintiffs do not dispute these propositions. This is why Plaintiffs have reserved their arguments about the lawfulness and policy implications of CACI's borrowed servant defense for their motion *in limine* on that subject. *See* ECF No. 1718-1.

CACI spends a significant portion of its brief either attempting to rebut the arguments that Plaintiffs presented in that motion or arguing that the arguments made on that motion should not be made to a jury. *See* ECF No. 1745 at 7-12 (explaining, over multiple pages, why CACI maintains that it is "incorrect to extrapolate based on [regulations] that contractors can never be

supervised by the military chain of command").[3] The merits of that contention, however, are wholly irrelevant to the question that CACI's motion ostensibly is meant to address: the evidence that Plaintiffs may offer if the Court allows the borrowed servant defense to be presented on the merits (which, again, is evidence that *also* relates to *respondeat superior* liability). However, CACI spends very little time on that issue. Beyond conclusory and factually incorrect statements about CACI's lack of visibility into its employees' performance when conducting interrogations or the supposed "total divide" between the documents that Plaintiffs seek to offer and the supposed "realities" at Abu Ghraib, *see* ECF No. 1745 at 2, 4, CACI hardly even attempts to credibly fashion an argument as to why the evidence that Plaintiffs will offer if their motion *in limine* is denied is not relevant to the "fact-sensitive" borrowed servant inquiry and matters of command or control when the alleged misconduct occurred.

As described above, the evidence that Plaintiffs intend to offer—principally the Army Field Manual, AR 715-9, and CACI's contract with the Government—were not some aspirational documents that were somehow entirely untethered to the realities at Abu Ghraib, but instead are

[3] For example, CACI insists 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* ECF No. 1745 at 8; *id.* at 5 n.4. Plaintiffs will address these cases in full in their reply in connection with their motion *in limine* to preclude the borrower servant defense—but suffice it to say that the few cases that CACI has boiled the ocean to identify are completely inapposite. Several, for example, involve interpretation of workers' compensation statutes under various state laws. Others are 55 and 91 years old, and say nothing about military policy at the relevant time—but in any event, none implicate the federal interests that are at the core of Plaintiffs' motion.

Similarly, CACI embarks on a lengthy digression about personal services contracts in response to a point in Plaintiffs' motion *in limine*. ECF No. 1745 at 8-12. CACI is wrong, as Plaintiffs will explain in their reply in further support of that motion, but, for purposes of the instant motion, the question is irrelevant to what evidence Plaintiffs should be able to offer if CACI's borrowed servant defense is permitted to proceed, so Plaintiffs will avoid inundating the Court with unnecessary argument in this brief.

important documents that established the framework for CACI's relationship with the military, the services that CACI provided, and the work that it actually performed at the Hard Site. Moreover, the record clearly reflects that these documents were understood as governing the relationship between CACI and the military, and they were relied on and considered by relevant players in this case. These documents are plainly relevant for that reason alone. They are also crucial for testing the credibility of CACI's witnesses, whom CACI has prepared for decades to incant the phrases "operational control" and "administrative control" in an effort to disclaim and obfuscate any power or control that CACI had regarding the work that CACI was paid to perform and over its employees' conduct at the time when the alleged misconduct occurred, and to counter CACI's implausible narrative of its role at Abu Ghraib.

Perhaps most surprisingly, CACI argues that the provisions of the actual operative contract with the Government are not relevant to the borrowed servant analysis. ECF No. 1745 at 13. No doubt the provisions undermine CACI's borrowed servant defense, as the defense also flies in the face of borrowed servant precedent both in this jurisdiction and nationwide. More importantly, such contractual provisions typically are among the ***first*** places triers of fact look, in part because these contracts can demonstrate—as in this case—the sheer illogic of the invoking party's contentions. For example, in *Trevino v. Gen. Dynamics Corp*., the court ruled that "the contracts themselves evidence the intention not to create a borrowed servant relationship.… If the parties to these contracts had intended that General Dynamics' designers would receive their instructions on a day-to-day basis from Mare Island Supervisors, there would have been no need to describe General Dynamics' specific area of responsibilities in the agreement." 626 F. Supp. 1330, 1339 (E.D. Tex. 1986), *aff'd in part, vacated in part*, 865 F.2d 1474 (5th Cir. 1989); *see also, e.g*., *Starnes v. United States*, 139 F.3d 540, 541-42 (5th Cir. 1998) (focusing on terms of the "Military

