UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

SUHAIL NAJIM ABDULLAH AL SHIMARI, *et al.*, Plaintiffs, v. CACI PREMIER TECHNOLOGY, INC., Defendant,	)	No. 1:08-cv-0827 LMB-JFA

DEFENDANT CACI PREMIER TECHNOLOGY, INC.'S REPLY IN SUPPORT OF ITS MOTION FOR JUDGMENT AS A MATTER OF LAW OR, ALTERNATIVELY, FOR A NEW TRIAL

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I. INTRODUCTION

Plaintiffs' opposition does not effectively counter the clear reasons why CACI is entitled to judgment as a matter of law. The Fourth Circuit's decision in *Hencely v. Fluor Corporation*, 120 F.4th 412 (4th Cir. 2024), unambiguously held that the combatant activities preemption applies to tort duties under all "non-federal" bodies of law, which includes international law. That word choice is intentional, and defeats Plaintiffs' argument that preemption applies only to state law. Plaintiffs also are wrong in arguing, in direct contravention of the position they took at trial, that their claims are actually substantive federal claims, and even if they were right the law is clear that federal statutory law preempts the common-law claim-creating power of federal courts.

With respect to the borrowed servant doctrine, Plaintiffs once again argue that any power to control by CACI defeats the defense, a position that this Court has repeatedly rejected and which is inconsistent with Fourth Circuit law and the Restatements of Agency. Their legal arguments on borrowed servant underwhelming, Plaintiffs resort to gross mischaracterizations of the record in an attempt to resuscitate their claims. But the Court was right in observing that it was "uncontestable" that the Army controlled interrogation operations performed by both soldiers and CACI interrogators. That the jury disagreed is a result of instructional error and the injection of emotion and retribution into the case. This Court's function is to ensure the judgment conforms to the evidence presented, and that requires entry of judgment on borrowed servant grounds.

With respect to conspiracy, the trial evidence, even when viewed favorably to Plaintiffs, does not prove an agreement to act unlawfully. At most, the evidence shows parallel conduct in a chaotic and stressful atmosphere. That does not a conspiracy make. Plaintiffs' conspiracy claims should have been put to rest at the motion-to-dismiss stage. Plaintiffs' conspiracy claims have no more merit than their direct abuse and aiding-and-abetting claims, which the Court rightly

dismissed for a wholesale lack of supporting evidence. A jury verdict on claims that fail to meet the legal requirement for a conspiracy does not change CACI's entitlement to judgment.

Finally, the jury's damages award is excessive and fraught with error. Under Fourth Circuit law, Plaintiffs cannot recover more than modest compensatory damages without expert medical and psychological evidence. The jury's punitive damages award also is unavailable, or at least grossly excessive, on a number of grounds Plaintiffs do not effectively rebut.

To be sure, CACI's view is that this Court lacks subject-matter jurisdiction. Plaintiffs' claims are impermissibly extraterritorial, exceed the Court's power to create a judge-made cause of action, and implicate CACI's derivative sovereign immunity and the political question doctrine. This case also was untriable, consistent with notions of due process, based on the discovery and evidentiary restrictions imposed as a result of the United States' three invocations of the state secrets privilege. CACI reasserts all of these defenses and immunities, and should receive relief on all of them. But even if the Court focuses on the defenses significantly impacted by events at trial, or by developments in the law, CACI is entitled to judgment on all of Plaintiffs' claims.[1]

II. ARGUMENT

A. Plaintiffs' Claims Are Preempted

The Fourth Circuit held in *Hencely v. Fluor Corporation*, 120 F.4th 412 (4th Cir. 2024) that claims against civilian contractors based on a "***non-federal tort duty***" are preempted if the contractor employees are "integrated into combatant activities over which the military retains command authority." *Id.* at 426. This broad preemption reflects the purpose of the combatant activities exception to the FTCA: "eliminating [non-federal tort] regulation of the military during

[1] Plaintiffs' opposition only meaningfully addresses preemption, borrowed servant, conspiracy, and damages. CACI rests on the arguments in its opening memorandum, and on its prior legal challenges, for the other issues raised in CACI's motion.

wartime" and "preserv[ing] the field of wartime decisionmaking exclusively for the federal government." *Id.* at 426, 430. Plaintiffs' laundry list of arguments against preemption fall flat.

In noting that *Hencely* uses the term "non-federal" just once (Dkt. #1845 at 6), Plaintiffs invoke the "Beetlejuice" defense, that the Fourth Circuit's holdings are to be taken seriously only if they are repeated three times.[2] There is a clear word that the Fourth Circuit could have used if it intended to limit combatant activities preemption to preemption of state-created tort duties. It could have used the word "state." The Court's holding that "***non-federal tort dut[ies]***" are preempted as inconsistent with the federal goal of eliminating tort regulation of the military during wartime is not a typographical error. It is a clear recognition that combatant activities preemption applies to claims, such as the narrow class of claims over which the ATS provides jurisdiction, brought under international law. That *Hencely* would frame its holding in terms of "non-federal" tort duties is unsurprising given that *Hencely* adopts the reasoning in *Saleh v. Titan Corp.*, 580 F.3d 1, 16 (D.C. Cir. 2009), a case in which the D.C. Circuit held that both state-law and ATS claims were preempted by the federal interests underlying the combatant activities exception.

