UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

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

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

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I. INTRODUCTION

CACI files this motion to correct a miscarriage of justice, to eliminate an extravagant runaway-jury verdict founded not on evidence but on passion and sympathy. Undeniably, there was abuse of some of the 50,000 detainees in the custody of U.S. forces from 2001-04, 7,000 of whom were detained at Abu Ghraib when CACI personnel arrived in October 2003. And indisputably, CACI personnel performed interrogations of detainees at Abu Ghraib under the direction and control of the U.S. military. And it was the military, not CACI personnel, whom Plaintiffs claimed abused them. The military, however, was not a defendant in this case, nor were the individual soldiers Plaintiffs identified as their abusers. Aside from two notorious military policemen ("MPs"), Plaintiffs made no attempt to determine which soldiers abused them. As a result, the sins of Abu Ghraib were visited upon CACI without regard to the evidence. That is no more apparent than in the jury's question, not timely disclosed to CACI, whether they could award punitive damages to a non-profit organization – rather than Plaintiffs – to assist other victims of human rights violations at Abu Ghraib. While moral outrage about Abu Ghraib is understandable, even appropriate, it does not support the verdict against CACI.

While CACI has raised threshold legal defenses throughout this case – extraterritoriality, the Court's power to create a cause of action, state secrets, derivative sovereign immunity, to name a few – the Court has shown no inclination to revisit those rulings. Rather than focus on those issues in unabridged form, CACI centers this motion on four issues involving new law or an issue significantly affected by what occurred at trial.

First, during the trial, the Fourth Circuit issued a preemption decision that makes clear that Congress has, by statute, barred tort claims against contractors that arise in connection with the military's battlefield activities. In *Hencely v. Fluor Corp.*, 120 F.4th 412 (4th Cir. 2024), the Fourth Circuit held that all *non-federal* tort duties, *i.e.*, international torts under the ATS, are

preempted as against contractors performing combatant activities while integrated into the U.S. military mission and operating under ultimate military authority. CACI's interrogation work at Abu Ghraib surely qualifies and requires entry of judgment in CACI's favor.

Second, as the Court observed at trial, the evidence is "uncontestable" that the military chain of command directed and controlled CACI employees for interrogation operations. That's the borrowed servant doctrine. But the Court's erroneous Supplemental Instruction No. 1 kneecapped the defense and confused the jury, causing it to reach an unsupported and unreasonable verdict on the mistaken belief that *any* control by CACI defeated the borrowed servant doctrine.

Third, the verdict is not supported by the evidence adduced at trial, which does not establish a conspiracy in which CACI personnel reached an agreement that encompassed abuse of these Plaintiffs. The evidence of a conspiracy here is no better than the claims of direct abuse by CACI personnel and of aiding and abetting – which this Court dismissed for lack of evidence. At most, the evidence shows parallel conduct, involving other detainees, on which a conspiracy claim cannot rest. The only conclusion a reasonable jury could reach was one in favor of CACI.

Fourth, both the Plaintiffs' damages theory and the jury's damages award are defective in many ways, described below. In addition, the outrageous award of punitive damages is subject to the $350,000 cap under Virginia law, if it can stand at all.

All of these issues, as well as the defenses the Court has previously rejected, compel entry of judgment in CACI's favor, dismissal for lack of jurisdiction, or a new trial.

II. LEGAL STANDARD

Judgment as a matter of law is appropriate to reverse a jury's verdict if "there is no legally sufficient evidentiary basis for a reasonable jury to have found for that party with respect to that issue." Fed. R. Civ. P. 50(a). The Court may grant a new trial under Rule 59 if "(1) the verdict is against the clear weight of the evidence, or (2) is based upon evidence which is false, or (3) will

result in a miscarriage of justice, even though there may be substantial evidence which would prevent the direction of a verdict." *Atlas Food Sys. & Servs., Inc. v. Crane Nat'l Vendors, Inc.*, 99 F.3d 587, 594 (4th Cir. 1996). To evaluate the weight of evidence, the Court may make credibility judgments. *Knussman v. Maryland*, 272 F.3d 625, 647 (4th Cir. 2001).

III. ARGUMENT

A. Plaintiffs' Claims Are Preempted

During the trial of this action, the Fourth Circuit issued *Hencely v. Fluor Corporation*, 120 F.4th 412 (4th Cir. 2024),[1] the reasoning of which confirms CACI's entitlement to judgment on preemption grounds.[2] As *Hencely* holds, all ***non-federal*** tort claims against civilian contractors 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 wartime" and "preserv[ing] the field of wartime decisionmaking exclusively for the federal government." *Id.* at 426, 430. *Hencely* represents the Fourth Circuit's full-throated adoption of *Saleh v. Titan Corp.*, 580 F.3d 1 (D.C. Cir. 2009), in which the D.C. Circuit held preempted non-federal torture and CIDT conspiracy claims under state law *and the ATS*. The operative facts in *Saleh*, of course, are identical to those here, as *Saleh* involved torture and CIDT conspiracy claims against CACI arising out of the Abu Ghraib prison scandal. Plaintiffs here were members of the *Saleh* putative class and would have had judgment entered against them, like the

[1] Hencely filed a petition for rehearing *en banc* on November 13, 2024.

[2] A Fourth Circuit panel held that all tort claims against CACI were preempted. *Al Shimari v. CACI Int'l Inc.*, 658 F.3d 413, 420 (4th Cir. 2011). That decision was vacated on jurisdictional grounds. *Al Shimari v. CACI Int'l Inc.*, 679 F.3d 205 (4th Cir. 2012) (*en banc*).

200+ named plaintiffs in *Saleh*, if the district court had granted class certification or if Plaintiffs had not engaged in forum shopping.

The starting point for applying *Hencely* is that Plaintiffs' claims in this case are *non-federal* tort claims. The ATS does not create any substantive federal claims; it provides jurisdiction for a limited set of torts that violate the law of nations. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 714 (2004). Plaintiffs asked this Court to recognize their claims as a part of the *law of nations* and to allow those claims grounded in *international law* to proceed under the ATS's jurisdictional grant.

Indeed, in limiting the cross-examination of Dr. Modvig, Plaintiffs made clear their view that federal law is *irrelevant* because their claims *are not grounded in federal law*:

> The U.S. War Crimes Act is not relevant to the claims the jury will be asked to decide, *which is whether the acts at issue rise to a violation of international law* . . . . The statutory definitions set forth in the War Crimes Act . . . *are matters of domestic law, and will not help the jury understand what is considered torture and CIDT under international law*.

Dkt. #1774 at 2 (emphasis added); Dkt. #1760 ("The War Crimes Act is not relevant to Plaintiffs' claims . . . which involve violations of international law, ***not domestic law***." (emphasis added)). The Court granted Plaintiffs' motion on the grounds that Plaintiffs' claims are not federal, but based on "alleged violations of international law" to which substantive federal law is ***"not relevant***." Dkt. #1780. Thus, Plaintiffs' tort claims in this case are, by definition, ***non-federal*** tort claims which, as *Hencely* holds, are preempted as against contractors integrated into combatant activities under ultimate military command.

