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

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

PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO
CACI'S MOTION FOR JUDGMENT AS A MATTER OF LAW OR FOR A NEW TRIAL

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PRELIMINARY STATEMENT

In seeking the extraordinary relief of overturning a jury verdict, CACI throws a laundry list of meritless arguments at the wall, nearly all of which the Court has already explicitly rejected, in the hopes that one might stick. But none of them do.

To begin, the Court has already rejected CACI's argument that Plaintiffs' Alien Tort Statute, 28 U.S.C. § 1350 ("ATS") claims are "preempted," explaining that preemption does not invalidate federal claims. CACI's reliance on the Fourth Circuit's recent decision in *Hencely* is misplaced because it dealt with preemption of *state-law*, not federal, claims. The Court's prior ruling has only been strengthened by the facts developed at trial.

Similarly, CACI's arguments regarding the borrowed-servant defense were all rejected by the Court before and during the trial. The Court's supplemental instruction appropriately addressed the jury's question about the borrowed-servant defense and reflected applicable law. And the evidence at trial easily supported the jury's finding that CACI did not meet its burden of proving the borrowed-servant defense.

CACI's challenge to the jury's damages awards is equally misguided. Medical evidence is not needed to support a compensatory damages award. And it is well-established that punitive damages are available in ATS cases. Contrary to CACI's argument, wrongdoing by a managerial employee is not required to warrant punitive damages. Nonetheless, Plaintiffs proved that fact. Finally, it was CACI's burden to prove its expenses as an offset to any punitive damages award, but it failed to do so. The Court has rejected CACI's remaining perfunctory arguments before, and CACI offers no reason for the Court to change its prior rulings.

CACI, a multi-billion-dollar corporation that was found by two U.S. Army Generals and a properly instructed jury to have participated in the torture of detainees at Abu Ghraib prison, is

not the victim of a "miscarriage of justice" or "runaway-jury." Opening Br. ("Br.") at 1. The trial was fair and the unanimous jury verdict was overwhelmingly supported by the evidence.

LEGAL STANDARD

In assessing CACI's Rule 50 motion, the Court must "draw all reasonable inferences in favor of [Plaintiffs], and it may not make credibility determinations or weigh the evidence." *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150 (2000)). "If, with that evidence"—*i.e.*, the evidence viewed most favorably to Plaintiffs—"a reasonable jury could return a verdict in favor of plaintiffs," the Court must deny the motion, "even if the [C]ourt's judgment on the evidence differs." *Duke v. Uniroyal Inc.*, 928 F.2d 1413, 1417 (4th Cir. 1991).

The hurdle that CACI must clear for its Rule 59(a) motion is similarly high: it must show "the verdict is against the clear weight of the evidence." *Minter v. Wells Fargo Bank, N.A.*, 762 F.3d 339, 346 (4th Cir. 2014). Granting a Rule 59(a) motion is an "extraordinary remedy which should be used sparingly." *Hicks v. Ferreyra*, 582 F. Supp. 3d 269, 286 (D. Md. 2022).

ARGUMENT

I. Plaintiffs' Claims Are Not Preempted

CACI ignores an inconvenient and dispositive truth: that this Court conclusively rejected CACI's "preemption" argument in 2018. *Al Shimari v. CACI Premier Tech.*, 300 F. Supp. 3d 758, 787-89 (E.D. Va. 2018). No change in the law (or the evidence) justifies reversing the Court's ruling. The Fourth Circuit's recent decision in *Hencely v. Fluor Corp.*, 120 F.4th 412 (4th Cir. 2024) does not affect this Court's prior ruling that ATS claims cannot be preempted because *Hencely* only addressed preemption of state-law claims. Thus, the application of elementary preemption principles alone requires denial of CACI's motion. Further, the trial evidence makes clear that CACI's conduct is not protected by the federal interest underlying the combatant-activities exception.

A. Plaintiffs' ATS Claims Cannot Be Preempted Because They Are Federal Claims and Implicate Paramount Federal Interests

In 2017, CACI moved to dismiss on the basis that the FTCA's combatant-activities exception, 28 U.S.C. § 2680(j), preempts Plaintiffs' claims—the same argument CACI makes now. ECF No. 627 at 37-41. In 2018, the Court rejected that argument. 300 F. Supp. 3d at 789. Laying bare the misdirection of CACI's description of Plaintiffs' ATS claims as "non-federal tort claims," Br. at 3, the Court reasoned that "plaintiffs' claims are exclusively brought pursuant to federal law." 300 F. Supp. 3d at 789. "As such, respecting federal interests requires enforcing the federal law upon which plaintiffs rely": the ATS. *Id.* Thus, the Court held that an ATS claim against a contractor could not be preempted even when the claim concerned "activities arising out of combatant activities." *Id.* The Court's 2018 analysis is the law of the case.

As the Court has recognized, Plaintiffs brought federal common law claims under a federal statute (the ATS) and the federal common law incorporates international law, including the right to be free from "*jus cogens* violations," like torture. *Al Shimari v. CACI Premier Tech.*, 368 F. Supp. 3d 935, 959 (E.D. Va. 2019) *appeal dismissed*, 775 F. App'x. 758 (4th Cir. 2019). The preemption doctrine—and judicial authority to regulate the relationship between federal and state laws—stems from the Supremacy Clause, and means that only state law claims can be preempted; it makes no sense to speak of federal claims being preempted by a different federal law. *See, e.g., Norfolk S. Ry Co. v. City of Alexandria*, 608 F.3d 150, 156 (4th Cir. 2010) ("[T]he doctrine of preemption … permits Congress to expressly displace *state or local law* in any given field."). Consistent with that reasoning, *Boyle v. United Technologies Corp.*—the foundational case on which CACI's preemption argument is based—permits preemption of a claim "only where … a significant conflict exists between an identifiable federal policy or interest and the

operation of *state law*." 487 U.S. 500, 507 (1988) (emphasis added). No court, including the Fourth Circuit, has ever applied *Boyle* outside of the context of preemption of state-law claims.

As it did in its 2017 motion to dismiss, CACI urges the Court to follow a paragraph of dicta[1] from a divided panel in *Saleh v. Titan Corp.*, 580 F.3d 1, 16 (D.C. Cir. 2009). That paragraph stated, with almost no analysis, that an ATS claim was preempted by the FTCA for the same reasons that the state-law claims had been preempted. *Id.* *Saleh*'s only support for this conclusion was a case where an executive-branch action was found to conflict with the National Labor Relations Act. *Saleh*, 580 F.3d at 16 (citing *Chamber of Commerce of U.S. v. Reich*, 74 F.3d 1322, 1332-39 (D.C. Cir. 1996)). This Court rejected the D.C. Circuit's dicta in 2018, finding it "conclusory and fails to consider the nature of the ATS as a federal statute—and, as such, as a congressional choice to incorporate principles of international law into domestic law." *Al Shimari*, 300 F. Supp. 3d at 789 n.36. *Saleh*'s example of a conflict between an executive action and a federal statute is inapposite. Here, Plaintiffs' claims are brought under a federal statute enacted by Congress and governed by federal common law. Other than this unpersuasive dicta from *Saleh,* CACI has been unable to unearth any case, ever, where a federal claim brought in federal court was deemed preempted.

The logic of this Court's prior decisions dictates that an ATS claim based on *jus cogens* violations—and the paramount federal interests that it represents—cannot be preempted by the other interests embodied by the FTCA (which, it must be recalled, expressly excludes contractors, *see* 28 U.S.C. § 2671). *Jus cogens* norms "enjoy the highest status within

[1] This paragraph was dicta because it came "after the court had already determined that the ATS did not provide a cause of action for plaintiffs." *Al Shimari*, 300 F. Supp. 3d at 789 n.36. Its status as dicta is significant because *Saleh*'s primary ATS holding—that there was no cause of action for private actors for torture, 580 F.3d at 14-16—vitiated the plaintiffs' federal claim and the asserted federal interest it would carry, in that case. In this case, the Court reached the opposite conclusion, maintaining the viability of the federal claim and the significant federal interests in vindicating the *jus cogens* prohibition on torture.

international law," *Al Shimari*, 368 F. Supp. 3d at 962, and "[i]nternational law is part of our law," *The Paquete Habana*, 175 U.S. 677, 700 (1900). These norms are "nonderogable," "binding on the federal government and enforceable in the federal courts," and "invalidate any contradictory state acts." *Al Shimari*, 368 F. Supp. 3d at 955, 959, 963. And "where there is a right, there must be a remedy." *Id.* at 958. Given that, it cannot be the case that the nonderogable right to be free from torture becomes derogated when a contractor gets sued.