Plaintiffs also argue that *Hencely* is inapplicable because their torture and CIDT claims are claims brought under federal law, not international law. This premise is both incorrect and beside the point. As the Supreme Court explained, "[t]he ATS is 'strictly jurisdictional' and does not by its own terms provide or delineate the definition of a cause of action for violations of international law." *Jesner v. Arab Bank, PLC*, 584 U.S. 241, 254 (2018) (quoting *Sosa v. Alvarez-Machain*, 542 U.S. 692, 713-14 (2004)). That said, the *Sosa* majority concluded that "Congress intended the ATS to furnish jurisdiction for a relatively modest set of actions alleging violations of the *law of*

[2] In the movies *Beetlejuice* and *Beetlejuice Beetlejuice*, the title character appears only if his name is called three times. *See* https://www.cbr.com/why-beetlejuice-three-times-name/.

nations." *Id.* at 720 (emphasis added); *see also Jesner*, 584 U.S. at 254 ("Congress enacted [ATS] against the backdrop of the general common law, which in 1789 recognized a limited category of 'torts in violation of the law of nations.'" (quoting *Sosa*, 542 U.S. at 714)). Thus, Plaintiffs' claims are claims under international law for which ATS provides jurisdiction. Indeed, if norms under the law of nations were incorporated into federal law, there would be no need whatsoever for the ATS, as those claims could be brought as federal question claims under 28 U.S.C. § 1331.

Plaintiffs also have no good explanation as to how their current view that their claims are *federal* claims squares with the position they took, and the Court adopted, at trial. As CACI detailed (Dkt. #1829 at 4), Plaintiffs told the Court that Dr. Modvig should not be questioned on the federal definition of CIDT, as set forth in the War Crimes Act, because their claims "involve violations of international law, ***not domestic law***." Dkt. #1760 at 1 (emphasis added). The Court agreed, barring CACI from asking Dr. Modvig about federal law on the grounds that Plaintiffs' claims "alleged violations of international law" to which substantive federal law is "not relevant." Dkt. #1780. Plaintiffs relegate their response to a footnote in which they assert that violations of international law are not really international law claims but common-law claims under federal law. This argument renders the ATS irrelevant and is inconsistent with *Sosa*'s holding that ATS grants jurisdiction over claims in violation of the law of nations. Plaintiffs' position also would mean that Congress can establish a statutory definition of CIDT but leave federal courts somehow free to craft their own definition of the same term as a matter of federal common law. As this Court has recognized, Plaintiffs are absolutely incorrect. "To determine the content of an international norm, courts should look first to whether Congress has defined the relevant international legal norm, *in which case federal courts must apply the statutory standard*." Dkt. #615 at 5 (emphasis added) (citing *In re XE Servs. Alien Tort Litig.*, 665 F. Supp. 2d 569, 582 (E.D. Va. 2009)).

It is also notable that the Fourth Circuit based its holding on eliminating from the battlefield "non-federal tort dut[ies]," and not non-federal tort "claims." *Hencely*, 120 F.4th at 426. Even if one conceived the ATS, contrary to *Sosa*'s holding, as authorizing the importation of law of nations tort duties into federal law, the fact remains that under such a conception of the law, Plaintiffs claims are viable only if they involve a law of nations tort duty that can exist in the context of Plaintiffs' claims. As *Hencely* makes clear, the combatant activities exception *eliminates* any non-federal tort duty from the battlefield when contractors are integrated into the military operation. *Id.* Thus, there would be no cognizable international law tort duty to import into federal law even if Plaintiffs were correct that ATS, a strictly jurisdictional statute, transformed international law tort duties into federal claims.

All of that aside, Plaintiffs threshold proposition, offered without citation to authority, is that federal statutory law such as the combatant activities exception cannot preempt claims based on other elements of federal law. Dkt. #1845 at 3. While that might be true in the main, that concept is demonstrably incorrect when it comes to the power of federal statutory law to preempt judicial recognition of federal *common* law. *See Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410, 423 (2011) (federal statutes can displace the power of federal court to recognize causes of action under federal common law); *Milwaukee v. Illinois*, 451 U.S. 304, 314 (1981) (same).

