IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

SUHAIL NAJIM ABDULLAH AL SHIMARI, *et al.*, Plaintiffs, v. CACI PREMIER TECHNOLOGY, INC., Defendant,	No. 1:08-cv-0827 LMB-JFA **PUBLIC VERSION**
CACI PREMIER TECHNOLOGY, INC., Third-Party Plaintiff, v. UNITED STATES OF AMERICA, and JOHN DOES 1-60, Third-Party Defendants.	

DEFENDANT CACI PREMIER TECHNOLOGY, INC.'S MEMORANDUM IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

I. INTRODUCTION

> Great cases, like hard cases, make bad law. For great cases are called great not by reason of their real importance in shaping the law of the future, but because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment. These immediate interests exercise a kind of hydraulic pressure which makes what previously was clear seem doubtful, and before which even well settled principles of law will bend.

Northern Sec. Co. v. United States, 193 U.S. 197, 400-401 (Holmes, J., dissenting).

This is such a case. It arises from the abuse of detainees at Abu Ghraib prison during the war in Iraq, following the attacks of September 11, 2001. The Abu Ghraib photos – incontrovertible proof of abuse – shocked the world in April 2004. There was nothing in U.S.-Arab relations that screamed scandal louder than Abu Ghraib. The issues presented in this case are all permeated to some extent with this atmosphere. It is quite understandable, therefore, that this case would produce the kind of "hydraulic pressure" of which Justice Holmes spoke. Despite this, the principles of law controlling this case are neither complex nor revolutionary. They are as settled as they are simple.

Whether Plaintiffs were, in fact, abused at Abu Ghraib is *not* an issue material to this motion. The Court dismissed the claims alleging direct abuse by CACI PT personnel, as there was no evidence to support those claims. What *is* at issue is whether there is any evidence of CACI PT's participation in a conspiracy to abuse detainees, or evidence that CACI PT provided practical assistance to military personnel who abused Plaintiffs and did so for the purpose of facilitating such abuse. Most emphatically, there is not.

It is impossible to overstate the degree and scope of attention, publicity and scrutiny that the Abu Ghraib scandal received. The scandal made the front page of every major newspaper for months on end. It was the subject of books, movies, Congressional hearings and government

investigations. Yet the mind-boggling array of investigations did not turn up evidence of CACI PT personnel having a role in any mistreatment these Plaintiffs allegedly suffered.[1] Nor did the multitude of government investigations result in criminal, civil, or administrative action against CACI PT or its personnel for detainee abuse, giving credence to the D.C. Circuit's observation that "[t]his fact alone indicates the government's perception of the contract employees' role in the Abu Ghraib scandal." *Saleh v. Titan Corp.*, 580 F.3d 1, 10 (D.C. Cir. 2009).

Plaintiffs' entire case is nothing more than an attempt to impose liability on CACI PT because its personnel worked in a war zone prison with a climate of activity that reeks of something foul. The law, however, does not recognize guilt by association with Abu Ghraib. As a result, summary judgment for CACI PT is warranted.

II. STATEMENT OF MATERIAL UNDISPUTED FACTS

A. Plaintiff Rashid

1. Plaintiff Rashid has alleged that he was subjected to various forms of mistreatment while at Abu Ghraib prison. Ex. 9 at 5-7; Ex. 10 at 97-105.

2. Rashid is unable to "currently identify any CACI employees with whom he had contact." Ex. 9 at 7.

3. No witness or document produced in this case has indicated that any CACI PT employee had any interaction with Rashid.

[1] The investigations that resulted in a written report included the Taguba report, the Jones/Fay report, the Church report, the Mikolashek report, the Ryder report, the Herrington report, the Schlesinger report, the Formica report, the Schmidt-Furlow report, and the Senate Armed Services Committee report. Numerous other investigations did not involve public reports, such as the investigation conducted by a prosecutorial task force based in the U.S. Attorney's Office for the Eastern District of Virginia.

4. Rashid acknowledged that he had no knowledge of any interactions between himself and CACI PT employees; of any role by CACI PT employees in the mistreatment he alleges; of conspiratorial conduct by CACI PT employees; or of assistance by CACI PT employees directed toward those he alleges mistreated him. Ex. 10 at 148-49.

5. The United States has not identified any CACI PT personnel as having interacted with Rashid. It has identified two Army interrogators – Army Interrogator H and Army Interrogator I[2] – as having interacted with Rashid in a single interrogation. Ex. 11 at 7.

6. Army Interrogator H testified that he remembered his interrogation of Rashid, and that Rashid was not mistreated. Ex. 6 at 59, 67-77. Army Interrogator H testified that the *only* role played by any CACI PT employee in how he conducted his interrogation of Rashid was that a CACI PT employee was acting as Army Interrogator H's section leader for a two-week period during which Rashid's interrogation occurred. *Id.* at 74. Army Interrogator H was clear, however, that [redacted] *Id.* at 145. [redacted] *Id.* at 144-45. That interrogation plan, however, did not call for any abuse and only sought approval for lawful interrogation techniques approved by the Army chain of command. *Id.* at 70-71. Army Interrogator H testified that he did not enter into any agreement with CACI PT personnel to abuse detainees, that no one from CACI PT directed him to "assault, abuse or otherwise mistreat Rashid." *Id.* at 92-93.

7. Army Interrogator I did not remember his interrogation of Rashid. Ex. 7 at 64-67. He testified, however, that he was not "aware of CACI personnel having any

[2] The United States initially identified this interrogator as "Unidentified Interrogator I," but subsequently confirmed his identity as an Army interrogator. Dkt. #897 at 2.

involvement with Rashid during the time that he was a detainee at Abu Ghraib prison," or of CACI PT personnel "having any role in how Rashid was treated." *Id.* at 74. Army Interrogator I testified that, for interrogations in which he participated, CACI PT personnel had no role in dictating the detainees' conditions of confinement or treatment; selecting interrogation approaches; or in deciding how the participants would conduct themselves. *Id.* at 60-62. Army Interrogator I denied conspiring with CACI PT personnel or anyone else to mistreat detainees and denied being assisted by CACI PT personnel in mistreating detainees. *Id.* at 98.

B. Plaintiff Al-Ejaili

8. Plaintiff Al-Ejaili has alleged that he was subjected to various forms of mistreatment while at Abu Ghraib prison. Ex. 12 at 4-5; Ex. 13 at 78-80.