Lastly, the United States has largely rejected the balance of interests that CACI proposes by recognizing, in an amicus brief in this case, that there are "strong federal interests embodied in" the criminal prohibition against torture, in "ensuring that a contractor's involvement in detention operations is conducted in a manner consistent with that prohibition," and "in providing a basis for holding the contractor accountable for its conduct." Declaration of Muhammad U. Faridi dated Dec. 9, 2024 ("Faridi Decl."), Ex. 1. The Fourth Circuit acknowledged these interests when it relied on the "prohibitions under United States and international law against torture" as a basis to find that Plaintiffs' claims were justiciable. *Al Shimari v. CACI Premier Tech., Inc.*, 840 F.3d 147, 162 (4th Cir. 2016). These federal interests trump the federal interest implicated by the combatant-activities exception, to the extent there could be any conflict between the two (there is not in this case, *see infra* section I.C). Indeed, that is the United States' position in this case: "there should be no federal preemption [of state-law tort claims] … to the extent that a contractor has committed torture as defined in 18 U.S.C. § 2340." Faridi Decl. Ex. 1 at 9. If state-law tort claims involving torture by a contractor are not preempted, then certainly neither are ATS claims.

B. *Hencely* Does Not Warrant Reversing the Court's Prior Ruling

In *Hencely*, the Fourth Circuit held that a plaintiff's *state-law* negligence claims were preempted by the combatant-activities exception. 120 F.4th at 425. *Hencely* did not address

whether ATS claims, or any other claim based on a federal statute, can be preempted by the FTCA. Because it only addressed the preemption of state-law negligence claims, *Hencely* did not provide any new legal principles that are relevant to this case. The Fourth Circuit simply applied its prior decision in *In re KBR, Inc., Burn Pit Litig.*, 744 F.3d 326, 340-341 (4th Cir. 2014). Notably, CACI already relied upon *Burn Pit* in its preemption arguments that this Court rejected in 2018. *See* ECF No. 627 at 38-40. There are no new developments of law or fact that would justify reversing the Court's prior ruling now.

CACI insists that "*Hencely* represents the Fourth Circuit's full-throated adoption of *Saleh v. Titan*" and thus "requires entry of judgment in CACI's favor." Br. at 3, 7. That is false. *Hencely* did not even mention—let alone adopt—the only aspect of *Saleh* that is relevant to CACI's preemption argument: *Saleh*'s dicta that ATS claims can be preempted by the FTCA. Indeed, *Hencely* says nothing about *Saleh* that is different from what *Burn Pit* said in 2014 and what CACI already argued to the Court in 2017. *See* ECF No. 627 at 38-40. It was *Burn Pit* that "adopt[ed] the *Saleh* test" for "the preemption of *state tort law*" by the combatant-activities exception. *Burn Pit*, 744 F.3d at 351 (emphasis added). *Hencely* simply repeats *Burn Pit*'s use of that already-considered test. 120 F.4th at 426. It did not change Fourth Circuit law.

CACI makes a mountain out of an (inapposite) molehill by fixating on *Hencely*'s one use of the phrase "non-federal tort duty." Br. at 6 (quoting *Hencely*, 120 F.4th at 426). CACI grasps at straws to argue without any support that "non-federal" means that *Hencely*'s preemption discussion applies to ATS claims because the ATS incorporates international law. This is nonsense. First, because the facts of *Hencely* concern only negligence claims under state law, and did not involve the ATS or international law, there is no basis to conclude that the Fourth Circuit meant the phrase "non-federal" encompasses international-law claims recognized as

cognizable by Congress. In any event, as this Court has held, ATS claims are not "non-federal." *See* 300 F. Supp. 3d at 789. Claims for violations of international law under the ATS are federal claims, because the ATS is "a congressional choice to incorporate[s] principles of international law into domestic law," and to confer U.S. courts with jurisdiction over "private claims under federal common law for violations of any [specific, universal, and obligatory] international law norm," *Sosa v. Alvarez-Machain*, 542 U .S. 692, 732 (2004); *Al Shimari*, 368 F. Supp. 3d at 959. Thus, even under CACI's implausible reading of *Hencely*, Plaintiffs' ATS claims are still not preempted.[2]

C. The Federal Interest Underlying the Combatant-Activities Exception Does Not Shield a Contractor From Liability for Torture

Even if Plaintiffs' claims were of the type that *could* be preempted by an FTCA exception (they are not), based on the trial evidence, they would still not be preempted. The trial established that CACI conspired to torture detainees contrary to law and without military authorization, and the federal interest underlying the combatant-activities exception does not shield such conduct from liability.

As the *en banc* Fourth Circuit made clear in this case, combatant-activity preemption is a "defense to liability and not an immunity from suit." *Al Shimari v. CACI Int'l*, 679 F.3d 205, 217 (4th Cir. 2012) (*en banc*). It requires "careful analysis of intrinsically fact-bound issues" and "entail[s] an exploration of the appellants' duties under their contracts with the government and whether they exceeded the legitimate scope thereof." *Id.* at 223; *see also Burn Pit*, 744 F.3d at

[2] CACI's argument about Plaintiffs' motion *in limine* concerning Dr. Modvig's expert testimony is off base. Br. at 4. There is no inconsistency between Plaintiffs' statement about the jury's inquiry focusing on international law, not the U.S. War Crimes Act, and the fact that Plaintiffs' ATS claims are federal claims. That is because, as this Court has explained, "there is today a federal common law right derived from international law that entitles individuals not to be the victims of *jus cogens* violations." *Al Shimari*, 368 F. Supp. 3d at 959.

351 (vacating district court's preemption ruling because discovery was needed to resolve this fact-intensive issue for *state law* claims). Because "preemption is an affirmative defense," CACI has the "burden of establishing preemption." *Burrell v. Bayer Corp.*, 918 F.3d 372, 382 n.3 (4th Cir. 2019).[3]

To establish a conflict between federal interests and Plaintiffs' claims that would justify preemption, CACI had to prove that (1) when it conspired to inflict torture and CIDT on detainees, CACI was "integrated into combatant activities over which the military retains command authority," and that (2) Plaintiffs' claims are "arising out of [CACI's] engagement in such activities." *Hencely*, 120 F.4th at 426 (quoting *Burn Pit*, 744 F.3d at 349). As the *en banc* Fourth Circuit observed, this inquiry should focus on "whether the contractor complied with the government's specifications and instructions." *Al Shimari*, 679 F.3d at 219.[4] To say that CACI did not comply with the government's instructions when it conspired to torture detainees would be an understatement. The Army never authorized CACI interrogators to torture detainees, and CACI's conduct violated federal and international law, and the terms of its contracts with the Army. *See, e.g.*, ECF No. 1794, Ex. D, Fay Tr. 30:20-31:03; Faridi Decl. Ex. 42 (Interrogation Rules of Engagement); ECF No. 1808, Ex. B, Wood Tr. 81:20-82:2, 84:3-7, 85:2-20; Faridi Decl. Ex. 83. Indeed, it is because torture and cruel, inhuman and degrading treatment are

[3] CACI waived any preemption defense by failing to raise it at trial and by not requesting jury instructions concerning the factual issues that CACI believed relevant to the defense. *See* ECF No. 1821, Nov. 7, 2024 Tr. 40:4-17 (CACI's counsel acknowledging CACI's main trial defense was borrowed servant and not addressing preemption); *cf. Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 453–54 (2005) (if a defendant requests, a trial court should instruct the jury on the issues pertaining to a preemption defense). In any event, CACI's preemption defense fails on the merits.

