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

SUHAIL NAJIM ABDULLAH AL SHIMARI, et al.,	)	
Plaintiffs,	)	Case No. 1:08-CV-00827-GBL-JFA
v.	)	
CACI PREMIER TECHNOLOGY, INC.,	)	
Defendant.	)	

MEMORANDUM IN SUPPORT OF DEFENDANT CACI PREMIER TECHNOLOGY, INC.'S MOTION TO DISMISS PLAINTIFF AL SHIMARI'S COMMON-LAW CLAIMS FOR FAILURE TO STATE A CLAIM

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I. INTRODUCTION

When CACI Premier Technology, Inc. ("CACI PT") moved to dismiss this action five years ago, it advocated that the Court conduct a choice of law determination in order to assess whether Plaintiffs' common law tort claims were available under governing law. The Court deferred making that decision and has now directed CACI PT to brief the choice of law question with respect to Plaintiff Al Shimari's[1] common law tort claims in order to assess whether those claims can proceed.[2]

Choice of law determinations can be tedious. They also can be complicated. Determining the body of tort law that will decide if Plaintiff Al Shimari's common law claims are viable is a tedious process because Plaintiff Al Shimari originally filed his claims in one jurisdiction (Ohio) that has no connection to the dispute and consented to transfer of those claims to another jurisdiction (Virginia), the claims involve alleged conduct and injury in a foreign country (Iraq), and arose out of the United States' conduct of war.

While the process is tedious, it is really not that complicated and the required result is clear. Whether the Court reaches the result through a straightforward application of Ohio's choice of law rules, or by process of elimination by identifying jurisdictions that *cannot* supply

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[1] The other Plaintiffs' common law tort claims have been dismissed as untimely. Dkt. #226.

[2] At the April 19, 2013 hearing in this action, the Court and parties considered whether the unavailability of common law tort claims under the governing law would deprive the Court of subject matter jurisdiction, *see* Fed. R. Civ. P. 1, or would require dismissal for failure to state a claim, *see* Fed. R. Civ. P. 12(b)(6). CACI PT can see the argument that this is a question of subject matter jurisdiction, just as the Court would be deprived of subject matter jurisdiction over Plaintiffs' Alien Tort Statute claims if that statute has no extraterritorial effect. In any event, whether the viability of Plaintiffs' common law tort claims is a question of subject matter jurisdiction or failure to state a claim does not make a difference here. CACI PT's motion does not seek to contradict Plaintiffs' factual allegations with matters outside the complaint, and the choice of law issue is a pure question of law.

the applicable law, the result is the same. Ohio's choice of law rules presume that Plaintiff Al Shimari's claims must be viable under Iraqi law (as the place of injury) in order to proceed. No other jurisdiction has a greater relationship to this lawsuit sufficient to overcome the strong presumption that Iraqi law applies. CACI PT, however, has a threshold defense to tort claims brought under Iraqi law in that contractors supporting the occupation of Iraq are not subject to liability under Iraqi law. Ohio's choice of law rules make clear that when the choice of law determination points to a jurisdiction where the defendant has an absolute, threshold defense, the court simply applies that defense and dismisses or enters judgment in favor of the defendant. That is the end of the analysis.

The Court can reach the same result by working backwards and identifying all jurisdictions whose laws at first blush *might* control the result, and then eliminating the jurisdictions whose laws *cannot* be the basis for Plaintiff Al Shimari's claims. Ohio law (as the original forum) cannot apply because Ohio has no connection to the litigation other than its short-lived status as the original forum. Clear Supreme Court precedent precludes, on due process grounds, applying the substantive law of a forum that has no connection to the lawsuit.

Virginia's substantive law cannot be applied because Virginia has no interest in this lawsuit that would overcome Ohio's strong presumption that a tort claim must be available under the law of the place of injury in order for the case to proceed. Virginia would not even apply *its own laws* to Plaintiff Al Shimari's claims if he had filed them in Virginia. Moreover, the experience with the other three Plaintiffs (who had their common-law claims dismissed based on Virginia law) demonstrates that Virginia has no cognizable interest in these claims that would overcome the presumption of *lex loci delicti*.

The only other possible body of law that comes to mind is United States federal law. However, the United States has not created a federal private judicial right of action for Plaintiff Al Shimari's common law claims. The United States has not created a statutory cause of action for these claims either. Instead, the United States has legislated in this area by creating federal *criminal* jurisdiction and limiting civil recovery to an administrative claims process. As a result, while CACI PT does not minimize the United States' interest in the manner in which it prosecutes war, Congress has not seen fit to provide Plaintiff Al Shimari with a cause of action that he can pursue in court under federal law for his common law claims.

Thus, process of elimination yields the same result as a straightforward application of Ohio's choice of law rules – if Plaintiff Al Shimari is to have a viable common law tort claim, it must be a claim that is available under Iraqi law. CACI PT has an absolute defense to claims brought under Iraqi law because it is not subject to Iraqi law. Consequently, the Court should dismiss Plaintiff Al Shimari's common law tort claims.

II. ANALYSIS

A. Plaintiff Al Shimari's Common Law Tort Claims Are Actionable Only If Allowed By Iraqi Law, Which They Are Not

The starting point for a choice of law analysis is that Al Shimari originally filed suit in Ohio. If Ohio was a proper venue, then Ohio's choice of law rules apply to Plaintiff Al Shimari's claims. *Ferens v. John Deere Company*, 494 U.S. 516, 523 (1990); *Van Dusen v. Barrack*, 376 U.S. 612, 633 (1964).[3]

[3] If Ohio was not a proper venue, then Virginia's choice of law rules apply, *Myelle v. American Cyanamid Co.*, 57 F.3d 411, 413 (4th Cir. 1995), meaning that Plaintiff Al Shimari's common law claims would meet the same fate as those asserted by the other three Plaintiffs. *See* Dkt. #226 (dismissing the common law claim of Plaintiffs Rashid, Al-Ejaili, and Al Zuba'e as untimely under Virginia law); *see also Casey v. Merck & Co.*, 722 S.E.2d 842, 845-46 (Va. 2012) (Virginia does not toll its statute of limitations based on a pending putative class action or persons who were not named plaintiffs in the putative class action).

Application of Ohio's choice of law rules demonstrates that Plaintiff Al Shimari's tort claims are cognizable only if available under Iraqi law, which is the place of alleged injury and the place of the conduct that allegedly caused the injury. Plaintiff Al Shimari's common law tort claims are not cognizable under Iraqi law. Accordingly, they must be dismissed. CACI PT, as an entity supporting the military occupation in Iraq, is not subject to local Iraqi law, both by virtue of Coalition Provisional Authority Order 17 and also under customary international law.

