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-LMB-JFA
v.	)	
	)	**PUBLIC VERSION**
CACI PREMIER TECHNOLOGY, INC.,	)	
Defendant.	)	

MEMORANDUM IN SUPPORT OF DEFENDANT CACI PREMIER TECHNOLOGY, INC.'S MOTION TO DISMISS PLAINTIFFS' THIRD AMENDED COMPLAINT

Conor P. Brady
Virginia Bar No. 81890
John F. O'Connor (admitted *pro hac vice*)
Linda C. Bailey (admitted *pro hac vice*)
STEPTOE & JOHNSON LLP
1330 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 429-3000 – telephone
(202) 429-3902 – facsimile
cbrady@steptoe.com
joconnor@steptoe.com
lbailey@steptoe.com

William D. Dolan, III
Virginia Bar No. 12455
LAW OFFICES OF WILLIAM D. DOLAN, III, PC
8270 Greensboro Drive, Suite 700
Tysons Corner, Virginia 22102
(703) 584-8377 – telephone
wdolan@dolanlaw.net

Counsel for Defendant CACI Premier Technology, Inc.

TABLE OF CONTENTS

Page

I. INTRODUCTION 1

II. MOTION TO DISMISS STANDARD 1

III. THIS COURT LACKS SUBJECT MATTER JURISDICTION 3

A. The Political Question Doctrine Precludes Judicial Review 3

1. There Is No Evidence That CACI Personnel Acted Unlawfully in Connection With Any Treatment of These Plaintiffs 5

2. CACI PT Operated Under the Actual Control of the U.S. Military 7

3. Plaintiffs' Claims Necessarily Implicate Sensitive Military Judgments 9

B. Plaintiffs' Allegations Are Not Cognizable Under the Alien Tort Statute 12

1. Plaintiffs' Allegations, Even If True, Do Not Constitute Torture 13

a. Simple Assaults Are Not Torture 15
b. The One Allegation of Electric Shock, With No Serious Injury and Not to a Sensitive Part of the Body, Is Not Torture 17
c. Al Zuba'e's Alleged Dog Bite Is Not Torture 17
d. Plaintiffs' Allegations of Stress Positions Are Not Torture 18
e. The Sexual Assaults Alleged By Al Shimari and Al Zuba'e Do Not Constitute Torture 18

2. Cruel, Inhuman or Degrading Treatment Allegations 20

a. Plaintiffs' Assault Allegations Are Not CIDT 22
b. Plaintiffs' Living Conditions Are Not CIDT 23
c. Forced Hygiene Is Not CIDT 23
d. Plaintiffs' Allegations of Stress Positions Are Not CIDT 23
e. Plaintiffs' Alleged Threats Are Not CIDT 23
f. Plaintiffs' Interactions With Dogs Are Not CIDT 24
g. The One Allegation of Electric Shock Is Not CIDT 25
h. Plaintiffs' Alleged Sexual Assaults Are Not CIDT 25

3. War Crimes 25

IV. THE TAC FAILS TO STATE A CLAIM 26

A. Plaintiffs Fail to Allege a Plausible Entitlement to Relief 26

1. Plaintiffs' Conspiracy Claims Must Be Dismissed 27

a. Pleading Requirements for Co-Conspirator Liability 27
b. The Court's Dismissal of the Conspiracy Claims in the Second Amended Complaint and Plaintiffs' Amendment 29
c. The TAC Does Not Allege Facts Supporting CACI PT Participation in a Conspiracy to Mistreat These Plaintiffs 30

2. Plaintiffs Also Have Failed to Allege a Plausible Motive for CACI PT to Enter into a Conspiracy 33

3. CACI PT Cannot Be Held Liable for the Alleged Actions of Its Employees' Alleged Co-Conspirators 33

B. Plaintiffs' Aiding and Abetting Claims Fail 34

C. Plaintiffs' ATS Claims Are Preempted 35

1. The Constitution's Allocation of War Powers Precludes ATS Claims Arising Out of the United States' Conduct of War 36

2. The Combatant Activities and Foreign Country Exceptions to the FTCA Preempt Plaintiffs' ATS Claims. 37

3. Plaintiffs' ATS Claims Are Barred By CPA Order 17 41

4. Congress's Legislation Regarding Claims of Torture Displace Federal Common Law Claims Under ATS 42

D. CACI PT Is Derivatively Immune from Suit 45

V. CONCLUSION 45

TABLE OF AUTHORITIES

Page(s)

CASES

A Society Without a Name v. Virginia,
655 F.3d 342 (4th Cir. 2011) 29, 31, 32, 35

Ahmed v. Keisler,
504 F.3d 1183 (9th Cir. 2007) 16

Al-Quraishi v. Nakhla,
728 F. Supp. 2d 702 (D. Md. 2010) 13

Ali Jaber v. United States,
2017 WL 2818645 (D.C. Cir. June 30, 2017) 4

Am. Ins. Ass'n v. Garamendi,
539 U.S. 396 (2003) 36, 37

American Electric Power Co. v. Massachusetts,
564 U.S. 410 (2011) 42, 43, 44

Ashcraft v. Iqbal,
556 U.S. 662 (2009) 2, 28, 31

Aziz v. Aloclac, Inc.,
658 F.3d 388 (4th Cir. 2011) 34, 35

Bell v. Wolfish,
441 U.S. 520 (1979) 19

Bushee v. Angelone,
7 Fed. App'x 182 (4th Cir. 2001) 19

Cai Luan Chen v. Ashcroft,
381 F.3d 221 (3d Cir. 2004) 16

Campbell-Ewald Co. v. Gomez,
136 S. Ct. 663 (2016) 45

Carmichael v. Kellogg, Brown & Root Services, Inc.,
572 F.3d 1271 (11th Cir. 2009) 11

Chowdhury v. WorldTel Bangl. Holding, Ltd.,
746 F.3d 42 (2d Cir. 2014) 16, 17

Cohn v. Bond,
953 F.2d 154 (4th Cir. 1991) 28

Coleman v. Tennessee,
97 U.S. 509 (1878)....................37

Crosby v. Nat'l Foreign Trade Council,
530 U.S. 363 (2000)....................36

Cvent, Inc. v. Eventbrite, Inc.,
739 F. Supp. 2d 927 (E.D. Va. Sept. 14, 2010) 28

DaimlerChrysler Corp. v. Cuno,
547 U.S. 332 (2006)....................2, 3, 5

Dandan v. Ashcroft,
339 F.3d 567 (7th Cir. 2003) 16

Day v. DB Capital Group, LLC,
No. DKC 10-1658, 2011 WL 887554 (D. Md. Mar. 11, 2011)....................34

Deutsch v. Turner Corp.,
324 F.3d 692 (9th Cir. 2003) 37

Djonda v. United States AG,
514 F.3d 1168 (11th Cir. 2008) 17

Dostal v. Haig,
652 F.2d 173 (D.C. Cir. 1981)....................37

ePlus Tech Inc. v. Aboud,
313 F.3d 166 (4th Cir. 2002) 28

Grenadier v. BWW Law Grp.,
No. 1:14-cv-827, 2015 WL 417839 (E.D. Va. Jan. 30, 2015) (Brinkema, J.)....................28, 31

Hill v. Lockheed Martin Logistics Mgmt., Inc.,
354 F.3d 277 (4th Cir. 2004) 28

Hines v. Davidowitz,
312 U.S. 52 (1941)....................36

Hinkle v. City of Clarksburg,
81 F.3d 416 (4th Cir. 1996) 28, 31

In re KBR, Inc., Burn Pit Litig.,
744 F.3d 326 (4th Cir. 2014) .... *passim*

In re Xe Servs. Alien Tort Litig.,
665 F. Supp. 2d 569 (E.D. Va. 2009) 25

Japan Line, Ltd. v. County of Los Angeles,
441 U.S. 434 (1979)....................36

Johnson v. United States,
170 F.2d 767 (9th Cir. 1948) 38

Kazemzadeh v. United States AG,
577 F.3d 1341 (11th Cir. 2009) 16

Lebron v. Rumsfeld,
670 F.3d 540 (4th Cir. 2011) 3

Leitensdorfer v. Webb,
61 U.S. 176 (1857)....................37

Loren Data Corp. v. GXS, Inc.,
501 F. App'x 275 (4th Cir. 2012) 29, 33, 34

Marmott v. Md. Lumber Co.,
807 F.2d 1180 (4th Cir. 1986) 28

Martin v. Mathena,
No. 7:08-cv-00573, 2009 U.S. Dist. LEXIS 3856 (W.D. Va. Jan. 21, 2009)....................17

Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,
475 U.S. 574 (1986)....................29

Mehinovic v. Vuckovic,
198 F. Supp. 2d 1322 (N.D. Ga. 2002)....................21, 22

Milwaukee v. Illinois,
451 U.S. 304 (1981)....................43

Mohamad v. Palestinian Auth.,
132 S. Ct. 1702 (2012)....................43

Munyakazi v. Lynch,
829 F.3d 291 (4th Cir. 2016) 16

New Orleans v. The Steamship,
87 U.S. 387 (1874)....................37

Padilla v. Yoo,
678 F.3d 748 (9th Cir. 2012) 14

Price v. Socialist People's Libyan Arab Jamahiriya,
294 F.3d 82 (D.C. Cir. 2002) .... *passim*

Pugsley v. Privette,
263 S.E.2d 69 (Va. 1980) 12

Richmond, Fredericksburg & Potomac R. Co. v. United States,
945 F.2d 765 (4th Cir. 1991) 2, 3

Ruddell v. Triple Canopy, Inc.,
No. 1:15-cv-1331, 2016 WL 4529951 (E.D. Va. Aug. 29, 2016) 45

SD3, LLC v. Black & Decker (U.S.) Inc.,
801 F.3d 412 (4th Cir. 2015) 2, 28

Seale & Assoc., Inc. v. Vector Aerospace Corp.,
No. 1:10-cv-1093, 2010 WL 5186410 (E.D. Va. Dec. 7, 2010) 2

Sec'y of State for Defence v. Trimble Navigation Ltd.,
484 F.3d 700 (4th Cir. 2007) 2

Simpson v. Socialist People's Libyan Arab Jamahiriya,
326 F.3d 230 (D.C. Cir. 2003) 17

Sosa v. Alvarez-Machain,
542 U.S. 692 (2004) .... *passim*

Tachiona v. Mugabe,
216 F. Supp. 2d 262 (S.D.N.Y. 2002) 22

Taylor v. Kellogg Brown & Root Svcs., Inc.,
658 F.3d 402 (4th Cir. 2011) 11

Tellabs, Inc. v. Makor Issues & Rights, Ltd.,
551 U.S. 308 (2007) 2

Thomas v. Salvation Army S. Territory,
841 F.3d 632 (4th Cir. 2016) 28

Thomasson v. Perry,
80 F.3d 915 (4th Cir. 1996) (en banc) 3

Tiffany v. United States,
931 F.2d 271 (4th Cir. 1991) 3

United States v. Belmont,
301 U.S. 324 (1937) 36

United States v. Moussaoui,
382 F.3d 453 (4th Cir. 2004) 3

United States v. Pink,
315 U.S. 203 (1942)...36

Vitol, S.A. v. Primerose Shipping Co.,
708 F.3d 527 (4th Cir. 2013) 2

Wag More Dogs, LLC v. Cozart,
680 F.3d 359 (4th Cir. 2012) 29

Walters v. McMahen,
795 F. Supp. 2d 350 (D. Md. 2011) 28

Warfaa v. Ali,
No. 15-1464 (U.S. May 23, 2017) 44

Wiggins v. 11 Kew Gardens Ct.,
497 F. App'x 262 (4th Cir. 2012) 27

Williams v. United States,
50 F.3d 299 (4th Cir. 1995) 2

Wills v. Rosenberg,
No. 1:11cv1317, 2012 WL 113676 (E.D. Va. Jan. 13, 2012).....................................32

Witthohn v. Fed. Ins. Co.,
164 F. App'x. 395 (4th Cir. 2006) 3

Xuncax v. Gramajo,
886 F. Supp. 162 (D. Mass. 1995) 22

Young v. United Parcel Serv., Inc.,
707 F.3d 437 (4th Cir. 2013) 28

Ziglar v. Abbasi,
137 S. Ct. 1861 (2017)..3, 36, 44

Zschernig v. Miller,
389 U.S. 429 (1968)...36, 37

ACTS

2002, Pub. Law 107-243, 116 Stat. 1498 (Oct. 16, 2002) 35

CONSTITUTIONS

U.S. Const. art. I, § 8, cls. 1, 11-15 ....36, 37

STATUTES

18 U.S.C. § 113(b)(2) 26

18 U.S.C. § 1365 26

18 U.S.C. § 2340 ....13, 14, 19, 21, 24

18 U.S.C. § 2340A 43

18 U.S.C. § 2340B 43

18 U.S.C. § 2441 ....21, 24, 25, 26

28 U.S.C. § 1350 note (2)(b)(1) 13, 14, 36, 43, 44

28 U.S.C. § 2680(j) 36

28 U.S.C. § 2680(k) 40

CODE OF FEDERAL REGULATIONS

8 C.F.R. §§ 208.18, 1208.18 13

BOOKS AND ARTICLES

Restatement (Second) of Torts § 876 ....34, 35

Restatement (Third) of Agency § 2.01 cmt. 28

I. INTRODUCTION

Plaintiffs are Iraqis detained by the U.S. military at a battlefield detention facility during the Iraq War. Their claims arise out of the United States' conduct of war. While Plaintiffs allege that they were mistreated while detained by the United States military, they seek no recovery from the United States or any soldiers. Instead, they have sued CACI Premier Technology, Inc., a contractor that provided interrogators at Abu Ghraib prison. Notably, the Third Amended Complaint ("TAC") does not allege a single instance in which a CACI PT employee actually mistreated Plaintiffs. Rather, Plaintiffs proceed on claims of co-conspirator and aiding and abetting liability based on the premise that if a few CACI PT interrogators gave instructions to soldiers regarding the treatment of *other detainees that were assigned to them*, CACI PT should be the source of recovery for any detainee, including Plaintiffs, with a grievance about their treatment at Abu Ghraib prison. Plaintiffs' claims fail as a matter of law for several reasons.