In *American Electric Power*, the U.S. Supreme Court held that federal statutes can preempt the federal common-law powers of federal courts, and "the relevant question for purposes of displacement is 'whether the field has been occupied, not whether it has been occupied in a particular manner.'" *Am. Elec. Power*, 564 U.S. at 426 (quoting *Milwaukee*, 451 U.S. at 324). And *Hencely* does not leave this question up for debate, holding that "when it comes to warfare, 'the federal government ***occupies the field***' and 'its interest in combat is ***always precisely contrary***

to the imposition of a non-federal tort duty.'" 120 F.4th at 426 (emphasis added) (quoting *Saleh*, 580 F.3d at 7); *see also id* at 430 (preemption based on a combatant activities exception to the FTCA "preserves the field of wartime decisionmaking exclusively for the federal government"). Thus, even if Plaintiffs were correct that their claims are substantive federal claims – and they are not correct – statutory occupation of the field, which *Hencely* recognizes with respect to combatant activities, preempts the power of federal courts to create a common-law federal claim.[3]

In a footnote, Plaintiffs make a passing argument that CACI waived its preemption defense by not asking the jury to be instructed on preemption. Dkt. #1845 at 8 n.3. But "preemption is a question of law," *Knight v. Boehringer Ingelheim Pharms.*, 984 F.3d 329, 337 (4th Cir. 2021), so there is no factual issue on which to instruct the jury. Plaintiffs' "*cf.*" citation to *Bates v. Dow Agrosciences LLC*, 544 U.S. 431 (2005), is misleading. That case stands for the unremarkable proposition that when aspects of a plaintiffs' claim is preempted, but other aspects are not, the jury instructions should be clear on what the jury must find for liability so it is not ambiguous whether the jury found the defendant liable based on preempted issues. *Id.* at 453-54. Here, the Court's pretrial rulings did not pare back Plaintiffs' claims at all on preemption grounds, so a jury instruction directed at the scope of preemption would have served no purpose.

Finally, Plaintiffs throw a Hail Mary and argue that combatant activities preemption does not apply because "[i]nstructing military personnel to torture detainees . . . is not necessary to or in direct connection with actual hostilities, and it is unlawful." Dkt. #1845 at 9. Courts do not make combatant activities preemption decisions based on whether the tortious event supported

[3] This does not mean there is no recourse for violations of *jus cogens* norms during war. As an example, the Anti-Torture Act, 18 U.S.C. § 2340A, criminalizes torture and applies extraterritorially. But the federal government exercises prosecutorial discretion in deciding whether to bring a criminal case, which *Sosa* identified as one reason why federal courts should exercise great caution before permitting a civil claim under ATS. 542 U.S. at 727.

hostilities, but ask whether the operations from which the tortious conduct derived were in direct connection with actual hostilities. In *In re Burn Pit Litig.*, 744 F.3d 326 (4th Cir. 2014), the court did not ask whether poisoning U.S. troops and others with toxic waste was a combatant activity; it asked whether "[p]erforming waste management . . . functions to aid military personnel in a combat area" was a combatant activity. *Id.* at 351. In *Johnson v. United States*, 170 F.2d 767 (9th Cir. 1948), the court did not ask whether polluting a clam farm with "oils, sewage, and other noxious matter" was a combatant activity; it asked whether "supplying ammunition to fighting vessels in a combat area during war" was a combatant activity. *Id.* at 768, 770. In *Koohi v. United States*, 976 F.2d 1328, 1337 (9th Cir. 1992), the court did not ask whether shooting down a civilian airliner was a combatant activity, but whether supplying weapons to a U.S. Navy ship during time of conflict was a combatant activity. And in *Saleh v. Titan Corp.*, 580 F.3d 1, 9 (D.C. Cir. 2009), the court held that the specific activities CACI personnel were engaged in at Abu Ghraib prison, allegations of torture notwithstanding, constituted combatant activities.

B. The Borrowed Servant Doctrine Precludes Liability

The supplemental instruction provided to the jury was incorrect. Dkt. #1829 at 9-13. It contradicted the Court's consistent, correct interpretation of the law and led the jury to conclude the borrowed servant doctrine did not apply despite "uncontestable" evidence proving the military controlled interrogation work at Abu Ghraib. *See id.* at 8 (quoting Dkt. #1821 at 10:8-18) ("[Y]ou do have, I think, pretty much *uncontestable evidence* that the military set the ground rules for how interrogations were supposed to be conducted. . . . And the work that was being done was interrogation work. And all of that falls under the military's end of things.") (emphasis added). Plaintiffs' opposition does nothing more than mischaracterize the evidence and trot out the same arguments this Court has rejected many times over. Neither strategy is availing.

1. Supplemental Instruction No. 1 Was Erroneous and Prejudicial

Plaintiffs rely on the same legal argument that this Court has told them, several times, is incorrect: that the general employer must have *completely* relinquished control for the borrowed servant doctrine to apply. Dkt. #1845 at 10. Once again, that is ***not*** the law in the Fourth Circuit. *Estate of Alvarez v. Rockefeller Foundation*, 96 F.4th 686, 693 (4th Cir. 2024). As the Court stated in response to Plaintiffs' dual agency argument:

> You have to read the *whole* opinion [in *Alvarez*]. It goes on to say in terms of determining liability, you have to determine who is actually controlling *the work* of the employee. . . . when the misconduct occurs, because that's the only relevant time period. . . . But *if it were a complete relinquishment, a complete relinquishment, then effectively they wouldn't be an employee in my view*.