Plaintiff Al Shimari may seek to invoke the law of some jurisdiction other than Iraq in an effort to salvage some or all of his common law claims. Such an effort is futile. Ohio's choice of law rules identify the appropriate body of governing law. If the law of the jurisdiction supplying the governing law does not allow recovery, Ohio courts simply dismiss or enter judgment; they do not cast about trying to find *some* jurisdiction that would allow the plaintiff's claims. Plaintiff Al Shimari may attempt to invoke Virginia law for his "negligent hiring, training and supervision" claim. Such a result is not permitted under Ohio's choice of law rules, and even if it were, dismissal still would be required. Plaintiff Al Shimari has not alleged facts supporting a negligent hiring claim under Virginia law, and Virginia does not recognize tort claims for negligent training and supervision. Plaintiffs theoretically could turn to federal law, but federal law does not provide for a common law cause of action. Indeed, over the past twenty-five years, the United States Congress has repeatedly legislated in the field at issue here, and the one common characteristic of this legislation is that it *does not* create a private right of action for Plaintiff Al Shimari.

1. Ohio's Choice of Law Rules Provide That Any Common Law Tort Action Must Be a Product of Iraqi Law

In *Morgan v. Biro Mfg. Co.*, 474 N.E.2d 286 (Ohio 1984), the Ohio Supreme Court clarified Ohio's choice of law rules for tort actions. The court reaffirmed that the rule of *lex loci*

delicti (applying the law of the place of injury) was the presumptive result under Ohio's choice of law rules, although this presumption could be overcome in specifically-defined circumstances. The *Morgan* court framed the analysis as follows:

> When confronted with a choice-of-law issue in a tort action under the Restatement of the Law of Conflicts view, analysis must begin with Section 146. Pursuant to this section, a presumption is created that the law of the place of the injury controls unless another jurisdiction has a more significant relationship to the lawsuit. To determine the state with the most significant relationship, a court must then proceed to consider the general principles set forth in Section 145. The factors within this section are: (1) the place of the injury; (2) the place where the conduct causing the injury occurred; (3) the domicile, residence, nationality, place of incorporation, and place of business of the parties; (4) the place where the relationship between the parties, if any, is located; and (5) any factors under Section 6 which the court may deem relevant to the litigation. All of these factors are to be evaluated according to their relative importance to the case."

Id. at 288-89.[4]

Thus, the starting point under Ohio's choice of law rules is the presumption that if Plaintiff Al Shimari's common law tort claims are cognizable, they must be cognizable under Iraqi law as the place of injury. Far from overcoming this presumption, the Section 146 factors identified in *Morgan* reinforce that Iraqi law governs Plaintiff Al Shimari's common law claims. The place of injury (Factor 1) is Iraq. The place of the alleged conduct causing the injury (Factor 2) is Iraq. The domicile, residence and nationality of the parties (Factor 3) is Iraq for Plaintiff Al

[4] The Section 6 factors are: (1) the needs of the interstate and international systems, (2) the relevant policies of the forum, (3) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue, (4) the protection of justified expectations, (5) the basic policies underlying the particular field of law, (6) certainty, predictability and uniformity of result, and (7) ease in the determination and application of law to be applied." *Restatement (Second), Conflict of Laws* § 6 (1971).

Shimari, and Virginia/Delaware for CACI PT.[5] The place of the parties' relationship (Factor 4) is Iraq. The Restatement Section 6 factors (Factor 5) do not point strongly to any jurisdiction. The interest in certainty, predictably and uniformity of result points to application of Iraqi law, or possibly United States federal law, because applying the law of a particular state of the United States (based on the defendant's domicile) would render military operations in Iraq subject to a multitude of different states' tort law (and possibly the law of more than one state if two persons from different states collectively caused injury to someone in Iraq). The only Section 6 factor that even arguably points away from application of Iraqi law is ease of determination and application of the law. However, as CACI PT notes below, it is actually not difficult to determine and apply Iraqi law here because the applicable Iraqi law (as promulgated by the Coalition Provisional Authority as the temporary government for Iraq during the time of the events at issue), expressly provided that contractors such as CACI PT would not be subject to liability under substantive Iraqi law.

As we explain below, when Ohio's choice of law rules point to the substantive law of a particular jurisdiction, and the defendant has a threshold defense under the laws of that jurisdiction, the result is simply dismissal or entry of judgment. As a result, the Court need not even get into the weeds of Iraqi tort law because CACI PT has a threshold defense to tort liability. Moreover, Ohio's choice of law rules so strongly point toward evaluating Plaintiff Al Shimari's common law claims under Iraqi law, the more readily-available case law under the law of a state of the United States is an insufficient basis for simply disregarding Ohio's settled choice of law rules.

[5] CACI PT is incorporated in Delaware and has its principal place of business in Virginia. *See* TAC ¶ 8.

2. CACI PT Cannot Be Held Liable to Plaintiff Al Shimari Under Substantive Iraqi Law

By the time CACI PT interrogation personnel arrived at Abu Ghraib prison in October 2003, Iraq was under the administration of the Coalition Provisional Authority ("CPA"). On June 26, 2003, the CPA Administrator, Ambassador L. Paul Bremer, issued CPA Order 17. CPA Order 17 began with the observation "that under international law occupying powers, including their forces, personnel, property and equipment, funds and assets, are not subject to the *laws or jurisdiction* of the occupied territory." O'Connor Decl., Ex. 1 at 1 (emphasis added).[6] Based on that premise, CPA Order 17 includes a broad preemption provision that bars application of substantive Iraqi law to contractors supporting the occupation:

> Coalition contractors and their sub-contractors as well as their employees not normally resident in Iraq, shall not be subject to Iraqi laws or regulations in matters relating to the terms and conditions of their contracts in relation to the Coalition Forces or the CPA.

Id. § 3(1). Section 3(2) of CPA Order 17 provided that contractors were immune from Iraqi legal process. Thus, CPA Order 17, in separate sections, preempts application of Iraqi law to coalition contractors (such as CACI PT) and provides those contractors with immunity from Iraqi legal process.

By any definition, the preemption provision of CPA Order 17 is very broad. The preemption clause in CPA Order 17 bars application of Iraqi law to any matter "relating to" the terms and conditions of CACI PT's contract. *Id.* § 3(1). In *Altria Group, Inc. v. Good*, 555 U.S. 70, 85 (2008), the Court explained at length the "unusual breadth" of preemption clauses using

[6] CPA Order 17 defines "Coalition Personnel" to include "all non-Iraqi military and civilian personnel assigned to or under the command of the Commander, Coalition Forces, or all forces employed by a Coalition State, including attached civilians . . . ."