9. Al-Ejaili is unable to "currently identify any CACI employees with whom he had contact." Ex. 12 at 6.

10. Al-Ejaili acknowledged that he had no basis for concluding that CACI PT personnel were involved in his alleged mistreatment. Ex. 13 at 9-10, 66, 73, 194-96, 216. Instead, Al-Ejaili testified that, in his view, if CACI PT had personnel at Abu Ghraib prison, "they have fault." *Id.* at 194. When asked whether he had any information about CACI PT personnel giving instructions or recommendations regarding his treatment, Al-Ejaili admitted that he did not. *Id.* at 196 ("No, I don't have any specific information.").

11. The United States' records do not indicate any intelligence interrogation of Al-Ejaili. Ex. 14 at 5. The United States' records indicated that Army interrogator Sergeant Joseph Beachner had been assigned as Al-Ejaili's interrogator, and that CACI PT interrogator Steven Stefanowicz may have questioned Al-Ejaili on one occasion as well. *Id.* at 16.

12. During Sergeant Beachner's deposition, Army counsel permitted him to affirm the contents of his prior sworn statement that: [redacted]

[redacted] *Id.* at 16; Ex. 8 at 30-31; Ex. 15 at 2. [redacted] Ex. 8 at 20, 21-22, 23, 24. Thus, the only evidence in the record of any interaction between a CACI PT employee and Al-Ejaili involves a single encounter that complied with the applicable interrogation rules of engagement.

C. Plaintiff Al Shimari

13. Plaintiff Al Shimari was in U.S. military custody for more than four years, from November 2003 to March 2008, and was held at Abu Ghraib prison from December 2003 to October 2004. Dkt. #968 at ¶¶ 5-6 (Stip. of Facts). Al Shimari alleges that he was abused while in U.S. military custody at Abu Ghraib prison. Ex. 16 at 4-7; Ex. 17 at 41-67, 85-86.

14. Al Shimari is unable to "currently identify any CACI employees with whom he had contact." Ex. 16 at 7-8.

15. While Al Shimari alleges that he was subjected to a number of interrogations in which he was mistreated (Ex. 17 at 85-86), the United States has identified only one intelligence interrogation of Al Shimari, and further states that the participating interrogation personnel were CACI Interrogator A and Army Interrogator B. Ex. 14 at 4-5. [redacted] (Ex. 1 at 85; Ex. 2 at 49-50), but testified that the types of abuses alleged by Al Shimari did not occur during any interrogation in which they participated. Ex. 1 at 93-106; Ex. 2

at 55-56, 58-62. CACI Interrogator A further testified that [redacted] and had no role in dictating the detention conditions for detainees who were assigned to him for interrogation. Ex. 1 at 74, 88-90. He also testified that he never provided instructions regarding the treatment of detainees who were not assigned to him for interrogation. *Id.* at 92-93. Army Interrogator B testified that he never saw any abuse of a detainee. Ex. 2 at 85.

D. Plaintiff Al-Zuba'e

16. Plaintiff Al-Zuba'e has alleged that he was subjected to various forms of mistreatment while at Abu Ghraib prison. Ex. 18 at 5-7; Ex. 19 at 76-81, 91-93, 103, 105-07.

17. Al-Zuba'e is unable to "currently identify any CACI employees with whom he had contact." Ex. 18 at 7.

18. Al-Zuba'e acknowledged that he had no basis for concluding that CACI PT personnel had *any* involvement in the mistreatment he alleges. Ex. 19 at 30-31, 33, 36, 44-45, 56-58, 64, 65, 81. Al-Zuba'e summed up his knowledge of matters relating to CACI PT thusly: "I don't know anything about CACI or anything." *Id.* at 30.

19. The United States represents that Al-Zuba'e was the subject of three interrogations at Abu Ghraib prison: (1) a November 7, 2003 interrogation by Army Interrogator C and Army Interrogator F; (2) a November 18, 2003 interrogation by Army Interrogator D and Army Interrogator E; and (3) a December 23, 2003 interrogation by CACI Interrogator G and Army Interrogator B. Ex. 14 at 5.[3]

20. [redacted] Ex. 3 at 48, 52-53; Ex. 5 at 46-47, 51. Army

[3] The United States initially designated Interrogators F and G as "Unidentified," but later determined that "F" had been a soldier and "G" had been a CACI PT employee. Dkt. #897 at 2.

Interrogator C, however, [redacted] Ex. 3 at 57-62. He also testified that [redacted] *Id.* at 64-67. Army Interrogator F testified that CACI PT personnel had no role in the interrogation or treatment of detainees assigned to Army Interrogator C and Army Interrogator F for interrogation, including their interrogation of Al-Zuba'e. Ex. 5 at 44-45, 54, 63-65. Army Interrogator F testified that the only CACI PT employee with whom he participated in interrogations was "a nice guy" who he had never seen strike or mistreat a detainee. *Id.* at 38, 64-65. Army Interrogator F further testified that the abuses alleged by Al-Zuba'e did not occur in any interrogation in which he participated. *Id.* at 54-59.

21. Army Interrogator E does not remember his November 18, 2003 interrogation of Al-Zuba'e. Ex. 4 at 61.[4] He also has no knowledge of CACI PT personnel having a role in deciding how his interrogation of Al-Zuba'e proceeded or in dictating Al-Zuba'e's confinement conditions. *Id.* at 62. He testified that the abuses Al-Zuba'e alleges never occurred in any interrogation in which he participated. *Id.* at 62-66. He also denied entering into an agreement with CACI PT personnel to abuse detainees and denied that Al-Zuba'e was mistreated in connection with Army Interrogator E's interrogation of him. *Id.* at 69, 184-85.

22. Army Interrogator B [redacted] Ex. 2 at 64-66.[5] Army Interrogator B testified, however, that he

[4] The United States could not locate Army Interrogator D, the other participant in the November 18, 2003 interrogation.

[5] The United States has located the other participant in this interrogation, CACI Interrogator G. If and when he is deposed, CACI PT will supplement the record as appropriate.

never saw anything that he would consider abuse of a detainee, and also specifically denied having seen detainees subjected to any of the abuses alleged by Al-Zuba'e. *Id.* at 69-71, 85.

E. U.S. Army Assumption of Responsibility for Supervising and Controlling CACI PT Interrogators' Interactions With Detainees

23. CACI PT provided interrogators to the U.S. Army under Delivery Orders 35 and 71 ("DO 35" and "DO 71," respectively). DO 35 provided for integration of CACI PT interrogators into the military's interrogation teams in order to accomplish intelligence priorities established by Coalition Joint Task Force-7 ("CJTF-7"). Ex. 20 at ¶ 4. DO 35 also provided that CACI PT interrogators would conduct interrogations in accordance with "local SOP and higher authority regulations," would conduct other intelligence activities "*as directed*," and "will report findings of interrogation IAW with local reference documents, SOPs, and higher authority regulations *as required/directed*." *Id.* at ¶ 6 (emphasis added).