Saleh was the first federal appellate decision to fully address federal preemption in the ATS context. 580 F.3d at 16. With respect to the state-law tort claims, the D.C. Circuit held that such claims were preempted on two grounds. *First, Saleh* adapted the government contractor defense identified in *Boyle v. United Technologies Corp.*, 487 U.S. 500 (1988), which was based on the discretionary function exception to the FTCA, to war-zone-related claims against service

contractors. As the court explained, the principle underlying the combatant activities exception to the FTCA is that combatant activities "by their very nature should be free from the hindrance of a possible damage suit." *Id.* (quoting *Johnson v. United States*, 170 F.2d 767, 769 (9th Cir. 1948)). *Second*, the court held that the plaintiffs' state-law claims were preempted based on the Supreme Court's "other preemption precedents in the national security and foreign policy field." *Id.* at 6, 12-13. The D.C. Circuit then adopted the following test for civilian contractor preemption:

> During wartime, where a private service contractor is integrated into combatant activities over which the military retains command authority, a tort claim arising out of the contractor's engagement in such activities shall be preempted.

Id. at 9. Having already held that "the detention of enemy combatants" falls squarely within the concept of combatant activities, and with the evidence clear that CACI employees "were integrated into the military's operational activities," the court concluded that federal law preempted the plaintiffs' state-law tort claims. *Id.*

Turning to the plaintiffs' ATS claims, which included claims of conspiracy to commit torture and CIDT, *Saleh* held that ATS claims are based on *international law* and, just like state-law tort claims, must give way to the federal interest in eliminating tort duties from the battlefield:

> Finally, appellants' ATS claim runs athwart of our preemption analysis which is, after all, drawn from congressional[ly] stated policy, the FTCA. If we are correct in concluding that state tort law is preempted on the battlefield because it runs counter to federal interests, ***the application of international law to support a tort action on the battlefield must be equally barred.***

Id. at 16 (citation omitted) (emphasis added). Thus, as explained in *Saleh*, the uniquely federal interests inherent in the prosecution of war preempt non-federal tort claims grounded in state law or international law where contractors are integrated into combatant operations under ultimate military authority. *Id.* at 5-6, 16.

In *In re KBR, Inc., Burn Pit Litigation*, 744 F.3d 326 (4th Cir. 2014) ("*Burn Pit*"), the Fourth Circuit adopted the broad conception of "combatant activities" applied in *Saleh* and

Johnson. *Id.* at 351. The court also held that KBR's employees were engaged in "combatant activities" because "[p]erforming waste management . . . functions to aid military personnel in a combat area is undoubtedly 'necessary to and in direct connection with actual hostilities.'" *Id.*

Hencely reaffirms the combatant activities test applied in *Saleh* and *Burn Pit* and compels entry of judgment for CACI. In *Hencely*, a soldier sued a contractor (Fluor) for injuries he suffered when a suicide bomber detonated a bomb at Bagram Airfield in Afghanistan. *Hencely*, 120 F.4th at 418. The Fourth Circuit noted that it and other courts of appeals had "extended the logic" of *Boyle*'s government contractor defense to suits against service contractors arising in theaters of war.[3] The court further explained that the federal interests associated with combatant activities required a much broader preemption of tort claims:

> [T]he conflict between federal and state interests in this context ***is much broader*** than the discrete inconsistency between federal and state duties in *Boyle*. Instead, when state tort law touches the military's battlefield conduct and decisions, it inevitably conflicts with the combatant activity exception's goal of eliminating such regulation of the military during wartime. ***In other words, 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***.

Id. at 426 (emphasis added) (cleaned up).

Having identified the conflict between the federal interest in eliminating tort regulation of the military's battlefield conduct and "the imposition of a non-federal tort duty," *Hencely* again endorsed the preemption test that led to entry of judgment in CACI's favor in *Saleh*:

> [D]uring wartime, where a private service contractor is integrated into combatant activities over which the military retains command authority, a tort claim arising out of the contractor's engagement in such activities shall be preempted.

Id. (quoting *Burn Pit*, 744 F.3d at 349). The court agreed with *Saleh* that "the military need not

[3] *Id.* at 426 (citing *Saleh*, 580 F.3d at 9, *Badilla v. Midwest Air Traffic Control Serv., Inc.*, 8 F.4th 105, 127-28 (2d Cir. 2021), *Harris v. KBR, Inc.*, 724 F.3d 458, 480-81 (3d Cir. 2013), *Burn Pit*, 744 F.3d at 350-51, *Koohi v. United States*, 976 F.2d 1328, 1337 (9th Cir. 1992)).

maintain exclusive operational control over the contractor for the government to have an interest in immunizing a military operation from suit." *Id.* Thus, the preemption test "allows the contractor to exert *some* limited influence over an operation, as long as the military retain[s] command authority." *Id.* (quotations omitted). Applying these principles, *Hencely* explains that "supervising Local National employees on a military base in a theater of war" is a combatant activity. *Id.* Moreover, though Fluor had "some discretion," including the power to deny tools to Local Nationals and to monitor employees' performance and fire them, this did not undermine Fluor's preemption defense because the military retained overall command authority. *Id.* at 429.

Hencely requires entry of judgment in CACI's favor. Plaintiffs seek to impose "a non-federal tort duty" on CACI through the ATS. *Id.* at 426. Battlefield interrogation services, under constant threat of attack,[4] are "combatant activities" under the Fourth Circuit's "broad" conception of that term. *Id.* at 427.[5] There also is no serious question that the U.S. military exercised "ultimate command authority" over the interrogation mission into which CACI interrogators were integrated. The *Hencely* preemption test does not require exclusive U.S. military control over interrogators, only that the military had ultimate command authority over the mission. The Court described the "uncontestable evidence" of military control and the record is replete with evidence

[4] Witness after witness testified that Abu Ghraib prison was in the middle of an active war zone and under constant attack and threat of attack. *See, e.g.*, Dkt. #1824 at 66:21-67:6, 75:1-76:3 (Taguba); Dkt. #1816 at 5:21-5:25, 93:7-93:16 (Nelson); Dkt. #1817 at 161:7-161:15 (Brady); Dkt. #1818 at 72:18-74:5, 109:8-109:20 (Porvaznik); *id.* at 255:6-256:15 (Billings); *id.* at 278:6-279:3 (Mudd); Dkt. #1794 at 27, 60 (Frederick); Dkt. #1807-1 at 4-5 (Pappas); Dkt. #1803-8 at 5, 71 (Stefanowicz); PTX23 at 15-16, 24 (Fay Report).

[5] *Hencely* held that "supervising Local National employees on a military base in a theater of war" was a combatant activity. 120 F.4th at 427. *Burn Pit* held that "waste management . . . to aid military personnel in a combat area" are "undoubtedly" combatant activities. *Harris* held that "[m]aintaining the electrical systems for a barracks in an active war zone" was a combatant activity. 724 F.3d at 481. In *Saleh*, the D.C. Circuit specifically held that CACI's interrogation activities at Abu Ghraib were combatant activities. 580 F.3d at 6.

supporting the Court's observation.[6] CACI, by contrast, still is not even permitted to know which detainees were being interrogated by its own interrogators.[7] Thus, the interrogation mission at Abu Ghraib falls comfortably within the military operations for which combatant activities preemption applies. *Hencely* requires entry of judgment in CACI's favor.

B. The Borrowed Servant Doctrine Precludes Liability

After the presentation of all evidence at trial, the Court rightly observed that it was "uncontestable" as to who directed and controlled CACI employees for the interrogation mission:

> [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. They put the Tiger Teams and these teams together. There was a military chain of command. ***And the work that was being done was interrogation work. And all of that falls under the military's end of things.*** And what CACI was doing was doing classic government contracting, that is they were providing the government with people to perform a function which the government wanted help with.