"relating to" language as opposed to the "based on" preemption language that was before the Court in *Altria Group*:

> At issue in [*American Airlines, Inc. v. Wolens*, 513 U.S. 219 (1995)] was the pre-emptive effect of the Airline Deregulation Act of 1978, which prohibited States from enacting or enforcing any law "relating to rates, routes, or services of any air carrier." The plaintiffs in that case sought to bring a claim under the Illinois Consumer Fraud and Deceptive Business Practices Act. Our conclusion that the state-law claim was pre-empted turned on the unusual breadth of the ADA's pre-emption provision. We had previously held that the meaning of the key phrase in the ADA's pre-emption provision, "*relating to* rates, routes, or services," is a broad one. Relying on precedents construing the pre-emptive effect of the same phrase in [the ERISA Act], *we concluded that the phrase "relating to" indicates Congress' intent to pre-empt a large area of state law to further its purpose of deregulating the airline industry.* Unquestionably, the phrase "relating to" has a broader scope than the Labeling Act's reference to rules "based on" smoking or health; whereas "relating to" is synonymous with "having a connection with," "based on" describes a more direct relationship.

Altria Group, 555 U.S. at 85 (citations omitted) (second emphasis added); *see also Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 383-84 (1992) (use of "relating to" language confers broad preemptive effect); *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664 (1993) (same).

Here, there is no question that Plaintiff Al Shimari's common law claims "relate to" the terms and conditions of CACI PT's contract to provide interrogation services in Iraq. As Plaintiffs allege in their Third Amended Complaint, CACI PT's contract required CACI PT to provide "the best value Interrogation Support Cell management and support, [in accordance with Department of Defense, US Civil Code, and International] regulations and standard operating procedures." TAC ¶ 15 (alteration made by Plaintiffs in TAC). As Plaintiffs also allege, CACI PT's contract required CACI PT to "provide Interrogation Support Cells, as directed by military authority . . . to assist, supervise, coordinate, and monitor all aspects of interrogation activities, in order to provide timely and actionable intelligence to the commander." *Id.* Plaintiffs claim that

CACI PT failed to comply with these contractual terms and that, as a result of that alleged failure, CACI PT is liable to Plaintiffs in tort. Indeed, CACI PT employees did not happen upon Abu Ghraib prison or interact with detainees on a lark. They were there because the terms and conditions of CACI PT's contract with the United States called for their participation in the interrogation effort, and the terms and conditions of that contract with the United States set forth how CACI PT employees were required to conduct themselves.

Plaintiff Al Shimari's claims are so "related to" the terms and conditions of CACI PT's contract that he specifically alleges that his injuries resulted from actions taken by CACI PT in violation of the terms and conditions of the contract. TAC ¶ 96 ("From that position of *de facto* authority, CACI PT employees gave direction to military personnel ***in direct violation of CACI PT's [Statement of Work] as well as the controlling military regulations***." (second emphasis added)).; *id.* ¶ 162 ("CACI PT at all times was obligated ***by the terms of its contract*** and by applicable military regulations to directly supervise and discipline its employees." (emphasis added)); *id.* ¶ 192 ("CACI PT knew that the United States intended ***and required*** any person ***acting under the contract to the United States*** would conduct themselves in accordance with the relevant domestic and international laws . . . ." (emphasis added)); *id.* ¶ 202 ("***Despite obligations under its contract with the United States government*** and obligations under United States government regulations, CACI PT acted negligently and wrongfully by failing to adequately supervise its employees." (emphasis added)); *id.* ¶ 205 ("CACI PT failed to ensure that its employees and agents ***abided by the contract terms*** and with the Geneva Conventions." (emphasis added)); *id.* ¶ 212 ("These acts [torture], perpetrated by Defendant while working under a contract with the United States, ***directly contradicted the contract's express terms***, domestic law, and the United States' express policy against torture." (emphasis added)).

The preemption provision of CPA Order 17 is not limited to breach of contract claims, or claims "based on" the terms and conditions of CACI PT's contract. CPA Order 17 preempts Iraqi law for matters "relating to" the terms and conditions of CACI PT's contract. Plaintiffs allege throughout the Third Amended Complaint that Plaintiffs' injuries occurred because CACI PT did not adhere to the terms of its contract with the United States. By a plain reading of the broad preemption clause in CPA Order 17, Iraqi law is preempted. Moreover, when a plaintiff asserts claims governed by a body of law that has been preempted, the required result is dismissal with prejudice or entry of judgment. *See, e.g.*, *McCauley v. Home Loan Inv. Bank, FSB*, 710 F.3d 551, 556 (4th Cir. 2013) (affirming dismissal of plaintiff's state-law unconscionability claim because that claim was preempted by federal statute); *Ross v. FDIC*, 625 F.3d 808, 813 (4th Cir. 2010) (affirming entry of judgment for defendant because plaintiff's claim was asserted under North Carolina law and application of North Carolina law was preempted by statute).

Moreover, even if CPA Order 17 never issued, CACI PT would not be subject to Iraqi law because of a longstanding principle of international law that occupying personnel are not subject to the laws of an occupied territory. That is the starting point for CPA Order 17, as that order specifically acknowledges "that under international law occupying powers, including their forces, personnel, property and equipment, funds and assets, are not subject to the *laws or jurisdiction* of the occupied territory." O'Connor Decl., Ex. 1 at 1 (emphasis added). This statement of the law of war in CPA Order 17 is well established. Plaintiffs are Iraqi citizens who were captured by the U.S. military forces on the battlefield in Iraq and imprisoned by the U.S. military in a battlefield detention facility. Under longstanding precedent, all persons residing within invaded or occupied territory are "liable to be treated as enemies," and this designation

"does not in any manner depend on [their] personal allegiance." *The Prize Cases*, 67 U.S. 635, 674 (1862).[7]

In *Coleman v. Tennessee*, 97 U.S. 509, 517 (1878), the Court held that the law of an occupied territory applies only to internal relations between its citizens, and not to occupying personnel. The rule of law announced in *Coleman* is well established.[8] Similarly, in *Dow v. Johnson*, 100 U.S. 158, 165 (1879), the Supreme Court explained that occupying personnel are subject only to their country's criminal laws, and are not subject to the laws of the occupied territory:

> If guilty of wanton cruelty to persons, or of unnecessary spoliation of property, or of other acts not authorized by the laws of war, they may be tried and punished by the military tribunals. They are amenable to no other tribunal, except that of public opinion, which, it is to be hoped, will always brand with infamy all who authorize or sanction acts of cruelty and oppression.