Dkt. #1619 at 5:3-6:4 (emphasis added); *see also* Dkt. #1627 at 6:12-7:6 ("[Y]our proposal . . . . goes beyond what the Fourth Circuit deems to be the proper formulation."); *see also* Dkt. #1820 at 42:21-24 ("They will always be working for both; the issue is who's controlling it at the time the tort is committed. That's the essence of the borrowed servant.").

There is no "dual agency" exception to the borrowed servant doctrine under Fourth Circuit law. Indeed, when Plaintiffs raised the Court's purported "failure to instruct on a possible liability that would come from dual agency," the Court stated clearly that its rejection of Plaintiffs' made-up dual agency exception not only would stand, but was "law of the case." Dkt. #1630 at 11:1-2, 12:1-4. The cases Plaintiffs cite make clear that the dual agency exception they tout is a feature of state law that the Fourth Circuit has only applied in cases controlled by state law. *See Sharpe v. Bradley Lumber Co.*, 446 F.2d 152 (4th Cir. 1971) (North Carolina state law); *Vance Trucking v. Canal Ins. Co.*, 395 F.2d 391 (4th Cir. 1968) (South Carolina state law); *US Methanol, LLC v. CDI Corp.*, No. 21-1416, 2022 WL 2752365, at *5 n.4 (4th Cir. July 14, 2022) (unpublished, *per curiam* opinion applying West Virginia law that mentions the borrowed servant doctrine in *dicta* in a footnote).

After rehashing legal arguments they have long been told are incorrect, Plaintiffs turn to misstating the record. Plaintiffs restate as if somehow conclusive the Restatement (Third) of Agency's definition of vicarious liability, which rightfully requires that for vicarious liability to attach the tortfeasing agent must have acted within his scope of employment. Dkt. #1845 at 12. Then Plaintiffs assert that CACI "conceded" that its employees were acting within the scope of their employment when they purportedly conspired to mistreat detainees. *Id.* This is demonstrably false. The Court raised a concern that the scope of employment instruction was confusing in a case in which the employees were operating under employment contracts with CACI to work on a government contract, under which they reported to the chain of command. *See* Dkt. #1820 at 37:24-38:16. Because the Court shifted the burden of proof to CACI and found the instruction confusing, CACI agreed not to include the scope of employment instruction:

> We note that the Court's proposed instruction differs from last trial in that the Court last trial placed the burden on plaintiffs and then this one places it on us. We object to that, but to the extent the Court's adhering to that, then we're not going to request a scope of employment instruction.

Id. at 40:6-12. CACI also agreed with the Court, however, that if the jury asked questions that implicated the scope of employment, the Court should provide its drafted instruction. *Id.* at 40:17-41:2. At no point did CACI "concede" anything on the scope of employment.

Plaintiffs next urge that under binding precedent, and contrary to CACI's contention, the existence of "some" control undermines the borrowed servant defense. Dkt. #1845 at 13. Apparently, Plaintiffs missed when the Court commented that "an intelligent jury" would understand "that power to control would . . . automatically mean *small instances of some control would not be enough*." Dkt. #1821 at 18:22-19:1 (emphasis added); *see also Ladd v. Rsch. Triangle Inst.*, 335 F. App'x 285, 288 (4th Cir. 2009)) (the borrowing employer's authority "need

only encompass the servant's performance of the particular work in which he is engaged at the time of the [tort]") (citation omitted).

To underscore their argument, Plaintiffs cite cases that basically say that it is not enough to trigger the defense for a lent employee to follow general instructions and cooperate with the borrowing employer. Dkt. #1845 at 13. CACI has never argued otherwise, but that is not the same thing as arguing that *any* control by the lending employer defeats the defense. Plaintiffs follow up these citations by saying, "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." *Id.* (emphasis added). Anyone who would say the evidence showed mere cooperation or coordination between CACI employees and the Army, as opposed to Army direction and control, simply wasn't paying attention at trial. *See* Dkt. #1832 at 13-16.

2. The "Uncontestable" Evidence at Trial Proved the U.S. Army – Not CACI – Directed and Controlled CACI Interrogators' Work

Plaintiffs stretch to substantiate the jury's verdict with trial evidence. Plaintiffs ask the Court to ignore that the U.S. government *admitted* that CACI interrogators were directed by the military chain of command and that no one from CACI was in that chain of command. Dkt. #1845 at 13-14. The only basis Plaintiffs offer for doing so is that "answers to pre-trial interrogatories . . . are not binding." *Id.* Plaintiffs ignore that no one from the U.S. government ever denied or even contradicted these admissions. Thus, for purposes of this trial, they remain the position of the U.S. government that was admitted by agreement of the parties.