First, Plaintiffs' claims are barred by the political question doctrine because Plaintiffs cannot identify any unlawful conduct by CACI PT employees relating to *Plaintiffs'* treatment, CACI PT personnel were under the actual control of the U.S. military, and adjudicating this case would require the Court to question actual, sensitive military judgments. *Second*, none of Plaintiffs' allegations of mistreatment fall within the narrow class of claims permitted under the Alien Tort Statute. *Third*, Plaintiffs have not alleged the *facts* required to proceed on co-conspirator and aiding and abetting theories of liability. *Fourth*, Plaintiffs' claims are preempted by the U.S. Constitution, federal statutory law, and Coalition Provisional Authority Order 17.

II. MOTION TO DISMISS STANDARD

On a Rule 12(b)(1) motion to dismiss, the Court is not bound by the allegations in the complaint, "and may consider evidence outside the pleadings without converting the proceeding to one for summary judgment." *In re KBR, Inc., Burn Pit Litig.*, 744 F.3d 326, 333 (4th Cir.

2014) ("*Burn Pit*"). A court considering a subject matter jurisdiction challenge acts as finder of fact for purposes of the motion and resolves any evidentiary disputes. *Id.* (citing *Williams v. United States*, 50 F.3d 299, 304 (4th Cir. 1995). The plaintiff has the burden of proving subject matter jurisdiction. *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 342 (2006); *Richmond, Fredericksburg & Potomac R. Co. v. United States*, 945 F.2d 765, 768 (4th Cir. 1991).

On a Rule 12(b)(6) motion, courts must dismiss a complaint unless the plaintiff alleges enough facts to nudge its claims across the line from conceivable to plausible. *Twombly*, 550 U.S. at 570; *Ashcraft v. Iqbal*, 556 U.S. 662, 678 (2009).

In assessing plausibility, legal conclusions couched as factual allegations are disregarded. *Twombly*, 550 U.S. at 555. Labels, conclusions, or a "formulaic recitation of the elements of a cause of action will not do." *Iqbal*, 556 U.S. at 678 (citing *Twombly*, 550 U.S. at 555). "[N]aked assertions" without further factual enrichment are insufficient. *Id.* (citing *Twombly*, 550 U.S. at 557). A plaintiff must plead more than facts merely consistent with a defendant's liability. *Id.* (citing *Twombly*, 550 U.S. at 557). "'Unadorned conclusory allegations' are akin to no allegations at all." *SD3, LLC v. Black & Decker (U.S.) Inc.*, 801 F.3d 412, 423 (4th Cir. 2015) (quoting *Vitol, S.A. v. Primerose Shipping Co.*, 708 F.3d 527, 543 (4th Cir. 2013).

When ruling on a Rule 12(b)(6) motion, courts consider the complaint and documents incorporated into the complaint by reference. *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007); *Sec'y of State for Defence v. Trimble Navigation Ltd.*, 484 F.3d 700, 705 (4th Cir. 2007). The court may also consider "official public records, documents central to a plaintiff's claim, and documents sufficiently-referred to in the Complaint without converting the motion to dismiss into one for summary judgment." *Seale & Assoc., Inc. v. Vector Aerospace*

Corp., No. 1:10-cv-1093, 2010 WL 5186410, at *2 (E.D. Va. Dec. 7, 2010) (quoting *Witthohn v. Fed. Ins. Co.,* 164 F. App'x. 395, 396-97 (4th Cir. 2006)).

III. THIS COURT LACKS SUBJECT MATTER JURISDICTION

A. The Political Question Doctrine Precludes Judicial Review

No federal power is more clearly committed to the political branches than the warmaking power. *Lebron v. Rumsfeld*, 670 F.3d 540, 548-49 (4th Cir. 2011); *United States v. Moussaoui*, 382 F.3d 453, 469-70 (4th Cir. 2004). "There is nothing timid or half-hearted about this constitutional allocation of authority." *Thomasson v. Perry*, 80 F.3d 915, 924 (4th Cir. 1996) (en banc). "The strategy and tactics employed on the battlefield are clearly not subject to judicial review." *Tiffany v. United States*, 931 F.2d 271, 277 (4th Cir. 1991). The political question doctrine implicates the Court's subject matter jurisdiction, *Burn Pit*, 744 F.3d at 333, and Plaintiffs have the burden to establish subject matter jurisdiction. *DaimlerChrysler*, 547 U.S. at 342; *Richmond, Fredericksburg & Potomac R. Co.*, 945 F.2d at 768.

The Supreme Court recently expounded on these principles in cabining the power of federal courts to imply a *Bivens* action for detainee abuse in the aftermath of 9/11:

> National-security policy is the prerogative of the Congress and President. Judicial inquiry into the national-security realm raises concerns for the separation of powers in trenching on matters committed to the other branches. These concerns are even more pronounced when the judicial inquiry comes in the context of a claim seeking injunctive or other relief. This risk of personal damages liability is more likely to cause an official to second-guess difficult but necessary decisions concerning national-security policy.
>
> For these and other reasons, courts have shown deference to what the Executive Branch has determined . . . is essential to national security. Indeed, courts traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs unless Congress specifically has provided otherwise.

Ziglar v. Abbasi, 137 S. Ct. 1861 (2017) (internal citations and quotations omitted).

In *Al Shimari IV*, the Fourth Circuit directed this Court to apply the following test to determine whether this Court lacks subject matter jurisdiction because this case implicates nonjusticiable political questions:

> [A]ny conduct of the CACI employees that occurred under the actual control of the military or involved sensitive military judgments, and was not unlawful when committed, constituted a protected exercise of discretion under the political question doctrine. Conversely, any acts of the CACI employees that were unlawful when committed, irrespective whether they occurred under actual control of the military, are subject to judicial review. Thus, the plaintiffs' claims are justiciable to the extent that the challenged conduct violated settled international law or the criminal law to which the CACI employees were subject at the time the conduct occurred.

Al Shimari IV, 840 F.3d at 159.[1] The Fourth Circuit further explained that application of this test requires examination of the *evidence* surrounding Plaintiffs' alleged mistreatment and the sources of any direction regarding such alleged mistreatment:

> This "discriminating analysis" will require the district court to examine ***the evidence*** regarding the specific conduct to which the plaintiffs were subjected and the source of any direction under which the acts took place. If the disputed facts are inextricably intertwined" with the facts underlying the merits of the plaintiffs' claims, the district court should resolve these disputed jurisdictional facts along with the intertwined merits issues.

Id. at 160-61 (emphasis added) (internal citations omitted). Plaintiffs cannot meet their burden of establishing subject matter jurisdiction under the *Al Shimari IV* test because: (1) there is no evidence of unlawful conduct by CACI PT personnel relating to any alleged mistreatment of these Plaintiffs; (2) CACI PT interrogators were under the "actual control of the military"; and (3) this case would require the Court to question "sensitive military judgments." *Id.* at 159.

[1] The D.C. Circuit recently concluded that the Fourth Circuit erred in adopting the "lawfulness" element for political questions, as that test "puts the cart before the horse, requiring the district court to first decide the merits of a claim and, only thereafter, determine whether that claim was justiciable." *bin Ali Jaber v. United States*, 2017 WL 2818645 (D.C. Cir. June 30, 2017). We also recognize that the Court is bound by the Fourth Circuit's ruling.

1. There Is No Evidence That CACI Personnel Acted Unlawfully in Connection With Any Treatment of These Plaintiffs

Two principles guide the "lawfulness" inquiry directed by the Fourth Circuit. The first is that the unlawfulness inquiry is not focused on the conduct of whoever mistreated Plaintiffs, but on evidence of whether *CACI PT personnel* engaged in unlawful conduct associated with Plaintiffs' alleged injuries. *Id.* at 160 (inquiry is based on "the evidence regarding the specific conduct to which the plaintiffs were subjected and the source of any direction under which the acts took place"); *id.* at 151 ("We hold that conduct *by CACI employees* that was unlawful when committed is justiciable . . . . [and] acts committed *by CACI employees* are shielded from judicial review under the political question doctrine if they were not unlawful when committed . . . .) (emphasis added); *id.* at 157 ("*a contractor's acts* may be shielded from judicial review . . . only to the extent that *those acts* . . . were not unlawful" (emphasis added)). The unlawfulness inquiry examines whether conduct of CACI PT personnel was clearly unlawful *at the time it was committed*; "grey area" conduct is treated the same as lawful conduct. *Id.* at 160. The second principle is that Plaintiffs have the burden of proof in demonstrating the existence of subject matter jurisdiction, and therefore the burden of tying their allegations of mistreatment to unlawful conduct by CACI PT interrogators. *DaimlerChrysler*, 547 U.S. at 342.

Plaintiffs cannot identify any evidence that CACI PT personnel engaged in conduct known to be unlawful in 2003-04 that is connected to their mistreatment. Plaintiffs admitted in interrogatory responses that they could not identify significant contact between themselves and a CACI PT interrogator. Exs. 1-3 (Responses to Interrogatory 5). Nor did Plaintiffs testify to any interactions with a CACI PT interrogator in their depositions. Plaintiffs have not developed any evidence that a CACI PT interrogator gave any instructions to a soldier or other person to mistreat these Plaintiffs in any way. While Plaintiffs' complaint alleges that military and civilian

interrogators sometimes gave instructions to solders regarding the treatment of detainees to whom they were assigned, TAC ¶ 18, Plaintiffs also allege that "[i]nterrogators were responsible for particular detainees." TAC ¶ 17. There is no evidence that any of these Plaintiffs were assigned to a CACI PT interrogator.

Indeed, Plaintiffs rely on the deposition testimony of Private Ivan Frederick, one of the MPs court-martialed for detainee abuse, for the notion that interrogators sometimes gave guard instructions to "soften up" particular detainees, TAC ¶ 18, but Frederick testified that instructions regarding treatment of particular detainees came from both military and civilian interrogators, that such instructions were always specific to a detainee assigned to that interrogator, and that he did not know anything about the treatment of these Plaintiffs. Ex. 4 at 185-86, 208-09, 226-27, 230. Private Graner, another court-martialed MP, testified similarly. Ex. 5 at 53-56. Indeed, Plaintiffs' own complaint alleges that CACI PT personnel were about one-fifth of the personnel assigned to the Joint Interrogation and Debriefing Center ("JIDC") during the relevant time frame. TAC ¶ 16 (citing Ex. 6).