Training Agreement" between the Army and the private hospital in rejecting the argument that the doctor was a borrowed servant); *id.* (emphasizing that the contracts' terms regarding control "is a factor to be considered"); *Alday v. Patterson Truck Line, Inc.*, 750 F.2d 375, 377 (5th Cir. 1985) (noting that despite contrary evidence regarding realities of the alleged borrowing employer's control over the plaintiff at a worksite, the contractual provisions between that company and the general employer created disputes as to the borrowed servant defense); *Bradley v. Nat'l Collegiate Athletic Ass'n*, 464 F. Supp. 3d 273, 286–89 (D.D.C. 2020) (extensively discussing the Memorandum of Understanding between the military consortium of medical hospitals and the private medical practice in analyzing the borrowed servant defense). In fact, the Fourth Circuit previously has found that the terms of a contract to be dispositive in the borrowed servant analysis. *US Methanol, LLC v. CDI Corp*., No. 21-1416, 2022 WL 2752365, at *5 n.4 (4th Cir. July 14, 2022) (relying solely on "the terms of the contract" with respect to the supervision of personnel and the allocation of responsibility in resolving the borrowed servant defense). The notion that CACI's contract should not be considered evinces—even by CACI's standards—the untenable overreach.

CACI has not identified a single case in which a plaintiff was prohibited from offering the sort of limited evidence that Plaintiffs seek to offer here to provide the factual context for CACI's responsibilities for and over its employees. In fact, the cases cited by CACI undermine its position as they reinforce that the evidence that CACI is seeking to preclude is properly considered as part of the "fact-intensive" inquiry into the borrowed servant relationship. For example, in *Melancon v. Amoco Prod. Co*., the Fifth Circuit ***considered*** the parties' contract in affirming the trial court's finding regarding the existence of a borrowed servant relationship. 834 F.2d 1238, 1245 n.13 (5th

Cir. 1988), *amended on reh'g in part sub nom. Melancon v. Amoco Prods. Co*., 841 F.2d 572 (5th Cir. 1988).

Similarly, courts have also not hesitated in considering guidance and regulations in evaluating the borrowed servant defense or similar defenses implicating the command and control of particular personnel. *See, e.g.*, *Bramlett v. Bajric*, 2012 WL 4951213, at *4 (N.D. Ga. Oct. 17, 2012) (considering federal regulation regarding who has control of certain leased equipment in connection with the invocation of borrowed servant doctrine); *Saratoga Sav. & Loan Ass'n v. Fed. Home Loan Bank of San Francisco*, 724 F. Supp. 683, 685-86 (N.D. Cal. 1989) (focusing on federal regulations regarding delegation of supervision functions in evaluating the borrowed servant defense); *In re KBR, Inc., Burn Pit Litig*., 744 F.3d 326, 339 (4th Cir. 2014) (considering "military guidance documents" in determining whether "the military directed the[] tasks" at issue, rather than the contractor); *see also id.* at 338 (discussing another Court's reliance on Army Field Manual in resolving the political question doctrine inquiry).

II. CACI'S CLAIMED NEED TO INTRODUCE A BEVY OF NEW EVIDENCE IS BOTH INCORRECT AND UNTIMELY

CACI threatens that it "will have no choice but to respond" to Plaintiffs' regulatory and policy evidence with "statutes, regulations, policy statements, and Department of Defense instructions, guidance, and admissions that say the opposite," as well as additional "law and policy documents demonstrating that contractor personnel are not permitted to supervise or direct military personnel." ECF No. 1745 at 2; *see also id.* at 12. As an initial matter, CACI is simply wrong as to the nature of the documents that Plaintiffs intend to use at the upcoming trial. Again, currently, Plaintiffs only seek to introduce into evidence the documents discussed in the background section of this brief. But CACI is threatening to create chaos unless it has its way.