Plaintiffs fully ignore the remaining dispositive evidence in favor of mischaracterizing Dan Porvaznik's role at Abu Ghraib. This is understandable as the dispositive evidence supporting CACI's borrowed servant defense, and proving Mr. Porvaznik had a purely administrative role as site lead, is not susceptible to manipulation. It is clear as day. Plaintiffs' own exhibit proves that

the JIDC chain of command at Abu Ghraib, in October 2003, determined that there would be two chains of command (1) an operational command fully controlled by military leadership and (2) an administrative chain of command, which included "the civilian contractor site manager." Dkt. #1829-9 (PTX133) at 41. The testimony from the commanding officer at Abu Ghraib and the Officer in Charge of the ICE left no room for doubt that no CACI personnel, including Mr. Porvaznik, had any role with respect to supervising interrogation work. Dkt. #1832 at 13-14.

Plaintiffs tout CACI's ability to recruit, pay, and generally discipline CACI employees as somehow showing CACI had the ability to direct and control interrogation work at Abu Ghraib. Dkt. #1845 at 14. To show CACI directed interrogation operations, Plaintiffs focus on the fact that Mr. Porvaznik could have reviewed (*but did not*) interrogation reports or viewed interrogations at Abu Ghraib and met with Captain Wood to get the Army's feedback of how CACI interrogators were doing. *Id.* But even if the actual facts matched Plaintiffs' overstatement of the facts, none of this would support a conclusion that CACI had control over its interrogators' *interrogation work*. Rather, it shows that CACI retained administrative management over its employees, aided by Mr. Porvaznik and his conferences with Captain Wood, to ensure CACI interrogators were meeting *the military's* expectations. Indeed, the very fact that Mr. Porvaznik had to ask Captain Wood to find out how CACI interrogators were performing demonstrates that the military chain of command, and not Mr. Porvaznik, directed, controlled, and monitored their interrogation work.

Most of the rest of Plaintiffs' purported "evidence" of CACI's non-existent control at Abu Ghraib is nothing but Plaintiffs' gross distortions of the record. For example, Plaintiffs state that Amy Jensen (CACI's program manager) "explained it was the duty of the CACI site leads to supervise CACI employees." *Id.* at 15. The transcript paints a different picture:

Q Now, who supervises the CACI employees in Iraq?

A The military.

> Q Does CACI supervise its employees at all in any way, shape or form?
>
> A CACI site leads would make sure that the employees were adhering to the military standards of the unit they were supporting.
>
> Q So is CACI -- the CACI site leads were supposed to make sure that the CACI employees were doing what the military wanted them to do?
>
> A Correct.
>
> Q So they were supervising them in that regard?
>
> A Yes.

Dkt. #1817 at 139:22-141:1. In other words, the site lead checked in with the military to see if CACI interrogators were performing as the military expected. Dkt. #1845 at 14 (Mr. Porvaznik "monitored the performance of the CACI interrogators *by meeting daily with Captain Wood to receive feedback*") (emphasis added). Asking the military for information about its own employees hardly demonstrates CACI's control.

Plaintiffs try to loop in Tom Howard, who was not stationed at Abu Ghraib, as someone who supervised CACI interrogators. Dkt. #1845 at 15. Plaintiffs rely on Mr. Nelson's testimony, but omit that he testified on cross-examination that CACI interrogators did not report to Mr. Howard. Dkt. #1824 at 27:18-22. Mr. Howard's high-level visibility into counterintelligence operations in Iraq hardly shows CACI controlled interrogation work at Abu Ghraib.

Aside from mischaracterizations of the record, Plaintiffs continue to rely on an Army field manual that no military personnel at Abu Ghraib ever mentioned and which the commanding officer over the JIDC had never seen. Dkt. #1807-1 at 20-21 (Pappas). Plaintiffs claim trial evidence showed that the field manual was "fully consistent with what happened on the ground," based on MG Taguba's testimony. Dkt. #1845 at 17. But MG Taguba *was not on the ground at Abu Ghraib* when abuses occurred and interviewed just a few intelligence personnel during his investigation, which was limited to MP operations. Plaintiffs further ignore that when asked, "So

did the Army, without going through the COR, have control over the CACI interrogators?" MG Taguba testified, "They can predicated on the incident." Dkt. #1824 at 68:14-16.

Plaintiffs also rely on Mr. Nelson's testimony that CACI had "the ability to influence operations" at Abu Ghraib. *Id.* at 12:17. Plaintiffs ignore that Mr. Nelson said the ambit of this theoretical influence was following the contract with the military, removing employees who were not complying with the contract (which required that CACI employees integrate into the military chain of command), and working with the military. Dkt. #1816 at 90:14-91:4. None of this indicates direct supervision. Mr. Nelson testified to exactly what he meant when he said CACI had "the ability to influence operations": (1) removing personnel accused of "improprieties" and (2) "asking questions about how are personnel performing, are there any issues coming up that we need to be aware of." Dkt. #1824 at 12:16-13:11 (Nelson).