24. DO 71 provided that CACI PT interrogators 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. 21 at ¶ 3 (emphasis added). DO 71 also provided at "[a]ll actions [of the interrogators provided under DO 71] will be managed by the Senior [Counter-Intelligence] Agent," a member of the United States military. *Id.* at ¶ 4.d.

25. In practice, interrogation operations followed the contract requirements. When CACI PT interrogators arrived at Abu Ghraib prison, they were given a memorandum of understanding by Captain Carolyn Wood,[6] the Officer in Charge of the Interrogation Control Element ("ICE"). Ex. 22 at 27-28; Ex. 23. The memorandum provides that [redacted] Ex. 23 at ¶ 6. The military chain of command controlled

[6] By the time she was deposed in this case, Captain Wood was known as Major Holmes.

all aspects of a CACI PT interrogator's performance of the interrogation mission and treated CACI PT interrogators for operational purposes exactly the same as Army interrogators. Ex. 22 at 26, 28-29, 36 (Holmes); Ex. 24 at ¶¶ 4-5 (Brady); Ex. 25 at ¶ 9 (Pappas); *see also* Ex. 26 [redacted]

26. Colonel Pappas, who commanded the 205th Military Intelligence Brigade at Abu Ghraib prison, confirmed that "[i]n all respects, CACI PT interrogators were subject to the operational control of the U.S. military," and that "CACI PT interrogators were fully integrated into the Military Intelligence mission and [were] operationally indistinguishable from their military counterparts." Ex. 25 at ¶¶ 8, 9 (Pappas). CACI PT employees testified similarly. Ex. 27 at ¶ 10; Ex. 1 at 43-[redacted] 57-61, [redacted]

27. The Army had total control over the activities of both Army interrogators and CACI PT interrogators in their dealings with detainees. As Colonel Pappas stated:

> The military decided where each detainee would be incarcerated within Abu Ghraib prison, which detainees would be interrogated, and who would conduct the interrogations of a given detainee. Both military and CACI PT interrogators were required to prepare an interrogation plan for a detainee, which was reviewed and approved by the U.S. military leadership in the ICE. At the conclusion of an interrogation, military and civilian interrogators were required to prepare an interrogation report and enter it into a classified military database. The military then decided what use to make of information obtained during interrogations.

Ex. 25 at ¶ 10 (Pappas); Ex. 27 at ¶ 13 (Porvaznik); [redacted]

28. CACI Interrogator A, the one CACI PT interrogator identified as having conducted an intelligence interrogation of a Plaintiff who has been deposed in this case, testified that the U.S. Army chain of command, and not CACI PT managers, controlled their conduct of interrogations and dealing with detainees. The U.S. Army's total control over operational

matters, and CACI PT's complete lack of control over such matters, extended to dictating the conditions of confinement for detainees; assigning detainees to Tiger Teams for interrogations; approving interrogation plans and techniques to be used in each interrogation; establishing the approved interrogation rules of engagement; and approving any interrogation techniques that required authorization from higher headquarters. Ex. 1 at 43-[redacted] 57-61, [redacted]

III. SUMMARY JUDGMENT STANDARD

The standards for this motion are stated in this Court's decision in *Ghebreab v. Inova Health Sys.*, No. 1:16-cv-1088 (LMB/JFA), 2017 WL 1520427, at *6 (E.D. Va. April 26, 2017):

> Summary judgment is appropriate where the record demonstrates that "there is no genuine dispute as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). Although the Court must view the record "in the light most favorable to the non-moving party," *Dulaney v. Packaging Corp. of Am.,* 673 F.3d 323, 324 (4th Cir. 2012), "[t]he mere existence of a scintilla of evidence in support of the [nonmovant's] position will be insufficient" to overcome summary judgment. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 252 (1986); *see also Am. Arms Int'l v. Herbert,* 563 F.3d 78, 82 (4th Cir. 2009). Rather, a genuine issue of material fact exists only "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson,* 477 U.S. at 248. Moreover, "[t]he mere existence of some alleged factual dispute" cannot defeat a motion for summary judgment. *Hooven-Lewis v. Caldera,* 249 F.3d 259, 265 (4th Cir. 2001). Instead, the dispute must be both "material" and "genuine," meaning that it must have the potential to "affect the outcome of the suit under the governing law." *Id.*
>
> Where the nonmoving party bears the burden of proof, the party moving for summary judgment may prevail by showing "an absence of evidence to support" an essential element of that party's case. *Celotex corp. v. Catrett,* 477 U.S. 317, 322-25 (1986); *see also Rhodes v. E.I. du Pont de Nemours & Co.,* 636 F.3d 88, 94 (4th Cir. 2011). Once the moving party has successfully demonstrated that absence, the nonmoving party must "come forward with specific facts," rather than "metaphysical doubt[s]" or conclusory allegations that prove that there is a genuine dispute for trial. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475

> U.S. 574, 586-87 (1986) (internal quotations omitted); *see also Erwin v. United States,* 591 F.3d 313, 319 (4th Cir. 2010). Failure to do so "renders all other facts immaterial" and entitles the movant to judgment as a matter of law. *Rhodes,* 636 F.3d at 94. Under Fed. R. Civ. P. 56(c), "[a] party asserting that a fact . . . is genuinely disputed must support the assertion by . . . citing to particular parts of materials in the record . . . [or] showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact." The court must "draw any permissible inference from the underlying facts in the light most favorable to the party opposing the motion," however, "those inferences must, in every case, fall within the range of reasonable probability and not be so tenuous as to amount to speculation or conjecture." *Thompson Everett, Inc. v. Nat'l Cable Adver., LP.,* 57 F.3d 1317, 1323 (4th Cir. 1995).

Id. at *6.

IV. ANALYSIS

After forty-six depositions, and production of hundreds of thousands of documents, Plaintiffs have not corroborated their allegations that they were abused. That issue, however, is not material to this motion. Even accepting Plaintiffs' allegations of abuse as true, CACI PT is entitled to summary judgment because the undisputed facts do not permit holding CACI PT liable for any such abuse these Plaintiffs claim to have suffered.