Id. at 166.[9]

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[7] *See also Johnson v. Eisentrager*, 339 U.S. 763, 772 (1950) ("[I]n war 'every individual of the one nation must acknowledge every individual of the other nation as his own enemy—because [he is] the enemy of his country.'" (quoting *The Rapid*, 8 U.S. 155, 161 (1814))); *Dow v. Johnson*, 100 U.S. 158, 164 (1879) (all inhabitants of occupied territory may be treated as enemies and are "liable to be dealt with as such without reference to their individual opinions or dispositions"); *United States v. Farragut*, 89 U.S. 406, 423 (1874); *The Gray Jacket*, 72 U.S. 342, 369-70 (1866); *In re Mrs. Alexander's Cotton*, 69 U.S. 404, 419 (1864); *The Venice*, 69 U.S. 258, 275 (1864);

[8] *See Madsen v. Kinsella*, 343 U.S. 341, 345 n.6 (1952) (dependent of American servicemember immune from jurisdiction of local courts in occupied Germany); *Dooley v. United States*, 182 U.S. 222, 230 (1901); *Leitensdorfer v. Webb*, 61 U.S. 176, 177 (1857); *Dostal v. Haig*, 652 F.2d 173, 176-77 (D.C. Cir. 1981); *Hamilton v. McClaughry*, 136 F. 445, 447-48 (C.C. D. Kan. 1905); *In re Lo Dolce*, 106 F. Supp. 455, 460-61 (W.D.N.Y. 1952); *Aboitiz & Co. v. Price*, 99 F. Supp. 602, 617 (D. Utah 1951).

[9] Indeed, *Dow* goes farther than stating that occupying personnel are not subject to the laws of the occupied territory, and also states that occupying personnel are not subject to civil suits in their own country. *Dow*, 100 U.S. at 166. The Court need not reach this issue to determine that occupying personnel are not subject to the laws of the occupied territory.

The *Dow* Court described this principle as precluding liability – and in CACI PT's view, precluding civil suit – for all acts of a "military character, whilst in the service of the United States,"[10] "acts of warfare,"[11] and to the exercise of a "belligerent right."[12] The Court later reaffirmed *Dow* and held that it protects parties "from civil liability for any act done in the prosecution of a public war." *Freeland v. Williams*, 131 U.S. 405, 417 (1889).[13] Importantly, *Dow* is not limited to uniformed soldiers. *Ford v. Surget*, 97 U.S. 594, 606-07 (1878) (holding civilian citizen of Mississippi could not be sued for destroying another citizen's cotton in support of the occupying Confederate forces);[14] *see also Filarsky v. Delia*, 132 S. Ct. 1657, 1663 (2012) ("[I]t should come as no surprise that the common law did not draw a distinction between public servants and private individuals engaged in public service in according protection to those carrying out government responsibilities.").[15] While the *en banc* Fourth Circuit concluded that the principles applied in *Coleman* and *Dow* were best considered as a potential defense to

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[10] *Dow*, 100 U.S. at 163.

[11] *Id.* at 169.

[12] *Id.* at 167.

[13] The immunity recognized in *Dow* is not defeated by an allegation that the conduct was "unauthorized by the necessities of war." *Dow*, 100 U.S. at 169.

[14] Because the Supreme Court treated the Confederate government as illegitimate, its forces were viewed as occupying powers in the seceding states until such time as the occupied territory reverted back to Union control. *Ford*, 97 U.S. at 606; *Thorington v. Smith*, 75 U.S. (8 Wall.) 1, 10-12 (1868).

[15] Given the historical paucity of tort suits against occupying personnel, the principles announced and applied in *Dow* have rarely arisen as a litigated issue, but have been enforced when implicated. *See Moyer v. Peabody*, 212 U.S. 78, 237 (1909) (*Dow* protected Colorado governor from civil suit for actions taken in putting down labor unrest); *Freeland*, 131 U.S. at 417 (Confederate soldier protected from suit for alleged theft of cattle during occupation of West Virginia); *Ford*, 97 U.S. at 606-07 (civilian immune from suit for destruction of cotton in support of Confederate occupation); *United States v. Best*, 76 F. Supp. 857, 860 (D. Mass. 1948) (*Dow* protected American civilian in occupied Austria from search warrants issued by Austrian courts).

liability and not as an immediately-appealable immunity defense, *Al Shimari v. CACI Int'l Inc*, 679 F.3d 205, 216 (4th Cir. 2012), the court was careful to express no view as to whether the *Coleman* and *Dow* lines of cases provide an applicable defense to liability here. *Id.* at 217; *see also id.* at 224 (Wynn, J., concurring) ("Accordingly, today's opinion offers no guidance to the district court on the underlying merits of these matters. To do otherwise would, in my opinion, potentially usurp the role of the district court or risk overstepping our own.").

Indeed, CPA Order 17 affirms and implements the standards announced in *Coleman* and *Dow* in its provision relating to claims. Section 6 of CPA Order 17 provides for claims by those suffering "personal injury . . . arising from or attributed to Coalition personnel or any persons employed by them." O'Connor Decl., Ex. 1 at § 6. That section of CPA Order 17 makes no provision whatsoever for claims arising "in connection with military combat operations." *Id.* Thus, the claims provision of CPA Order 17 applies the *Freeland* standard of barring civil claims "for any act done in the prosecution of a public war." *Freeland*, 131 U.S. at 417. For claims not arising "in connection with military combat operations," CPA Order 17 provides that the claim "shall be submitted and dealt with by the Parent State" at issue, and that the claim will be resolved "in a manner consistent with the ***national*** laws of the Parent State." *Id.* (emphasis added).

Plaintiffs' own allegations bring their claims squarely within the scope of *Coleman*'s and *Dow*'s holdings. While *Dow* bars suit and civil liability for "any act done in the prosecution of a public war,"[16] Plaintiffs specifically allege that ***"Defendant's acts took place during a period of armed conflict, in connection with hostilities."*** TAC ¶ 247. Plaintiffs also allege that CACI PT personnel supported the military's battlefield interrogation mission, at a prison captured and

[16] *Freeland*, 131 U.S. at 417.

operated by the U.S. military as an expeditionary interrogation facility. TAC ¶¶ 1, 11-17. Because CACI PT's employees were acting at Abu Ghraib "in the prosecution of a public war," *Freeland*, 131 U.S. at 417, CACI PT would not be subject to the application of Iraqi law *even if* the CPA administrator had not issued CPA Order 17, and even if Plaintiff Al Shimari's unfounded allegations against CACI PT were true. *Dow*, 100 U.S. at 166. Moreover, if Plaintiff Al Shimari's claims somehow could be viewed as not arising in connection with military combat operations, despite the allegations in the Third Amended Complaint, CPA Order 17 limits claims to those available under federal law (which as discussed below, makes no provision for a private right of action in court but does allow for administrative claims).

3. When Ohio's Choice of Law Rules Provide for Application of the Laws of a Jurisdiction that Does Not Permit the Plaintiff's Claims, the Result is Dismissal or Entry of Judgment

Ohio choice of law rules require that Plaintiff Al Shimari's common law tort claims, if they are viable, be available as a product of substantive Iraqi law. They are not available under substantive Iraqi law. Plaintiffs might take this reality and argue that the Court should then cast about to find another jurisdiction where CACI PT *is* subject to that jurisdiction's substantive tort laws and apply the tort law of that alternative jurisdiction. That is not how Ohio's choice of law rules work.