CACI PT believes that jurisdictional discovery from the United States before briefing justiciability would have been the appropriate course of action. Such discovery would have allowed the parties to identify what interrogators, if any, were assigned to these Plaintiffs. This would have allowed the Court and the parties to collect additional information regarding the veracity of Plaintiffs' allegations of mistreatment and to ascertain the persons with whom Plaintiffs interacted. Indeed, the Fourth Circuit's remand instructions directed that the justiciability inquiry be based on *evidence*, *Al Shimari IV*, 840 F.3d at 160, and further briefing after jurisdictional discovery will be required if any of Plaintiffs' claims survive the present motion. Regardless, the fact remains that the burden of establishing justiciability rests with

Plaintiffs, and Plaintiffs' failure of proof as to conduct by CACI PT personnel *relating to these Plaintiffs* that was unlawful under settled law in 2003 means that the "unlawfulness" exception to the political question doctrine cannot be applied here.

Indeed, even if Plaintiffs could prove – which they cannot – that CACI PT interrogators ordered military guards to use enhanced interrogation techniques on them, such conduct was at worst "grey area" conduct that would not preclude application of the political question doctrine. The interrogation techniques used at Abu Ghraib were expressly approved by the Secretary of Defense, and included but were not limited to "stress positions, exploitation of detainee fears (such as fear of dogs), removal of clothing, hooding, deprivation of light and sound," "prolonged standing, sleep deprivation, dietary manipulation, hooding . . . face and stomach slaps," and "environmental manipulation." Ex. 7 at xxii-xxiv. *Al Shimari IV* at 160; *id.* at 159 (if the lawfulness of conduct by CACI PT employees "was not settled at the time the conduct occurred, and the conduct occurred under the actual control of the military or involved sensitive military judgments, that conduct will not be subject to judicial review").

2. CACI PT Operated Under the Actual Control of the U.S. Military

In *Al Shimari IV*, the Fourth Circuit concluded that the Court erred in assessing actual control over CACI PT interrogators by focusing on the *formal* control as opposed to *actual* control. As the Court explained:

> [The requirement for actual control by the military] is not satisfied by merely examining the directives issued by the military for conducting interrogation sessions, or by reviewing any particular interrogation plans that the military command approved in advance. Instead, the concept of direct control encompasses not only the requirements that were set in place in advance of the interrogation, but also what actually occurred in practice during those interrogations and related activities.

Id. at 157. The absence of full jurisdictional discovery before briefing political question prevents the parties from developing evidence regarding who interrogated these Plaintiffs and how they

were supervised on specific occasions. Regardless, the discovery taken in this case demonstrates beyond doubt that the military leadership exercised actual, and not just formal, control over CACI PT interrogators. As we explain below, this actual control is confirmed by the deposition testimony of boots-on-the-ground personnel who served at Abu Ghraib prison.

From the moment they arrived at Abu Ghraib, the military chain of command controlled all aspects of CACI PT personnel's performance of the interrogation mission. Holmes Dep. at 27 (Ex. 8). As Major Holmes, U.S. Army, the Officer in Charge of the Interrogation Control Element ("ICE") at Abu Ghraib prison, testified, "[b]asically, we treated the CACI personnel the same way that we did military intelligence." *Id.* at 26, 36. For purposes of day-to-day operations, CACI PT personnel reported up the military chain of command in the same way as soldiers. *Id.* at 28-29.

[redacted]

The plans were reviewed by Major Holmes, the non-commissioned officer in charge, or the chief warrant officer. *Id.* CACI PT personnel were not allowed to use any different interrogation techniques or tactics than the military personnel. *Id.* Any nonstandard techniques had to be approved by the military chain of command. *Id.* These facts regarding *actual* control to which Major Holmes testified were confirmed by another boots-on-the-ground witness, CACI PT interrogator Daniel Porvaznik, as well as by CACI PT interrogator Torin Nelson. Porvaznik Decl. ¶¶ 10-16 (Ex. 9); Nelson Dep. at 27-31 (Ex. 10).

Moreover, the military leadership at Abu Ghraib prison also monitored interrogations, as interrogations took place in booths with one-way glass. Holmes Dep. at 35-36. Major Holmes, consistent with her identical role in supervising military and CACI PT interrogators, testified that

she observed interrogations but could not recall whether the interrogations she observed were by military or CACI PT interrogators because she "treated them all the same." *Id.* at 36.

Based upon this evidence, the only possible conclusion is that the military had actual control over the interrogation-related conduct at Abu Ghraib prison.

3. Plaintiffs' Claims Necessarily Implicate Sensitive Military Judgments

In *Al Shimari IV*, the Fourth Circuit noted that this Court had held that the present case was nonjusticiable because it would "require the court to question actual, sensitive judgments made by the military." 840 F.3d at 158 (internal citations omitted). The Fourth Circuit concluded that this Court's analysis was "incomplete," not wrong, on this issue. *Id.* The Fourth Circuit concluded the analysis was incomplete because it had "fail[ed] to draw a distinction

between unlawful conduct and discretionary acts that were not unlawful when committed." *Id.* Thus, the court of appeals did not reject that this case required questioning sensitive military judgments, only with this Court's failure to conduct an "unlawfulness" inquiry. *Id.*

This Court was correct in its conclusion that resolution of this case would require the judiciary to question actual, sensitive judgments of the military. The events at Abu Ghraib occurred in the context of the Iraq War, and the prison was located in the midst of the war zone and under regular attack. Frederick Dep. at 209; Harman Dep. at 45-46 (Ex. 11). The current lawsuit challenges the interrogation of detainees in an effort to extract actionable intelligence. The CACI PT interrogators were integrated into the military intelligence operation at Abu Ghraib and supervised by military officers. Their interrogation practices were governed by military rules and regulations. In fact, CACI PT interrogators used the same interrogation techniques and followed the same rules as their military counterparts. *See* Section III.A.2, *supra*.

The military approved interrogation techniques – including many of the techniques about which Plaintiffs' complain, *see* Section III.A.2, *supra*[2] a – and decided whether a given technique could be used and what level of approval was required. Holmes Dep. at 121-24. "Civilian contractors" were to abide by what the military had determined was "permitted and not permitted as a[n] interrogation technique." *Id.* at 124. An examination of CACI PT interrogators' conduct would thus require a "reexamination" of "sensitive judgments" to hire contractor interrogators, on which detainees to use contractors, with what supervision, and using

---

[2] [redacted] Ivan Frederick testified that, prior to the arrival of the first CACI PT interrogators, detainees were already being kept nude or partially nude, dressed in women's underwear, placed in stress positions, handcuffed to the bars of their cells, and subjected to dietary and environmental manipulation. *See* Holmes Dep. at 105-07, 112; Frederick Dep. at 194-95. [redacted]

which interrogation techniques, notwithstanding that these decisions have been "entrusted to the military in a time of war." *Carmichael v. Kellogg, Brown & Root Services, Inc.*, 572 F.3d 1271, 1281 (11th Cir. 2009) (relied upon by the Fourth Circuit when setting forth the two-part standard for applying the political question doctrine to military contractors in *Taylor v. Kellogg Brown & Root Svcs., Inc.*, 658 F.3d 402 (4th Cir. 2011)).

Deciding whether to approve these interrogation techniques and then to apply them to specific detainees requires the application of military judgment and expertise. The military must make sensitive judgments regarding the proper balance between respect for detainees and the military imperative of intelligence gathering during an ongoing war. *See Carmichael*, 572 F.3d at 1282 (political question doctrine applies where the military must "calibrate the risks" and perform a "delicate balancing of considerations").

Thus, three particular features of the present litigation make it unavoidable that a decision on the merits would require the Court "to question actual, sensitive judgments made by the military." *Al Shimari IV*, 840 F.3d at 158. First, military interrogators used the exact same techniques as CACI PT interrogators pursuant to the same set of rules and orders. *See* Section III.A.2, *supra*; *see also* Holmes Dep. at 26, 28-29, 35 (CACI PT interrogators treated the same as military intelligence, subject to the same rules and limits). Any decision on CACI PT interrogation techniques will, in effect, constitute a ruling on the propriety of the identical techniques used by military personnel. Second, military officers reviewed, approved, and even witnessed interrogations by CACI PT interrogators. *See* Section III.A.2, *supra*. CACI PT interrogators had the identical operational chain of command as military interrogators. Holmes Dep. at 28. Finally, the interrogation booths were designed so that military officers could

monitor interrogations. *Id.* at 35-36. As a result, any attack on the interrogation techniques used by CACI PT interrogators necessarily implicates command decisions by their military superiors.

The types of inquiry necessary to adjudicate Plaintiffs' claims will necessarily call into question sensitive military judgments. This is particularly true because it remains unknown whether they were interrogated by military intelligence or CACI PT personnel. Accordingly, Plaintiffs' claims are nonjusticiable under the political question doctrine.

B. Plaintiffs' Allegations Are Not Cognizable Under the Alien Tort Statute

Plaintiffs allege an extensive array of mistreatment to which they claim to have been subjected at Abu Ghraib prison, nearly all of which allegedly was inflicted by military personnel. At the first hearing following the Fourth Circuit's remand of this case, the Court suggested to Plaintiffs that they "jettison" from the case "*types of mistreatment*" that were not "slam-dunks" in an effort to "simplif[y]" the case. *See* 12/16/16 Tr. at 17 (emphasis added). Plaintiffs elected not to do that. They did, however, voluntarily dismiss with prejudice their common-law tort claims (Dkt. #574), including claims such as simple assault. There is a world of difference between the requirements for simple assault and for a claim that is viable under the ATS. *See, e.g.*, *Pugsley v. Privette*, 263 S.E.2d 69, 74 (Va. 1980) ("The law is so jealous of the sanctity of the person that the slightest touching of another, . . . if done in a rude, insolent or angry manner, constitutes a battery for which the law affords redress. . . ."). By dismissing their common-law claims, without removing any allegations of mistreatment from the case, Plaintiffs have left it for the Court and the parties to wade through Plaintiffs' allegations to evaluate which, if any, fall within the "narrow class of international norms" that are cognizable under the ATS. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 729 (2004).

The lack of connection to CACI PT aside, many of Plaintiffs' allegations of mistreatment, if true, are deplorable. The task here, however, is not to place a value judgment on

Plaintiffs' allegations, but to assess whether any of them are actionable under the ATS. As we explain below, almost none of Plaintiffs' allegations of mistreatment even arguably satisfy the requirements for claims of torture, cruel, inhuman or degrading treatment ("CIDT"), or war crimes under the definitions recognized by this Court. The Court should not "define down" these recognized international norms to encompass every act that the Court, Plaintiffs, or CACI PT would find unacceptable. Otherwise, simple assault is elevated to a violation of a universally-accepted international norm actionable under the ATS, a result clearly not permitted by *Sosa*.

1. Plaintiffs' Allegations, Even If True, Do Not Constitute Torture

None of Plaintiffs' allegations, however sympathetic, come close to the kind of extreme conduct required to be considered torture. The Court has embraced a definition of "torture" that requires that the acts were: (1) committed by a person acting "under color of law," (2) directed at a person within the accused's custody or physical control, and (3) intended to inflict severe physical or mental pain or suffering not incidental to lawful sanctions. Dkt. #615 at 8; 18 U.S.C. § 2340; 28 U.S.C. § 1350 note (2)(b)(1). These elements mirror the Convention Against Torture ("CAT"), 1465 U.N.T.S. 85, art. 1, ¶ 1, and are described in greater detail by regulations implementing CAT, 8 C.F.R. §§ 208.18, § 1208.18.

As there is no dispute as to whether Plaintiffs were within the custody and physical control of the U.S. military, the only remaining inquiry[3] is whether the allegations amount to acts "intended to inflict severe physical or mental pain or suffering." As the Fourth Circuit observed,

[3] The Court has advised that the parties should treat *Al-Quraishi v. Nakhla*, 728 F. Supp. 2d 702, 749-51 (D. Md. 2010), as "controlling precedent" on whether an ATS claim for torture can be brought against a private party. Dkt. #615 at 10. *Al-Quraishi* permitted a defendant to be treated as acting under color of law for establishing a torture claim but as a private entity for purposes of immunity. 728 F. Supp. 2d at 749-51. CACI PT is proceeding accordingly, although the D.C. Circuit has held to the contrary. *Saleh*, 580 F.3d at 15-16 (Plaintiffs "cannot artfully allege that [CACI PT] acted under color of law for jurisdictional purposes while maintaining that their action was private" for purposes of preemption and immunity).

whether conduct violates recognized international norms must be judged as of the time of the acts in question. *Al Shimari IV*, 840 F.3d at 156. Much of the alleged conduct involves practices that were expressly permitted by the executive branch. *See* Ex. 7 at xxii-xxiv; *Al Shimari IV*, 840 F.3d at 156, n.3. Indeed, the Ninth Circuit held that it was unable to say that in 2003 – the time period at issue here – that the interrogation techniques "allegedly employed against [Jose] Padilla, however appalling, necessarily amounted to torture." *Padilla v. Yoo*, 678 F.3d 748, 768 (9th Cir. 2012). These techniques included "extreme isolation; interrogation under threat of torture, deportation and even death; prolonged sleep adjustment and sensory deprivation; exposure to extreme temperatures and noxious odors; denial of access to necessary medical and psychiatric care; substantial interference with [Padilla's] ability to practice his religion; and incommunicado detention for almost two years." *Id.* at 752.