Dkt. #1821 at 10:8-18 (emphasis added). As explained below, the Court's Supplemental Instruction No. 1 misstated the law on the borrowed servant defense, leaving the jury with the incorrect understanding that any control by CACI over its employees defeated the defense. The Court should enter judgment in CACI's favor on the weight of the evidence, but if not, the Court's erroneous supplemental instruction requires a new trial on the borrowed servant defense.

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[6] Dkt. #1821 at 10:8-18 (Court's description of "uncontestable evidence"); *see also* Dkt. #1816 at 102:15-102:20, 103:4-103:7, 105:14-105:19, 109:11-109:20, 112:4-112:11 (Nelson); Dkt. #1817 at 158:14-159:9, 162:22-163:6 (Brady); Dkt. #1807-1 at 15-17 (Pappas); Dkt. #1803-8 at 16, 17, 23, 27 (Stefanowicz); Dkt. #1803-1 at 14 (Interrogator A); Dkt. #1803-7 at 18-19, 24 (Interrogator G); Dkt. #1818 at 294:6-294:16, 297:10-297:16 (Mudd); *id.* at 169:10-169:16, 171:11-171:21, 175:5-175:19, 177:12-177:15 (Billings); Dkt. #1807-2 at 5-9, 11-12 (Wood); DX2 at 8, 14-15 (U.S. Interrogatory Responses); PTX133 at 40-43, ¶¶ 2, 6, 15 (Oct. 1, 2003 DoD MFR); DX20 (JIDC Org. Chart); PTX42 (IROEs).

[7] This presented the remarkable, and objectionable, scenario wherein a corporate defendant was not allowed to know the identity, qualifications or military approved interrogation techniques of its own employees who participated in material and critical events regarding the Plaintiffs. *Cf.* FRANZ KAFKA, THE TRIAL (1925).

1. Supplemental Instruction No. 1 Did Not Fairly Respond to the Jury's Question and Misstated Binding Fourth Circuit Law

A supplemental instruction must "fairly respond[] to the jury's question without creating prejudice." *United States v. United Med. & Surgical Supply Corp.*, 989 F.2d 1390, 1407 (4th Cir. 1993). An erroneous supplemental instruction requires reversal "if the error is determined to have been prejudicial, based on a review of the record as a whole." *Id.* at 1406.

The Court's original jury instruction on the borrowed servant doctrine was a straightforward, accurate statement of Fourth Circuit law, requiring the jury to determine "under whose direction and control were the employees when they engaged in the alleged misconduct." Dkt. #1811-4 at 24. Faithfully applied, this instruction was fatal to Plaintiffs' claims as – between the U.S. Army and CACI – no reasonable juror could conclude that it was CACI that directed and controlled interrogators at Abu Ghraib. *See* Section III.B.2, *infra*. Plaintiffs objected *ad nauseam* to the Court's instruction, asking the Court to give an erroneous "dual servant" instruction[8] under which – contra Fourth Circuit law – absent "complete relinquishment of control," power to control is deemed shared and the borrowed servant defense is defeated. Dkt. #1820 at 42:9-24.

Consistent with law of the case, the Court rejected these inaccurate additions to the jury instruction, but allowed Plaintiffs to make their erroneous "dual servant" argument to the jury during closing arguments, *id.* at 43:2-4, which they did, *id.* at 66:5-9. CACI, in its closing argument, denounced this notion of shared control, which the Court had repeatedly rejected. *Id.*

[8] Plaintiffs proposed an instruction that included the following description: "If both employers share control over the person, and the person is simultaneously performing work on behalf of both employers, then the person is considered to be a 'dual servant.' In that situation, the original employer is still responsible for the conduct of the employee." Dkt. #1764 at 21. This, of course, would eviscerate the borrowed servant doctrine. The Court "looked carefully" at this proposed instruction and determined it was "too complicated and [] not actually 100 percent accurate." Dkt. #1820 at 34:12-14.

at 93:7-21 (Plaintiffs "wanted you to conclude that if you find that CACI had any direction or control over CACI personnel, that there's shared liability, and so they are liable for the conduct of the employees . . . . Read the instruction. That's not what it says.").

The ramifications of Plaintiffs' improper argument were then compounded by instructional error. On November 8, 2024, the jury submitted a question to the Court regarding the borrowed servant defense: "Does control mean full control or some control?" In response, the Court issued the following supplemental instruction over CACI's objection:

> It is a question of fact that the jury must decide whether CACI had the power to control the interrogation work being performed by CACI employees at Abu Ghraib when the alleged torture or cruel, inhuman, or degrading treatment occurred. ***Whether the Army alone or both the Army and CACI had this power to control is a factual question that you must decide.***

See Supplemental Instruction No. 1 (emphasis added). CACI explained that the second sentence in the supplemental instruction was "confusing and wrong," because it suggested that any ability at the margins to control employees would overcome the borrowed servant defense. Dkt. #1821 at 17:24-18:13 (citing *Huff v. Marine Tank Testing Corp.*, 631 F.2d 1140 (4th Cir. 1980)). The ambiguity created by asking the jury to decide if "the Army alone or both the Army and CACI" had the power to control interrogation work exacerbated the jury's stated confusion regarding how much control was necessary to support or defeat the borrowed servant defense. The Court, however, believed that "if they're an intelligent jury . . . that ***power to control would I think automatically mean small instances of some control would not be enough***." *Id.* at 18:22-19:1 (emphasis added). CACI proposed including that clarification, which would have addressed the jury's question without introducing legal inaccuracy and ambiguity to the instruction. *Id.* at 19:4-6. The Court, however, declined. *Id.* at 19:7-10. Unfortunately, the Court's prediction that the jury would infer that some control was not enough from the supplemental instruction proved overly optimistic.

The jury's verdict made clear that the second sentence in the supplemental instruction created the false perception that *any* power to direct a borrowed employee by the lending employer defeats the borrowed servant doctrine. As the Court previously recognized, that is not the law in the Fourth Circuit, which requires a determination of which employer had control over the particular work being done at the time the tort occurred. Dkt. #1820 at 34:15-19 ("That's the core issue for the borrowed servant doctrine.").[9] As the Court explained, "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." *Id.* at 42:21-24. The existence of "some" ability to control by the lending employer does not undermine the defense – two employers, each with some measure of control, is a condition precedent to triggering the borrowed servant doctrine in the first place.

On this point, the Fourth Circuit and the Restatements of Agency agree: "The authority of the borrowing employer does not have to extend to every incident of an employer-employee relationship; rather, it need only encompass the servant's performance of the particular work in which he is engaged at the time of the accident." *Ladd v. Rsch. Triangle Inst.*, 335 F. App'x 285, 288 (4th Cir. 2009)) (citation omitted); *Estate of Alvarez v. Rockefeller Found.*, 96 F.4th 686, 694 (4th Cir. 2024); *Huff*, 631 F.2d at 1142 (supervisor on site from lending employer insufficient to overcome borrowed servant defense). The question is: Who was "in the better position to exercise control in a manner that reduces the risk of injury to third parties?" RESTATEMENT (THIRD) OF AGENCY § 7.03 (2006). This is a binary determination, both under the law and as a matter of logic.