In other words, CACI had to check with the military to see if there were any problems with any of its employees. That's not direct supervision. Moreover, Plaintiffs fail to mention that Mr. Nelson testified that he had no knowledge of anyone (including himself) ever making a report to anyone at CACI (including Mr. Porvaznik) that CACI personnel had engaged in abuse at the time in question. Dkt. #1824 at 27:7-28:1; Dkt. #1816 at 78:12-16 (telling the Court he did not report anything to CACI or Mr. Porvaznik). Plaintiffs also omit that Mr. Nelson testified (1) "CACI interrogators . . . reported through your chain of command to the military personnel who were running the JIDC at Abu Ghraib . . . as far as operational matters go," (2) "If there's any operational issues, first go-to is the military," and (3) "CACI couldn't do anything really about operational affairs, intelligence matters, anything like that." Dkt. #1816 at 102:15-24, 104:9-16. In short, Plaintiffs' best evidence from the trial record has to be cherrypicked and manipulated just to suggest CACI had any control over interrogation work at Abu Ghraib. Even then, it falls short.

C. The Jury's Conspiracy Verdict Is Against the Weight of the Evidence

Plaintiffs' conspiracy claims never should have been submitted to the jury, and the jury's verdict is against the clear weight of the evidence presented at trial. Plaintiffs' opposition does not cite any legal authorities, and does not dispute CACI's irrefutable position on the legal requirements for providing a conspiracy. These include that Plaintiffs must prove an agreement; that "parallel conduct and a bare assertion of a conspiracy are not enough for a claim to proceed," *Thomas v. Salvation Army S. Territory*, 841 F.3d 632, 637 (4th Cir. 2016), that "[w]ithout more, parallel conduct does not suggest conspiracy," *A Soc'y Without a Name v. Virginia*, 655 F.3d 342, 346 (4th Cir. 2011); and that mere presence in an area where wrongdoing occurs is insufficient for a conspiracy claim, *Lewis v. Gupta*, 54 F. Supp. 2d 611, 619 (E.D. Va. 1999) (Ellis, J.).

But Plaintiffs' purely factual defense of its conspiracy claims relies exclusively on evidence of parallel misconduct. Plaintiffs assert that "CACI interrogators instructed military police to 'set the conditions' for detainees and 'soften [them] up"' (Dkt. #1845 at 19), but Plaintiffs ignore that the trial did not produce a scintilla of evidence that a CACI interrogator ever gave instructions relating to a detainee not assigned to him or that any CACI interrogator gave anyone instructions (good, bad, or otherwise) relating to these Plaintiffs. Plaintiffs also ignore that none the three government investigations introduced at trial found the broad conspiracy Plaintiffs allege. Indeed, the one investigation going in depth into the causes of detainee abuse from a military intelligence perspective – the Fay report – unambiguously found that the abuses were caused not by a broad conspiracy, but by individual criminal misconduct. PTX23 at 41-42.

D. CACI Is Entitled to a New Trial or Remittitur on Damages

1. The Jury's Compensatory Damages Award Is Excessive

Plaintiffs misdescribe CACI as arguing that a compensatory damages claim must be supported by medical evidence. Dkt. #1845 at 20 ("The premise of CACI's challenge to the

compensatory damages award is wrong: medical evidence is not needed to support a damages award."). But CACI never said anything of the sort, and in fact acknowledged the opposite:

> ***While a plaintiff can choose to support his claims of physical and emotional injuries only through his own testimony***, the authorities cited above hold that when a plaintiff makes such a decision, ***his self-diagnosis can support only a "minimal" award of damages for emotional distress***, and certainly not the "sizeable award" that the jury awarded, an award that simply adopted Plaintiffs' counsel's requested damages figure.

Dkt. #1829 at 22 (emphasis added) (quoting *Hetzel v. Cnty. of Prince William*, 89 F.3d 169, 171 (4th Cir. 1996) (quoting *Johnson v. Hugo's Skateway*, 974 F.2d 1408, 1414 (4th Cir. 1992) (*en banc*))); *see also Hetzel*, 89 F.3d at 171 (A "plaintiff's own brief testimony," without supporting medical or psychological evidence, is "insufficient to support ***a sizeable award*** for emotional distress." *Id.* (citation omitted). Thus, CACI's point is not that compensatory damages are unavailable when based on the plaintiff's own testimony, but that a *sizeable* compensatory damages award is unavailable. Three million dollars is sizeable.