In any event, the conduct at issue here is not severe enough to be considered torture. Neither the Anti-Torture Act nor the TVPA defines severe physical pain or suffering. The relevant definition of "severe mental pain or suffering" requires severe physical pain or suffering. 18 U.S.C. § 2340(2). "The term 'torture,' . . . is usually reserved for extreme, deliberate and unusually cruel practices, for example, sustained *systematic* beating, application of electric currents *to sensitive parts of the body*, and tying up or hanging in positions *that cause extreme pain*." *See* Report of the Committee on Foreign Relations, S. Exec. Rep. No. 30, 101st Cong., 2d Sess. 1, 2 at 14 (1990) ("Senate Report") (emphasis added) (Ex. 12). "The critical issue is the degree of pain and suffering that the alleged torturer intended to, and actually did, inflict upon the [alleged] victim. The more intense, lasting, or heinous the agony, the more likely it is to be torture." *Price v. Socialist People's Libyan Arab Jamahiriya*, 294 F.3d 82, 93 (D.C. Cir. 2002) (citing Senate Report at 15 ("The United States understands that, in order to constitute

torture, an act must be a deliberate and calculated act of an extremely cruel and inhuman nature, specifically intended to inflict *excruciating and agonizing* physical or mental pain or suffering.") (internal quotations omitted)). Importantly, "torture does not automatically result whenever individuals in official custody are subjected even to direct physical assault." *Id.*

In *Price*, allegations of "kicking, clubbing, and beatings" were insufficient to permit the court to assess the severity of the plaintiffs' pain and suffering. 294 F.3d at 93. To satisfy the "rigorous" torture definition, the court required additional information regarding the beatings' "frequency, duration, the parts of the body at which they were aimed, and the weapons used to carry them out." *Id.* Plaintiffs' allegations do not satisfy this standard. The only allegations that warrant consideration under the standard for torture are: (1) Plaintiffs' assault allegations, (2) Al Shimari's allegation of receiving an electrical shock, (3) Al Zuba'e's allegation of being bitten by a dog, (4) Plaintiff Al Ejaili's allegation of being held in a stress position for over 24 hours, and (5) Plaintiffs Al Shimari and Al Zuba'e's allegations of sexual assault.[4]

a. Simple Assaults Are Not Torture

The vast majority of the allegations of abuse made by Plaintiffs are simple assaults committed by different persons, at different times and in different places, and without pattern. Plaintiff Al Shimari complains that on various occasions he was required to kneel on stones during an interrogation while being pushed and/or stepped on by guards or an interrogator, Al Shimari Dep. 41-42, 47-49, 118-19 (Ex. 13), pushed into a wall, *id.* at 54-57, struck on various parts of his body, *see, e.g.*, *id.* at 77, 96-98, hit with a baton and a rifle, *id.* at 102, and dragged or

[4] Plaintiffs also allege they were housed in substandard living conditions, that they were subjected to solitary instances each of forced hygiene upon entry to the prison, encounters with dogs that did not lead to dog bites, and being threatened. These allegations are so distant from the kinds of allegations necessary to assert a claim of torture that they do not merit discussion, and are addressed below in CACI PT's discussion of CIDT. By definition, if treatment does not qualify as CIDT, which none of these do, they cannot qualify as torture.

pulled by the hood tied around his neck, *id.* at 103-04. Al Shimari claims that from the tightness of the ties around his hands he is now unable to carry heavy loads, *id.* at 96, his vision has suffered, *id.* at 95-96, and his teeth have begun to fall out, *id.* at 96. Plaintiff Al Ejaili alleges that he was punched and kicked in various parts of his body, Al Ejaili Dep. 79-82 (Ex. 14), had hot and cold liquids thrown on him, *id.* at 100-01, and was "hurt with pipes," *id.* at 102. Al Ejaili sustained no physical injuries that required medical care after departing Abu Ghraib. *Id.* at 130. Al Zuba'e asserts that he was hit, punched, and kicked, Al Zuba'e Dep. 50-51, 58-59, 106 (Ex. 15), dragged while crawling on the ground after he fell, which caused him to bleed, *id.* at 57-61, shaken, *id.* at 94, and thrown towards a wall twice, *id.* at 76, 106. The only injuries he identified from this treatment was swelling for which he received medication while at Abu Ghraib, *id.* at 108, some sort of injury to his hand and wrist, *id.* at 117, and "a spinning in [his] head" or headache that began after his release for which he has received medication from a doctor, *id.*

As explained above, torture is not presumed every time a person in custody is subjected to physical assault. *See Price*, 294 F.3d at 93; *Chowdhury v. WorldTel Bangl. Holding, Ltd.*, 746 F.3d 42, 52 (2d Cir. 2014). Sporadic beatings of the kind alleged by Plaintiffs are insufficient. *See, e.g.*, *Munyakazi v. Lynch*, 829 F.3d 291, 297 (4th Cir. 2016) (sporadic beatings do not meet the legal definition of torture); *Kazemzadeh v. United States AG*, 577 F.3d 1341, 1347 (11th Cir. 2009) (five hour interrogation in which police beat plaintiff with hands and electric wire did not constitute torture); *Cai Luan Chen v. Ashcroft*, 381 F.3d 221, 235 (3d Cir. 2004) (beatings that did not result in serious injury and for which petitioner did not seek medical help did not rise to the level of persecution); *Ahmed v. Keisler*, 504 F.3d 1183, 1201 (9th Cir. 2007) (being beaten on four occasions while in custody did not rise to the level of torture); *Dandan v. Ashcroft*, 339

F.3d 567, 573-74 (7th Cir. 2003) (finding that detention for three days without food and beatings that caused facial swelling did not compel a finding of past persecution based on torture).

The case of *Djonda v. United States AG*, 514 F.3d 1168 (11th Cir. 2008), is particularly instructive. *Id.* at 1171. Among a long list of abuses, the plaintiff was ordered to disrobe, beaten with a belt and kicked, and threatened. *Id.* Upon his release, he arrived at a hospital "covered with blood" and had multiple scratches, mostly around his neck and knees, and multiple muscle bruises. *Id.* He was hospitalized for two days. *Id.* This conduct did not amount to torture. *Id.*

b. The One Allegation of Electric Shock, With No Serious Injury and Not to a Sensitive Part of the Body, Is Not Torture

Plaintiff Al Shimari alleged that he received a single shock on one occasion, on his hand, from a purported lie detector. He did not suggest that any injury resulted from it. *See* Al Shimari Dep. 102-03. "The term 'torture' can apply to *powerful* electric shock***s*** administered to the body, when the fact-finder determines that the shocks are *sufficiently severe*. *Chowdhury*, 746 F.3d at 52 (emphasis added) (quoting *Price*, 294 F.3d at 93); *see also Simpson v. Socialist People's Libyan Arab Jamahiriya*, 326 F.3d 230, 234 (D.C. Cir. 2003). Torture can also be found when electric shocks are applied "*to sensitive parts of the body*." Senate Report at 14. Even if true, a single shock to a non-sensitive part of the body, and which caused no lasting injury, is not torture even if such conduct is clearly worthy of condemnation.

c. Al Zuba'e's Alleged Dog Bite Is Not Torture

Plaintiff Al Zuba'e asserts that on his first day at Abu Ghraib – prior to any interrogations – a dog was allowed to bite him on his hand and legs, with no apparent lasting injury. Al Zuba'e Dep. 61-62. This allegation does not equate to torture. *See, e.g.*, *Martin v. Mathena*, No. 7:08-cv-00573, 2009 U.S. Dist. LEXIS 3856, at *5-6 (W.D. Va. Jan. 21, 2009) (no excessive force

when dog bit plaintiff twice on the elbow and once on the lower-left stomach area); *Price*, 294 F.3d at 93 (torture requires "intense, lasting, or heinous . . . agony").

d. Plaintiffs' Allegations of Stress Positions Are Not Torture

Al Shimari complains of being required to stand on his toes with his nose against a wall during an interrogation and with his nose against a wall through the night once. Al Shimari Dep. 55-57, 120-21. Al Ejaili states that he was put in painful stress positions, but suffered no serious injury. *See, e.g.*, Al Ejaili Dep. 68 (tied to a pole), 201. Al Zuba'e testified that he was handcuffed to a bed with his hands above his head for 24 hours, during which he had to urinate and/or defecate on himself. Al Zuba'e Dep. 79-81, 136-37. On a separate occasion, Al Zuba'e stated that he was handcuffed in a bent-down position to his cell door. *Id.* at 102-03.

These allegations do not qualify as torture. As the Fourth Circuit recognized, "the September 2003 [Interrogation Rules of Engagement] memorandum authorized aggressive interrogation tactics to be used under certain conditions, including the use of stress positions and 'sleep management.'" *Al Shimari IV*, 840 F.3d at 156, n.3 (noting those tactics were removed in a later, superseding memorandum); *see also* Ex. 7 at xxii-xxiv) (techniques approved by Secretary Rumsfeld, including "stress positions . . . prolonged standing"). In addition, Plaintiffs did not testify to sustaining any lasting injury or the "intense, lasting, or heinous . . . agony" required for a torture claim. *See Price*, 294 F.3d at 93. Thus, regardless of whether the military's policies for stress positions at Abu Ghraib prison were ill-conceived or not, the stress positions of which these Plaintiffs complain do not equate to torture.

e. The Sexual Assaults Alleged By Al Shimari and Al Zuba'e Do Not Constitute Torture

Plaintiff Al Shimari described being hit on his genitalia, Al Shimari Dep. 105, 123, and digitally probed by guards in his rectum, *id.* at 125. Plaintiff Al Zuba'e also described being hit

on his genitalia, Al Zuba'e Dep. 134-35, as well as manually aroused and photographed, *id.* at 37-42. Plaintiff Al Ejaili described no instances of sexual assault. While these allegations are distressing, and if true are not defended as appropriate by CACI PT, these allegations fall short of the conduct required to support a torture claim under the ATS.

To start, Al Shimari's description of having his anus probed amounts to nothing more than cavity searches. Far from rising to the level required for torture, body cavity searches of persons in detention are constitutional unless they are motivated by punitive intent. *See Bushee v. Angelone*, 7 Fed. App'x 182, 183-84, n.* (4th Cir. 2001) (citing *Bell v. Wolfish*, 441 U.S. 520, 545-46 (1979)) (concluding that body cavity searches do not violate the Fourth or Eighth Amendments if they are reasonable and not motivated by punitive intent). Furthermore, regardless of intent – as constitutionality is not the standard here – cavity searches do not cause extreme pain or lead to disfigurement or impaired function.

While undoubtedly humiliating, being forcibly aroused and photographed does not meet the definition of torture. It does not cause "severe physical or mental pain" as required by the statutory definitions of torture. *See, e.g.*, 18 U.S.C. § 2340. It poses no risk of death, does not cause physical pain, does not burn or disfigure the recipient or impair the function of any body part. Moreover, Al Zuba'e's allegation involves intake procedures at Abu Ghraib prison that occurred *before* he was assigned to the hard site where CACI PT provided interrogators.

The allegations that Plaintiffs were hit in the genitals, while offensive and if true condemned by CACI PT and not tied to CACI PT personnel in any way, do not qualify as torture. Neither Plaintiff complaining of this conduct visited a doctor seeking treatment for injuries as a result of such conduct. Al Shimari Dep. 111-12; Al Zuba'e Dep. 116-17 (describing injuries sustained at Abu Ghraib and visiting a doctor for symptoms unrelated to any assault on

his genitals). Plaintiff Al Shimari complains that he has not had children since his release from Abu Ghraib and that he has difficulty performing the sex act. Al Shimari Dep. 126-27. Given, however, that Al Shimari's wife was 46 years old when he was released, Al Shimari admitted to treating his family "very bad[ly]" after his release, and the fact that Al Shimari himself was almost 50 (an age group in which it is estimated that over 40% of men suffer erectile dysfunction),[5] his complaints are not surprising and are likely unrelated to the strikes to his genitals, which required no medical treatment.