[9] *See also* Dkt. #1619 at 5:3-6:4 ("[A]s I read *Alvarez*, I don't think it goes as far as you indicate."); Dkt. #1627 at 6:12-7:6 ("I don't agree with your proposal. I think it goes beyond what the Fourth Circuit deems to be the proper formulation."); Dkt. #1630 at 12:1-4 ("We've been through this a couple of times, if the Court was wrong, it was wrong, but ***that's, in my view, the law of the case at this point***.") (emphasis added).

Even where an instruction is correct, not the case here, it is inadequate if it does not sufficiently respond to the jury's questions. *United Med. & Surgical Supply Corp.*, 989 F.2d at 1407. Here, the supplemental instruction incorrectly stated the legal standard and did not address the jury's main concern, whether they should determine who had "full control or some control" over CACI interrogators. The instruction failed to inform the jury that the borrowed servant doctrine is concerned with who was in the better position to exercise control over the work in a manner that reduced the risk of injury to third parties. The instruction further suggested that shared control (*i.e.*, *some control* by CACI) defeated the defense. That is not the law in this Circuit.

Contrary to the Court's speculation, the jury did not interpret the instruction to "mean small instances of some control would not be enough." Consequently, on a record of "*uncontestable evidence*" that "the work that was being done was interrogation work," "all of [which] falls under the military's end of things," the jury found against CACI. Dkt. #1821 at 10:8-18 (emphasis added). That is a direct result of the Court's instructional error.

The error injected by Supplemental Instruction No. 1 was not harmless. To start, juries are presumed to follow courts' instructions. *Weeks v. Angelone*, 528 U.S. 225, 234 (2000). In this case, there is no doubt the jury found the erroneous supplemental instruction decisive. The jury submitted its questions regarding control to the Court shortly before 2:05 p.m. on Friday, November 8, 2024. *See* Dkt. #1821 at 1. At 2:58 p.m., the jury received Supplemental Instruction No. 1. *Id.* at 19:18. Shortly thereafter, the jury asked to pose a question to the Court *ex parte*. *Id.* at 20:21 (reflecting 3:01 p.m.). The parties later learned that the jurors asked to award punitive damages to non-profit organizations instead of Plaintiffs. *See* Dkt. #1822 at 6:10-15. Thus, immediately after receiving Supplemental Instruction No. 1, the jury apparently concluded liability

deliberations and turned to damages.[10] Because the instruction did not fairly respond to the jury's question and left the jury with the false impression that "some control" by CACI was sufficient to defeat the borrowed servant defense, CACI would be entitled to a new trial on its defense even if the evidence was not so one-sided as to entitle CACI to judgment.

2. The Evidence at Trial Provided No Legally Sufficient Basis for a Reasonable Jury to Reject the Borrowed Servant Doctrine

The Court called the evidence of direction and control over CACI interrogators "uncontestable." CACI agrees. The following evidence is uncontroverted and dispositive:

1. **DX2**: The United States' interrogatory responses state: (a) CACI interrogators "were subject to the direction of the military chain of command," (b) "[N]o CACI personnel were in this chain of command," (c) "the military chain of command controlled the interrogation facility, set the structure for interrogation operations, and was responsible for how interrogations were to occur during both the planning and execution phases," and (d) "[o]versight in the use of [interrogation] approaches [wa]s provided by the interrogators' military section and ICE leaders." *See* DX2 at 8, 10, 14-15.

2. **PTX133**: The Army directed interrogation personnel at Abu Ghraib as follows:

   "CHAIN OF COMMAND. The JIDC is not a standard military organization, and therefore does not follow a standard structure. Two chains of command will be in effect – the operational and the administrative. The interrogation section leader will be the first person in the operational chain of command, proceeding to the NCOIC and OIC. Administrative actions will be resolved either by the civilian contractor site manager or the HHSC 1SG / commander."

   "CIVILIAN ADMINISTRATIVE ISSUES. Each civilian agency has designated a site manager or representative. If the designated representative is not solving problems that arise, such as pay problems, please bring it to the attention of the chain of command." PTX133 at 41.

1. **Testimony of Col. Pappas**: Col. Pappas testified: (a) the military chain of command directly supervised and directed CACI interrogators' actions in their interrogation duties, (b) CACI interrogators received the same operational interrogation taskings and direction as MI, (c) CACI interrogators were "in all respects subject to the operational control of the military" in terms of their interrogation duties, (d) CACI interrogators were subject to the same standards of conduct as MI, (e) the military selected detainees

[10] Before the jury returned a verdict, CACI requested a Supplemental Jury Instruction to correct Supplemental Instruction No. 1. Dkt. #1806. The Court did not address CACI's request.

to be interrogated, (g) the military assigned interrogators to detainees, (f) the military reviewed and approved interrogation plans and did not take any direction from CACI management, (g) the military decided how to use information learned during interrogations, and (h) LTC Jordan "was the person ultimately responsible for making sure that military intelligence was issuing appropriate instructions [to MPs] in the context of their interrogations." *See* Dkt. #1807-1 at 5-6, 9-10, 15-18.

2. **Testimony of Capt. Wood (Maj. Holmes)**: Capt. Wood testified: (a) that she, her NCOIC, and military section leaders oversaw all interrogators, including from CACI, (b) CACI interrogators reported to the military chain of command for the interrogation mission, (c) the military "didn't differentiate between the civilian[s] and the soldiers" and "treated the CACI personnel the same way that we did the military intelligence," (d) she took advice from multiple people, including CACI Site Lead Dan Porvaznik, but retained ultimate authority over which CACI personnel were placed on a Tiger Team, (e) CACI personnel were provided the same orientation materials as military interrogators, (f) CACI interrogators had the same performance requirements, interrogation planning and reporting requirements as military interrogators, all of which were reviewed and approved by the military chain of command, and (g) CACI Site Lead Dan Porvaznik was "an administrative go-to guy" who had no authority over interrogations, did not make any decisions related to interrogations, and was not part of the approval authority for interrogation plans. Dkt. #1807-2 at 6-13.

CACI produced considerably more evidence, beyond these dispositive exhibits and testimony, in support of its borrowed servant defense. None of it was contested. Instead, in opposition to CACI's defense, Plaintiffs produced two documents: (1) an Army Field Manual that JIDC leadership had never seen (PTX207; Dkt. #1807-1 at 20-21 (Pappas)) and (2) an Army regulation about which there was no evidence anyone associated with CACI's contract or its employees' performance of the interrogation mission had any knowledge (PTX227).

It was error to deny CACI's motion *in limine* to exclude these exhibits. These exhibits purportedly reflect Army policy on how contractors *should be directed and controlled*, when the pertinent question is, policy aside, who wielded the actual *power* to direct and control them. *Alvarez*, 96 F.4th at 694. The Court's admission of legal regulations and manuals forced CACI to correct Plaintiffs' erroneous presentation by showing that the Federal Acquisition Regulations

barred contractor control over intelligence operations,[11] which left the jury in the impossible situation of deciding the substantive content of the law, a role exclusively reserved for the Court.[12]

Even then, Plaintiff's presentation of the law to the jury was wrong and self-contradictory. When asked what the field manual meant regarding managing contractors, MG Taguba testified that contractors "are still expected to conform to the terms of their contract designed by the Army . . . and also to obey established law and statutes while under their subordinates." Dkt. #1824 at 68:1-13. Plaintiffs tried to clarify his answer, and asked MG Taguba, "So did the Army, without going through the COR, have control over the CACI interrogators?" to which he replied, "***They can predicated on the incident***." *Id.* at 68:14-16 (emphasis added).