Plaintiffs' other arguments are equally unavailing. They claim that ATS cases often involve compensatory damages in seven figures, and that "some of these cases" involve only the plaintiff's description of his injuries. Dkt. #1845 at 20-21. But Plaintiffs cite only one example – *Yousuf v. Samantar*, No. 04-cv-1360, 2012 WL 3730617, at *14-15 (E.D. Va. Aug. 28, 2012), a case in which the defendant took a default judgment "rather than contest liability and damages." *Id.* at *2. In *Yousuf*, the Court relied on the Ninth Circuit's conclusion in *Hilao v. Estate of Marcos*, 103 F.3d 789, 793 (9th Cir. 1996), that damages could be based on the plaintiff's own testimony, a premise with which CACI does not quarrel. *Yousuf*, 2012 WL 3730617, at *15. But with the defendant in *Yousuf* defaulting and not contesting damages, there was no advocate to direct the Court to Fourth Circuit law, which the Court did not cite or acknowledge in *Yousuf*, expressly forbidding a sizeable emotional distress damages award based solely on a plaintiff's self-diagnosis.

Finally, Plaintiffs contend that there were expert diagnoses of Plaintiffs' claimed injuries through CACI's expert, Dr. Payne-James, a premise that is untrue as to Al Shimari and Al-Zuba'e and, if possible, even more untrue as to Al-Ejaili. Dr. Payne-James did not offer diagnoses of Al Shimari and Al-Zuba'e, but merely testified that their physical markings were consistent with their claims, and consistent with *many* other possible causes. Al-Ejaili was not examined by Dr. Payne-James, or anyone else who testified at trial, and Al-Ejaili admitted that he had no lasting physical injuries from Abu Ghraib. Dkt. #1815 at 219:2-16, 250:13-25. None of the Plaintiffs presented expert testimony, or lay testimony other than his own, as to his alleged emotional injuries.

2. There Is No International Consensus Supporting an Award of Punitive Damages Against a Corporate Defendant

Plaintiffs do not seriously dispute that there is no international consensus for awarding punitive damages in civil actions, but contend that this inarguable fact does not matter. But Plaintiffs have not cited to a single appellate court decision affirming an award of punitive damages in an ATS case – no surprise since the handful of district court cases involving such damages have been default judgments from which no appeal lies. *See Yousuf*, 2012 WL 3730617, at *14-15. The two appellate court decisions Plaintiffs cite have nothing to do with damages; they address corporate liability, and do so in a way inconsistent with any significant award of punitive damages. Plaintiffs cite *Flomo v. Firestone Nat'l Rubber Co.*, 643 F.3d 1013, 1020 (7th Cir. 2011), for the proposition that "[i]nternational law imposes substantive obligations and the individual nations decide how to enforce them." Dkt. #1845 at 22. But in the same discussion, the Seventh Circuit merely observed that a corporation *would* be subject to compensatory damages under ATS, and "*perhaps*" punitive damages, if its ***board of directors*** had ***approved*** slave trading. *Id.* And Plaintiffs quote *Doe I v. Nestle USA*, 766 F.3d 1013, 1022 (9th Cir. 2014), for the proposition that "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." Dkt. #1845 at 22. Plaintiffs also cite *Yousuf*, where this Court held that in ATS cases, "punitive damages are typically governed by state law to comply with due process." *Yousuf*, 2012 WL 3730617, at *15.

But therein lies the problem with Plaintiffs' view of the law. They argue here that domestic law determines the availability of punitive damages, and then the rest of their damages arguments contend that the Court is not bound by domestic law regarding punitive damages because this is an ATS case. Plaintiffs claim that they are not subject to domestic rules prohibiting punitive damages for non-managerial conduct and that they are not subject to Virginia's cap on punitive damages. Dkt. #1845 at 22-23, 28. Plaintiffs even argue that the compensatory damages award is not subject to Fourth Circuit restraints, where the only evidence of emotional harm is the plaintiff's own testimony, on the grounds that ATS cases are different. Dkt. #1845 at 21. Either damages in an ATS case must comport with international consensus or they must hew to the requirements of domestic law. Plaintiffs cannot toggle between the two options as their needs dictate.

3. Punitive Damages Cannot Be Awarded Against a Corporate Employer for Non-Managerial Conduct

"[P]unitive damages may be awarded against a corporate employer only if either (1) that employer participated in the wrongful acts giving rise to the punitive damages, or (2) that employer authorized or ratified the wrongful acts giving rise to the punitive damages." *A.H. v. Church of God in Christ*, 831 S.E.2d 460, 478 (Va. 2019); *see also Ward v. AutoZoners, LLC*, 958 F.3d 254, 264 (4th Cir. 2020) (punitive damages against employer via vicarious liability requires proof that manager-level employees acted "themselves with malice or reckless indifference"). Plaintiffs argue that these standards do not apply because they are based on either state law or federal law, but as this Court has held with respect to ATS cases, "punitive damages are typically governed by state law to comply with due process." *Yousuf*, 2012 WL 3730617, at *15.