2. Cruel, Inhuman or Degrading Treatment Allegations

The United States did not take the position that the provision in the CAT addressing CIDT applied to alien detainees held abroad until 2014,[6] more than a decade after Plaintiffs' allegations. Prior to that, United States took the position that the CIDT provisions did not apply to alien detainees held abroad.[7] As a result, Plaintiffs' CIDT claims were not "specific, universal, and obligatory" at the time of the alleged conduct. *Sosa*, 542 U.S. at 732. Because the CIDT provision did not clearly apply to aliens held abroad, it cannot be applied to Plaintiffs.

---

[5] *See* M. Lakin & H. Wood, *Erectile Dysfunction*, *available at* http://www.clevelandclinicmeded.com/medicalpubs/diseasemanagement/endocrinology/erectile-dysfunction/ (Nov. 2012); *see also* Ahmed I. El-Sakka, *Erectile dysfunction in Arab countries. Part I: Prevalence and correlates*, Arab J. Urol. 2012 Jun; 10(2): 97–103, *available at* https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4442907/ (Jun. 2012) (citing studies finding the prevalence of erectile dysfunction amongst Arab men at higher than 40 percent). We note that Plaintiffs Al Shimari and Al Zuba'e have not yet been required to submit to medical examinations by medical personnel retained by CACI PT.

[6] *See* Opening Statement of Mary E. McLeod, Acting Legal Advisor, U.S. Dept. of State, to the United Nations Committee Against Torture (Nov. 12-13, 2014) (Ex. 16). The United States' position makes clear that "the law of armed conflict," not the CAT, "is the controlling body of law with respect to the conduct of hostilities and the protection of war victims." *Id.*

[7] Letter from William E. Moschella, Assistant Atty. General, to Senator Patrick J. Leahy (Apr. 4, 2005) at 2 (Ex. 17).

We recognize, however, that the Court has rejected the limitations the United States placed on the application of CIDT, *see* Dkt. #615 at 13, n.9; consequently, CACI PT will address Plaintiffs' CIDT claims under the standard adopted by the Court. To define CIDT, the Court adopted the definition of "cruel or inhuman treatment" in the War Crimes Act: "The act of a person who commits, or conspires or attempts to commit, an act intended to inflict severe or serious physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions), including serious physical abuse, upon another within his custody or control." *Id.* at 14. The relevant definition of "serious physical pain or suffering" requires a "bodily injury" involving "(i) a substantial risk of death; (ii) extreme physical pain; (iii) a burn or physical disfigurement of a serious nature (other than cuts, abrasions, or bruises); or (iv) significant loss or impairment of the function of a bodily member, organ, or mental faculty." 18 U.S.C. § 2441(d)(2)(D). "Serious mental pain or suffering" requires "prolonged mental harm caused by or resulting from . . . the intentional or threatened infliction of serious physical pain or suffering," "the threat of imminent death," or similar threats against another. 18 U.S.C. § 2441(d)(2)(E) (referencing 18 U.S.C. § 2340(2)).

None of Plaintiffs' allegations are severe enough meet the definition for cruel or inhuman treatment. This case stands in stark contrast with federal precedents that have found CIDT on the basis of severe mistreatment. For example, in *Mehinovic v. Vuckovic*, 198 F. Supp. 2d 1322, (N.D. Ga. 2002), the court held that the following acts did not constitute torture, but did constitute CIDT: the defendant carved a crescent symbolizing the Muslim faith into a plaintiff's forehead, forced the plaintiff to carry him like a horse while he beat the plaintiff, ordered the plaintiff to lick his own blood off the defendant's boots, and dunked the plaintiff's head in a bowl used as a toilet. *Id.* at 1348-49. After beatings, the defendant would force another plaintiff

to lick his own blood off of the police station walls. *Id.* Multiple plaintiffs were forced to run in a circle while guards swung wooden planks at them with such force that "one blow made them fall to the ground in so much pain they were unable to get up." *Id.* at 1334, 1348-49.

In *Xuncax v. Gramajo*, 886 F. Supp. 162 (D. Mass. 1995), the court found that being forced to witness the torture or severe mistreatment of an immediate relative, watching soldiers ransack their home and threaten their family, being bombed from the air, and having a grenade thrown at the plaintiffs constituted CIDT. *Id.* at 187. In *Tachiona v. Mugabe*, 216 F. Supp. 2d 262 (S.D.N.Y. 2002), the court found CIDT where victims, prior to their deaths, were bound, gagged, and forced to ride in a vehicle for hours, dragged down the street in front of neighbors and loved ones, and placed in fear of impending death. *Id.* at 281. Another victim was forced to watch her elderly mother being stoned by a mob, her brother and elderly father being dragged down the street and beaten, and her home being ransacked. *Id.* Still more victims "lived with constant threat of death" and "suffered repeated attacks to their persons, families, and property." *Id.* at 282. Without diminishing the seriousness of the allegations leveled by Plaintiffs in this case, those allegations are simply not in the same universe as the conduct these courts found to constitute CIDT. If true, they might be simple assaults, but they are not CIDT.

a. Plaintiffs' Assault Allegations Are Not CIDT

As detailed in Section III.B.1.a, Plaintiffs allege a number of assaults not tied to CACI PT personnel. Whether judged under the War Crimes Act definition adopted by the Court or by comparison to CIDT cases, the simple assaults alleged by Plaintiffs do not meet the level of severity necessary to establish a claim for CIDT. None of these assaults posed any risk of death, caused extreme physical pain or any injury beyond cuts, abrasions, or bruises. None involves the severe or serious physical or mental pain or suffering required for CIDT.

b. Plaintiffs' Living Conditions Are Not CIDT

Plaintiffs' allegations of uncomfortable living conditions do not amount to CIDT. These allegations involve exposure to cold, lack of clothing, wet clothing, sandbag pillows, cells which were kept light or dark, music being played loudly, humidity, lack of space, someone hitting their cell door hard, being forced to sleep during the day and be awake at night, food deprivation, lack of toilet paper, and being restrained – not in stress positions – with handcuffs or ties in a cell. *See* Al Shimari Dep. at 53-54, 58-60, 86-87, 94, 122; Al Ejaili Dep. at 64-68, 69-72, 101-02, 217; Al Zuba'e Dep. at 65-66, 87-98. None of these conditions caused risk of death, extreme pain, or significant injury. Thus, they do not qualify as CIDT.

c. Forced Hygiene Is Not CIDT

Plaintiff Al Shimari asserts that he was forced to shower in cold water until a bar of soap was dissolved, Al Shimari Dep. 67-74, 77, and was forcibly shaved, *id.* Plaintiff Al Zuba'e states that he was forced to shower in cold water and that the man showering him intentionally put soap in his eyes. Al Zuba'e Dep. 54-56. According to Al Zuba'e, the cold shower froze his body and made him fall on the floor. *Id.* Plaintiff Al Ejaili made no allegations related to forced hygiene. While upsetting to Plaintiffs, the temporary discomfort of taking a cold shower and the cultural embarrassment associated with receiving a shave pose no risk of death and do not cause extreme pain or significant injury. As such, these acts are not actionable as CIDT.

d. Plaintiffs' Allegations of Stress Positions Are Not CIDT

CACI PT has detailed Plaintiffs' allegations regarding stress positions in Section III.B.1.d. They do not involve the degree of extreme pain required to constitute CIDT.

e. Plaintiffs' Alleged Threats Are Not CIDT

Plaintiffs' allegations of threats made to them at Abu Ghraib are not actionable under the ATS for CIDT. Plaintiff Al Shimari claims that guards threatened to bring his wife to the prison

and threatened to shoot him with a bullet. Al Shimari Dep. 90, 100. Plaintiff Al Zuba'e claims that he was threatened when a soldier hugged him and said, "I'm going to do something bad to you." Al Zuba'e Dep. 53. Plaintiff Al Ejaili did not claim to have been threatened. Of these threats, the only one that is possibly actionable as CIDT under the ATS, for possibly causing serious mental pain or suffering, is the threat to shoot Al Shimari with a bullet. To qualify, however, a death threat must be of *imminent* death and there is no indication that was the case here. *See* 18 U.S.C. § 2441(d)(2)(E) (referencing 18 U.S.C. § 2340(2)). There is no mention that the soldier menaced Al Shimari with a gun or said anything to suggest any immediacy to the threat. Consequently, Al Shimari's allegation does not meet the standard for a threat of imminent death giving rise to a claim for CIDT. We also note that Al Shimari gave no testimony indicating that CACI PT personnel were involved with this threat. Al Shimari Dep. 100-01.

f. Plaintiffs' Interactions With Dogs Are Not CIDT

Only one of Plaintiffs' allegations involving dogs is even plausibly actionable as CIDT – Al Zuba'e's allegation that he was bitten by a dog *before* he was brought to the hard site and interrogated by *anyone*. Al Zuba'e Dep. 61-64. Al Zuba'e does not, however, allege any serious pain or injury. Plaintiff Al Shimari described two instances of being threatened with dogs: once during an interrogation when a window separated him and the dog, and once while in his cell in which the dog was permitted to bite a blanket that had been placed on Al Shimari's head. Al Shimari Dep. 64-66, 77-78. In no instance, however, was a dog ever permitted to bite Al Shimari. *Id.* Plaintiff Al Ejaili complained of dogs being allowed near his face while he was bagged. Al Ejaili Dep. 201. He does not know if they were muzzled or not. *Id.* None of these allegations pose a risk of death or cause extreme pain or significant injury.

g. The One Allegation of Electric Shock Is Not CIDT

Al Shimari testified that once he received an electrical shock by a "lie detector set" attached to his hands—not a sensitive body part—that suddenly shocked him. Al Shimari Dep. 102-03. There is no indication that this was a powerful shock or that it caused any significant pain or injury to Al Shimari. *Id.* Therefore, it does not meet the standard for serious physical or mental pain or suffering under the Court's definition of CIDT.

h. Plaintiffs' Alleged Sexual Assaults Are Not CIDT

Plaintiffs' allegations of sexual assault, *see* Section III.B.1.e, are not actionable as CIDT. Sexual assault, by itself, is insufficient to meet the definition of cruel and inhuman treatment under the War Crimes Act. For a sexual assault to be actionable, it must be "intended to inflict severe or serious physical or mental pain or suffering." 18 U.S.C. § 2441(d)(1)(B). Sexual assaults that do not involve the requisite severe or serious physical or mental pain and suffering are addressed separately under the War Crimes Act. *See id.* at § 2441(d)(G), (H). None of these allegations involve the degree of pain and suffering required to state a claim of CIDT.

3. War Crimes

The Court has held that war crimes are cognizable claims under ATS. A war crimes claim requires proof that a person "(i) intentionally (ii) killed or inflicted serious bodily harm (iii) upon innocent civilians (iv) during an armed conflict and (v) in the context of and in association with that armed conflict." *In re Xe Servs. Alien Tort Litig.*, 665 F. Supp. 2d 569, 588 (E.D. Va. 2009).[8] Plaintiffs' allegations do not constitute serious bodily harm. The War Crimes Act defines "serious bodily injury" as "(A) a substantial risk of death; (B) extreme physical pain;

---

[8] The section of the War Crimes Act that describes grave breaches of Common Article 3 applies only to breaches "committed in the context of and in association with an armed conflict *not of an international character*." 18 U.S.C. § 2441(c)(3) (emphasis added).

(C) protracted and obvious disfigurement; or (D) protracted loss or impairment of the function of a bodily member, organ, or mental faculty." 18 U.S.C. § 2441 (d)(2)(B) (cross-referencing 18 U.S.C. § 113(b)(2) (cross-referencing 18 U.S.C. § 1365)). This definition is nearly and in all practical ways identical to the definition embraced by the Court for CIDT. Rather than repeat identical arguments, the CIDT arguments raised *supra* are incorporated by reference.

Moreover, the requirement that Plaintiffs qualify as "innocent civilians" is important in the context of this case, as two of the three Plaintiffs have been barred from entering this country and their detainee files indicate activities hostile to the U.S. military. Al Shimari's detainee file identifies him as a "high ranking member of the Ba'ath Party" and former Iraqi military, and states that he was captured when a search of his property revealed a machine gun, six rocket launchers, ammunition, blasting caps, gun powder, and two improvised explosive devices. Al Zuba'e's detainee file states that he was captured based on a "be on the lookout" notice as being responsible for planning attacks on coalition forces. Dkt. #368 at 5-6 (quoting and citing to detainee files). Accordingly, Plaintiffs Al Shimari and Al Zuba'e likely could not pursue a war crimes claim *even if* their allegations of mistreatment involved the requisite degree of severity.