Plaintiffs offered no proof that either the field manual or the Army regulation were ever applied on the ground at Abu Ghraib. CACI, by contrast, provided a mountain of evidence that they were not, and that control on the ground reflected the law that CACI could not legally control intelligence operations. *See, e.g.*, DX20 (JIDC organization chart); Dkt. #1807-1 at 20-21 (Pappas had never seen the field manual). An October 2003 JIDC memorandum explicitly informed HUMINT contractors, "The JIDC is not a standard military organization, and therefore ***does not follow a standard structure***. ***Two chains of command will be in effect*** – the operational and the administrative. ***The interrogation section leader will be the first person in the operational chain of command, proceeding to the NCOIC and OIC***." PTX133 (emphasis added).

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[11] *See* DX77 ("The direction and control of intelligence and counter-intelligence operations" are inherently governmental functions, which cannot be performed by a contractor.). The only testimony on the weight to give the policy and regulatory documents came from Mark Billings, the only witness with any experience in government contracting, who testified that the FAR was "the umbrella regulation that governs all regulations." Dkt. #1818 at 168:12-23.

[12] CACI requested a jury instruction clarify that policy documents were only evidence of the government's policies at the time of the events in this case and were not entitled to any greater weight than other factual evidence, Dkt. #1768-1 at 13, which the Court declined to give.

The only other argument (not based on any actual conduct at Abu Ghraib) Plaintiffs offered was the unsupported theory that Dan Porvaznik had operational control. *See* Dkt. #1820 at 103:1-11 (closing rebuttal); Dkt. #1821 at 16:19-17:6 (arguing Porvaznik "was in control"). To start, that level of control is insufficient as a matter of law. *See* Section III.B.1, *supra*. Whatever terms are used to described his role as site lead, there is not a shred of evidence that Porvaznik had or exercised any power whatsoever over interrogation operations and the Officer in Charge of the ICE confirmed, in no uncertain terms, that he did not. Dkt. #1807-2 at 13 (Wood/Holmes) ("Q. Do you know if he had any authority over interrogations? A. No, not as far as the mission itself, no."). There was also no evidence that Porvaznik had any power over interrogator interactions with MPs. *See* Dkt. #1807-1 at 6 (Pappas). The undisputed evidence is that Porvaznik was an interrogator under the MI chain of command and was obligated, like any other interrogator, to report up the military chain any concerns related to interrogation work. Dkt. #1818 at 72:5-7, 89:6-23 (everyone required to report IROE violations to military), 95:25-96:4, 128:22-129:1; PTX42 (IROE). The dispositive, uncontestable evidence supporting the borrowed servant defense entitles CACI to judgment as a matter of law.

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

There is no evidence that CACI joined any conspiracy to abuse detainees. None. Nor is there any evidence as to why that would make sense for a corporate enterprise, why it would serve a corporate purpose. Of course, it would not. Moreover, Plaintiffs failed to demonstrate any CACI interrogators or other personnel participated in a conspiracy that resulted in Plaintiffs being abused.

As the Court instructed, Plaintiffs were required to prove an agreement, followed by an unlawful act carried out in furtherance that results in damage to each plaintiff. Dkt. #1820 at 130:8-23. Plaintiffs offered no evidence of an agreement between anyone from CACI and anyone else "to inflict torture or cruel, inhuman or degrading treatment on detainees at the Abu Ghraib

hard site." Dkt. #1820 at 130:13-16. The Fay Report chronicled 44 incidents of abuse of detainees, but does not characterize these as the product of an overarching conspiracy. Rather, for the 16 incidents of abuse for which MG Fay found interrogator involvement, he concluded that mistreatment was "directed on an individual basis." PTX23 at 41. Indeed, the Fay Report reflects only random, uncoordinated, and spontaneous acts of abuse. *Id.* at 41-42. Those facts cannot reasonably support an inference of conspiracy. Plaintiffs' conspiracy claims amount to nothing more than speculation and conjecture. This was unsurprising, given the Court's characterization of Plaintiffs' conspiracy claims as "shaky." Dkt. #1625 at 144:13-23.

Yet that was all Plaintiffs presented: bad things happened at Abu Ghraib, CACI personnel were present for some relevant time period and were accused of a few unrelated acts of abuse, *ergo* CACI is liable for damages to Plaintiffs. Guilt by association is not the law in this country. *See, e.g.*, *NAACP v. Claiborne Hardware Co.*, 459 U.S. 898, 919 (1982); *United States v. Brizuela*, 962 F.3d 784, 796 (4th Cir. 2020); *J.E.C.M. v. Lloyd*, 352 F. Supp. 3d 559, 587, n.14 (E.D. Va. 2018).

Plaintiffs' evidence constituted of their testimony of random abuses, not tied to CACI, and government reports that did not find a conspiracy but alleged a few discrete acts of misconduct by CACI personnel not involving Plaintiffs and not remotely rising to the level of abuse that Plaintiffs described. "[P]arallel 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). "Without more, parallel conduct does not suggest conspiracy . . . ." *A Soc'y Without a Name v. Virginia*, 655 F.3d 342, 346 (4th Cir. 2011); *see also Grenadier v. BWW Law Grp.*, No. 1:14-cv-827, 2015 WL 417839, at *11 (E.D. Va. Jan. 30, 2015). "[W]hen concerted conduct is a matter of inference, a plaintiff must include evidence that places the parallel conduct in context that raises a suggestion of a preceding agreement as distinct from identical, independent action." *Loren Data Corp. v.*

GXS, Inc., 501 F. App'x 275, 278 (4th Cir. 2012) (internal quotations omitted). "The evidence must tend to exclude the possibility that the alleged co-conspirators acted independently." *Id.*

The Fay Report depicts Abu Ghraib as unmitigated *chaos* – inadequate interrogation doctrine and training, a shortage of soldiers, intense pressure to produce actionable intelligence, use of Abu Ghraib by the CIA, confusion regarding interrogation techniques, an outdated training manual for interrogations, severe overcrowding at Abu Ghraib, a totally inadequate physical plant, scarcity of resources, frequent mortar attacks on Abu Ghraib killing and wounding detainees, and a broken detention operations program. PTX23 at 3-5, 11-12, 23-24. These facts contradict the notion that there was the coordination and planning one would expect to find in a conspiracy.

The trial evidence showed that it was U.S. Army-directed procedure for Army and CACI interrogators to work with MPs to implement approved interrogation approaches and that process was directed by the director of the JIDC, LTC Jordan. *See, e.g.*, Dkt. #1807-1 (Pappas) at 6. Even if that process resulted in mistreatment by the MPs, does not prove an independent agreement between the interrogators and MPs to torture or commit CIDT. Moreover, the evidence demonstrated that the notorious sexual assaults and physical assaults inflicted by MPs were the actions of sadistic and sick MPs acting on their own. Dkt. #1794 (Ex. A) (Frederick) at 6.