Pivoting from their legal argument, Plaintiffs contend that CACI management did, in fact, participate in or ratify a conspiracy to torture that extended to abuse of these Plaintiffs. Dkt. #1845 at 23. The trial evidence does not support this contention. Plaintiff contend that Steven Stefanowicz was a "de facto" assistant site lead, but even their witness acknowledged he was not assigned that role by CACI (Dkt. #1816 at 72:2-8), and the evidence is clear that even the site lead was a mere administrative conduit. Plaintiffs also contend that Daniel Porvaznik failed to report allegations of misconduct that were reported to him, but there is not a scintilla of evidence that Mr. Porvaznik failed to report a substantiated instance of torture or CIDT or that he had the intent to join in or ratify a torture conspiracy. At bottom, the evidence does not support liability against CACI on anything other than a *respondeat superior* basis, and CACI would submit that the evidence fails to even support that. In such a case, punitive damages are simply not permitted.

4. The Plaintiffs' Punitive Damages Claims Are Not Legally Cognizable

Plaintiffs submit that it was incumbent on CACI to help Plaintiffs present a legally-cognizable punitive damages calculation by quantifying CACI's profits. Dkt. #1845 at 24-25. Notably, Plaintiffs do not cite a single authority for this proposition. As CACI has explained (Dkt. #1829 at 24-25), the burden of proving a proper quantum of punitive damages that comports with due process lies with Plaintiffs. Plaintiffs neglected their damages case until the eve of trial and were left with no ability to provide a lawful calculation of punitive damages. Punitive damages can be based on profits, but not on gross revenues. *Yousuf*, 2012 WL 3730617, at *16. Plaintiffs offered no evidence regarding CACI's profits attributable to interrogation work.

5. The Jury Improperly Awarded Punitive Damages to Plaintiffs for Injuries to Others

The jury's note clearly showed a desire on the jury's part to award some of the punitive damages sought to a "credible non-profit organization that assists *other victims* of human rights

violations at Abu Ghraib prison." Dkt. #1811-05 (emphasis added). After the Court told the jurors they could not do that, the jury awarded the full amount of punitive damages sought to Plaintiffs. Punitive damages cannot be awarded for injuries suffered by others. *Philip Morris USA v. Williams*, 549 U.S. 346, 353 (2007). Plaintiffs argue that CACI waived this argument by failing to object to the Court meeting with the jury outside counsel's presence. There is no waiver here.

The express condition on which the parties agreed that the Court could meet with the jury *ex parte* was that the Court would disclose the contents of the session if it was consequential. Here, the jury sought to award punitive damages in an inappropriate way, and it was essential that the jury be told that it could not award punitive damages to a non-profit for the benefit of others *and* that it could not shift the amount it would award to a non-profit for the benefit of others to the Plaintiffs. The only case Plaintiffs cite in support of their argument is an unpublished and non-precedential (though not disclosed as such in Plaintiffs' opposition) Fourth Circuit decision that was much different from what happened here. In *Derflinger v. Ford Motor Co.*, 963 F.2d 367 (4th Cir. 1992) (unpub.), the trial judge disclosed the basic nature of the jury's question *and* told the parties that the court would repeat the negligence and contributory negligence instructions to the jury. *Id.* Waiver is "an intentional and voluntary relinquishment of a known right." *United States v. Ductan*, 800 F.3d 642, 647 n.1 (4th Cir. 2015). By allowing the Court to meet initially in private with the jury, on the express condition that the nature of the discussion would be disclosed to the parties if it was consequential, CACI did not waive its right that the Court act in conformity with Fourth Circuit precedent in responding to the jury's question.

6. Virginia's $350,000 Punitive Damages Cap Applies

Once again, Plaintiffs seek to avoid domestic law on punitive damages, while simultaneously arguing that ATS claims default to domestic law regarding remedies. This Court noted in *Yousuf* that in ATS cases "punitive damages are typically governed by state law to comply

with due process." *Yousuf*, 2012 WL 3730617, at *15. Plaintiffs' main argument is that CACI's position is frivolous because the case on which CACI relies – *Yousuf* – actually awarded more than $350,000 per plaintiff in punitive damages. Dkt. #1845 at 28.[4] But it is Plaintiffs' position that is frivolous. By its express terms, the Virginia cap on punitive damages applies only to "any action accruing on or after July 1, 1988." Va. Code Ann. § 8.01-38.1. A cursory reading of *Yousuf* reveals that the vast majority of the conduct for which the defaulting defendant was found liable occurred *before* July 1, 1988. *Yousuf*, 2012 WL 3730617, at *6 ("The violations alleged took place between 1981 and 1989 and was part of ongoing conduct before the fall of the Barre regime in 1991."). Thus, the *Yousuf* plaintiffs were not subject to Virginia's cap on damages.

III. CONCLUSION

The Court should dismiss this case, enter judgment for CACI, or order a new trial.

Respectfully submitted,

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[4] Plaintiffs even mock CACI's reliance on *Yousuf* as "inexplicable" given that the Court in *Yousuf* imposed "punitive damages well in excess of that statutory cap." Dkt. #1845 at 28.

CERTIFICATE OF SERVICE

I hereby certify that on the 16th day of December, 2024, I will electronically file the foregoing with the Clerk of Court using the CM/ECF system, which will then send a notification of such filing (NEF) to the following:

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