[4] *See also Al Shimari v. CACI Premier Tech.*, 658 F.3d 413, 432 (4th Cir. 2011) (King, J., dissenting)) ("[W]hile military contractors might be able to assert *Boyle*-type arguments when the *government*'s decisions result in injuries to third parties, the DOD adamantly opposes [permitting] contractors … to avoid accountability to third parties for *their own* actions by raising [preemption] defenses." (quoting DOD Rule, 73 Fed Reg. at 16,768)), *majority panel opinion vacated on reh'g en banc*, 679 F.3d 205 (4th Cir. 2012).

unlawful, and therefore cannot be ordered by the military, that the Fourth Circuit rejected CACI's political question argument as to such conduct. *Al Shimari,* 840 F.3d 147, 158.

Additionally, Plaintiffs' claims do not arise out of CACI's engagement in combatant activities. Combatant activities are "activities both necessary to and in direct connection with actual hostilities." *Hencely*, 120 F.4th at 427 (quoting *Burn Pit*, 744 F.3d at 351). Instructing military personnel to torture detainees, as CACI interrogators did, is not necessary to or in direct connection with actual hostilities, and it is unlawful. *See, e.g.*, ECF No. 1816 10/31/24 (AM) Trial Tr. 61:4-61:15 (Nelson) (abusing detainees is "counterproductive, ineffective, a waste of time"). While CACI frames the issue as whether "battlefield interrogation services … are combatant activities," Br. at 7, that is not the proper framing because directing or encouraging detainee abuse has no legitimate connection to interrogation services. Moreover, the military has no legal authority to command anyone to torture detainees, so it lacked "command authority" over CACI employees' participation in torture.

II. THE BORROWED SERVANT DOCTRINE DOES NOT SAVE CACI

CACI wants to throw out the verdict based on the Court's Supplemental Instruction No. 1 in response to the jury's question. But CACI's position cannot be squared with the law or the trial record, let alone warrant the extreme step of overturning the jury's verdict.

A. The Court's Supplemental Instruction No. 1 Was Responsive and Appropriate

CACI contends Supplemental Instruction No. 1 did not fairly respond to the jury's question. Not so. "[W]hen evaluating the adequacy of supplemental jury instructions given in response to a question asked by the jury during deliberations, [the court] must ask 'whether the court's answer was reasonably responsive to the jury's question and whether the original and supplemental instructions as a whole allowed the jury to understand the issue presented to it.'"

United States v. Satterfield, 254 F. App'x 947, 951-52 (4th Cir. 2007) (citing *Taylor v. Virginia Union University*, 193 F.3d 219, 240 (4th Cir. 1999)). If the jury's question indicates that it is struggling with an issue, the court has a duty to "clear [those difficulties] away with concrete accuracy." *United States v. Ellis*, 121 F.3d 908, 925 (4th Cir. 1997) (citation omitted).

The jury's question indicated that they were struggling with the applicable law on control as it related to CACI's affirmative defense. Supplemental Instruction No. 1 was reasonably and fairly responsive to the jury's query because it gave the jury additional detail while being consistent with the more-general initial instruction and applicable law. It also emphasized that the issue of control was a factual question for the jury to answer. By delivering Supplemental Instruction No. 1, the Court discharged its duty to clear up jury confusion with concrete accuracy.

CACI's assertion that the Court's Supplemental Instruction No. 1 was erroneous is incorrect. Contrary to CACI's assertion, when two employers have the power to control an employee's misconduct, the original employer cannot escape liability by simply invoking the borrowed servant doctrine. That is because a general employer remains liable for its employee unless the general employer has relinquished control of that employee ***as to the misconduct in question***. *See* ECF No. 1821, 11/8/24 Trial Tr. 3:23-4:21.[5] Indeed, as the Supreme Court explained in *Standard Oil v. Anderson*, "[i]n order to relieve the defendant [general employer]

[5] *US Methanol, LLC v. CDI Corp*., No. 21-1416, 2022 WL 2752365, at *5 n. 4 (4th Cir. July 14, 2022) ("Under the borrowed servant doctrine, a 'general employer' remains liable for the negligent conduct of his employee unless he has "***completely relinquished control***" of the employee's conduct to a third party for whom the employee is performing some service." (emphasis added)); *Bailey v. Allegheny Energy Serv. Corp*., No. 6:08-cv-00137, 2009 WL 10688060, at *2 (S.D.W. Va. 2009) ("Under the borrowed servant rule 'a general employer remains liable for the negligent act of his servant ***unless it affirmatively appears that he has completely relinquished control of the servant's conduct from which the alleged negligence arose*** to the person for whom the servant is engaged in performing a special service.'" (emphasis added)).

from the results of the legal relation of master and servant ***it must appear that that relation, for the time***, ***had been suspended,*** and a new like relation between the [employee] and the [special employer] had been created." 212 U.S. 215, 225 (1909). If not, then the employee is a dual servant, and the original employer remains liable.[6] Thus, by stating "[w]hether the Army alone or both the Army and CACI had this power to control is a factual question that you must decide," Supplemental Instruction No. 1 correctly recognizes this concept of shared control. ECF No. 1821, 11/8/24 Trial Tr. 20:13-15.

The Court's Supplemental Instruction No. 1 also comports with the Fourth Circuit's most recent treatment of the borrowed servant and dual servant doctrines. In *Estate of Alvarez v. Rockefeller Foundation*, the Fourth Circuit expressly recognized that "a person may be the servant of two masters ... ***at one time as to one act***, if the service to one does ***not involve abandonment*** of the service to the other." , 96 F.4th 686, 693 (4th Cir. 2024) (quoting *N.L.R.B. v. Town & Country Elec., Inc.*, 516 U.S. 85, 94-95 (1995) and Restatement (Second) of Agency § 226 on the dual servant doctrine) (emphasis added)). The Fourth Circuit there thus considered whether Dr. Soper was a dual servant ***after*** evaluating whether he was a borrowed servant. Ultimately, on the particular facts presented, the Fourth Circuit concluded that the original employer had ***no*** control over Dr. Soper (let alone any communication with him), that he was not even identified at all as a Rockefeller entity, and Dr. Soper was ***contractually prohibited*** from

[6] *See, e.g., Sharpe v. Bradley Lumber Co*., 446 F.2d 152, 155 (4th Cir. 1971) (finding general employer was liable for an employee who was also working for a special employer, because "an agent can be in the service of two principals simultaneously, provided ***both have a right to exercise some measure of control***, and ***there is a common or joint participation in the work and benefit to each*** from its rendition" (emphasis added)); *Vance Trucking Co. v. Canal Ins. Co*., 249 F. Supp. 33, 38 (D.S.C. 1966) (ruling general employer of a driver remained liable where "[the driver] had not abandoned the service of [the special employer] ***or*** his [general employer] in making the trip" and "[o]n the contrary, he continued ***to act for their mutual benefit*** and ***was subject to their joint control***." (emphasis added)), *aff'd*, 395 F.2d 391 (4th Cir. 1968).

taking direction from the original employer; thus, lacking any power to control Dr. Soper, the original employer was not liable for his conduct under the borrowed servant doctrine. Each of these dispositive facts cut the opposite way here: regular contact between CACI interrogators, the Site Manager and headquarters; the ability to supervise its employees; a clear demarcation between CACI employees and the military; and a contractual (and regulatory) ***requirement*** that CACI supervise and discipline its own employees.

Rather than address this part of *Estate of Alvarez*, CACI points to a ***comment*** to the Restatement (Third) of Agency. But the "black-letter" section it accompanies makes clear that "[a] principal is subject to vicarious liability to a third party harmed by an agent's conduct when … the agent is an employee who commits a tort while acting within the scope of employment[.]" Restatement (Third) of Agency § 7.03(2)(a) (2006). Thus, the test under Restatement (Third) of Agency turns on whether CACI's employees were acting within the scope of their employment for CACI when they conspired with military personnel to commit torture and CIDT—a fact that CACI already conceded. ECF No. 1821, 11/8/24 Trial Tr. 40:4-17. CACI also ignores other relevant parts of that comment, which explain that some courts "allocate liability to ***both general and special employer*** on the basis that ***both*** exercised control over the employee and ***both*** benefited to some degree from the employee's work." Restatement (Third) of Agency § 7.03 cmt. d(2) (emphasis added). This same principle is recognized by the Restatement (Second) of Agency, which provides: "A person may be the servant of two masters, not joint employers, ***at one time as to one act***, if the service to one does ***not involve abandonment*** of the service to the other." Restatement (Second) of Agency § 226 (emphases added)). CACI's new assertion that the relevant question is who is in a marginally "better position" to stop misconduct thus has no basis. The borrowed servant doctrine does not operate like a scale, alleviating a party of any

responsibility simply because there is a feather's weight of more control left with the other party. In order to remediate a tort, the question is which of *either or both* parties had sufficient control so as to be able to prevent or remediate the harm, and to impose liability on either party that failed to use the power given them to prevent it.