More importantly, however, CACI cannot explain why it suddenly needs to marshal and present the unspecified materials to which it alludes, other than to manufacture confusion. CACI has known for years that Plaintiffs would rely on military regulations and policy documents—and have in fact relied upon them—to counter CACI's "command and control" arguments, and CACI never thought that it was necessary to respond in the way that CACI now contemplates, not in summary judgment briefing in which it surfaced the borrowed servant defense (or argued against *respondeat superior* liability), or thereafter. CACI's new insistence is a wild grasp. Moreover, the materials on Plaintiffs' exhibit list were discussed at length during depositions in this case, as well as in an earlier, related litigation that the parties have agreed to treat as if taken in this case. Likewise, more than 15 years ago, those same documents were at the heart of an opposition to CACI's unsuccessful motion for summary judgment in the related case, *Saleh v. Titan*, regarding the fact that the military had "absolute operational control over CACI interrogators." *See, e.g.*, Case 1:05-cv-1165, ECF No. 135 at 2-3 (discussing AR 715-9 and the Army Field Manual at length); ECF No. 528-22 (Supplemental Declaration of LTC Eugene Daniels, U.S. Army); *see supra* at 5 (discussing Billings and Brady depositions).

Unsurprisingly, when CACI argued on summary judgment in this case that the borrowed servant doctrine applied to preclude CACI's liability, *see* ECF No. 1035 at 22, Plaintiffs opposed that motion by citing, among other documents, the Army Field Manual and another military policy document, Joint Publication 4-0. *See* ECF No. 1090, Statement of Material Facts, ¶¶ 38-39; *see also* ECF No. 1086-7, 1086-18. CACI did not address these materials in any way in its reply brief, nor did it attempt to offer the bevy of documents it now seeks to introduce; instead, CACI simply stated—conclusorily and non-responsively—that "the record unilaterally refutes Plaintiffs' allegations that CACI PT controlled operations at Abu Ghraib prison." ECF No. 1112 at 19. And

when Plaintiffs disclosed the few "regulatory or policy documents" in connection with the April 2024 trial, CACI similarly did not contend that it had "no choice" but to offer up a number of allegedly contrary documents in response, and did not argue as much in the subsequent months, as the parties prepared for the upcoming trial.

Surely, if CACI actually believed the mountain of new evidence was truly necessary, it would have identified that evidence and disclosed the evidence to Plaintiffs and to the Court, consistent with the Federal Rules of Civil Procedure, *see* Fed. R. Civ. P. 26(a)(3)(A)(iii), (B) (requiring disclosure, "at least 30 days before trial," "each document or other exhibit" that a party expects to or may offer, other than those presented solely for impeachment). Just two and a half weeks out from trial, however, CACI has still not disclosed or even given a hint as to the unspecified "statutes, regulations, policy statements, … instruction, guidance" and "law and policy documents" it claims it will need to introduce at trial. If CACI is waiting to spring on Plaintiffs a deluge of new documents without offering Plaintiffs a meaningful opportunity to review and object to those documents, that would be wholly improper, as well as in violation of the applicable rules. But it appears more likely that CACI simply hopes that by invoking the specter of a "free-for-all in which the jury parses military law and policy," ECF No. 1745 at 12, the Court will preclude even the narrow and plainly relevant evidence that Plaintiffs seek to offer. Plaintiffs respectfully submit that the Court should not fall for that gambit.

And it is not just about documents. Plaintiffs recently learned that CACI is now planning on calling witnesses bearing on its borrowed servant defense whom CACI neither called at the previous trial nor disclosed on its witness list. Nor have Plaintiffs previously had an opportunity to take the depositions of these witnesses. CACI cannot be allowed to prejudice Plaintiffs in this way on the eve of the retrial.

CONCLUSION

CACI understandably wishes that it will not have to address the evidence that casts doubt on its borrowed servant defense. But CACI cannot have its cake and eat it too. If CACI is permitted—despite Plaintiff's motion to foreclose the defense as a matter of law—to offer its borrowed servant defense, then Plaintiffs must also be able to offer the evidence that counters that defense on the merits, including the regulatory and policy documents that Plaintiffs long ago disclosed as exhibits, and upon which Plaintiffs have relied for years for the purposes of countering CACI's defense. The admission of this handful of documents does not open the floodgates for CACI to admit unknown materials that it has never previously disclosed on its exhibit list and/or that were not introduced at the prior trial. Plaintiffs respectfully request that this Court deny CACI's motion *in limine*.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 11, 2024, I electronically filed the foregoing, which sends notification to counsel for Defendants.

/s/ Charles B. Molster
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