With respect to whether anyone from CACI "knowingly and intentionally" joined the purported conspiracy and committed acts in furtherance thereof "there must be evidence that a defendant knowingly and intentionally did something that enabled the wrongful conduct to occur." Dkt. #1820 (Jury Instructions) at 131:16-21. At most, the hearsay evidence at trial could allow a jury to conclude that (1) Mr. Dugan once pushed one detainee down and dragged him to an interrogation booth, *see* Dkt. #1794 (Ex. D) (Fay) at 120:11-122:23, (2) Mr. Johnson participated in the mistreatment of an Iraqi police officer (*i.e.*, not a detainee) by having him squat backwards

in a chair, *id.* at 122:25-126:05, and (3) Mr. Stefanowicz participated in the mistreatment of two detainees to whom he was exclusively assigned, most of which involved interrogation approaches expressly contained in the IROEs, *id.* at 126:08-134:25. It was undisputed at trial that Mr. Stefanowicz was never assigned to any of the Plaintiffs.

Even assuming all the other elements for conspiracy were met, Plaintiffs offered no evidence that the discrete acts of misconduct of which these employees were accused resulted in *Plaintiffs'* mistreatment pursuant to a conspiracy. From Plaintiffs' descriptions, most of their alleged abuse occurred outside of interrogations and related to MP management of detainees, not military intelligence priorities. Moreover, the Court's pretrial ruling excluding evidence of the considerable CIA presence at the Abu Ghraib hard site prevented CACI from presenting possible alternative causes of Plaintiffs' injuries, evidence from which the jury could conclude that not all civilian interrogators at Abu Ghraib prison were CACI employees. Without proof of an agreement or acts in furtherance of an agreement to torture or inflict CIDT, and without proof that such acts caused Plaintiffs' alleged mistreatment, CACI is entitled to judgment as a matter of law.

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

"[T]he power and duty of the trial judge to set aside [an excessive] verdict . . . is well established, the exercise of the power being regarded not in derogation of the right of trial by jury but one of the historic safeguards of that right." *Cline v. Wal-Mart Stores, Inc.*, 144 F.3d 294, 304 (4th Cir. 1998). Whether a damages award is excessive is a question of law. *Id.* There are several bases for relief from the jury's damages award. The compensatory damages award ($3 million per Plaintiff) is speculative, unsupported by medical diagnoses, medical records, or the testimony of anyone other than Plaintiffs. Under Fourth Circuit law, no "sizeable" damages award can be supported by such scant evidence. With respect to punitive damages, there is no international consensus supporting punitive damages, making them unavailable in an ATS case. The punitive

damages award also improperly punishes CACI vicariously for alleged wrongs of non-managerial employees. The punitive damages award is impermissibly based on revenues instead of profits. The punitive damages award also punishes CACI for injuries suffered by others at Abu Ghraib prison and exceeds Virginia's $350,000 cap on punitive damages. The Court should order a new trial on damages pursuant to Rule 59, or alternatively issue a remittitur that would reduce the damages awards to amounts supported by the facts and consistent with due process.

Plaintiffs offered no evidence of pecuniary loss, no medical or psychological diagnoses, no medical records, no testimony from other detainees, or from Plaintiffs' friends or family about Plaintiffs' alleged abuse or the effects of such abuse. The *only* facts presented at trial on damages were Plaintiffs' self-descriptions. Al-Ejaili testified that he had *no lasting physical injuries* from Abu Ghraib prison and self-described psychological effects he, as a layman, attributed solely to Abu Ghraib. Dkt. #1815 at 219:2-16, 250:13-25. Al-Zuba'e testified that the lasting physical effects from his treatment at Abu Ghraib prison are a swollen wrist, a mark from a dog bite, and difficulties lifting his arm (Dkt. #1816 at 35:22-25), though he was able to lift his arm fine when examined by Dr. Payne-James. Dkt. #1819 at 33:10-23. Al-Zuba'e self-described psychological effects that he attributed to Abu Ghraib, describing difficulties making and keeping friends and strained family relations. Dkt. #1816 at 34:19-35:18. In his read-in testimony, Al Shimari offered a self-diagnosis of stomach pain, headaches, body pain, wrist pain, swollen feet, back pain, deteriorating family relationships, and nightmares he attributed to his month at the hard site and not to the nearly five years he was in U.S. custody in locations other than the hard site, or his war trauma and injuries from the Gulf War. Dkt. #1818 at 24:13-26:20.

With no medical diagnoses, Plaintiffs' counsel asked the jury to award Plaintiffs each $3 million in compensatory damages and a total of $32 million in punitive damages. Plaintiffs did

not pluck the $32 million out of thin air. As a remedy for Plaintiffs' repeated failure to disclose their damages claim, the Court capped Plaintiffs' punitive damages at the value of the two relevant delivery orders, or "$35 million, probably minus expenses." 12/15/23 Tr. at 18:13-15.

As the jury deliberated, it asked to send a note that the Court would not disclose to the parties. The parties consented to the Court meeting with the jury *ex parte*, with the proviso that the Court would disclose the jury's inquiry if it was consequential. The Court met with the jury and then declined to tell the parties the nature of the inquiry. As disclosed after the verdict, the jury expressed a desire to make part of any punitive damages award payable to a credible non-profit agency and not to the Plaintiffs. Dkt. #1811-05. The Court, without consulting or advising the parties, simply told the jury, "[N]o. Punitive damages don't work that way." Dkt. #1822 at 6:16-17. Unable to direct a portion of the requested punitive damages to the benefit of victims other than Plaintiffs, the jury simply rounded up the requested punitive damages to a figure divisible by three ($33 million) and awarded each Plaintiff $11 million in punitive damages.

1. The Jury's Compensatory Damages Award Is Excessive and Speculative, Entitling CACI to a New Trial on Damages or Remittitur

A compensatory damages award will be set aside as excessive where "no substantial evidence is presented to support it," *Barber v. Whirlpool Corp.*, 34 F.3d 1268, 1279 (4th Cir. 1994) or where "the verdict is against the clear weight of the evidence, or is based upon evidence which is false, or will result in a miscarriage of justice." *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*)). 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).

"Courts scrupulously analyze an award of compensatory damages for a claim of emotional distress predicated exclusively on the plaintiff's testimony." *Price v. City of Charlotte, N.C.*, 93

F.3d 1241, 1250-51 (4th Cir. 1996); *see also Hetzel*, 89 F.3d at 171-72 (reversing compensatory damages award based "almost exclusively" on plaintiff's testimony); *Spence v. Board of Educ. of Christina Sch. Dist.*, 806 F.2d 1198, 1201 (3d Cir. 1986) (affirming remittitur); *Cohen v. Board of Educ., Smithtown Cent. Sch. Dist.*, 728 F.2d 160, 162 (2d Cir. 1984) (a claim of emotional distress supported only by plaintiff's testimony could not support award of "substantial damages"). If the plaintiff's evidence of emotional distress is limited to his own testimony, he must "show a causal connection between the violation and [his] emotional distress." *Bryant v. Aiken Reg. Med. Ctrs. Inc.*, 333 F.3d 536, 547 (4th Cir. 2003). A court finding that the jury's compensatory damages verdict is excessive may order a new trial on damages or issue a remittitur. *Cline*, 144 F.3d at 305.

Here, Plaintiffs could have supported their claim for compensatory damages with expert testimony. Plaintiffs' retained medical expert appeared on Plaintiffs' updated witness list five days before trial. Dkt. #1773. 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. *Hetzel*, 89 F.3d at 171. Therefore, the Court should grant CACI a new trial on damages pursuant to Federal Rule of Civil Procedure 59(a), or in the alternative issue a remittitur in an amount no greater than $50,000 per Plaintiff.