A. CACI PT Is Entitled to Summary Judgment on Plaintiffs' Aiding and Abetting Claims

Plaintiffs' inability to identify those who allegedly mistreated them, other than to concede they were not CACI PT employees,[7] is a notable omission from their proof. The fatal omission, for purposes of their aiding and abetting claims, however, is the wholesale lack of evidence that

[7] *See* 9/22/17 Tr. at 15 ("We are not contending that the CACI interrogators laid a hand on the plaintiffs."); *see also* Dkt. #639 at 31 n.30 (the "gravamen of Plaintiffs' complaint is conspiracy and aiding and abetting").

CACI PT personnel provided practical assistance to the unknown soldiers who allegedly mistreated Plaintiffs, or that CACI PT personnel did so for the purpose of facilitating a crime.

In *Aziz v. Alcolac, Inc.*, 658 F.3d 388 (4th Cir. 2011), the Fourth Circuit held that international law determines the standard for imposing accessorial liability under ATS. *Id.* at 398. Using international law, the court established the requirements for aiding and abetting liability under ATS:

> [A] defendant may be held liable under international law for aiding and abetting the violation of that law by another when the defendant (1) provides practical assistance to the principal which has a substantial effect on the perpetration of the crime, and (2) does so with the purpose of facilitating the commission of that crime.

Id. at 398 (quoting *Presbyterian Church of Sudan v. Talisman*, 582 F.3d 244, 258 (2d Cir. 2009)). Put another way, Plaintiffs must show that CACI PT personnel assisted in the perpetration of a crime against *these Plaintiffs*, and that they acted with the purpose of causing the abuse allegedly suffered by these Plaintiffs. There is no evidence whatsoever of this.

In *Aziz*, the Fourth Circuit affirmed dismissal of aiding and abetting claims brought under ATS because a "cursory allegation" of general encouragement or assistance is inadequate; the plaintiff's burden is to prove substantial actual assistance in the commission of the international law violation that resulted in injury to the plaintiff. *Aziz*, 658 F.3d at 401. In *Talisman*, the Second Circuit held that aiding and abetting claims were available under ATS, but affirmed the entry of summary judgment because the record did not show actions by the defendant that assisted in causing injury to the plaintiffs for the purpose of facilitating an international law violation. 582 F.3d at 262-63. For example, while a Talisman Energy subsidiary may have refueled military aircraft bombing civilians, there was no evidence that Talisman, as the only defendant in the case, was involved in refueling the military bombers that attacked the plaintiffs.

Id.; *see also Doe I v. Cisco Sys., Inc.*, 66 F. Supp. 3d 1239, 1248 (N.D. Cal. 2014) (dismissing aiding and abetting claims because the allegations "do not show that the Defendants' conduct had a substantial effect on the perpetration of the alleged violations against Plaintiffs").

Courts in this circuit regularly grant summary judgment on aiding and abetting claims where there is no evidence that the defendant substantially assisted the tortfeasor in injuring the particular plaintiff, even where the defendant interacted with or had business dealings with the tortfeasor. Indeed, these courts do so under the more lenient "knowledge" standard permitted for aiding and abetting claims under domestic law, a *mens rea* standard the Fourth Circuit rejected in *Aziz* in favor of a stricter "purposefulness" test for claims under ATS. *See, e.g.*, *Smith v. Continental Ins. Co.*, 118 F. App'x 683, 685 (4th Cir. 2004); *Rockman v. Union Carbide Corp.*, No. 16-1169, 2017 WL 2687787, at *5 n.7 (D. Md. June 22, 2017) ("Plaintiff has neither identified the alleged tortfeasor with respect to any 'aiding and abetting' claim against Georgia-Pacific, nor presented any evidence that Georgia-Pacific provided 'substantial assistance or encouragement' to that tortfeasor."); *Lee v. Certainteed Corp.*, 123 F. Supp. 3d 780, 802 (E.D.N.C. 2015); *Venturetech II v. Deloitte Haskins & Sells*, 790 F. Supp. 576, 589 (E.D.N.C. 1992); *Fort v. SunTrust Bank*, No. 7:13-cv-1883, 2016 WL 4492898, at *16 (D.S.C. Aug. 26, 2016); *Whittaker v. David's Beautiful People, Inc.*, No. 14-2483, 2016 WL 429963, at *9 (D. Md. Feb. 4, 2016); *First Fin. Sav. Bank, Inc. v. Am. Bankers Ins. Co. of Fla.*, No. 88-33-CIV-5, 1990 WL 302790, at *6 (E.D.N.C. Apr. 17, 1990). The record in this case requires entry of summary judgment, as there is no evidence that CACI PT personnel provided assistance to anyone in abusing these Plaintiffs and did so for the purpose of facilitating a crime.

As a starting point, none of the Plaintiffs could provide facts regarding any interaction between themselves and any CACI PT employee or involvement by CACI PT employees in any

mistreatment they allegedly suffered. Statement of Facts ("SF") ¶¶ 2-4, 8-10, 13-14, 16-18. Al-Zuba'e "do[es]n't know anything about CACI or anything." SF ¶ 18. Rashid has no knowledge of CACI PT involvement in his mistreatment. SF ¶ 4. Al-Ejaili testified similarly, but added his opinion that the mere presence of CACI PT personnel at Abu Ghraib prison should be enough to render CACI PT liable to him. SF ¶ 10. Al Shimari has no knowledge of involvement by CACI PT personnel in his alleged mistreatment. SF ¶ 14.

While Plaintiffs may have been satisfied to avoid developing the factual record further, CACI PT pursued and took the pseudonymous deposition of every single interrogator the United States could locate who had contact with any of these Plaintiffs. The United States' records show that Rashid was interrogated only by Army interrogators, and both Army interrogators testified in their depositions that CACI PT personnel did not encourage or assist them in any mistreatment of Rashid. SF ¶¶ 5-7. The United States' records show that Al-Ejaili was never subjected to an intelligence interrogation. The only scintilla of evidence of an interaction between a CACI PT employee and Al-Ejaili is a statement from Sergeant Beachner, but Sergeant Beachner is unequivocal that the single interaction between Al-Ejaili and Mr. Stefanowicz was innocuous and fully complied with the interrogation rules of engagement. SF ¶¶ 11-12.

The CACI PT interrogator and Army interrogator participating in the single interrogation of Al Shimari testified that no mistreatment of Al Shimari occurred in connection with this encounter. SF ¶ 15. Thus, there is no evidence that anyone aided anyone else in mistreating Al Shimari in his one interaction with a CACI PT employee. Finally, United States records show that Al-Zuba'e was interrogated three times, twice by two different sets of Army interrogators and once by a CACI PT interrogator and an Army Interrogator. SF ¶ 19. Of the six total

participants, CACI PT has deposed four of them, and all four testified that CACI PT personnel never provided them with any assistance in mistreating detainees. SF ¶¶ 20-22.