Ohio courts do not operate as an advocate for the plaintiff and only apply a jurisdiction's law if the plaintiff has a viable claim under those laws. Rather, Ohio courts apply Ohio's choice of law rules evenhandedly and then the chips fall where they may. If the defendant has a threshold defense under the law of the jurisdiction whose laws apply, that simply ends the case and the court dismisses or enters judgment for the defendant. For example, in *Sholes v. Agency Rent-a-Car*, 601 N.E.2d 634, 641 (Ohio Ct. App. 1991), the court concluded that Texas law

applied to the plaintiff's tort claims and then affirmed entry of judgment on the plaintiff's negligent and intentional infliction of emotional distress claims because Texas law barred such claims in connection with termination of employment. *Id.*

Similarly, in *Developers Diversified Realty Corp. v. Vidalakis*, No. 1:06-cv-234, 2008 U.S. Dist. LEXIS 108012, at *20-22, 40-42, 54 (N.D. Ohio Feb. 14, 2008), the court dismissed the defendants' counterclaims for promissory fraud, breach of implied duty of good faith and fair dealing, and for a corporate accounting because the Court concluded that Delaware law applied and these claims were not available under Delaware law. *Id.*; *see also Reengineering Consultants, Ltd. v. EMC Corp.*, No. 2:08-cv-47, 2009 U.S. Dist. LEXIS 2627, at *19-20 (S.D. Ohio Jan. 14, 2009) (concluding that Ohio law applied to the plaintiff's tort claims and then dismissing plaintiff's tortious interference claim because Ohio law did not permit assertion of such a claim along with a breach of contract claim); *Hagberg v. Delphi Auto. Sys.*, 268 F. Supp. 2d 855, 860 (N.D. Ohio 2002) (holding that Michigan law, and not Ohio law, applied to dispute, and then granting summary judgment to defendant because Michigan law, unlike Ohio law, did not give plaintiff the right to sue on insurance policy); *Baumgardner v. Bimbo Food Bakeries Distrib., Inc.*, 697 F. Supp. 2d 801, 816 (N.D. Ohio 2010) (dismissing unjust enrichment claim because New York law, unlike Ohio law, does not allow alternative pleading of breach of contract and unjust enrichment claims); *Blaushild v. Smartcars, Inc.*, No. 1:92-cv-308, 1992 U.S. Dist. LEXIS 21755, at *9 (N.D. Ohio Dec. 2, 1992) (concluding that Georgia law, and not Ohio law, governed parties' relationship and dismissing Ohio statutory cause of action because it was not available under Georgia law); *Power Mktg. Direct, Inc. v. Ball*, No. C2-03-1001, 2004 U.S. Dist. LEXIS 30016, at *18-21 (S.D. Ohio June 28, 2004) (concluding that California law, and

not Ohio law, governed parties' relationship and dismissing tortious interference and civil conspiracy claims because they were not available under California law).

Therefore, the existence of a threshold defense to CACI PT under Iraqi law, by virtue of CPA Order 17 and the law of military occupation, does not support disregarding Ohio's choice of law rules and finding some other jurisdiction's laws to apply in this action. Rather, Ohio's choice of law rules require the Court to give effect to Iraqi law, under which CACI PT is not subject to liability, and dismiss Plaintiff Al Shimari's common law tort claims.

B. Application of Ohio's Substantive Tort Law Would Violate Due Process

It is well established that the constitutional requirement of due process applies to choice of law determinations, and that application of a jurisdiction's laws is unconstitutional if such an application is "arbitrary or unfair." *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 821-22 (1985); *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 307 (1981) (plurality opinion[17]) (due process prohibits application of state law that is "arbitrary [or] fundamentally unfair") (citing *Alaska Packers Ass'n v. Indus. Accident Comm'n*, 294 U.S. 532, 542 (1935) (choice of law determination that is "arbitrary or unreasonable . . . amount[s] to a denial of due process")); *see also Thornton v. Cessna Aircraft Co.*, 886 F.2d 85, 87 (4th Cir. 1989) (choice of law determination must satisfy due process "under the facts of the particular case").

For application of a state's laws to be neither arbitrary nor unfair, and thus comport with due process, the state "must have a 'significant contact or significant aggregation of contacts' to the claims asserted by each member of the plaintiff class, contacts 'creating state interests.'"

[17] Justice Stevens's concurrence in *Hague* also noted that a choice of law determination violates due process if it "were totally arbitrary or if it were fundamentally unfair to either litigant." *Hague*, 449 U.S. at 326 (Stevens, J., concurring in the judgment). Thus, a majority of the Court in *Hague* adopted the "arbitrary or unfair" due process test for choice of law determinations.

Shutts, 472 U.S. at 821-22 (quoting *Hague*, 449 U.S. at 312-13). As explained in *Hague*, "if a State has only an insignificant contact with the parties and the occurrence or transaction, application of its law is unconstitutional." *Hague*, 449 U.S. at 310-11. For this reason, as noted in *Shutts* and *Hague*, the Supreme Court has regularly invalidated lower court choice of law determinations, on constitutional due process grounds, when the lower court applied the law of a state with which the parties and their claims had only a "nonsignificant" contact. *Hague*, 472 U.S. at 309 (citing *Home Ins. Co. v. Dick*, 281 U.S. 397, 408 (1930), and *John Hancock Mut. Life Ins. Co. v. Yates*, 299 U.S. 178, 182 (1936)); *see also Shutts*, 472 U.S. at 820 (endorsing the Court's holdings in *Dick* and *Yates*); *In re TFT-LCD (Flat Panel) Antitrust Litig.*, No. M 07-1827, 2011 WL 1100133, at *4 (N.D. Cal. Mar. 24, 2011) ("Due Process requires a 'significant contact or significant aggregation of contacts' between the plaintiff's claims and the state at issue").

Moreover, as the Supreme Court made clear in *Shutts*, this rule of law applies with full force to the application of "forum law." *Shutts*, 472 U.S. at 821-22 ("Kansas must have a 'significant contact or significant aggregation of contacts' to the claims asserted by each member of the plaintiff class."); *see also Byers v. Lincoln Elec. Co.*, 607 F. Supp. 2d 840, 845-46 (N.D. Ohio 2009) ("In the present case, even if choice-of-law principles suggest that the law of (say) Ohio should apply to Byers' claims against a majority of defendants, this Court cannot apply Ohio law to a particular defendant if there is no significant relationship at all between that defendant and Ohio."); *Schwartz v. Upper Deck Co.*, 183 F.R.D. 672, 678 (S.D. Cal. 1999) ("*Shutts* would dictate application of all the laws of the states in which any class plaintiff resided."); *In re TFT-LCD*, 2011 WL 1100133, at *4 ("To decide whether the application of a particular State's law comports with the Due Process clause, the Court must examine 'the

contacts of the State, whose law [is to be] applied, with the parties and with the occurrence or transaction giving rise to the litigation.'" (quoting *Hague*, 449 U.S. at 308)). Thus, application of forum law is unconstitutional if the only connection between the forum and plaintiff and their claims is the situs of the lawsuit.