CACI's assertion that the "existence of 'some' ability to control by the lending employee does not undermine the defense," Br. at 11, is not only unsupported but also directly contradicted by precedent. Indeed, the Supreme Court has determined that the fact that the second employer may give general instructions and directions to a person tasked by another employer to assist is not sufficient to make that person a borrowed servant. *See, e.g.*, *Standard Oil*, 212 U.S. at 219 (finding the fact that the employee "depended upon signals … given by an employee of the [special employer]" was insufficient to shift liability away from the general employer).[7] Thus, that the CACI interrogators may have coordinated or cooperated with their Army counterparts does not mean that CACI is unaccountable for its employees' wrongful acts.[8]

B. CACI Did Not Prove Its Affirmative Borrowed-Servant Defense

Ignoring a mountain of evidence to the contrary, CACI cites four pieces of evidence that it asserts are "dispositive," going on to falsely contend that none of CACI's evidence was "contested." Br. at 13-14. For example, CACI latches on to a pretrial response to an

[7] *See also Royal v. Missouri & N. Arkansas R.R. Co., Inc.*, 857 F.3d 759, 763–64 (8th Cir. 2017) (explaining the "minimum cooperation necessary to carry out a coordinated undertaking … ***cannot*** amount to [the] control or supervision" required to find that an employee has been borrowed and the original employer is not responsible); *Kramer v. Kramer*, 199 Va. 409, 415 (1957) (explaining "the decedent's compliance with the defendant's directions merely showed *cooperation* rather than subordination" because "[t]he orders he received simply pointed out to him the work the [original employer] was under contract with the [second employer] to do").

[8] The other reasons advanced by CACI do not dictate otherwise, *e.g.*, CACI defaults to insisting the Court cannot depart from its rulings at the first trial. Br. at 9, 11. But law of the case is not inflexible, particularly where, as here, the evidence presented in a subsequent trial is different. 11/12/24 Trial Tr. 8:4-9 ("This [jury] saw it differently than the first one did. It was a different case in how it was tried.").

interrogatory by the United States as conclusive. Br. at 13 (citing DX-2). But answers to pre-trial interrogatories—and by a non-party—are not binding. *See Marcoin, Inc. v. Edwin K. Williams & Co.*, 605 F.2d 1325, 1328 (4th Cir. 1979). That is in contrast to the testimony of CACI's corporate representative, which *does* bind CACI, that "we were responsible for providing supervision to all our contractor personnel" and CACI site lead Dan Porvaznik was the "operational supervisor" who was "charged with supervising all aspects of interrogation activity at Abu Ghraib." ECF No. 1794, Ex. C., Morse Tr. 171:25-172:03, 172:14- 20. Indeed, the trial record showed the many aspects of CACI's power to control CACI interrogators and to prevent them from inflicting torture and CIDT on detainees, e.g., CACI's responsibility for recruiting, paying, and disciplining interrogators. *See, e.g.*, ECF No. 1817, 11/1/24 Trial Tr. 142:6-142:17 (Jensen (Monahan)); ECF No. 1818, 11/4/24 Trial Tr. 213:4-213:25 (Billings); ECF No. 1807-1, Ex. A, Pappas Tr. 57:12-19; 63:1-9.

Even more, CACI's "operational supervisor" and site lead Porvaznik admitted he had a range of tools to supervise CACI interrogators at Abu Ghraib. ECF No. 1818, 11/4/24 Trial Tr. 103:5-17, 116:21-117:23, 118:10-119:18, 121:7-122:16, 124:11-24.[9] It was Porvaznik—and not the military—who interviewed CACI personnel upon arrival at Abu Ghraib and who assigned them to what he deemed the appropriate teams, Faridi Decl. Ex. 4, at 74, and it was Porvaznik who monitored the performance of the CACI interrogators by meeting daily with Captain Wood to receive feedback, ECF No. 1818, 11/4/24 Trial Tr. 126:14-127:25 (Porvaznik). It was also Porvaznik to whom CACI employees were supposed to report improper behavior—and CACI interrogators did in fact report abuse to Porvaznik, including that committed by CACI

[9] Porvaznik saw interrogation plans prepared by CACI interrogators; observed and sat in on interrogations; and had the authority and responsibility to stop improper interrogations. ECF No. 1818, 11/4/24 Trial Tr. 86:19-87:12, 121:7-122:16. He confirmed he would have stopped a CACI interrogator if there was detainee abuse, and told the CACI chain of command. *Id.* 134:17-136:9, 136:17-22.

employees.[10] Porvaznik's testimony as to his supervisory responsibilities over CACI employees at Abu Ghraib was extensively corroborated:

- In January 2004 Porvaznik described his duties as "JIDC (CACI) Ops Site Lead Managing all CACI contractors supporting JIDC-AG operations." Faridi Decl. Ex. 5 at 1.
- CACI's program manager Amy Jensen, who had almost daily communication with CACI's managers and site leads in Iraq, explained it was the duty of the CACI site leads to supervise CACI employees. ECF No. 1817, 11/1/24 Trial Tr. 139:7-140:9, 140:17-21 (Jensen).
- CACI executive Charles Mudd testified the CACI site managers had the ability to influence the CACI employees in how they performed their duties. ECF No. 1820, 11/7/24 Trial Tr. 17:16-19:20 (Mudd). Mudd confirmed CACI interrogators were to take any issue about interrogation techniques to Porvaznik. *Id*. 16:7-17:5, 17:16-19:20.
- CACI interrogator Torin Nelson testified it was Porvaznik's responsibility "to ensure that as a site manager, we were all…providing the services that had been agreed upon to the client." ECF No. 1815, 10/30/24 Trial Tr. 276:23-277:1, 277:10-13.

Porvaznik was not the only CACI leader with responsibility for ensuring CACI employees performed under the contracts. For example, CACI's Tom Howard, who was a senior advisor on CACI's contract, had supervisory responsibility with respect to interrogations at Abu Ghraib, as well as hiring and firing authority. ECF No. 1824, 10/31/24 (PM) Trial Tr. 16:6-17:4 (Nelson). CACI's Steve Stefanowicz described his duties at Abu Ghraib as encompassing not only "massive amount of the interrogations" but also "operational issues." Faridi Decl. Ex. 21; *see also* ECF No. 1818, 11/4/24 Trial Tr. 241:18-242:25 (Billings). Stefanowicz also had "a de facto supervisory authority" and "was operating as" an assistant site manager or site lead. ECF No. 1816, 10/31/24 (AM) Trial Tr. 72:2-5 (Nelson). And CACI's Charles Mudd had supervisory duties, testifying he met with the military to discuss "day-to-day-type operations" and CACI

[10] ECF No. 1818, 11/4/24 Trial Tr. 89:16-23, 123:4-124:10, 131:5-134:2 (Porvaznik); ECF No. 1808, Ex. C (CACI Interrogator A testifying he reported three incidents of detainee abuse to Porvaznik, which included one CACI employee); ECF No. 1824, 10/31/24 (PM) Trial Tr. 18:5-8 (Nelson) (confirming CACI employees who engaged in or saw abuse were required to report it to CACI in the United States).

interrogators' performance at Abu Ghraib, and that CACI was responsible for dealing with issues with its employees. ECF No. 1818, 11/4/24 Trial Tr. 295:2-12, 289:14-291:11, 291:19-292:2.