Even if Plaintiffs' testimony that they were mistreated is accepted as true, Plaintiffs have not developed evidence that CACI PT employees did anything that substantially aided or encouraged the unknown alleged tortfeasors. Plaintiffs themselves have admitted that they lack facts tying CACI PT personnel to their alleged mistreatment, and the substantial third-party discovery taken in this case has not filled this glaring gap in Plaintiffs' own knowledge. As in *Aziz*, *Talisman*, and the non-ATS cases cited above, this wholesale absence of facts is fatal to Plaintiffs' aiding and abetting claims and requires entry of summary judgment.

B. CACI PT Is Entitled to Summary Judgment on Plaintiffs' Conspiracy Claims

As detailed in connection with Plaintiffs' aiding and abetting claims, Plaintiffs have no evidence that CACI PT personnel mistreated them or encouraged anyone else to mistreat them. Plaintiffs seek to plug the prominent gap in their evidence by asserting that they do not need to show *any* involvement by CACI PT personnel in their own mistreatment. Plaintiffs' theory is that some unidentified CACI PT personnel conspired with unidentified soldiers to abuse detainees, that these unidentified soldiers mistreated Plaintiffs as part of the conspiracy, and that, *voila,* CACI PT is responsible for Plaintiffs' damages. At the motion to dismiss stage, the Court ruled that Plaintiffs' *allegations* were sufficient to allow them to take discovery in support of their claims. We are now in the world where *evidence* and *facts* are what matter, and Plaintiffs have not developed sufficient facts on their conspiracy claims to survive summary judgment.

1. Applicable Standard

In ruling on CACI PT's motion to dismiss, the Court relied solely on *Cabello v. Fernandez-Larios*, 402 F.3d 1148, 1159 (11th Cir. 2005), for the proposition that the

requirements for a conspiracy claim under ATS are that "two or more persons agreed to commit a wrongful act, that defendant joined the conspiracy knowing of the goal of committing a wrongful act and intending to help accomplish it, and that one or more violations of the ATS 'was committed by someone who was a member of the conspiracy and acted in furtherance of the conspiracy.'" Dkt. #679 at 38 (quoting *Cabello*, 402 F.3d at 1159). Plaintiffs construe this as meaning that knowledge of the conspiratorial goal, without purpose, is sufficient to establish liability. In other words, Plaintiffs view this as a form of *Pinkerton* liability.[8]

With respect, the Court erred in relying on *Cabello* for the availability and elements of a conspiracy claim under ATS, as *Cabello* relied on domestic common law for the standards for such a claim, without reference to international law. *See Cabello*, 402 F.3d at 1159 (citing *Halberstam v. Welch*, which involved a conspiracy claim brought under District of Columbia law, as the source of the elements for a conspiracy claim under ATS). In this Circuit, however, courts must look to "international law to determine the standard for imposing accessorial liability." *Aziz*, 658 F.3d at 398 (citing *Talisman*, 582 F.3d at 259). In *Talisman,* the Second Circuit looked to international law and held that the *mens rea* standard for conspiracy and aiding and abetting liability in ATS actions is purpose rather than knowledge alone. 582 F.3d at 259.

In *Talisman*, the Second Circuit rejected the "*Pinkerton* theory" of co-conspirator liability under ATS, which would allow a defendant to be held liable for acts "committed in the furtherance of an unlawful conspiracy [if] the defendant was a member of that conspiracy." *Talisman*, 582 F.3d at 260 & n.10. Rather, *Talisman* held that if international law recognized co-

[8] *Pinkerton* stands for the proposition that a defendant may be held criminally liable for the unlawful acts of his co-conspirators committed in furtherance of and within the scope of the conspiracy and reasonably foreseeable to the defendant. *See Pinkerton v. United States*, 328 U.S. 640, 647-48 (1946); *United States v. Aramony,* 88 F.3d 1369, 1379 (4th Cir. 2008). The concept of *Pinkerton* liability does not extend to civil actions.

conspirator liability for a completed offense *at all*, it could extend only to "a criminal intention to participate in a common criminal design" and could encompass only international law offenses the defendant acted with the *purpose* of committing. *Id.*[9] Given the Fourth Circuit's endorsement of *Talisman*, *if* international law provides a basis for conspiratorial liability – and there is good reason to believe it does not – it does not permit *Pinkerton* liability under the ATS because there is no universally-recognized international norm for such liability.

Nor is there a universally-recognized international norm for double vicarious liability under a conspiracy theory involving a corporation – where an employee would be liable for a tort he did not personally commit as a member of a conspiracy, and *respondeat superior* then would impose liability on the employer for a tort the employee did not commit and that the employer neither knew about nor authorized. This is important because this is precisely the theory pursued by Plaintiffs – that CACI PT personnel are liable for detainee abuse committed not by them but by soldiers as members of a purported conspiracy, and that CACI PT is liable under *respondeat superior* for all abuse committed by all members of the conspiracy even though CACI PT neither knew about nor authorized that abuse and did not even know about the supposed conspiracy. Double vicarious liability, however, does not exist as an international law norm.

To demonstrate a violation of international law, Plaintiffs must prove that there are norms of an international character that were specifically defined, obligatory and universally accepted

[9] Contrary to Plaintiffs' view, *Cabello* does not endorse *Pinkerton* liability for the ATS. *See In re Chiquita Brands Intern., Inc.*, 792 F. Supp. 2d 1301, 1343 (S.D. Fla. 2011) ("[T]here is no inconsistency between the standard set forth in *Cabello*, urged by Plaintiffs, and *Talisman*'s standard, urged by Chiquita. That is, *Cabello* and *Talisman* both use a *purpose* standard for secondary liability. While *Cabello* does not use the term "purpose," its standard requires that the defendant "join[] the conspiracy knowing of at least one of the goals of the conspiracy and *intending to help accomplish it.*" The Court finds that this intent requirement is essentially the same as *Talisman*'s purpose requirement. Contrary to Plaintiff's position, *Cabello* requires more than mere knowledge of the principal's unlawful goals. *Cabello,* like *Talisman,* requires that the defendant act with the *intention* of accomplishing the offense.").

at the time of events giving rise to the alleged injuries. *Jesner v. Arab Bank*, 138 S. Ct. 1386, 1399 (2018); *Sosa v. Alvarez-Machain*, 542 U.S. 692, 732 (2004). No such universally-accepted international norm exists for *Pinkerton* liability or double vicarious liability and Plaintiffs have not attempted to demonstrate otherwise. The Court will search in vain through the authoritative sources of international law standards on which the Fourth Circuit relies, *see Aziz*, 658 F.3d at 396-400, for any acceptance of *Pinkerton* liability or double vicarious liability.