IV. THE TAC FAILS TO STATE A CLAIM

A. Plaintiffs Fail to Allege a Plausible Entitlement to Relief

Plaintiffs allege ATS claims for torture, CIDT, and war crimes, and for each theory assert a direct claim, a conspiracy claim, and an aiding and abetting claim. The TAC does not allege that a CACI PT employee directly injured Plaintiffs. Accordingly, the three direct claims (Counts I, IV, and VII) must be dismissed, and the issue is whether Plaintiffs have alleged a plausible factual basis for holding CACI PT liable for mistreatment inflicted by others on either a co-conspirator or aiding and abetting theory. Plaintiffs have not met the well-established pleading threshold for proceeding on these vicarious liability theories.

The last time this Court considered a Rule 12(b)(6) motion, ***the Court granted CACI PT's motion*** to dismiss Plaintiffs' conspiracy claims. The Court granted Plaintiffs leave to amend, but only for "amendments related to conspiracy allegations between" CACI PT and the military. Dkt. #227. Plaintiffs wildly exceeded the scope of the permitted amendments,[9] but the TAC does not cure the fatal defects that caused dismissal of their conspiracy claims. Indeed, the lack of any *facts* connecting CACI PT interrogators to any mistreatment these Plaintiffs might have suffered requires dismissal of all of Plaintiffs' claims, as they have not sufficiently alleged direct liability, co-conspirator liability, or aiding and abetting liability.

1. Plaintiffs' Conspiracy Claims Must Be Dismissed

a. Pleading Requirements for Co-Conspirator Liability

Plaintiffs' theory of co-conspirator liability is based on a syllogism: (1) a few CACI PT interrogators allegedly gave instructions to soldiers regarding the treatment of *other detainees*; (2) Plaintiffs were allegedly mistreated; so (3) Plaintiffs' mistreatment plausibly is the product of a conspiracy involving the CACI PT interrogators, and CACI PT therefore is liable for Plaintiffs' alleged injuries. Binding precedent makes clear that such a construct of co-conspirator liability cannot survive a motion to dismiss. The Court recognized as much in dismissing the conspiracy claims in the Second Amended Complaint and should do the same with respect to the TAC.

The Supreme Court and Fourth Circuit have adopted specific requirements for evaluating conspiracy claims under the *Iqbal/Twombly* standard. *First,* a court must be able to infer a conspiratorial agreement from the ***facts*** alleged, or the conspiracy claim must be dismissed. *Wiggins v. 11 Kew Gardens Ct.*, 497 F. App'x 262, 264 (4th Cir. 2012). These ***facts*** must show that the conspirators "positively or tacitly came to a mutual understanding to try to accomplish a

[9] CACI PT moved to strike the unauthorized amendments, but the Court entered judgment before ruling on that motion. CACI PT will renew that motion if necessary.

common and unlawful plan." *Hinkle v. City of Clarksburg*, 81 F.3d 416, 421 (4th Cir. 1996). Conclusory allegations of conspiracy, coupled with allegations of parallel conduct, is insufficient. *Twombly*, 550 U.S. at 556;*see also Grenadier v. BWW Law Grp.*, No. 1:14-cv-827, 2015 WL 417839, at *11 (E.D. Va. Jan. 30, 2015) (Brinkema, J.). The facts alleged must show involvement in the conspiracy by each defendant. *SD3 v. Black & Decker (U.S.), Inc.*, 801 F.3d 412, 422 (4th Cir. 2015); *Iqbal,* 556 U.S. at 676 (requiring a plaintiff to identify how "each defendant, through the official's own individual actions," violated the plaintiff's right). Notably, not just any corporate employee may bind a corporation to an agreement—the person must have authority, *see Hill v. Lockheed Martin Logistics Mgmt., Inc.*, 354 F.3d 277, 289 (4th Cir. 2004); Restatement (Third) of Agency § 2.01 cmt. b (same), or at a minimum have influenced a decisionmaker with authority, *cf. Young v. United Parcel Serv., Inc.*, 707 F.3d 437, 204 (4th Cir. 2013). Thus, to hold a corporation accountable for a conspiracy, Plaintiffs must allege what a person with authority said or did to convey an intent to cause the corporation to enter into a conspiracy. *See, e.g.*, *Cvent, Inc. v. Eventbrite, Inc.*, 739 F. Supp. 2d 927, 936 (E.D. Va. Sept. 14, 2010) (Brinkema, J.) (plaintiff explicitly pled one co-defendant was a contracted agent of the other, thus his assent to a contract bound his co-defendant).[10]

Second, allegations reflecting parallel conduct are insufficient to state a cognizable conspiracy claim. *Thomas v. Salvation Army S. Territory*, 841 F.3d 632, 637 (4th Cir. 2016).

[10] In addition, corporation cannot conspire with its employees, and employees acting within the scope of their employment cannot conspire amongst themselves. *Id.* at 939 ("If a corporation delegates a task to an individual (including an independent contractor) to serve corporate purposes, the individual acts with the same general objective as the corporation, and the corporation retains ultimate decisionmaking authority, then the individual and the corporation are for all intents and purposes the same entity. Under such circumstances, the individual and the corporation logically cannot conspire with one another."); *Walters v. McMahen,* 795 F. Supp. 2d 350, 358 (D. Md. 2011) (citing *ePlus Tech Inc. v. Aboud,* 313 F.3d 166 (4th Cir. 2002); *Cohn v. Bond,* 953 F.2d 154, 159 (4th Cir. 1991); *Marmott v. Md. Lumber Co.*, 807 F.2d 1180, 1184 (4th Cir. 1986)).

"Specifically, when 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). "The evidence must tend to exclude the possibility that the alleged co-conspirators acted independently." *Id.*; *see also A Society Without a Name v. Virginia*, 655 F.3d 342, 346 (4th Cir. 2011).

Third, a complaint must provide a plausible motive to enter into the alleged conspiracy. *Loren Data*, 501 F. App'x at 278. "If the alleged co-conspirators 'had no rational economic motive to conspire, and if their conduct is consistent with other, equally plausible explanations, the conduct does not give rise to an inference of conspiracy.'" *Id.* (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 595 (1986)). Plaintiffs have the burden to allege a plausible motive for CACI PT to enter the conspiracy that tends to exclude the possibility of independent conduct. *Wag More Dogs, LLC v. Cozart,* 680 F.3d 359, 365 (4th Cir. 2012).

b. The Court's Dismissal of the Conspiracy Claims in the Second Amended Complaint and Plaintiffs' Amendment

In dismissing Plaintiffs' conspiracy claims, the Court ruled that Plaintiffs "failed to set forth facts to support a claim . . . of conspiracy between CACI and the military as there are no facts which plausibly establish that plaintiffs were directly injured by a CACI contractor or any member of the alleged conspiracy to which CACI PT allegedly joined." Dkt. #237; Ex. 18 at 34. The Court noted Plaintiffs' failure to allege facts that tended "to exclude the possibility that the alleged co-conspirators acted independently." *Id.* at 42. The Court also concluded that Plaintiffs failed to allege facts showing an agreement of any kind between military personnel and CACI PT that related to these Plaintiffs. *See id.* at 42; *see also id.* at 28. The Court also questioned why CACI PT, which had a substantial contract with the Government, would plausibly enter into

a conspiracy to breach that contract. *Id.* at 21-22 ("What would be their incentive to do such a thing?"). Because the allegations in the Second Amended Complaint "merely demonstrate[d] parallel conduct of detainee torture, not conduct directed at [Plaintiffs]," and gave no basis for inferring that CACI PT entered into a conspiratorial agreement or had a motive to do so, the Court dismissed Plaintiffs' conspiracy claims. *Id.* at 43, 45.

The Court granted Plaintiffs leave to amend, and the new allegations in the TAC can be summarized as follows: (1) allegations concerning acts of alleged mistreatment of detainees <u>other than Plaintiffs</u>, (2) allegations (not authorized by the Court) bearing on *respondeat superior* theories of liability, (3) a cite to the deposition of former MP Frederick as supposedly supporting Plaintiffs' claims of conspiracy (when Frederick's deposition refutes Plaintiffs' position), and (4) paragraphs to their complaint summarizing the opinions of their own retained experts. As with the Second Amended Complaint, the new allegations in the TAC have no connection to the treatment of these Plaintiffs, do not adequately describe any unlawful agreement between CACI PT personnel and military personnel, and do not establish any plausible motive for a conspiracy.

c. The TAC Does Not Allege Facts Supporting CACI PT Participation in a Conspiracy to Mistreat These Plaintiffs

Plaintiffs' theory of co-conspirator liability has been a moving target. The Court granted Plaintiffs leave to amend their complaint to allege conspiracy allegations between CACI PT and the military. Dkt. #227. But Plaintiffs appear to have abandoned the theory that CACI PT made a corporate decision to conspire with military personnel to mistreat these Plaintiffs. Their new theory appears to be that a few low-level CACI PT employees entered into a conspiracy and somehow CACI PT should be liable for its employees' alleged co-conspirators' conduct. Under the case law cited above, Plaintiffs must allege facts showing both a conspiratorial agreement

and that any injuries suffered by these Plaintiffs were the product of the alleged conspiracy and not merely parallel conduct. Plaintiffs do not allege plausible facts on either score.

The TAC does not allege any facts identifying any person with authority who supposedly entered into an agreement with soldiers on CACI PT's behalf to mistreat these Plaintiffs, or facts regarding when this agreement was reached or what was supposedly said to form the conspiracy. *Hinkle*, 81 F.3d at 421. Instead, Plaintiffs rely heavily on vague allegations that CACI PT employees supposedly ordered MPs to implement harsh conditions upon detainees generally, or with respect to detainees *other than Plaintiffs*. TAC ¶¶ 18, 22-24, 39, 59, 68, 85, 101, 108-09, 111, 115-16, 120-21, 125, 127, 131-35, 141-42, 158. Not one of these allegations, however, claims that a CACI PT employee ordered an MP or anyone else to inflict improper conditions of detention on any of these Plaintiffs. *Id.* Nor do these paragraphs allege any other facts that would tie the activities of CACI PT employees to the Plaintiffs' mistreatment. *Id.*

This is a classic allegation of parallel conduct, and the case law is clear that allegations of parallel conduct, even if true, cannot support an inference that *Plaintiffs* were mistreated *as a result of a conspiracy involving CACI PT or its employees*. *A Society Without a Name*, 655 F.3d at 346 ("[P]arallel conduct does not suggest conspiracy, and a conclusory allegation of agreement at some unidentified point does not supply facts adequate to show illegality."). Such a conclusion would have to assume, without basis, that every act of mistreatment of any detainee at Abu Ghraib prison was by a member of the supposed conspiracy and was directed by a CACI PT participant, a leap of logic not permitted under *Iqbal* and its progeny. *Iqbal*, 556 U.S. at 676; *Grenadier*, 2015 WL 417839, at *11 (dismissing conspiracy claims that are "entirely conclusory and . . . contain[] no details showing that there was an agreement between two or more of the defendants to achieve an unlawful purpose or to use unlawful means")

Plaintiffs correctly allege that "[i]nterrogators were responsible for particular detainees," TAC ¶ 17, but the TAC alleges only four possible contacts between individual Plaintiffs and CACI PT personnel. None of these alleged contacts involves an allegation of mistreatment and three are indisputably innocuous. *See* TAC ¶¶ 133, 141, 142. In the fourth alleged contact, possibly between a CACI PT employee and Plaintiff Al Ejaili, Plaintiffs quote a statement by Sergeant Beachner that CACI PT employee "STEVE STEFNOWICZ [sic] did do one interrogation, I found out he was questioning the Al Jazeer [sic] reporter, when I found this out, I told him to stop because this was my detainee. He stopped. There [w** ****ng][11] violating the [Interrogation Rules of Engagement] in that particular Interrogation." *Id.* ¶ 124; *see also* Ex.19 at 2. The rest of Beachner's statement, which somehow did not make it into the TAC, includes a complete disclaimer by Beachner of seeing *any* detainee abuse at Abu Ghraib prison. Ex. 19 at 2.

As this Court recognized in dismissing Plaintiffs' prior complaint, unsupported assertions of conspiracy have been consistently rejected in this Circuit.[13] The TAC does not allege any ***fact*** that, if true, would connect conduct by any CACI PT employee to the mistreatment of any of these Plaintiffs. That, standing alone, requires dismissal of Plaintiffs' conspiracy counts.