2. The Jury's Punitive Damages Awards Are Precluded by Binding Precedent, Unconstitutional, and Excessive

"It should be presumed a plaintiff has been made whole for his injuries by compensatory damages, so punitive damages should only be awarded if the defendant's culpability, after having paid compensatory damages, is so reprehensible as to warrant the imposition of further sanctions to achieve punishment or deterrence." *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408,

419 (2003). "In ruling on a motion for a new trial [i]n federal practice, it is the duty of the district judge to set aside an excessive verdict even when such a verdict is supported by substantial evidence if [she] is of the opinion that the verdict is against the clear weight of the evidence, or is based upon evidence which is false, or will result in a miscarriage of justice." *Defender Indus., Inc. v. Nw. Mut. Life Ins. Co.*, 938 F.2d 502, 507 (4th Cir. 1991) (*en banc*). Courts exercise "independent judgment" in reviewing a jury's punitive damages award. *Cline*, 144 F.3d at 306.

As this Court observed in an ATS case, "punitive damages are typically governed by state law to comply with due process." *Yousuf v. Samantar*, No. 1:04-cv-1360, 2012 WL 3730617, at *15 (E.D. Va. Aug. 28, 2012); *Gregg v. Ham*, 678 F.3d 333, 343 (4th Cir. 2012) (courts review "such an award by applying the state's substantive law of punitive damages"). There are myriad reasons, addressed below, why the jury's punitive damages awards are inappropriate.

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

Plaintiffs bear the burden of showing "a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms." *Sosa*, 542 U.S. at 725. There is no international consensus allowing punitive damages in civil cases. *See, e.g.*, Helmut Koziol, *Punitive Damages – A European Perspective*, 68 La. L. Rev. 741, 748 (2008) ("Regarding European law, it is true that, in principle, the continental civil law systems disapprove of punitive damages . . . ."). Absent international consensus, there is no basis for an award of punitive damages under ATS. The handful of decisions allowing punitive damages in ATS cases, none binding here and often in default judgment situations, offer no reasoned analysis as to why a form of punishment most of the world rejects as a civil suit remedy is available under a statute creating jurisdiction for international law claims.

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

Because the purpose of punitive damages is to punish the defendant, "punitive 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"); *Bryant*, 333 F.3d at 548 n.4.

There is no evidence, much less clear and convincing evidence, that managerial-level CACI employees joined a torture conspiracy or ratified conspiratorial conduct by individual employees. As a result, the Court should issue a remittitur that excludes punitive damages.

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

The Court limited Plaintiffs' punitive damages to the value of the two delivery orders under which CACI provided interrogators to the U.S. military, "probably minus expenses." 12/15/23 Tr. at 18:13-15. This is consistent with the Court's prior recognition that Fourth Circuit law requires punitive damages awards consider "[i]mproper *profits* . . . to deprive the defendant of *profits* improperly derived." *Yousuf*, 2012 WL 3730617, at *16 (emphasis added). The punitive damages sought by Plaintiffs and awarded by the jury fail to adhere to these guideposts.

The undisputed testimony is that CACI had to pay salaries, benefits, and other costs out of the funds available to hire personnel. The only evidence on profits is that out of the funds made available for Technical Services Support, a "small amount" represented profit. Dkt. #1818 at 256:16-257:2 (Billings). Plaintiffs did not attempt to quantify that profit. It was Plaintiffs' burden to establish punitive damages, *i.e.*, profits, by clear and convincing evidence. *Cf. Projects Mgmt.*

Co. v. DynCorp Int'l, 584 F. App'x 121, 122 (4th Cir. 2014) (burden rests with plaintiff to offset revenues by costs); *Sunrise Continuing Care, LLC v. Wright*, 671 S.E.2d 132, 135 (Va. 2009) (same). By presenting only evidence of potential revenues (the delivery orders had "not to exceed" amounts and not fixed values) and no evidence of profits, Plaintiffs did not meet their burden to support the punitive damages they asked the jury to award. Remittitur is required.[13]

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

When the jury asked to confer with the Court *ex parte*, the parties consented, but only on condition that the Court would disclose the jury's question if it was consequential. Dkt. #1821 at 21:19-22:5. The jury's question made clear that the jury was contemplating awarding Plaintiffs only part of the punitive damages award requested and to give some portion to a "credible non-profit organization" that assists *other victims* of human rights violations at Abu Ghraib prison. Dkt. #1811-05. That question was consequential. The Court simply told the jury it could not do that with no further instruction. The Court also did not disclose the jury's question until after the verdict, denying CACI the opportunity to propose an instruction addressing the jury's question.

It is an unconstitutional taking and violates due process to award punitive damages to a plaintiff for injuries suffered by others. *Philip Morris USA v. Williams*, 549 U.S. 346, 353 (2007); *id.* at 354 ("no authority support[s] the use of punitive damages awards for the purpose of punishing a defendant for harming others."). The fairest reading of this jury's question is that it was poised to award Plaintiffs punitive damages in an amount less than they requested and to make

[13] Even if Plaintiffs could collect revenues instead of profits, the punitive damages exceed the court-ordered cap. The only line item in the delivery orders that is not pure costs is "Technical Services Support." Dkt. #1818 at 254:7-256:15, 258:4-7 (Billings). The funds available for Technical Services Support, with no deduction for costs, total $31,834,951.00 ($15,085,647 from Delivery Order 35 and $16,849,304 from Delivery Order 71). DX12 at 26; DX13 at 2.

a separate award for the benefit of others abused at Abu Ghraib. By telling the jury "no" without instructing that it could not simply shift punitive damages for injuries to others into an increased punitive damage award for Plaintiffs, the Court failed to address a key legal issue arising from the jury's question. The Court should have disclosed the question so that CACI could have requested an appropriate instruction. The Court should order a new trial on damages or issue a remittitur.

e. Any Punitive Damages Are Subject to Virginia's $350,000 Cap

This Court has held in the ATS context that "punitive damages are typically governed by state law to comply with due process." *Yousuf*, 2012 WL 3730617, at *15; *see also Gregg*, 678 F.3d at 343 (state's substantive law on punitive damages applies). Virginia imposes a per-plaintiff $350,000 cap on punitive damages. Va. Code Ann. § 8.01-38.1. If a jury returns a verdict in excess of the maximum amount allowed, "the judge shall reduce the award and enter judgment . . . in the maximum amount provided by this section." *Id.* The Court should apply this cap to Plaintiffs' punitive damages awards, if they are not eliminated. *See Sines v. Hill*, 106 F.4th 341, 344 (4th Cir. 2024) (rejecting claim that cap applies only to "run-of-the-mill tort claims.").

f. The Punitive Damages Awards Violate Due Process

The reasonableness of punitive damages awards typically is judged by, among other things, reference to the amount of compensatory damages. *Campbell*, 538 U.S. at 424-25. This must be assessed after the amounts of any compensatory damages approved by the Court are established.