If co-conspirator liability exists under ATS, it at a minimum requires Plaintiffs to prove: (1) that CACI PT and U.S. government personnel agreed to commit a recognized international law violation against these Plaintiffs; (2) that CACI PT personnel joined the agreement with the purpose or intent to facilitate the commission of the violation; and (3) that U.S. government personnel committed the violation. Plaintiffs do not even satisfy this standard for imposing co-conspirator liability on CACI PT employees, much less on their employer.

Put another way, a plaintiff must present *evidence* that the conspirators positively or tacitly came to a mutual understanding to try to accomplish a common and unlawful plan. *Mohamed v. Jeppesen Dataplan, Inc.*, 614 F.3d 1070, 1084 (9th Cir. 2010) (citing *Talisman*, 582 F.3d at 260). Evidence that a defendant, or the defendant's employees, engaged in conduct similar to that of the persons who injured the plaintiff is not proof of an agreement to conspire. "[P]arallel conduct and a bare assertion of a conspiracy are not enough for a claim to proceed." *Thomas v. Salvation Army S. Territory*, 841 F.3d 632, 637 (4th Cir. 2016). "Without more, parallel conduct does not suggest conspiracy, and a conclusory allegation of agreement at some unidentified point does not supply facts adequate to show illegality." *A Soc'y Without a Name v. Virginia*, 655 F.3d 342, 346 (4th Cir. 2011); *see also Grenadier v. BWW Law Grp.*, No. 1:14-cv-827, 2015 WL 417839, at *11 (E.D. Va. Jan. 30, 2015).

"[W]hen concerted conduct is a matter of inference, a plaintiff must include evidence that places the parallel conduct in "context that raises a suggestion of a preceding agreement" as "distinct from identical, independent action." *Loren Data Corp. v. GXS, Inc.*, 501 F. App'x 275, 278 (4th Cir. 2012). "The evidence must tend to exclude the possibility that the alleged co-conspirators acted independently." *Id.*; *see also A Society Without a Name*, 655 F.3d at 346. Indeed, "[a]iry generalities [and] conclusory assertions about conspiracy are insufficient to stave off summary judgment." *Strouse v. Wilson*, No. 3:12-cv-653, 2014 WL 843276, at *5 (E.D. Va. Mar. 4, 2014) (internal quotations omitted) (alterations in original). Plaintiffs have no evidence that satisfies the first conspiracy requirement.

2. Even if Co-Conspirator Liability Were Available Under ATS, Plaintiffs Have Not Produced Evidence That CACI PT Personnel Entered into an Agreement to Injure Them or Acted With the Purpose of Injuring Them

There is no evidence that CACI PT personnel entered into a conspiracy, tacitly or otherwise, the object of which was the mistreatment of these Plaintiffs. As a starting point, Plaintiffs must present evidence that whoever mistreated them did so as part of a conspiracy; if they were not in a conspiracy with CACI PT personnel, there is no basis for holding CACI PT liable for their misdeeds. There is no evidence in the record that the unknown persons who allegedly mistreated Plaintiffs had joined a conspiracy that included CACI PT personnel.

Moreover, Plaintiffs cannot produce direct or circumstantial evidence that CACI PT personnel conspired with soldiers for the purpose of abusing Plaintiffs. Plaintiffs have not produced evidence as to words used to convey entry into a conspiracy either by CACI PT personnel or by the unidentified persons who allegedly mistreated them. Plaintiffs' sole evidence is to point to allegations of a few discrete acts of misconduct by a few CACI PT employees, all involving other detainees, and to argue from there that these alleged acts permit

an inference that CACI PT participated in a conspiracy that caused injury to them. Mere presence at Abu Ghraib prison is way too tenuous to support an inference of conspiracy. The evidentiary record in this case will not support the inferences on which Plaintiffs' conspiracy claims depend, and in fact refute such inferences.

There are no facts to support a conclusion that any mistreatment of Plaintiffs outside of interrogations took place as part of a conspiracy involving interrogation personnel, as opposed to discrete acts of criminal misconduct by MPs or others. [redacted] Ex. 28 at 215-18, 221-26. With respect to alleged mistreatment during interrogations, only two of the Plaintiffs were interrogated by CACI PT personnel, and just once each. Ex. 14 at 4-5. There is no evidence that either of these interrogations involved abuse of the detainee; indeed, the available evidence refutes such a conclusion. SF ¶¶ 15, 20-22. Plaintiffs themselves have admitted that they have no evidence that they were mistreated by or at the direction of CACI PT personnel. SF ¶¶ 4, 10, 14, 18

Moreover, the evidentiary record refutes any conclusion that CACI PT personnel had any role with respect to the treatment of detainees they were not assigned to interrogate. The pseudonymous interrogators deposed in this case testified that CACI PT personnel had no influence over interrogations of, and detention conditions for, detainees to whom they were not personally assigned. SF ¶¶ 6-7, 15, 20-22. The parties also deposed MPs who were prosecuted for detainee abuse and who admitted to abusing detainees. These witnesses testified that military and civilian interrogators sometimes gave MPs instructions concerning the treatment of their detainees, but that those instructions pertained to specific detainees who the interrogator was interrogating. Ex. 28 at 208-09, 226-27; Ex. 29 at 55-56.

Thus, Plaintiffs lack evidence that CACI PT personnel directed anyone to mistreat them. They also lack evidence that the persons who allegedly mistreated them did so as part of a conspiracy that included CACI PT employees. Moreover, the evidentiary record refutes the proposition that CACI PT personnel had any role or interest in the treatment of detainees they were not assigned to interrogate. Plaintiffs' sole refuge is reliance on alleged parallel conduct – that a few CACI PT employees have been implicated in generally minor acts of misconduct regarding other detainees, so the Court and jury should infer that they were part of a conspiracy to mistreat everyone. That premise runs headlong into the case law, cited above, holding that allegations of parallel conduct do not permit an inference of conspiracy, as such conduct is equally or more consistent with independent action. Plaintiffs' premise also runs headlong into the narrower conception of co-conspirator liability under international law, which, if the concept even exists, limits liability to persons the alleged conspirator specifically intended to abuse. The Court gave Plaintiffs every opportunity to take discovery in an effort to develop factual support for their allegations. They have not done so; entry of summary judgment is required.