Importantly, the military framework governing CACI's contract all make explicit that CACI—and not the Army—bore ultimate responsibility for the conduct and supervision of CACI's employees. The Army Field Manual provides "[c]ommanders do not have direct control over contractors or their employees (contractor employees are not the same as government employees); only contractors manage, supervise, and give directions to their employees." Faridi Decl. Ex. 7 at 15. Indeed, the military is "prohibited from … [i]nterfering with the contractor's management prerogative by 'supervising' contractor employees or otherwise directing their work efforts." *Id*. at 90-91. Accordingly, "[m]aintaining discipline of contractor employees is the responsibility of the contractor's management structure, not the military chain of command. The contractor, through company policies, has the most immediate influence in dealing with infractions involving its employees. It is the contractor who must take direct responsibility and action for his employee's conduct." *Id*. at 68. And Army Regulation 715-9 provides that "[t]he commercial firm(s) providing battlefield support services 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." Faridi Decl. Ex. 8 at 16. The regulation thus states: "[c]ontracted support service personnel shall not be supervised or directed by military or Department of the Army (DA) civilian personnel." *Id*. at 17.[11]

[11] *See also* 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) ("[i]nappropriate use of force could subject a contractor or its subcontractors or employees to prosecution or civil liability under the laws of the United States and the host nation.").

This evidence of CACI's control is also reflected in CACI's government contract.[12] Pursuant to the contract, CACI promised to supply "resident experts" in interrogation, who would "assist, supervise, coordinate, and monitor all aspects of interrogation activities," and agreed it was "responsible for providing supervision for all contractor personnel." Faridi Decl. Ex. 3 at 6, 7; ECF No. 1818, 11/4/24 Trial Tr. 177:16-21, 178:3-179:2, 211:16-23 (Billings). And these authorities did not exist only on paper, unlike some of the documents CACI relies on (*compare* Faridi Decl. Ex. 12 *with* ECF No. 1807-1, Ex. A, Pappas Tr. 27:12-29:08). Indeed, the descriptions they offer of CACI's control over its interrogators are fully consistent with what happened on the ground. General Taguba confirmed that CACI was supposed to provide the supervision and management of CACI employees under the Army Field Manual and AR 715-9. ECF No. 1824, 10/31/24 (PM) Trial Tr. 65:3-65:12, 68:23-69:5, 75:23-76:3 (Taguba). And CACI interrogator Nelson explained it was "standard procedure" under the Army Field Manual for CACI's management to be able to stop CACI employees from abusing detainees, and testified that to his knowledge, CACI "did have the ability to influence operations." ECF No. 1816, 10/31/24 (AM) Tr. 90:8-91:4; ECF No. 1824 (PM) Trial Tr. 12:13-13:11 (Nelson).

In addition, the trial record demonstrated that existence of a command vacuum, which created chaotic conditions and made soldiers unclear about who was in charge, leaving the Army with little to no control over CACI interrogators to prevent misconduct by them.[13] CACI

[12] CACI's power to control its interrogators is also reflected in CACI's corporate policies. ECF No. 1818, 11/4/24 Trial Tr. 130:13-22 (Porvaznik); Faridi Decl. Exs. 9 & 10 at 7-8 (CACI Code of Ethics and Business Conduct Standards, stating "CACI management retains all rights … to direct, supervise, control, and when it deems appropriate, discipline the work force."); ECF No. 1817, 11/1/24 Trial Tr. 141:4-23 (Jensen (Monahan)); ECF No. 1815, 10/30/24 Trial Tr. 273:10-274:9 (Nelson).

[13] General Taguba documented the military's lack of control over contractors, finding CACI employees "d[id] not appear to be properly supervised within the detention facility at Abu Ghraib." ECF No. 1824, 10/31/24 Trial Tr. 52:9-16, 53:5-54:18. General Fay reported there was "an apparent lack of understanding of the appropriate relationship between contractor personnel, government civilian employees and military personnel"; for example, several soldiers indicated that "contractor personnel

interrogators exploited this command vacuum, taking it upon themselves to direct military personnel to abuse detainees. Even if there were some military direction at some overall level, the misconduct CACI employees undertook did not come at the direction of the Army, because the Army did not authorize or direct CACI interrogators to abuse detainees. ECF No. 1807-1, Ex. A, Pappas Tr. 65:9-21.

III. THE JURY'S CONSPIRACY VERDICT WAS AMPLY SUPPORTED

CACI's insistence that "[t]here is no evidence that CACI joined any conspiracy to abuse detainees" relies on a mischaracterization of the law of conspiracy. Br. at 16-17. In support of this sweeping statement, CACI simply rehashes its argument from its May 2024 motion for judgment as a matter of law that the Court rejected. *Compare* ECF No. 1639 at 23-26, *with* Br. at 16-19. With even more evidence presented at the second trial, the Court should again reject CACI's argument.

Plaintiffs' conspiracy claims require proof of the following: (1) an agreement to inflict torture or CIDT "on detainees at Abu Ghraib"; (2) CACI's knowing or intentional entry into that agreement; (3) commission of an overt act in furtherance of the conspiracy by one of its members; and (4) infliction of torture or CIDT upon the Plaintiff in question, resulting from acts in furtherance of the conspiracy. ECF No. 1820, 11/7/24 Trial Tr. 130:8-23. Evidence supporting the jury's finding includes, *inter alia*, the following:

- CACI's interrogators worked closely with the military police in Tier 1. *See* ECF No. 1794, Ex. A, Frederick Tr. 25:24-26:04 (describing "the working relationship between MPs and the interrogators" as "a brotherhood"); Faridi Decl. Ex. 14; Ex. 15 (images of

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were supervising government personnel or vice versa," and a government organizational chart showed a CACI contractor as "head of the DAB." Faridi Decl. Ex. 11; Faridi Decl. Ex. 12 at 3; *see also* ECF No. 1794, Ex. D, Fay Tr. 28:20-29:6; Faridi Decl. Ex. 13 at 2. General Jones concluded the failure to effectively screen, certify and integrate CACI interrogators contributed to the abuses at Abu Ghraib. Faridi Decl. Ex. 4, at 12, 24.

Tier 1A); ECF No. 1816 10/31/24 (PM) Trial Tr. 52:17–53:4 (Taguba) (testifying CACI personnel "were just roaming around undetected" in the hard site).

- CACI interrogators instructed military police to "set the conditions" for detainees and "soften [them] up"—euphemisms for torture and CIDT. *See* ECF No. 1817 (11/1/24 Trial Tr.) 28:6-16; 45:6-8; 66:9-14; 60:1-5; 72:15-20; 91:13-18)(Harman) ; ECF No. 1794, Ex. A, Frederick Tr. 50:06-08, 54:06-16; 55:23-56:08, 56:19-21; 98:17-22; ECF No. 1792, Ex. A, Graner Tr. 47:17-19, 48:06-48:11; *id.*, Ex. B, Ambuhl-Graner Tr. 13:14-22, 25:17-19, 46:06-08, 46:13, 46:15-17.

- CACI interrogators not only requested such abuses, but were present when they occurred or even engaged in them directly. *See, e.g.*, ECF No. 1817 11/1/24 Trial Tr. 22:5-10; 91:2-6 (Harman) (Big Steve provided instructions to Military Police regarding detainee treatment, and that the detainee depicted in Faridi Decl. Ex. 16 was assigned to a CACI interrogator); ECF No. 1794, Ex. A, Frederick Tr. 126:24-127:01 (Big Steve instructed Frederick to "use the dogs on [a detainee] and to treat him like shit"); *id.* 81:24-82:1 (use of "pressure point" techniques and obstruction of detainee's breathing in DJ's presence); ECF No. 1816 10/31/24 (AM) Trial Tr. 72: 13-14, 72:21-76:2, 76:7-13 (Nelson) (abuse of detainee by Big Steve); *id.* 76:24-77:4, 77:13-17 (abuse of detainee by DJ); *id.* 62:21-23, 63:10-12, 63:23-64:8 (abuse of detainee by Dugan).