E. The Court Erred in Finding Al Shimari Unavailable

The Court allowed Al Shimari to testify by live feed because the United States has banned him from entering this country. On the day he was supposed to testify, Plaintiffs' counsel advised they believed Iraqi authorities had arrested him. The Court did not even have first-hand evidence that Al Shimari was, in fact, in police custody. Instead, Plaintiffs' counsel stated that *somebody* acting as counsel for Al Shimari was told by *someone* who was a court official, that Al Shimari

was being detained by the Iraqi police. Dkt. #1798 at 1. This uncorroborated double-hearsay was the only information presented to the Court. Rather than dismiss Al Shimari's claims, however, the Court directed CACI to begin presenting its case and later summarily declared Al Shimari "unavailable" and allowed his prior testimony to be read into the record. Where, as here, Al Shimari's uncorroborated account is pitted against the irreconcilable account of another, "credibility is the primary issue" and a "plaintiff's demeanor and the like may detract from his ability to persuade." *Kirk v. United States*, 589 F. Supp. 808, 809 (E.D. Va. 1984). That is acutely true where the plaintiff, based solely on his own testimony, claims emotional distress – an injury that is "fraught with vagueness and speculation" and "easily susceptible to fictitious and trivial claims." *Price*, 93 F.3d at 1250-51. No precedent permits declaring a party unavailable under Fed. R. Evid. 804 on the vague and speculative record here.[14]

F. Plaintiffs' Claims Are Impermissibly Extraterritorial

The Court is required to apply the "focus" test to determine whether the conduct relevant to ATS's focus was domestic or extraterritorial. *Nestle USA v. Doe*, 593 U.S. 628, 632-33 (2021). General corporate activity, such as decisionmaking, does not transform overseas torts and injuries into a domestic application of the ATS. *Id.* at 634. The only conceivable foci for the ATS are the primary tort (torture and/or CIDT) and Plaintiffs' injuries. *Id.* These occurred in Iraq.[15] There is no domestic conduct in the record relevant to ATS's focus, so dismissal is required.

[14] "The non-appearance of a litigant at trial or his failure to testify as to facts material to his case and as to which he has especially full knowledge creates an inference that he refrained from appearing or testifying because the truth, if made to appear, would not aid his contention." *Scott v. Watsontown Trucking Co., Inc.*, 920 F. Supp. 2d 644, 654 (E.D. Va. 2013).

[15] PTX226 ¶¶ 1-8, 13-19; Dkt. #1815 at 246:22-247:13; Dkt. #1816 at 8:15-21; Dkt. #1818 at 30:14-19, 32:4-18, 38:25-39:12, 41:1-17.

G. No Cause of Action Should Have Been Created for Plaintiffs' Claims

The courts' authority to create causes of action "is, at best, uncertain." *Bulger v. Hurwitz*, 62 F.4th 127, 136 (4th Cir. 2023); *see also Nestle*, 593 U.S. at 634; *Sosa*, 542 U.S. at 694. "[A] single sound reason to defer to Congress" suffices to preclude an implied cause of action, *see Egbert v. Boule*, 596 U.S. 482 at 484 (2022), particularly where foreign affairs and national security are paramount. Also, the existence of an alternative remedial structure, even if ineffective or unavailable to the plaintiff, categorically precludes a judge-created cause of action. *Id.*; *Bulger*, 62 F.4th at 140-41. An administrative claim process existed that Plaintiffs did not use. DX37. Dismissal is required.

H. The United States' Assertion of the State Secrets Privilege Mandates Dismissal

"[S]ome matters are so pervaded by state secrets as to be incapable of judicial resolution once the privilege has been invoked." *El-Masri v. United States*, 479 F.3d 296, 306 (4th Cir. 2007) (citations omitted). As CACI has repeatedly asserted, *see* Dkt. #1800 at 24-27, by sustaining the United States' assertion of privilege over the identity and backgrounds of Plaintiffs' interrogators and the facts relating to their interrogations, but allowing this case to go forward, the Court crippled CACI's defense. *El-Masri*, 479 F.3d at 309. Accordingly, the Court should dismiss this case.

I. CACI Is Entitled to Derivative Sovereign Immunity from Plaintiffs' Claims

The Court barred CACI from pursuing this defense by holding, in an unprecedented decision, that the United States had impliedly waived its sovereign immunity. Dkt. #1183. That approach defied Supreme Court precedent, more so over time. Just this year, the Supreme Court reiterated in *Dep't of Agric. Rural Dev. Hous. Serv. v. Kirtz*, 601 U.S. 42 (2024), that sovereign immunity is waived and suit is permitted against the United States only when "the language of the statute" is "unmistakably clear" in allowing it. *Id.* at 48. The Fourth Circuit has ruled that the ATS does not provide or imply "any waiver of sovereign immunity." *Goldstar (Panama) S.A. v.*

United States, 967 F.2d 965, 968 (4th Cir. 1992). Implied waiver is the antithesis of a clear statement. The Court erred precluding CACI's derivative sovereign immunity defense.

Derivative sovereign immunity protects private parties from suit when they carry out the sovereign's will. *Burn Pit*, 744 F.3d at 341-42. Government contractors enjoy derivative immunity if "(1) the government authorized the contractor's actions, and (2) the government 'validly conferred' that authorization." *Id.* at 342. Both prongs are satisfied here. CACI performed pursuant to and adhered to a validly-awarded contract and no evidence shows CACI personnel acted in an unauthorized way *with respect to these Plaintiffs*. *Id.* at 331.

J. Plaintiffs' Claims Involve Nonjusticiable Political Questions

"Questions, in their nature political . . . can never be made in this court." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 170 (1803). Battlefield tactics "are clearly not subject to judicial review." *Tiffany v. United States*, 931 F.2d 271, 277 (4th Cir. 1991). Trial evidence showed no CACI interrogators committed or conspired to commit unlawful acts against Plaintiffs and the military controlled CACI personnel's interrogation work. The political question doctrine applies.

K. The Court Prevented CACI from Challenging the Plaintiffs' Credibility

The credibility of a witness is *always* subject to challenge. Fed. R. Evid. 607, 608. "The partiality of a witness is always relevant as discrediting the witness and affecting the weight of his testimony." *United States v. Turner*, 198 F.3d 425, 429 n.2 (4th Cir. 1999). Yet the Court prevented CACI from doing precisely that. Plaintiffs' *only* evidence of the claimed abuse was their own testimony. Plaintiffs claimed that they were abused in their interrogations, presenting a credibility battle between Plaintiffs and their interrogators. The Court's state secrets rulings barred CACI from having the interrogators appear as live witnesses, presenting background information on Plaintiffs' interrogators, or presenting evidence on the interrogation approaches approved by the Army for Plaintiffs' interrogations. Worse, the Court barred CACI from presenting evidence

about the Plaintiffs' apprehensions or whether Plaintiffs believed they had been wrongly detained by U.S. forces (Dkt. #1815 at 246:12-20), evidence bearing on Plaintiffs' bias and motive to lie. At the same time, the Court allowed Plaintiffs to describe themselves as schoolteachers and cabbies randomly "swept up" by U.S. forces, when one of them had an arsenal of guns, bombs and IEDs, and another was specifically sought by U.S. forces. Dkt. #1815 at 167:1-8. Evidence indicating involvement in an insurgency to kill U.S. soldiers suggests that the witness might lie about events during his detention. By shielding Plaintiffs' activities from the jury, whitewashing their backgrounds, and denying CACI critical information by sustaining the state secrets privilege, the Court crippled CACI's ability to attack their credibility. A new trial is required.

IV. CONCLUSION

The Court should dismiss this case for lack of subject matter jurisdiction, enter judgment for CACI, or order a new trial.

Respectfully submitted,

/s/ John F. O'Connor

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CERTIFICATE OF SERVICE

I hereby certify that on the 25th day of November, 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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