---

[11] These words are illegible due to a hole punch.

[12] Excerpts from Beachner's statement may be considered in evaluating CACI's Rule 12(b)(6) motion because the TAC Complaint quotes from and refers to that statement.

[13] *See, e.g.*, *A Society Without a Name*, 655 F.3d at 347 (allegations that the defendants "entered into a conspiracy" is a mere conclusory statement); *Wills v. Rosenberg*, No. 1:11cv1317, 2012 WL 113676, at *3 (E.D. Va. Jan. 13, 2012) (Brinkema, J.) (dismissal where no specific factual allegations explain the conspiracy).

2. Plaintiffs Also Have Failed to Allege a Plausible Motive for CACI PT to Enter into a Conspiracy

CACI PT had no incentive whatsoever to act contrary to U.S. law and in a manner at odds with U.S. policy in breach of CACI PT's contract, as that would only injure its relationship with a valuable contracting partner. Indeed, given that Plaintiffs have disavowed seeking recovery based on actions approved by the United States, the TAC is limited to claims that CACI PT engaged in conduct contrary to the desires of its contracting partner. The TAC alleges CACI PT received millions of dollars to perform its contractual obligation to provide intelligence services in a lawful manner, TAC ¶ 15, 204, and that "CACI PT knew that the United States government has denounced the use of torture and other cruel, inhuman, or degrading treatment at all times," *id.* ¶ 189. It further states that "CACI PT knew that it was illegal for them to participate in, instigate, direct, or aid and abet the torture of Plaintiffs and other detainees." *Id.*

The Court previously ruled that the conspiracy allegations in the Second Amended Complaint failed to allege a plausible motive for CACI PT to conspire to mistreat detainees. The Court was correct then, and the above allegations do not cure that defect. CACI PT had no rational economic motive to join a conspiracy, and its conduct is consistent with plausible explanations other than participation in a conspiracy. Thus, the conspiracy count must be dismissed. *Loren Data Corp.*, 501 F. App'x at 278.

3. CACI PT Cannot Be Held Liable for the Alleged Actions of Its Employees' Alleged Co-Conspirators

Unable to reach CACI PT with allegations of an agreement, Plaintiffs try to tag the corporation with liability for the conduct of non-CACI PT employees by heaping *respondeat superior* liability on top of co-conspirator liability. Courts considering Plaintiffs' novel "vicarious liability squared" theory have rejected it as a bridge too far. In *Oki Semiconductor Co. v. Wells Fargo Bank, N.A.*, the Ninth Circuit held that the doctrine of *respondeat superior*

could not be stretched to render an employer liable for the actions of its employee's co-conspirators because such a result would be inconsistent with the purpose of *respondeat superior* liability. 298 F.3d 768, 777 (9th Cir. 2002). As the Ninth Circuit explained, under *respondeat superior* an employer is responsible for the torts of its employees because it reaps the benefits of their work and can monitor their conduct to minimize liability. *Id.* Conversely, an employer reaps no benefit from and has no similar ability to monitor the conduct of its employees' alleged co-conspirators. *Id.*; *see also Day v. DB Capital Group, LLC*, No. DKC 10-1658, 2011 WL 887554, at *21 (D. Md. Mar. 11, 2011) (dismissing claims seeking to hold employer liable theory for conspiratorial conduct of its employees).

Because Plaintiffs cannot allege that any CACI PT employee directly injured them, it does not matter for this action whether those employees individually conspired with soldiers who mistreated Plaintiffs (though even that is not plausibly alleged). For the reasons discussed in *Oki Semiconductor*, a corporation is not liable for the acts of its employees' alleged co-conspirators.

B. Plaintiffs' Aiding and Abetting Claims Fail

Plaintiffs' aiding and abetting claims are equally lacking. The Fourth Circuit held that dismissal of aiding and abetting claims under ATS is required unless the plaintiff alleges facts showing that the defendant "provide[d] substantial assistance with the purpose of facilitating the alleged violation." *Aziz v. Aloclac, Inc.*, 658 F.3d 388, 401 (4th Cir. 2011). For aiding and abetting liability, a plaintiff must allege facts showing that the defendant "knowingly [gave] substantial assistance to someone committing a tort." Restatement (Second) of Torts § 876.

In *Aziz*, the Fourth Circuit applied the *Twombly/Iqbal* standard and affirmed dismissal of the plaintiff's aiding and abetting claim. The court held that allegations that the defendant placed mustard gas into the stream of commerce with the purpose of facilitating its use against Kurds in Iraq was insufficient because "[s]uch a cursory allegation . . ., untethered to any supporting facts,

constitutes a legal conclusion that neither binds us, nor is entitled to the presumption of truth." *Id.* (internal quotations and citations omitted). Thus, *Aziz* stands for the proposition that merely alleging the required assistance and *mens rea* is not enough to get past a motion to dismiss. Instead, a plaintiff must allege actual ***facts*** demonstrating that the defendant actually provided substantial assistance to the tortfeasor and did so with the requisite *mens rea*.

Nowhere do Plaintiffs allege any ***facts*** about how CACI PT provided substantial assistance to whomever allegedly mistreated them or ***facts*** supporting a conclusion that CACI PT possessed the required *mens rea*. Rather, Plaintiffs rely on parallel conduct allegations regarding conduct having nothing to do with these Plaintiffs. TAC ¶¶ 18, 22-24, 39, 59, 68, 85, 101, 108-09, 111, 115-16, 120-21, 125, 127, 131-35, 141-42, 158. Such allegations of parallel conduct do not support an inference that CACI PT somehow provided substantial assistance to whomever might have injured these Plaintiffs, or that CACI PT had any culpable *mens rea* with respect to injuries suffered by Plaintiffs. *A Society Without a Name*, 655 F.3d at 346.

C. Plaintiffs' ATS Claims Are Preempted

No court has reviewed and regulated the United States' prosecution of war against a foreign country, let alone under the "law of nations" – a body of rules gleaned from the law of foreign sovereigns. This Court should not be the first to use norms of international law to pass judgment on claims arising out of combatant activities in war. The ATS claims in this action arise out of the United States' prosecution of war against Iraq pursuant to the Authorization for Use of Military Force Against Iraq Resolution of 2002, Pub. Law 107-243, 116 Stat. 1498 (Oct. 16, 2002). In prosecuting the war in Iraq, the U.S. military decided to augment its interrogation of detainees with interrogators supplied by CACI PT. TAC ¶ 13. From those combatant activities, Plaintiffs seek to advance claims predicated not on the laws of the United States, but on customary international norms. That effort must fail.

Plaintiffs' ATS claims – however sympathetic – are preempted on three bases. *First*, the Constitutional allocation of war powers and the federal interests underlying the combatant activities exception to the FTCA, 28 U.S.C. § 2680(j), preclude application of the law of nations. *Second*, CPA Order 17, issued by the authority governing Iraq during its occupation, limits Plaintiffs to an administrative claim submitted to the United States. *Third*, Congress's enactment of the Torture Victims Protection Act ("TVPA"), 28 U.S.C. § 1350 note, displaces the power of federal courts to create a federal common law cause of action for torture under the ATS.

1. The Constitution's Allocation of War Powers Precludes ATS Claims Arising Out of the United States' Conduct of War

The Constitution expressly commits this Nation's foreign policy and war powers to the federal government. U.S. Const. art. I, § 8, cls. 1, 11-15; art. II, § 2, cls. 1, 2. "National-security policy is the prerogative of the Congress and the President." *Ziglar*, 137 S. Ct. at 1861. Absent express consent by the United States, the Constitution does not allow international law, or the law of any foreign sovereign, to govern the prosecution of war by the United States. Nor does the Constitution contemplate a judicial role in this area. Consistent with its view that "[p]ower over external affairs . . . is vested in the national government exclusively," *United States v. Pink*, 315 U.S. 203, 233 (1942), the Supreme Court regularly invalidates regulations that frustrate the federal government's Constitutionally-committed role as the sole voice on war and foreign affairs.[14] Based on these principles, the Supreme Court just last month held that a *Bivens* claim was not available for claims against former government officials for alleged abuse of federal detainees in the aftermath of the September 11 attacks. *Ziglar*, 137 S. Ct. at 1861.

[14] *See, e.g.*, *Am. Ins. Ass'n v. Garamendi*, 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); *Zschernig v. Miller*, 389 U.S. 429, 434-35 (1968); *Hines v. Davidowitz*, 312 U.S. 52, 65-68 (1941); *United States v. Belmont*, 301 U.S. 324, 331 (1937) ("[C]omplete power over international affairs is in the national government . . . .").

The federal interest in not having foreign sovereigns' law regulate military operations – through their acceptance or rejection of "international norms" – is particularly acute. An invading or occupying force is subject only to its own laws, and not the laws imposed on it by foreign sovereigns.[15] The D.C. Circuit recognized as much in *Saleh*, holding that the Constitutional commitment of foreign affairs powers to Congress and the President displaces claims brought under ATS that arise from the United States' conduct of war:

> The judicial restraint required by *Sosa* is particularly appropriate where, as here, a court's reliance on supposed international law would impinge on the foreign policy prerogatives of our legislative and executive branches. As the *Sosa* Court explained: "Since many attempts by federal courts to craft remedies for the violation of new norms of international law would raise risks of adverse foreign policy consequences, they should be undertaken, if at all, with great caution."

580 F.3d at 16 (citing *Garamendi*, 539 U.S. at 413-15; *Zschernig*, 389 U.S. at 440-41; *Sosa*, 542 U.S. at 727-28). *Saleh* involved ATS claims arising from interrogation activities at Abu Ghraib.

2. The Combatant Activities and Foreign Country Exceptions to the FTCA Preempt Plaintiffs' ATS Claims.

Plaintiffs' ATS 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). Moreover, the combatant activities exception to the FTCA clearly evinces

[15] *Coleman v. Tennessee*, 97 U.S. 509, 517 (1878); *New Orleans v. The Steamship*, 87 U.S. 387, 394 (1874); *see also Leitensdorfer v. Webb*, 61 U.S. 176, 177 (1857); 2 William Winthrop, *Military Law and Precedents* 800 (2d rev. ed. 1896). Indeed, in *Dostal v. Haig*, 652 F.2d 173, 176-77 (D.C. Cir. 1981), the D.C. Circuit reaffirmed the validity of *Coleman*, observing that local courts in occupied Berlin were solely organs of the occupying power with no authority over occupying personnel.

an intent by Congress that conduct on the battlefield not be regulated by tort law. *Saleh*, 580 F.3d at 7 ("[T]he policy embodied by the combatant activities exception is simply the elimination of tort from the battlefield.").

In *Saleh*, the D.C. Circuit considered these principles and their application to tort claims arising out of war zone conduct by service contractors. The Court noted that "uniquely federal interests are implicated" by tort suits brought by Abu Ghraib detainees. *Saleh*, 580 F.3d at 7. In considering whether the application of tort law to war zone conduct conflicts with these uniquely federal interests, the Court held that the principle underlying the combatant activities exception to the FTCA was 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)). Accordingly, the D.C. Circuit held that the federal principles underlying the combatant activities exception preempted tort claims in the following circumstances:

> 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. Moreover, the court held, military control need not be exclusive for preemption to apply, so long as the military is ultimately in charge. *Id.*

This Court need not decide whether the *Saleh* preemption test is applicable; the Fourth Circuit has already made that decision, adopting the *Saleh* preemption test in *In re KBR, Inc., Burn Pit Litigation*, 744 F.3d 326, 351 (4th Cir. 2014). In *Burn Pit*, the court also adopted the broad conception of "combatant activities" applied in *Saleh* and *Johnson v. United States*, 170 F.2d 767, 770 (9th Cir. 1948). *Id.* at 351. The court held that KBR's waste management and water treatment operations in a theater of war involved combatant activities because the activities were "both necessary to and in direct connection with actual hostilities." *Id.*

Burn Pit did not involve any federal or ATS claims, but *Saleh* did involve ATS claims. The D.C. Circuit analyzed the extent to which federal statutory law preempts ATS claims. The D.C. Circuit acknowledged the Supreme Court's admonition that federal courts exercise great restraint before allowing ATS claims to proceed, *id.* at 14 (citing *Sosa*, 542 U.S. at 732-33), and held that the federal interest in precluding tort litigation of battlefield conduct required application of the same "ultimate military control" test that barred plaintiffs' state-law claims:

> 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. To be sure, ATS would be drawing on federal common law that, in turn, depends on international law, so the normal state preemption terms do not apply. But federal executive action is sometimes treated as "preempted" by legislation. Similarly, an elaboration of international law in a tort suit applied to a battlefield is preempted by the same considerations that led us to reject the D.C. tort suit.