- The abuse inside the hard site took place openly and notoriously—so much so that "everybody knew" of the abuse, s*ee* ECF No. 1817 11/1/24 Trial Tr. 46:16-22 (Harman) , and it was memorialized in hundreds of pictures that the abusers themselves took, some of which were even used as computer screensavers. *See* ECF No. 1824 (10/31/24 (PM) Trial Tr. 43:3-11 (Taguba) ; ECF No. 1817 11/1/24 Trial Tr. 39:19–40:4(Harman) . As subsequent military investigations confirmed, the abuses were "systemic." Faridi Decl. Ex. 17 at 16.

- Plaintiffs were detained in Tier 1 during the same time period that CACI interrogators were operating there, and each plaintiff was interrogated, formally or informally, by CACI personnel. Faridi Decl. Ex. 18 (stipulation) ¶¶ 8, 18; Ex. 19 at 4-5; *see also, e.g.*, ECF No. 1815 10/30/24 Trial Tr. 199:22–200:9; 213:8–216:3 (Al-Ejaili); ECF No. 1816 10/31/24 (AM) Trial Tr. 21:18–22:3; 27:14–28:2; 25:4-10; 28:8-15 (Al-Zuba'e); ECF No. 1818 11/4/24 Trial Tr.15:7-11; 18:19-25 (Al Shimari) (Plaintiffs each testifying about interrogations by civilian interrogators).

- Plaintiffs suffered the same types of abuses that military police inflicted on detainees throughout Tier 1 at the direction of CACI interrogators. *See, e.g.*, ECF No. 1815 10/30/24 Trial Tr. 202:19–204:1 (Al-Ejaili) (describing being placed in a stress position); 211:10-25 (testifying being provided women's underwear to wear); 216:21–217:5 (describing use of dogs during interrogations); 217:16-18 (testifying he was kept naked 75 to 80 percent of his time inside the hard site); ECF No. 1816 10/31/24 (AM) Trial Tr. 14:3-11 (Al-Zuba'e) (describing being stripped naked and forced to shower); 22:24–24:11 (testifying a guard shoved him against a wall and restrained him with cuffs to the top of a bed overnight); ECF No. 1818 11/4/24 Trial Tr. 16:10-25 and 20:2-16 (Al Shimari) (describing being sexually assaulted); 17:10–18:2 and 19:10-21 (testifying to

being placed in stress positions during an interrogation); 18:3-15 (describing use of dogs during interrogations).

- Each Plaintiff testified about abuse by military police who admitted they carried out abuse to "soften up" detainees for interrogation. ECF No. 1815 10/30/24 Trial Tr. 208:5-14; 209:1-8; 240:11-19; 241:1-22; 243:19–244:2 (Al-Ejali) (testifying about abuse by Frederick and Graner); ECF No. 1816 10/31/24 (AM) Trial Tr. 33:15-17; 34:1-12 (Al-Zuba'e) (testifying about abuse by Graner); ECF No. 1818 11/4/24 Trial Tr. 23:20–24:2; 49:11-18 (Al Shimari) (testifying about recognizing Graner).

Thus, there is more than enough evidence, from a variety of sources, supporting the jury's verdict that CACI entered an agreement to abuse detainees within the hard site that resulted in Plaintiffs' abuse, as the Court has already concluded over the course of this case. *See* ECF No. 679 at 39-40. And CACI's legal arguments (like their misplaced analogy to "parallel conduct") are just as wrong now as they were in May 2024. The Court should reject them again.

IV. THE JURY'S DAMAGES AWARDS ARE AMPLY SUPPORTED

CACI's arguments to reduce Plaintiffs' damages invent rules that do not exist and overlook the compelling evidence supporting the jury's damages awards.

A. The Jury's Compensatory Damages Awards Are Supported

The premise of CACI's challenge to the compensatory damages award is wrong: medical evidence is not needed to support a damages award. A jury does not need medical evidence to understand how horrific torture can physically and psychologically harm a victim. As the Court acknowledged when it denied CACI's motion *in limine* to limit Plaintiffs' damages request, the "damage range" in cases brought under the ATS or the Torture Victim Protection Act involving claims of torture "appears to run in between the 1 to $3 million." Faridi Decl. Ex. 20, 12/15/23 Hr'g Tr. at 14:9-10; *see also* ECF No. 1357 at 11-13 (citing seventeen cases supporting Plaintiffs' damages request). In some of these cases, the plaintiffs' only evidence of their injuries was their own testimony. *See, e.g.*, *Yousuf v. Samantar*, No. 04-cv-1360, 2012 WL

3730617, *14-15 (E.D. Va. Aug. 28, 2012) (Brinkema, J.) (awarding $1 million each to plaintiffs who suffered torture based on their own testimony, without hearing expert testimony).

In this case, each Plaintiff testified at length about the abuse they suffered and how it injured them. *See* ECF No. 1836-1 at 2-3 (summarizing Plaintiffs' testimony). This "credible and compelling testimony of cognizable injuries" is more than enough to support the jury's compensatory damages award. *See, e.g.*, *Yousuf*, 2012 WL 3730617, at *14. The cases CACI cites in which damages awards were reduced are inapposite because they do not involve any sort of physical abuse, let alone the horrific physical, psychological and emotional torture that Plaintiffs suffered. *See, e.g.*, *Hetzel v. County of Prince William*, 89 F.3d 169, 171 (4th Cir. 1996) (police officer alleged that she suffered stress and headaches as a result of being denied a promotion due to sex discrimination). And in any event, the jury *did* hear medical evidence of Plaintiffs' injuries from CACI's own expert, Dr. Payne-James. *See, e.g.*, ECF No. 1819 11/6/24 Trial Tr. 78:21-86:1 (Plaintiffs' medical symptoms are consistent with the torture they suffered). The Court should not disturb the jury verdict.

B. The Jury's Punitive Damages Awards Are Supported

CACI's litany of arguments challenging the jury's punitive damages awards are without merit.

1. The Availability of Punitive Damages in ATS Cases is Well Established

This Court and others in the Eastern District of Virginia—and nationwide—widely recognize the availability of punitive damages under the ATS. *See, e.g.*, *Yousuf v. Samantar*, 2012 WL 3730617, at *16 (E.D. Va. Aug. 28, 2012) (noting that "[p]unitive damages are

commonly awarded in cases under the ATS" and awarding same).[14] CACI insists that punitive damages are unavailable in ATS cases, despite the well-established precedents of such awards, on the claimed basis that "[t]here is no international consensus allowing punitive damages in civil cases." Br. at 23. But whether there is such a consensus is irrelevant:[15] "international law defines norms and determines their scope, but delegates to domestic law the task of determining the civil consequences of any given violation of these norms." *Doe I v. Nestle USA, Inc*., 766 F.3d 1013, 1022 (9th Cir. 2014); *Flomo v. Firestone Nat. Rubber Co., LLC*, 643 F.3d 1013, 1020 (7th Cir. 2011) ("International law imposes substantive obligations and the individual nations decide how to enforce them."); *see also Est. of Alvarez v. Johns Hopkins Univ*., 275 F. Supp. 3d 670, 688-89 (D. Md. 2017) (approvingly citing *Nestle* and *Flomo*). Domestic law, of course, permits punitive damages for tort violations and regularly awards such damages in ATS cases.

Accordingly, there is no basis to hold that punitive damages—though almost always awarded to prevailing plaintiffs in ATS cases—are somehow unavailable for ATS claims.

2. Even if the ATS Required Proof of Participation by "Managerial Employees," Plaintiffs Proved Such Participation

CACI next argues that the punitive damages awards "[i]mproperly punish[] CACI vicariously for alleged wrongdoing of non-managerial employees." Br. at 20. But there is no requirement that a managerial employee commit wrongdoing to warrant imposition of a punitive

[14] *See also, e.g.*, *In re XE Servs. Alien Tort Litig*., 665 F. Supp. 2d 569, 595–96 & n.36 (E.D. Va. 2009) (stating that "courts have consistently awarded punitive damages for ATS claims," and citing numerous cases, and rejecting defendant's argument that punitive damages are unavailable for such claims).