3. Plaintiffs Have Not Produced Evidence that CACI PT Joined an Agreement with the Purpose or Intent to Injure Them

Plaintiffs have no direct evidence that reasonably supports the proposition that CACI PT, as a company, joined a conspiracy with the specific intent to commit any violation of international law. While intent can be inferred without direct evidence, Plaintiffs have no circumstantial evidence to support such an inference as to CACI PT's intent, or any evidence that any person with the power to enter into an agreement on CACI PT's behalf did so with respect to a conspiracy to mistreat these Plaintiffs.

C. CACI PT Is Entitled to Summary Judgment Because It Has No *Respondeat Superior* Liability for Plaintiffs' Claims

1. The Borrowed Servant Doctrine Bars Plaintiffs' Claims

When an employer provides its employees for use by another entity that takes responsibility for controlling the employees' conduct, the borrowing entity is the entity to which *respondeat superior* liability flows. *See White v. Bethlehem Steel Corp.*, 222 F.3d 146, 149 (4th Cir. 2000); *Huff v. Marine Tank Testing Corp.*, 631 F.2d 1140, 1144-45 (4th Cir. 1980); *NVR, Inc. v. Just Temps, NC*, 31 F. App'x 805, 807 (4th Cir. 2002) ("The borrowed servant doctrine arose as a means of determining which of two employers, the general employer or the borrowing employer, should be held liable for the tortious acts of an employee whose conduct injured a third party . . . ."); *Hamilton v. Gordon*, No. 3:04-cv-71, 2005 WL 1154279, at *4 (W.D. Va. May 16, 2005); *see also Williamson v. Consol. Rail Corp.*, 926 F.2d 1344, 1350 (3d Cir. 1991); *Melancon v. Amoco Prods. Co.*, 834 F.2d 1238, 1244-45 (5th Cir. 1988); *United States v. Bissett-Berman Corp.*, 481 F.2d 764, 772 (9th Cir. 1973).

In *White*, the Fourth Circuit traced the borrowed servant doctrine to *Standard Oil Co. v. Anderson*, 212 U.S. 215 (1909), which holds that, for purposes of *respondeat superior* liability, "[t]he master is the person in whose business he is engaged at the time, and who has the right to control and direct his conduct." *Id.* at 224-25 (internal quotations omitted); *see also* Restatement (Third) of Agency § 703 cmt. d(2) (2006) ("Liability should be allocated to the employer in the better position to take measures to prevent the injury suffered by the third party. An employer is in that position if the employer has the right to control an employee's conduct."). The touchstone of the borrowed servant doctrine is control – "who has the power to control and direct the servants in the performance of their work." *White*, 222 F.3d at 149.

Moreover, for the borrowed servant doctrine to apply, "[t]he authority of the borrowing employer does not have to extend to every incident of the employer-employee relationship; rather, it need only encompass the servant's performance of the particular work in which he is engaged at the time of the accident." *Id.* Indeed, even if the borrowing entity fails to adequately supervise and control the employee, *respondeat superior* liability nevertheless shifts to the borrowing entity because it is the power to control the employee's conduct that matters, not whether such power was exercised adequately. *Id.* at 150 (allegation that special employer failed to provide adequate supervision supported application of borrowed servant doctrine because it demonstrated that the power and responsibility to control rested with the special employer).

Here, the undisputed facts demonstrate that the U.S. Army chain of command assumed the right and power to supervise and control the manner in which CACI PT personnel interacted with detainees and performed their operational mission. The U.S. Army's total operational control included the responsibility and power to determine which detainees would be interrogated, to dictate the confinement conditions at Abu Ghraib prison, to assign detainees to particular interrogation teams, to establish the interrogation rules of engagement, to approve interrogation plans, and to approve interrogation approaches that required case-by-case approval. SF ¶¶ 23-28. The U.S. Army's total control over how military and CACI PT interrogators interacted with detainees was confirmed through the testimony of Colonel Thomas Pappas, the commander of the military intelligence brigade at Abu Ghraib prison (Ex. 25 at ¶¶ 8-10); Colonel William Brady, the contracting officer for the CACI PT contracts (Ex. 24 at 4-5); Major Holmes, the Officer-in-Charge of the Interrogation Control Element at Abu Ghraib prison (Ex. 22 at 26-29, [redacted]); Daniel Porvaznik, the CACI PT site lead who provided administrative support for CACI PT employees (Ex. 27 at ¶ 13); and the only CACI PT

interrogator deposed thus far who has been identified as having conducted an intelligence interrogation of any of these Plaintiffs (Ex. 1 at 58-[redacted] 88-90).

By design and in practice, CACI PT provided interrogators that the United States Army would control in terms of their dealings with detainees and performance of the interrogation mission. That is all that is required for application of the borrowed servant doctrine, and the doctrine eliminates any potential *respondeat superior* liability on CACI PT's part.

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

Whether and under what circumstances double vicarious liability is an available standard under ATS is not a question of domestic law, but must be established by universally-accepted international norms. *Aziz*, 658 F.3d at 398. Plaintiffs bear the burden of proving that that their novel theory of double vicarious liability is specifically defined, obligatory and universally accepted for ATS jurisdiction to lie. *See Sosa*, 542 U.S. at 736 (rejecting ATS jurisdiction where plaintiff "cites little authority that a rule so broad has the status of a binding customary norm today"). Absent positive authorities adopting double vicarious liability as a universally-accepted norm, the Court must enter judgment in CACI PT's favor on Plaintiffs' conspiracy claims.