Saleh, 580 F.3d at 16 (citation omitted). Thus, Plaintiffs' ATS claims are subject to the "ultimate military authority" preemption test.

Under the *Saleh* "ultimate military authority" test, claims are preempted if the claims involve conduct "during wartime," and the "private service contractor is integrated into combatant activities over which the military retains command authority." With respect to whether Plaintiffs' claims involve conduct "during wartime," Plaintiffs specifically allege in their complaint that "Defendant's acts took place during a period of armed conflict, in connection with hostilities." TAC ¶ 247. Similarly, the materials properly considered on a Rule 12(b)(6) motion establish that CACI PT personnel were "integrated into combatant activities over which the military retains command authority." *Burn Pit*, 744 F.3d at 349 (quoting *Saleh*, 580 F.3d at 9). Plaintiffs' complaint alleges that CACI PT personnel "worked within" the JIDC. TAC ¶ 16. Plaintiffs' complaint further alleges that "[t]he January 23, 2004 JIDC organizational

chart recorded 97 soldiers and 32 CACI PT employees," and that the organizational chart "shows CACI PT employees assigned to 15 of the 20 staffed cells conducting interrogations within the Interrogation Control Element ('ICE')." *Id.* The Court may consider the contents of the JIDC organizational chart because Plaintiffs' complaint cites to its contents. *See* Section II, *supra*. The JIDC organizational chart shows CACI PT's interrogators fully integrated into the Tiger Teams used to conduct interrogations, interchangeably with military interrogators, with all Tiger Teams reporting to an Army noncommissioned officer Section Leader, and then to the Army noncommissioned and commissioned officers who commanded the JIDC.

Moreover, one of CACI PT's interrogation contracts provided that CACI PT personnel "will be integrated into MIL/CIV analyst, screening, and interrogation teams" and would conduct intelligence activities "as directed." Ex. 21 at ¶¶ 4, 6. The other interrogation contract provided that CACI PT personnel would "perform under the direction and control of the unit's MI chain of command or Brigade S2, as determined by the supported command." Ex. 22 at ¶ 3.

For combatant activities preemption to apply, all that is required is that the contractors be integrated into the military mission and that the military have *ultimate* (not exclusive) control over the contractors' activities. *Saleh*, 580 F.3d at 6; *Burn Pit*, 744 F.3d at 351. Even with the limitations on considering extrinsic materials on a Rule 12(b)(6) motion, the materials properly considered – the TAC and documents quoted, described or cited in the TAC – establish the existence of a state of war, the integration of CACI PT personnel into the JIDC, and the ultimate military control over the JIDC. As a result, Plaintiffs' ATS claims are preempted.

Similarly, the federal interests embodied in the foreign country exception to the FTCA, 28 U.S.C. § 2680(k), preempt Plaintiffs' claims. The reason that claims involving injuries in foreign countries are excluded from the United States' waiver of sovereign immunity is that

Congress did not want the United States' conduct being judged through "the application of foreign substantive law." *Sosa*, 542 U.S. at 707. But Plaintiffs' claims under ATS specifically seek to subject injuries arising out of United States war operations to the law adopted by foreign sovereigns, through their acceptance or rejection of proposed international norms. This is directly contrary to the policies underlying the foreign country exception.

3. Plaintiffs' ATS Claims Are Barred By CPA Order 17

Plaintiffs' ATS claims also are barred by CPA Order 17. By the time CACI PT interrogation personnel arrived at Abu Ghraib prison in October 2003, Iraq was under the administration of the CPA. On June 26, 2003, the CPA Administrator, Ambassador L. Paul Bremer, issued CPA Order 17, and that order remained in effect throughout the time Plaintiffs allege that they were held at the Abu Ghraib hard site. Ex. 23. Section 6 of CPA Order 17 creates an exclusive claims regime for Iraqis injured during the occupation:

> Third party claims including those for property loss or damage and for personal injury, illness or death or in respect of any other matter arising from or attributed to Coalition personnel or any persons employed by them, whether normally resident in Iraq or not and that do not arise in connection with military combat operations, shall be submitted and dealt with by the Parent State whose Coalition personnel, property, activities or other assets are alleged to have caused the claimed damage, in a manner consistent with the national laws of the Parent State.

CPA Order 17, § 6. The Parent State at issue here is the United States.

By its terms, Section 6 of CPA Order 17 provides for the filing of *administrative claims* that would be decided in whatever manner the Parent State has put in place for evaluating such administrative claims under its *national laws*. Moreover, the section permits claims and not suits, requires that they be "dealt with" and not "adjudicated," and uses the same combat/non-combat dichotomy as the Foreign Claims Act, 10 U.S.C. § 2734(a), the administrative claims process applicable to claims arising out of operations in Iraq.

Thus, CPA Order 17 establishes that if a claimant's injury arises out of noncombat operations, under Section 6, the claimant shall submit a claim to the Parent State (here, the United States) where it will be dealt with under national law (here, the Foreign Claims Act). Indeed, as the D.C. Circuit has acknowledged, the United States has confirmed its willingness to allow administrative claims involving bona fide instances of mistreatment of detainees in Iraq. *Saleh*, 580 F.3d at 2. CPA Order 17 thus prohibits tort claims by Iraqis alleging injury at the hands of Coalition personnel, and instead requires submission of an administrative claim to the Parent State.

4. Congress's Legislation Regarding Claims of Torture Displace Federal Common Law Claims Under ATS

In *Sosa*, the Supreme Court held that "the ATS was meant to underwrite litigation of a narrow set of common law actions derived from the law of nations, but that a number of considerations required that the power to create federal common law remain subject to "vigilant doorkeeping" to ensure that it was limited "to a narrow class of international norms today." 542 U.S. at 729. These considerations include changes in "the prevailing conception of the common law . . . in a way that counsels restraint in judicially applying internationally generated norms," along with the current understanding that federal courts ordinarily do not create federal common law. *Id.* at 725-26. *Sosa* also required restraint in permitting new common-law causes of action because the Court "has recently and repeatedly said that a decision to create a private right of action is one better left to legislative judgment in the great majority of cases." *Id.* at 727. These considerations are fatal to Plaintiffs' efforts to pursue claims alleging torture under the ATS.

The Supreme Court analyzed the interplay between federal statutes and recognition of federal common law causes of action in *American Electric Power Co. v. Massachusetts*, 564 U.S. 410 (2011) ("*AEP*"). In *AEP*, the Court held that no federal common-law cause of action

was available against power plants for contributing to global warming because, even if such an action would have been available previously, the enactment of the Clean Air Act displaced any federal common-law claims that might have existed. *Id.* at 429. As the Court explained, "[w]hen Congress addresses a question previously governed by a decision rested on federal common law . . . the need for such an unusual exercise of law-making by the federal courts disappears." *Id.* at 423 (quoting *Milwaukee v. Illinois*, 451 U.S. 304, 314 (1981)). "Legislative displacement of federal common law does not require the 'same sort of evidence of a clear and manifest [congressional] purpose' demanded for preemption of state law." *Id.* (quoting *Milwaukee*, 451 U.S. at 317) (alteration in original). A federal statute need not even permit a private cause of action to displace a federal common-law cause of action; "the relevant question for purposes of displacement is whether the field has been occupied, not whether it has been occupied in a particular manner." *Id.* at 426 (internal quotation and citation omitted).

Here, Congress has repeatedly legislated on the issue of claims involving allegations of torture. Congress enacted the Anti-Torture Act, thereby creating a federal criminal statute, with extraterritorial application, criminalizing acts of torture. 18 U.S.C. § 2340A. In the very next section, entitled "Exclusive remedies," Congress provided as follows:

> Nothing in this chapter shall be construed as precluding the application of State or local laws on the same subject, ***nor shall anything in this chapter be construed as creating any substantive or procedural right enforceable by law by any party in any civil proceeding***.

18 U.S.C. § 2340B (emphasis added). In separate legislation, the Congress created a private federal right of action for allegations of torture, but limited such suits to *individuals* who were acting *under color of foreign law*. TVPA, 28 U.S.C. § 1350 note; *Mohamad v. Palestinian Auth.*, 132 S. Ct. 1702, 1706 (2012) (TVPA permits suits against natural persons only).

Where Congress has, through legislation, established the contours of a civil cause of action for torture, "the need for . . . an unusual exercise of law-making by the federal courts disappears." *AEP*, 564 U.S. at 423. This is consistent with *Sosa*'s admonition that the decision whether to permit a federal private right of action is generally best left to a legislative determination, which has occurred here. *Sosa*, 542 U.S. at 727. Indeed, the United States has recently taken the position that Congress's enactment of the TVPA "spoke 'directly' to the question of a remedy for certain conduct that violates universally accepted and specifically defined human rights norms," and thus displaced any federal common-law power to permit an ATS claim for torture against a former Somali official. Brief of United States as *Amicus Curiae* at 14-16, *Warfaa v. Ali*, No. 15-1464 (U.S. May 23, 2017). Granted, *Warfaa* involved a claim of torture that *would* fall within the private right of action created by the TVPA, but the Supreme Court made clear in *AEP* that displacement of federal common law occurs when "the field has been occupied," without regard to "whether it has been occupied in a particular manner." *AEP*, 564 U.S. at 426. Indeed, in *AEP*, the enactment of the Clean Air Act *had not* led to creation of a private right of action, but the plaintiffs' claims nevertheless were impermissible because Congress's legislation had occupied an area previously addressed by federal common law.

Plaintiffs ask this Court to allow claims based on alleged international consensus where Congress enacted implementing legislation that specifically precluded a private right of action against defendants acting under color of federal law. There is no history or tradition of allowing persons from an invaded country to ask United States courts to pass judgment on how Congress and the Executive prosecute a war, and the Court should reject Plaintiffs' request that the Court, in the guise of recognizing a common-law damages action, become a judicial monitor of the federal government's conduct of war. *Ziglar*, 137 S. Ct. at 1861.

D. CACI PT Is Derivatively Immune from Suit

There have been significant recent developments in the law of derivative immunity for government contractors, as the Court is aware. *Ruddell v. Triple Canopy, Inc.*, No. 1:15-cv-1331, 2016 WL 4529951, at *5 (E.D. Va. Aug. 29, 2016) (citing *Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663 (2016)). In *Campbell-Ewald*, the Supreme Court held that a contractor was entitled to immunity to the extent it complied with instructions from the government. *Campbell-Ewald*, 136 S. Ct. at 673. Discovery taken by Plaintiffs revealed no non-compliance with government instructions relating to the treatment of these Plaintiffs. Because this is a Rule 12 motion to dismiss, and not a summary judgment motion, CACI PT has not submitted the record materials showing CACI PT's entitlement to immunity. If this case were to survive CACI PT's motion to dismiss, CACI PT will revisit immunity at the summary judgment stage of the case.

V. CONCLUSION

For the foregoing reasons, the Court should dismiss the Third Amended Complaint.

Respectfully submitted,

/s/ Conor P. Brady
Conor P. Brady
Virginia Bar No. 81890
John F. O'Connor (admitted *pro hac vice*)
Linda C. Bailey (admitted *pro hac vice*)
STEPTOE & JOHNSON LLP
1330 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 429-3000 – telephone
(202) 429-3902 – facsimile
cbrady@steptoe.com
joconnor@steptoe.com
lbailey@steptoe.com

William D. Dolan, III
Virginia Bar No. 12455
LAW OFFICES OF WILLIAM D. DOLAN, III, PC
8270 Greensboro Drive, Suite 700
Tysons Corner, Virginia 22102
(703) 584-8377 – telephone
wdolan@dolanlaw.net

Counsel for Defendant CACI Premier Technology, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on the 19th day of July, 2017, I will electronically file the foregoing with the Clerk of Court using the CM/ECF system, and will serve by hand delivery and electronic mail to the following:

John Kenneth Zwerling
The Law Offices of John Kenneth Zwerling, P.C.
114 North Alfred Street
Alexandria, Virginia 22314
jz@zwerling.com

/s/ Conor P. Brady
Virginia Bar No. 81890
Attorney for Defendant CACI Premier Technology, Inc.
STEPTOE & JOHNSON LLP
1330 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 429-3000 – telephone
(202) 429-3902 – facsimile
cbrady@steptoe.com