[15] CACI is, in any event, wrong about the claimed lack of consensus. The very law review article constituting its lone citation acknowledges that civil law systems "demand[] the effectiveness of [punitive] sanctions … for the violation of obligations arising from Community law." Helmut Koziol, *Punitive Damages – A European Perspective*, 68 La. L. Rev. 741, 749 (2008), and courts discussing the international community's approach to damages for international law violations recognize that "[i]f a violation is … an international crime, punitive damages may be awarded." *In re XE Servs. Alien Tort Litig*., 665 F. Supp. 2d 569 595 (quoting Restatement (Third) of Foreign Relations Law § 901) (internal citation omitted)).

damages award. The cases CACI cites for that proposition are inapposite: they either concern claims brought under state law, *e.g., A.H. v. Church of God in Christ*, *Inc.* 831 S.E.2d 460, 478 (Va. 2019), or under Title VII, which expressly limits the circumstances in which punitive damages may be awarded, *see* 42 U.S.C. § 1981a(b)(1).

The issue ultimately matters little, though, because the evidence at trial showed that CACI managerial employees either "participated in the wrongful acts giving rise to the punitive damages" or ratified those wrongful acts. For example, Steven Stefanowicz "had a de facto supervisory authority" over CACI employees at the prison and was operating as the "assistant site manager or site lead." ECF No. 1816, 10/31/24 Trial Tr. 71:25-72:5 (Nelson); Faridi Decl. Ex. 21 (Stefanowicz discussing with CACI personnel in Virginia his "position as the number two person" at Abu Ghraib); *see also Ward v. AutoZoners, LLC*, 958 F.3d 254, 264, 265 (4th Cir. 2020) (recognizing that an employee serving in a "managerial capacity" for purposes of imposition of punitive damages under Title VII "need not be the employer's top management, officer, or director" or serve in some "higher managerial capacity"). Meanwhile, Dan Porvaznik—CACI's "operational supervisor" who was responsible for "managing all CACI contractors" (*see* pp. 14-15, *supra*) ignored and even concealed from the military concerns raised by multiple employees about detainee abuse. *See, e.g.*, Faridi Decl. Ex. 22; ECF No. 1818, 11/4/24 Trial Tr. 140:8-141:11; 143:24-145:18; 147:15-149:18; Faridi Decl. Ex. 5. And CACI management in both Virginia and Iraq did the same, and evinced at least reckless indifference in the process, by recruiting, hiring, and promoting unqualified personnel while disclaiming any responsibility for training and supervising their conduct, despite company policies requiring them to do so (and even after concerns about detainee abuse were raised to Mr. Porvaznik and others within CACI). *See* Faridi Decl. Ex. 23; Ex. 24; Ex. 6; Ex. 26; Ex. 10; ECF No. 1818,

11/4/24 Tr. 109:25-110: (Porvaznik insisting that he did not in practice supervise employees with respect to interrogations). Accordingly, even if Plaintiffs were required to prove that CACI managerial employees either "participated in the wrongful acts giving rise to the punitive damages" or ratified those wrongful acts, Plaintiffs offered ample evidence to satisfy those requirements.

3. CACI's Decision Not to Offer Evidence of Its Actual Profits Is Not a Basis to Disturb the Punitive Damages Awards

CACI now insists that the punitive damages awards are "[n]ot [l]egally [c]ognizable" because Plaintiffs could—supposedly—only recover punitive damages for CACI's profits under the delivery orders and it was "Plaintiffs' burden to establish … [such] profits." Br. at 24-25. Not so. Nearly a year prior to trial, the Court resolved CACI's motion *in limine* as to Plaintiffs' damages by concluding, *inter alia*, that punitive damages would be capped at $35 million, and that Plaintiffs were entitled to argue to the jury that "the punitive damage that's appropriate in this case is the total revenue that CACI received" under CACI's delivery orders governing its interrogation services at Abu Ghraib. *See* Faridi Decl. Ex. 20 at 19:4-8. The Court also observed that CACI, if it wished, could "com[e] in and show[] … what the *actual* profit was" if Plaintiffs offered such an argument. *Id.* at 19:14-17 (emphasis added). At trial, Plaintiffs offered evidence regarding the amount of revenue that CACI was entitled to receive under the aforementioned delivery orders, *see* ECF No. 1818, 11/4/24 Trial Tr. 189:12-191:19; *see also* Faridi Decl. Ex. 3; Ex. 27, as well as testimony from CACI's Rule 30(b)(6) witness that these delivery orders represented only "a small part of CACI's portfolio of work" at the time. ECF No. 1794, Ex. C at 87:21-22. Beyond asking its witness whether CACI profited from these delivery orders and eliciting that the witness "d[idn't] know for sure" but "assume[d] [CACI] did," *see* 11/4/24 Trial Tr. 258:25-259:1, CACI made no effort to "show[] … what the actual

profit was" under those orders. Faridi Decl. Ex. 20 at 19:14-17. Thus, during closing arguments, Plaintiffs argued that "the appropriate measure of punitive damages" was "the amount that CACI stood to gain from the contracts that it had for interrogation services," less reimbursable costs and expenses identified in the delivery orders—approximately $32 million.[16] ECF No. 1820, 11/7/24 Trial Tr. 71:7-13. CACI elected not to argue the appropriate measure of punitive damages in its closing.

Contrary to CACI's contention, nothing in the law—certainly nothing in CACI's "*cf.*" case citations, which (among other limitations) do not concern punitive damages awards—supports the notion that Plaintiffs had to prove CACI's profits actually received, rather than the value of the delivery orders to CACI. Rather, as the Court made clear, if CACI wished to argue to the jury that its profits under the delivery orders, rather than the amounts it was entitled to receive, were a better proxy for damages, ***CACI*** could "com[e] in and show[] … what the actual profit was." Faridi Decl. Ex. 20 at 19:14-17. CACI made the strategic decision not to do so. Much as CACI might wish to transform a strategic call it now regrets into a failure by Plaintiffs to meet their burden, that is not the law.

4. CACI Waived Its Speculative Argument Based on the Jury's Note Regarding Punitive Damages

Next, CACI, pointing to the jury's note regarding punitive damages and to *Philip Morris USA v. Williams*, 549 U.S. 346 (2007), maintains that the jury improperly awarded such damages against CACI "for injuries suffered by others." Br. at 19-20. CACI is wrong. First, the thrust of CACI's argument is really that the Court committed an instructional error—an argument CACI

[16] Certain line items in the delivery orders—for example, those for "Travel" or "ODC's," *see, e.g.*, Faridi Decl. Ex. 3 at 30—constitute amounts for which CACI could be reimbursed for certain expenses incurred. *See* ECF No. 1818, 11/4/24 Trial Tr. 189:12-191:19; 254:7-256:15 (Billings testifying regarding such line items). Plaintiffs did not include such line items in determining the amount that CACI "stood to gain" from the delivery orders.

has plainly waived. During the jury's second day of deliberations, the Court informed the parties that the jury wished to share a note with the Court, but not with counsel. *See* ECF No. 1821, 11/8/24 Trial Tr. 21:3-18. The Court—requesting "input" and "guidance from counsel"—proposed to discuss the jury's note outside the presence of counsel, but explain to the jury that the contents of the note would be disclosed to counsel if the Court determined that the question was germane to the jury's deliberations. *See id.* at 21:19-22:6. CACI represented that it was "perfectly fine with the Court's proposed approach," *id.* at 23:5-6, and the Court proceeded in this agreed-upon manner. Thus, CACI has waived any argument as to the Court's handling of the jury's note. *See Derflinger v. Ford Motor Co*., 963 F.2d 367 (4th Cir. 1992) (finding in similar circumstances that plaintiff "waived his right to challenge the district court's handling of the jury's note and the re-instruction").

CACI's argument also rests on pure speculation as to the motivations underlying the jury's note about punitive damages. In *Philip Morris*—where the plaintiff's counsel repeatedly requested that the jury consider how many people other than plaintiff's husband had died from smoking and award damages on that basis, and where the jury ultimately awarded punitive damages roughly 100 times higher than its compensatory award, *see id.* at 350-51—the Supreme Court held that punitive damages awards may not be used to punish a defendant for injuries inflicted on "strangers to the litigation." *Id.* at 353-54. The Supreme Court recognized that evidence of harm or potential harm to such nonparties could be considered by the jury in determining the reprehensibility of a defendant's conduct, a factor relevant to the size of a punitive award, *id.* at 355, 357, but emphasized that where there is "a significant" risk that the jury would award punitive damages to punish a defendant for injuries to "strangers to the litigation," a court "***upon request***, must protect against that risk." *Id.* at 357 (emphasis added).