Here, Plaintiff Al Shimari has no contact whatsoever with Ohio, nor do his claims. Plaintiff Al Shimari is an Iraqi citizen, residing in Iraq. TAC ¶¶ 1, 4. Plaintiff Al Shimari alleges that he was mistreated while in United States custody in Iraq. TAC ¶ 1. He has asserted his claims against a Defendant that is incorporated in Delaware with its principal place of business in Virginia. TAC ¶¶ 8. There is no indication that Plaintiff Al Shimari has ever been to Ohio, ever met anyone from Ohio, or ever heard of Ohio. Under these circumstances, a straightforward application of *Shutts* prohibits application of Ohio's substantive tort law, as "forum" law, to common law claims asserted by Plaintiff Al Shimari that have no connection at all to Ohio.[18] Simply put, *Shutts* does not allow a plaintiff to utilize substantive tort law from a jurisdiction with no connection to his case simply by filing suit in that jurisdiction.

[18] During the parties' briefing on CACI PT's motion for partial summary judgment against Plaintiffs Rashid, Al-Ejaili, and Al Zuba'e, the parties agreed that Supreme Court case law allows a forum to apply its own *procedural law* consistent with due process. For that reason, the Supreme Court in *Sun Oil Co. v. Wortman*, 486 U.S. 717, 722 (1988), held that "the Constitution does not bar application of the forum State's statute of limitations." *See also id.* at 727 (Kansas may apply "its own statute of limitations" in a case filed in Kansas). Thus, while *Sun Oil* permits a forum to categorically apply its own procedural rules, even to claims having no connection to the forum, *Shutts* precludes the forum from applying its *substantive* law in such a circumstance. *Shutts*, 472 U.S. at 821-22. Plaintiffs have recognized this distinction. Dkt. #192 ("*Wortman* involved similar facts as *Shutts* – a class action over royalty payments filed in Kansas state court. 486 U.S. at 720-21. However, whereas *Shutts* involved the application of Kansas substantive law to claims insufficiently connected to Kansas, *Wortman* dealt with the statute of limitations, which the Court categorized as procedural for the purposes of its analysis. *Id.* at 721, 726.").

C. Plaintiff Al Shimari Cannot Pursue His Common Law Claims Under Virginia Law

1. Virginia Has No Interest in Plaintiff Al Shimari's Claims to Overcome Ohio's (and Virginia's) Presumption that a Tort Claim Is Actionable Only if Allowed Under the Law of the Place of Injury

When opposing CACI PT's motion to dismiss in 2008, Plaintiffs avoided taking a position on the applicable law. Plaintiffs argued, however, that Ohio choice of law rules would allow application of the law of a place other than the place of injury if the other jurisdiction "has a more significant relationship to the lawsuit." Dkt. #53 at 13. With the place of injury not a body of law under which Plaintiffs can recover, Plaintiffs may argue that Virginia has such a monumental interest in providing the substantive law for Plaintiff Al Shimari's claims that this interest overcomes the strong presumption that the law of the place of injury controls. Such an argument cannot save Plaintiff Al Shimari's common law claims.

First, it is impossible to conclude that Virginia has an interest in having its law govern Al Shimari's claims. If Plaintiff Al Shimari had originally filed his claims in Virginia state or federal court, *Virginia's* choice of law rules would not result in the application of Virginia tort law to claims involving injuries allegedly inflicted in Iraq. "Under Virginia law, the rule of *lex loci delicti*, or the law of the place of the wrong, applies to choice-of-law decisions in tort actions." *Colgan Air, Inc. v. Raytheon Aircraft Co.*, 507 F.3d 270, 275 (4th Cir. 2007). If Virginia had an overwhelming interest at play here, then one might expect its own courts to apply choice of law rules that would require application of Virginia law. Virginia courts' steadfast adherence to rules requiring application of the law of the place of the tortious conduct and injury refute any assertion that Virginia has an interest in having Ohio apply a different rule of decision. Indeed, the present action demonstrates beyond doubt Virginia's lack of a cognizable interest in Plaintiffs' claims. As this Court has held, Virginia law throws the other

three Plaintiffs' common law claims out of court as untimely. Dkt. #226. Given the Virginia Supreme Court's decision in *Casey*, 722 S.E.2d at 845-46, it simply cannot be said that Virginia has any interest in providing a forum for these Plaintiffs' claims, and certainly not an interest so weighty as to overcome Ohio's (and Virginia's) rules calling for application of the law of the place of injury.

Second, Plaintiff Al Shimari's claims arise out of CACI PT's provision of contract interrogation personnel in a war zone, to the federal government, in aid of the federal government's exercise of the most quintessentially federal power imaginable – the prosecution of war against a foreign nation. U.S. Const. art. I, § 8, cls. 1, 11-15; art. II, § 2, cls. 1, 2. In sum, "[m]atters related to war are for the federal government alone to address." *Deutsch v. Turner Corp.*, 324 F.3d 692, 712 (9th Cir. 2003). By contrast, the states have no permissible role in regulating the United States' conduct of war. *United States v. Pink*, 315 U.S. 203, 233 (1942) ("Power over external affairs is not shared by the States; it is vested in the national government exclusively,"[19] As noted above, Virginia would not apply its own substantive law if this were an ordinary tort case involving an automobile accident occurring in another state. *Colgan Air*, 507 F.3d at 275. Given that Plaintiff Al Shimari's claims arise in the context of activities constitutionally committed to the federal government, Virginia's interest in applying its substantive tort law to claims involving conduct and injuries outside Virginia is diminished even more.

[19] The Supreme Court regularly invalidates state regulations that encroach on the federal government's constitutionally-committed role as the sole voice on war and foreign affairs. *See, e.g.*, *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 539 U.S. 396, 413-14 (2003); *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 380-81 (2000); *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 447-49 (1979); *Hines v. Davidowitz*, 312 U.S. 52, 65-68 (1941); *United States v. Belmont*, 301 U.S. 324, 331 (1937); *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 318 (1936).

Indeed, Virginia's lack of a cognizable interest in Plaintiff Al Shimari's claims is consistent with the presumption against extraterritorial application of state laws and the constitutional limits on the application of state laws to activity occurring wholly outside a state's borders. *See Healy v. Beer Inst.*, 491 U.S. 324, 336-37 & n.13 (1989); *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573, 579 (1986); *Cotto Waxo Co. v. Williams*, 46 F.3d 790, 793 (8th Cir. 1995); *NCAA v. Miller*, 10 F.3d 633, 640 (9th Cir. 1993). Accordingly, state law, like federal law, is presumed not to have extraterritorial effect. *See, e.g.*, *Kelly v. R.S. Jones & Assocs., Inc.*, 406 S.E.2d 34, 37 (Va. 1991) (Virginia wrongful death statute does not apply extraterritorially); *see also Moreno v. Baskerville*, 452 S.E.2d 653, 655 (Va. 1995) (Virginia law against drug distribution would not be applicable against a defendant where the transfer of drugs occurred in Arizona even if payment was made in Virginia).