D. Plaintiffs' Claims Are Preempted

This case arises out of the war in Iraq. In the Authorization for Use of Military Force Against Iraq Resolution of 2002, Pub. L. No. 107-243, 116 Stat. 1498, Congress authorized military action against Iraq to defend the national security of the United States. No court has reviewed and regulated, in the context of a civil action, the United States' prosecution of war against a foreign country, whether by the U.S. military, other government agencies, or contractors. No federal statute provides a cause of action allowing that, let alone a private cause of action for these Plaintiffs. State law is clearly preempted, as the Constitution and federal law

vest exclusive responsibility for waging war in the federal government. And using the "law of nations" – a body of rules gleaned from the law of foreign sovereigns – is even more inimical to the federal interests. The Court should decline the invitation to use international norms to preempt the Constitution and Congressional determinations with respect to providing a cause of action for allegations such as Plaintiffs'. This Court should not be the first to use international law norms to pass judgment on civil claims arising out of combatant activities in war.[10]

While this Court previously denied CACI PT's motion to dismiss based on preemption, a different outcome is now required. Since the Court decided CACI PT's motion to dismiss, the Supreme Court reinforced in *Jesner* that "ATS litigation implicates serious separation-of-powers and foreign-relations concerns" and "must be 'subject to vigilant doorkeeping.'" 138 S. Ct. at 1398. With Plaintiffs' claims of direct abuse having been dismissed, the separation-of-powers and foreign-relations concerns are heightened, as Plaintiffs seek to hold CACI PT liable for acts of U.S. soldiers in their prosecution of a war, litigation that Congress has sought to foreclose through legislation. In addition, the discovery conducted since the Court's motion to dismiss ruling shows that CACI PT personnel were fully integrated into the military intelligence operations at Abu Ghraib, both in formal structure and in practice, and that U.S. military retained command authority over those activities. SF ¶¶ 23-28. This satisfies the controlling standard in this Circuit, which this Court is bound to follow.

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

[10] Indisputably, the occupation government installed in Iraq by the United States and its allies provided that contractors supporting the military were immune to Iraqi laws and legal process. *See* Coalition Provisional Order 17.

policy is the prerogative of the Congress and the President." *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1861 (2017). 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.[11] Indeed, just last year the Supreme Court relied on these principles in holding that the vigilant doorkeeping required for a *Bivens* claim precluded recognizing such a claim against former government officials for alleged abuse of federal detainees in the aftermath of the September 11 attacks. *Ziglar*, 137 S. Ct. at 1861.

The federal interest in not having foreign sovereigns' law regulate U.S. military operations – through their acceptance or rejection of "international norms" – is particularly acute. 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."

[11] *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).

Saleh v. Titan Corp., 580 F.3d 1, 16 (D.C. Cir. 2009). The facts of this case are identical to *Saleh*; indeed, Plaintiffs were putative class members in *Saleh*. Therefore, the Court can reject preemption only by directly rejecting the Court of Appeals' decision in *Saleh*. While inconsistent results and conflicting obligations imposed on parties are hazards of our judicial system, that outcome would contravene the "strong judicial policy against the creation of two conflicting resolutions arising out of the same or identical transaction," in accordance with the Supreme Court's "long expressed . . . concerns for finality and consistency" of judicial decisions. *See Heck v. Humphrey*, 512 U.S. 477, 484-85 (1994).

At the motion to dismiss stage, the Court rejected preemption on the grounds that "the ATS is itself a federal statute," that Congress made a "considered determination that there should be a cause of action in federal court for violations of the law of nations," and that applying the ATS represents "the constitutional exercise of Congress's inherent power to regulate the conduct of war." Dkt. #678 at 46. The Court's prior analysis does not fully credit the fact that ATS is a jurisdictional statute only and creates no substantive causes of action. *Sosa*, 542 U.S. at 713. Indeed, the causes of action Congress had in mind when enacting ATS were offenses against ambassadors, violations of safe conduct and piracy, *id.* at 720, none of which involved applying the law of nations to the United States' conduct of war against a foreign enemy in a foreign land. *See Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108, 124 (2013). While the ATS allows federal courts to "recognize private claims under federal common law" for a "modest number of international law violations," *Sosa,* 542 U.S. at 724, 732, the Constitution's commitment of the prosecution of war to Congress and the Executive precludes judicial recognition of claims seeking to hold CACI PT liable for allegedly tortious acts committed by U.S. soldiers.

2. The Combatant Activities Exception to the FTCA Preempt Plaintiffs' ATS Claims

The Constitution's allocation of war powers is not the only federal source of law that preempts Plaintiffs' claims; federal statutes evincing a congressional intent to preclude judicial review of military operations similarly preempt Plaintiffs' claims. "Matters related to war are for the federal government alone to address." *Deutsch v. Turner Corp.*, 324 F.3d 692, 712 (9th Cir. 2003). The combatant activities exception to the FTCA evinces Congressional intent that battlefield conduct 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.*

The Fourth Circuit adopted the *Saleh* preemption test in *In re KBR, Inc., Burn Pit Litig.*, 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*. *Id.* at 351. The court held that KBR's waste management and water treatment operations in a war theater involved combatant activities because they were "both necessary to and in direct connection with actual hostilities." *Id.*

Although *Burn Pit* did not involve any federal or ATS claims, *Saleh* did involve ATS claims. In denying CACI PT's motion to dismiss, this Court concluded that *Saleh* "does not support preempting plaintiffs' ATS claims" because "[i]n *Saleh*, the court was concerned with the conflict between federal policy – as embodied in the FTCA – and state tort law; however, in the present civil action, plaintiffs' claims are exclusively brought pursuant to federal law." Dkt. # 678 at 49. With respect, this is a misreading of *Saleh*. While the *Saleh* court held that the plaintiffs' state-law claims were preempted, the court devoted an entirely separate section to explaining why the plaintiffs' ATS claims also were preempted. *Saleh*, 580 F.3d at 16-17. 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) (emphasis added). As explained in *Saleh*, the ATS is a jurisdictional statute and relies on federal common law and international law to create a cause of

action. *Id.*; *Sosa*, 542 U.S. at 714. As such, the uniquely federal interests inherent in the prosecution of war preempt the use of international law to create a federal common-law cause of action cognizable under the ATS. *See, e.g.*, *Am. Elec. Power Co. v. Massachusetts*, 564 U.S. 410, 423 (2011) (federal statutes can displace the power of federal court to recognize causes of action under federal common law); *Milwaukee v. Illinois*, 451 U.S. 304, 314 (1981) (same).

Thus, Plaintiffs' ATS claims are subject to the "ultimate military authority" preemption test. Under that 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." *Burn Pit*, 744 F.3d at 349. These facts are undisputed and established by CACI PT's contracts, testimony from the Army chain of command and CACI PT personnel who served under the military's direct and ultimate control at Abu Ghraib prison. SF ¶¶ 23-28. This evidence, combined with the lack of any contrary factual record, entitles CACI PT to a judgment as a matter of law that Plaintiffs' ATS claims are preempted.

V. CONCLUSION

The Court should grant summary judgment to CACI PT on all of Plaintiffs' claims.

Respectfully submitted,

/s/ John F. O'Connor

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CERTIFICATE OF SERVICE

I hereby certify that on the 20th day of December, 2018, I will electronically file the foregoing with the Clerk of Court using the CM/ECF system, which will then send a notification of such filing (NEF) to the following:

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