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

SUHAIL NAJIM ABDULLAH AL SHIMARI *et al*.,	)	
Plaintiffs,	)	
v.	)	C.A. No. 08-cv-0827 GBL-JFA
CACI INTERNATIONAL, INC., *et. al*.,	)	
Defendants	)	

PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION FOR RECONSIDERATION

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INTRODUCTION

This is a civil action for damages by four victims of the infamous atrocities at the Abu Ghraib prison in Iraq, brought against a government contractor whose employees are alleged to have presided over and carried out those abuses. Defendants CACI International, Inc. and CACI Premier Technology, Inc. (collectively "CACI") move this Court to reconsider its 2008 denial of their motion for partial summary judgment, and to dismiss the state law claims of three of four Plaintiffs, on statute of limitations grounds.

CACI's motion is not meritorious. First, assuming (as CACI's motion does) that Virginia law governs, CACI's reliance on a recent decision of the Virginia Supreme Court, *Casey v. Merck & Co.*, 722 S.E.2d 842 (Va. 2012), is misplaced. CACI failed to apply the retroactivity analysis required under Virginia law to assess whether *Casey's* holding should bar claims filed by Plaintiffs nearly four years ago in reliance on the then-existing state of the law. That retroactivity analysis, and the equitable considerations underlying it, decisively counsel against application of the *Casey's* new tolling principles to this case. The Court need go no further in denying CACI's motion.

Second, if this Court were to conclude that the Virginia rule against tolling announced for the first time in *Casey* must be applied retroactively to cases pending when it was decided, the Court would then have to consider a larger question: whether Virginia law applies at all. While CACI repeatedly admonishes this Court to apply "binding" Virginia law regarding the tolling of the statute of limitations, CACI forgets that this action was filed in the Southern District of Ohio and transferred here pursuant to 28 U.S.C. § 1404(a). Under U.S. Supreme Court precedent, the choice-of-law rules of the transferor jurisdiction – here, Ohio – normally

govern a transferred case after transfer, and those rules lead to the conclusion that the claims of the three Plaintiffs in question are timely.

PROCEDURAL BACKGROUND

The three plaintiffs who are the subject of CACI's dismissal motion – Taha Yaseen Arraq Rashid, Sa'ad Hamza Hantoosh Al-Zuba'e, and Salah Hasan Nusaif Jasim Al-Ejaili (collectively, the "Rashid Plaintiffs") – are Iraqi citizens who were tortured at Abu Ghraib prison. Plaintiff Rashid was first imprisoned on September 22, 2003 and released without charge on May 6, 2005. Plaintiff Al-Zuba'e was first imprisoned on November 1, 2003 and released without charge on October 24, 2004. Plaintiff Al-Ejaili was first imprisoned on November 3, 2003, and released without charge on February 1, 2004. Plaintiff Suhail Najim Abdullah Al Shimari – whose claims CACI does not seek to dismiss as untimely – was first imprisoned on November 7, 2003 and released without charge on March 27, 2008.

On June 9, 2004, a number of Iraqi citizens imprisoned in U.S.-run facilities in Iraq, including Abu Ghraib, filed a class action in the Southern District of California, *Saleh v. Titan Corp.*, No. 04-cv-1143 (S.D. Cal. June 9, 2004), against Titan Corporation, CACI International, and several of their subsidiaries, asserting various federal and state law claims relating to the torture and abuse of the plaintiffs. The *Saleh* action was twice transferred, first to this Court and then to the United States District Court for the District of Columbia. The *Saleh* plaintiffs amended their complaint three times before their motion for class certification was denied on December 6, 2007.

On June 30, 2008, Plaintiff Al Shimari commenced this action against CACI in the Southern District of Ohio. In August 2008, upon CACI's motion, Al Shimari's action was transferred to this Court without objection, and is presently before the Court.

On September 15, 2008, Al-Shimari filed an Amended Complaint, Dkt. No. 28, in which the Rashid Plaintiffs joined. Shortly thereafter, on Oct. 10, 2008, CACI sought dismissal of the claims asserted by the Rashid Plaintiffs based on the statute of limitations. In litigating that motion, CACI assumed that Virginia law governed, and Plaintiffs did not contest that assumption because they had a complete answer under Virginia law. CACI relied on the Fourth Circuit decision in *Wade v. Danek Medical, Inc.*, 182 F.3d 281 (4th Cir. 1999), to argue that Virginia did not permit cross-jurisdictional tolling of Plaintiffs' claims during the pendency of the *Saleh* class action. Plaintiffs countered that the Virginia Supreme Court's subsequent decision in *Welding, Inc. v. Bland County Service Authority*, 541 S.E.2d 909 (Va. 2001), permitted such tolling. By Order issued November 25, 2008, the Court agreed with the Rashid Plaintiffs and declined to dismiss those three plaintiffs' state law claims. Mem. Order Nov. 25, 2008.