Thus, the beginning premise is that Ohio choice of law rules presumptively assess the viability of Plaintiff Al Shimari's tort claims based on whether they are available under Iraqi law, the place where Al Shimari claims to have been injured. Here, Virginia's choice of law rules, strict enforcement of its statutes of limitations, and presumption against extraterritorial application of its laws would not permit Plaintiff Al Shimari's claims even if they had been brought originally in Virginia. Consequently, Virginia cannot conceivably have an interest so weighty as to overcome Ohio's ordinary choice of law rules.

2. Plaintiff Al Shimari's "Negligent Hiring, Training and Supervision" Claim Is Not Cognizable Under Virginia Law

Plaintiff Al Shimari might retreat from trying to apply Virginia law to all of his common law claims, and instead argue that Virginia law at least should govern his "negligent hiring, training and supervision" claim. TAC, Count XIX. The argument presumably would be that this claim has a greater connection to Virginia, where CACI PT is headquartered, and from where

CACI PT hired the interrogation personnel who deployed to Iraq. Even if this claim could be assessed under Virginia law (Al Shimari's injuries *still* occurred in Iraq), Virginia law would not allow this claim as asserted by Plaintiff Al Shimari.

A claim of negligent hiring under Virginia law requires a showing that the employer "fail[ed] to exercise reasonable care in placing an individual *with known propensities*, or propensities that *should have been discovered by reasonable investigation*, in an employment position in which, due to the circumstances of the employment, it should have been foreseeable that the hired individual posed a threat of injury to others." *Interim Personnel of Cent. Va., Inc. v. Messer*, 559 S.E.2d 704, 707 (Va. 2002) (emphasis added). "The test is whether the employer has negligently placed an unfit person in an employment situation involving an unreasonable risk of harm to others." *Morgan v. Wal-Mart Stores, LP*, No. 3:10-cv-669, 2010 WL 4394096, at *3 (E.D. Va. Nov. 1, 2010) (internal quotations omitted).

The "failure to meet a training or educational standard does not come close to rising to the level where it is foreseeable that injury would result." *Wolf v. Fauquier County Bd. of Supervisors*, No. 1:06-cv-945, 2007 WL 2688418, at *6 (E.D. Va. Sept. 12, 2007). Importantly, "[m]ere proof of failure to investigate a potential employee's background is not sufficient to establish an employer's liability for negligent hiring. *Interim Personnel*, 559 S.E.2d at 707; *see also Majorana v. Crown Cent. Petroleum Corp.*, 539 S.E.2d 426, 431 (Va. 2000). As the Virginia Supreme Court explained in *Majorana*, "the plaintiff must show that an employee's propensity to cause injury to others was either known or should have been discovered by reasonable investigation." *Majorana*, 539 S.E.2d at 431-32; *see also Southeast Apts. Mgmt., Inc. v. Jackman*, 513 S.E.2d 395, 397 (Va. 1999) (rejecting negligent hiring claim because there were

no facts to suggest that the employee had a known or reasonably discoverable propensity to molest women prior to his hiring).

When these requirements of Virginia law are considered, it is clear that Plaintiff Al Shimari has not stated a claim under Virginia law *even if* Virginia law could be applied to this claim. The touchstone of a negligent hiring claim is that the plaintiff must identify an employee who injured him and identify the employee's propensities that were known to the employer, or reasonably knowable by the employer at the time of hiring, that should have precluded the hire. Plaintiff Al Shimari, however, has neither identified a CACI PT employee who supposedly injured him, nor has he identified any propensities regarding such employee that were known or should have been known by CACI PT at the time of hire. Indeed, Plaintiff Al Shimari has not identified *any* CACI PT employee, much less one with whom he had contact, who had a known or knowable propensity to injure prior to being hired by CACI PT. All Plaintiff Al Shimari has alleged is that CACI PT did not adequately screen its employees for hire (TAC ¶ 308). Plaintiff Al Shimari alleges no *facts* to support such a contention, but even if he did, Virginia law could not be clearer that a complete and total failure to screen employees is insufficient to state a claim for negligent hiring. *Interim Personnel*, 559 S.E.2d at 707; *see also Majorana*, 539 S.E.2d at 431.

Plaintiff Al Shimari also cannot turn to Virginia law for his negligent supervision claim because such a cause of action is not recognized under Virginia law. In *Chesapeake & Potomac Tel. Co. of Va. v. Dowdy*, 365 S.E.2d 751, 754 (Va. 1988), the plaintiff alleged that the employer was liable for negligent supervision in allowing the plaintiff's supervisors to harass him at work. The Virginia Supreme Court noted that "[t]here can be no actionable negligence unless there is a legal duty, and a consequent injury." *Id.* The court then concluded that "[i]n Virginia, there is

no duty of reasonable care imposed on an employer in the supervision of its employees under these circumstances and we will not create one here." *Id.* The Fourth Circuit has similarly rejected negligent supervision claims asserted under Virginia law on the grounds that Virginia does not recognize such a cause of action. *See Spencer v. Gen. Elec. Co.*, 894 F.2d 651, 656-57 (4th Cir. 1999) ("To reject Spencer's contention that there exists in Virginia a cause of action against G.E. for its negligent supervision of Neal, we need look no further than the Supreme Court of Virginia's decision in [*Dowdy*]."), *overruled on other grounds by Farrar v. Hobby*, 506 U.S. 103 (1992); *Johnson v. Enter. Leasing Co.*, No. 98-2573, 1999 W 496879, at *1 (4th Cir. July 13, 1999) ("We note that Johnson's claims of negligent supervision and negligent retention are not cognizable under Virginia law.").