Thus, where courts have vacated punitive damages awards pursuant to *Philip Morris*, they have done so because the case both presented a "significant risk," usually based on attorney argument (not present here), that the jury would improperly base its punitive damages award on harm to others, and involved denial by the trial court of a proffered curative jury instruction. *See, e.g.*, *White v. Ford Motor Co.*, 500 F.3d 963, 972 (9th Cir. 2007). Conversely, courts reject such arguments either where the requisite "significant" risk of an improper punitive damages award is lacking, or where the defendant never requested an instruction that punitive damages cannot be awarded to punish defendants for harm to non-parties, thus waiving the *Philip Morris* argument. *See, e.g.*, *Planned Parenthood Fed'n of Am., Inc. v. Ctr. for Med. Progress*, 480 F. Supp. 3d 1000, 1018 (N.D. Cal. 2020) (noting both absence of risk and waiver), *aff'd,* 2022 WL 136113963 (9th Cir. 2022); *Sony BMG Music Ent. v. Tenenbaum*, 660 F.3d 487, 505-06 (1st Cir. 2011) (same).

Here, CACI waived any *Philip Morris* argument. CACI did not propose any instruction on the subject of damages for harm to non-parties at any point during trial. Further, there is no "significant" risk of the kind contemplated in *Philip Morris* that the jury's punitive damages award constituted punishment for harm to nonparties. CACI insists that the "fairest reading" of the jury note is that the jury "was poised to award Plaintiffs punitive damages in an amount less than they requested," Br. at 25-26, but that is sheer speculation and not a fair reading. Notably, the Court answered "no. Punitive damages don't work that way" to the jury's question. ECF 1822, 11/8/24 (unsealed) Trial Tr. 6:16-17. If the jury thought that CACI's proven involvement in the conspiracy to abuse detainees that resulted in Plaintiffs' injuries warranted punitive damages in an amount "less than [Plaintiffs] requested," the jury simply would have awarded a lower amount. A fairer reading of the jury's note is that the jury recognized that, as to the

injuries suffered by the Plaintiffs, significant punitive damages were necessary to fulfill the purpose of such awards (deterrence and punishment), but desired that a portion of the punitive damages awards be used for a charitable purpose, instead of being paid to them. That does not mean that the jury awarded punitive damages based on harm to others.

5. Virginia's Cap on Punitive Damages Applies Is Irrelevant

Next, CACI argues that Virginia's statutory cap applies to the jury's punitive damages award. Br. at 26. In support of this proposition, CACI—beyond inexplicably citing a decision of this Court imposing punitive damages well in excess of that statutory cap, *see Yousuf*, 2012 WL 3730617, at *16 (awarding a total of $14 million in punitive damages)—points only to cases that involve punitive damages awards for state law claims. *See, e.g.*, *Gregg v. Ham*, 678 F.3d 333, 343 (4th Cir. 2012) (South Carolina-law claims); *Sines v. Hill*, 106 F.4th 341, 346 (4th Cir. 2024) (Virginia-law claims). Those cases have no relevance here. Where a federal court evaluates state law claims, substantive state law applies to those claims. *See Stover v. Coll. of William & Mary in Virginia*, 635 F. Supp. 3d 429, 445 (E.D. Va. 2022). But where, as here, only federal claims are at issue, state substantive law does not govern. *See Calliste v. City of Charlotte*, 695 F. Supp. 3d 708, 729 (W.D.N.C. 2023). Virginia's statutory cap thus does not limit punitive damages on a federal claim.

6. The Punitive Damages Awards Do Not Violate Due Process

Finally, CACI argues that punitive damages awards "violate due process"—but offers by way of explanation only the suggestion that if this Court reduces the compensatory damages awards (as explained above, there is no basis for doing so), the ratio between the compensatory awards and the punitive awards may present a constitutional concern. *See* Br. at 26. Notably, CACI does not argue that the present ratio (where punitive damages are approximately 3.67 times higher than compensatory damages) presents any constitutional issue, and it could not

reasonably do so.[17] There is, accordingly, no basis to find any due process violation with respect to the punitive damages awards here.

V. CACI'S OTHER ARGUMENTS ARE SIMILARLY MERITLESS

A. The Court Correctly Found Suhail Al Shimari To Be Unavailable

The Court properly found Mr. Al Shimari unavailable under Federal Rule of Evidence 804(a)(5) based on the sworn declaration from one of Plaintiffs' counsel of record and other representations made by Plaintiffs' counsel. *See* ECF Nos. 1796, 1796-1, 1798. Contrary to what CACI suggests, the Court did not need the impossible: "first-hand evidence that Al Shimari was … in police custody." Br. at 26. In deciding whether evidence is admissible, "the court is not bound by evidence rules," such as those governing hearsay. Fed. R. Evid 104(a). Moreover, "[i]t is proper for the court to accept … the representations of counsel with respect to the unavailability of a witness." *United States v. Sindona*, 636 F.2d 792, 804 (2d Cir. 1980).

B. The Government's State-Secrets Assertions Do Not Warrant Dismissal of Plaintiffs' Claims

As the Court has held many times, *e.g.*, ECF No. 1143, and as Plaintiffs have explained in detail elsewhere, *see, e.g.*, ECF No. 1649 at 32-35, the government's state-secrets assertions do not warrant dismissal of Plaintiffs' claims because they did not prevent CACI from obtaining a fair trial. The Court should reject this rehashed argument out of hand.

C. CACI Is Not Entitled to Derivative Sovereign Immunity

The Court should again reject CACI's argument that it is entitled to derivative sovereign immunity. *Al Shimari v. CACI Premier Technology, Inc.*, 368 F. Supp. 3d 935, 958-68 (E.D. Va.

[17] *See, e.g.*, *Saunders v. Branch Banking And Tr. Co. Of VA*, 526 F.3d 142, 154 (4th Cir. 2008) (affirming punitive damages award that was 80 times higher than compensatory award and noting that it is only when punitive damages awards "exceed a single digit ratio when compared to compensatory damages" that constitutional concerns arise but that even higher ratios can comport with due process).

2019), *appeal dismissed by,* 775 F. App'x. 758 (4th Cir. 2019). In addition to the reasons set forth in the Court's prior opinion, CACI is not entitled to derivative sovereign immunity because it violated the sovereign's laws, as Plaintiffs explained in prior briefing. *See* ECF No. 1172 at 9-15. To the extent the Court considers this argument, it should reiterate and confirm that CACI's violations of federal law independently preclude derivative sovereign immunity. *See Campbell-Ewald Co. v. Gomez,* 577 U.S. 153 (2016).

D. The Court Properly Prevented CACI From Offering Irrelevant, Unfairly Prejudicial Evidence About Why Plaintiffs Were Detained

This is yet another rehash of an argument that the Court has rejected many times. CACI offers no reason for the Court to reconsider its prior rulings, and the Court should not do so.

E. CACI's Arguments about Extraterritoriality, Implied Causes of Action, and the Political Question Doctrine Should Be Rejected Again

CACI's final arguments challenge the Court's prior rulings without offering any new theories or evidence. As to extraterritoriality, the Court has repeatedly held that "[t]he record … shows substantial domestic conduct that is relevant to the alleged law of nations violations." *Al Shimari v. CACI Premier Tech., Inc*., 684 F. Supp. 3d 481, 497 (E.D. Va. 2023). As to whether the ATS provides a cause of action for Plaintiffs, the Court "has held that torture [and] CIDT constitute violations of the law of nations for which a private right of action exists under the ATS." *Id*. at 504. And the Fourth Circuit has rejected CACI's political-question argument. *See Al Shimari*, 840 F.3d at 158-59. There is no basis for the Court to change any of these rulings.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully submit that this Court should deny CACI's motions for judgment as a matter of law and for a new trial on all claims and uphold the jury's verdict.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on December 9, 2024, I electronically filed the foregoing, which sends notification to counsel for Defendants.

/s/ Charles B. Molster, III
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