The judges of this Court similarly have consistently dismissed negligent supervision claims on the grounds that the tort does not exist under Virginia law. *Eley v. Evans*, 476 F. Supp. 2d 531, 532 n.3 (E.D. Va. 2007) (Smith, J.) ("Notably, federal and Virginia courts have held that Virginia does not recognize negligent supervision as a valid cause of action."); *Muse v. Schleiden*, 349 F. Supp. 2d 990, 1001 (E.D. Va. 2004) (Ellis, J.) ("First, as plaintiff conceded in her opposition to the motion for summary judgment, her first theory fails because Virginia does not recognize a claim for negligent supervision."); *Keck v. Virginia*, No. 3:10-cv-555, 2011 WL 4589997, at *21 (E.D. Va. Sept. 9, 2011) (Lauck, M.J.) ("The Supreme Court of Virginia has declined to recognize[] a tort of negligent supervision of an employee by the employer and its managerial personnel." (internal quotations omitted) (alteration in original)); *Elrod v. Busch Entertainment Corp.*, No. 4:09-cv-164, 2010 WL 5620918, at *6 (E.D. Va. Dec. 14, 2010) (Miller, M.J.) ("There is no authority in Virginia for a claim of negligent supervision. . . . The vast majority of Virginia state cases have interpreted *Dowdy* to foreclose any independent cause

of action for negligent supervision in Virginia, and have sustained demurrers dismissing negligent supervision claims."); *Wolf*, 2007 WL 2688418, at *7 (Cacheris, J.) ("Because Plaintiffs cite no authority for a duty to supervise in Virginia, summary judgment is appropriate and will be granted to Defendant.").[20]

Similarly, there is no tort of negligent training under Virginia law. *See Morgan*, 2010 WL 4394096, at *4 (Hudson, J.) ("However, this Court is not aware of any case from the Supreme Court of Virginia or lower courts that recognizes the distinct tort of negligent training. This Court will not recognize a Virginia cause of action for negligent training where such cause of action has not been clearly established." (citations omitted)); *Keck*, 2011 WL 4589997, at *21 ("Virginia courts likewise have declined to recognize a tort of negligent training."); *Williams v. Dowell*, 34 Va. Cir. 240, 1994 WL 1031277, at *3 (Va. Cir. Ct. 1994) ("Research discloses no reported decision in Virginia which recognizes [a claim for negligent training]."); *Meccia v. Pioneer Life Ins. Co.*, 13 Va. Cir. 17, 1987 WL 488659, at *6 (Va. Cir. Ct. 1987) (declining to recognize tort under Virginia law because "the 'negligent failure to train', as a separate and distinct tort, finds little support in the authorities").

Thus, *even if* Plaintiff Al Shimari could turn to Virginia law to supply the substantive law for his "negligent hiring, training, and supervision" claim, his claim would fail under Virginia

[20] CACI PT is aware of three Virginia Circuit Court decisions in which courts have allowed a negligent supervision claim to survive a demurrer. *See Hernandez v. Lowe's Home Ctrs., Inc.*, No. CL10-8412, 2011 WL 8964944, at *3 (Va. Cir. Ct. Aug. 1, 2011) (citing cases). But as the *Hernandez* court acknowledged, these few cases overruling a demurrer are greatly outnumbered by the Virginia Circuit Court decisions categorically holding that a negligent supervision claim does not exist under Virginia law: "Relying on *Dowdy*, Virginia circuit courts have consistently declined to recognize a distinct tort of negligent supervision." *Id.* (citing nine circuit court decisions to this effect). And, as Judge Cacheris noted in *Wolf*, none of the three cases overruling demurrers actually recognized the tort of negligent supervision. *Wolf*, 2007 WL 2688418, at *7 ("Although other state courts have included language suggesting the possibility that there might be circumstances where it might be appropriate to find a duty to supervise, they have not so found.").

law. Plaintiff Al Shimari has not alleged facts sufficient to state a negligent hiring claim and the torts of negligent training and negligent supervision do not exist under Virginia law.

D. Federal Law Does Not Provide a Private Right of Action for Plaintiff Al Shimari's Common Law Tort Claims

CACI PT does not doubt that the United States Congress has the power to legislate in the sphere of war and detainee operations, and thus has within its powers to create, or decline to create, a private right of action under federal law that would apply to tort claims by detainees. Indeed, because Plaintiff Al Shimari's common law tort claims arise out of the United States' prosecution of a foreign war – perhaps the most uniquely federal prerogative imaginable – United States *federal* law is the one body of law where there might exist a sufficient interest to support application of the tort law of a jurisdiction other than Iraq. *But see Dow*, 100 U.S. at 166. Indeed, that is the legal structure permitted by CPA Order 17, which bars claims arising in connection with "military combat operations," but allows claims not arising in connection with military combat operations to be submitted ***"in a manner consistent with the national laws of the Parent State."*** O'Connor Decl., Ex. 1 at § 6 (emphasis added)

The problem for Plaintiff Al Shimari's tort claims, however, is that the United States Congress has *repeatedly* legislated in this sphere over the past twenty-five years and the common feature of all that legislation is that Congress has not created a private right of action for a detainee to assert a tort claim in court under federal law. Instead, Congress has elected to create multiple, overlapping layers of *criminal* laws, where the United States has control over the proceedings by virtue of prosecutorial discretion, and has limited *civil* court actions to those involving misconduct under color of *foreign law*. Congress has elected to make available to detainees such as Plaintiff Al Shimari an *administrative claims process*, but has not created a private right of action to be pursued in court.

Congress enacted the Anti-Torture Statute in 1994, 18 U.S.C. § 2340, 2340A, but limited the statute's reach to criminal prosecution, with no private civil right of action. Congress did create a private right of action for claims of torture in the Torture Victims Protection Act of 1991, 28 U.S.C. § 1350 note, but it expressly limited that private right of action to acts taking place under color of foreign law. Congress has enacted legislation creating jurisdiction in federal district court for civilians accompanying the armed forces overseas,[21] and has enacted legislation creating court-martial jurisdiction over contractors serving in the field with the armed forces during a contingency operation.[22] Again, this legislation focused solely on criminal jurisdiction and did not create a private right of action.

The sole civil remedy available under federal law to Plaintiff Al Shimari for his common law claims is an administrative claims process established by the United States for addressing bona fide claims of detainee abuse. *Saleh v. Titan Corp.*, 580 F.3d 1, 2-3 (D.C. Cir. 2009). Plaintiff Al Shimari simply has elected not to avail himself of the administrative claims process available to him.[23] That is his choice, but the fact remains that United States federal law does not provide a body of substantive tort law that would allow Plaintiff Al Shimari's common law claims to proceed under federal law instead of under Iraqi law.

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[21] *See, e.g.*, Military Extraterritorial Jurisdiction Act of 2000, 18 U.S.C. § 3261 *et seq.* (creating federal court forum for crimes committed by civilians serving with the armed forces overseas).

[22] Uniform Code of Military Justice art. 2(a)(10), 10 U.S.C. § 802(a)(10) (designating civilians serving with the armed forces "in the field" during time of war as subject to trial by court-martial).

[23] Of course, that administrative claims process does not have the significant impediments to the truth-seeking function inherent in the present litigation, where Plaintiffs' detainee files are heavily redacted and the United States has classified and will not divulge the identity of any interrogation personnel with whom Plaintiffs may have had contact. In an administrative claims process, the United States simply reviews the files and makes whatever determination justice requires.

III. CONCLUSION

For the foregoing reasons, the Court should dismiss Plaintiff Al Shimari's common law claims (Counts X through XX of the Third Amended Complaint).

Respectfully submitted,

/s/ J. William Koegel, Jr.

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CERTIFICATE OF SERVICE

I hereby certify that on the 29th day of April, 2013, 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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