CACI then delayed the current proceedings for three and a half years – until May 2012 – by filing a purported appeal without appellate jurisdiction of the Court's denial of CACI's motion to dismiss Plaintiffs' state law claims based on certain affirmative defenses. *See Al Shimari v. CACI Int'l, Inc.*, 679 F.3d 205 (4th Cir. 2012) (*en banc*) (holding that the Court lacked jurisdiction over CACI's premature appeal). In this period of time, and but for the dilatory appeal, all of Plaintiffs' state law claims could have been fully adjudicated. Near the end of that period, the Second Circuit certified questions of law to the Virginia Supreme Court to clarify whether "Virginia law permit[s] equitable tolling of a state statute of limitations due to the pendency of a putative class action in another jurisdiction." *Casey v. Merck & Co.*, 653 F.3d 95 (2d Cir. 2011). In March 2012, the Virginia Supreme Court answered in the negative. *Casey v. Merck & Co.*, 722 S.E.2d 842 (Va. 2012).

ARGUMENT

Plaintiffs do not quarrel with this Court's authority to revisit interlocutory rulings when intervening developments in the law merit such reconsideration (*see* Defts.' Memo in Support at 2-3). Nor do Plaintiffs ask this Court to "simply ignore" the *Casey* decision (Defts.' Memo in Support at 12). *Casey* would mandate the dismissal of the Rashid Plaintiffs' state law claims as untimely only if (1) *Casey* applies retroactively to this case, and (2) the law of Virginia, to which this action was transferred, instead of Ohio, where the case originated, governs. CACI assumes, as it did in its original motion for partial summary judgment in 2008, that Virginia law applies. The Rashid Plaintiffs had a sufficient answer to the 2008 motion by demonstrating that Virginia law, even assuming it controlled, tolled their claims. These Plaintiffs believe they still have a complete answer under Virginia law because the rule against tolling announced for the first time in *Casey* should not be applied retroactively to this case, which was filed before that decision. In the alternative, as demonstrated in Point II below, if the Court determines that *Casey* would apply to this case, it would then have to determine whether the law of the transferor state Ohio and not Virginia governs this case, as the claims of the Rashid Plaintiffs are indisputably timely under Ohio law.

I. THE COURT SHOULD NOT RETROACTIVELY APPLY *CASEY* TO PLAINTIFFS' CLAIMS

Casey should not be applied retroactively. Such retroactive application would strip plaintiffs of their right to proceed with their pending claims that were held timely under the prior understanding of Virginia law reflected in this Court's decision of November 25, 2008.

CACI ignores the balancing test set forth in *Fountain v. Fountain*, 200 S.E.2d 513, 514 (Va. 1973), *cert. denied*, 416 U.S. 939 (1974), which courts are obligated to undertake before applying judicial rulings retroactively and which decidedly counsels against dismissing

the Rashid Plaintiffs' state law claims. Virginia courts do not retroactively apply a judicial determination of law if: 1) it establishes a new principle of law, either by deciding an issue of first impression or by overruling clear precedent on which litigants may have relied; 2) after examining the purpose of the rule in question, a finding of non-retroactivity will not retard operation of the rule; and 3) retroactive application would impose some inequity. *City of Richmond v. Blaylock*, 440 S.E.2d 598 (Va. 1994).

A. Plaintiffs Relied On Clear Legal Precedent Permitting Cross-Jurisdictional Tolling Of Their Claims

Until the *Casey* decision issued earlier this year, Plaintiffs and this Court read Virginia law to permit equitable tolling based on purported class actions pending in other jurisdictions. In 2001, the Virginia Supreme Court ruled in *Welding* that cross-jurisdictional tolling is permitted under Virginia law. *See* 541 S.E.2d at 224 (noting that tolling is not limited in "its application to a specific type of action"). When the applicability of that principle to the present case was contested by CACI in moving for summary judgment early in the case, this Court squarely held that the claims of the Rashid Plaintiffs were timely. (Mem. Order Nov. 25, 2008). If the law were to the contrary, i.e., if there were any prospect that the law as espoused in *Casey* years later would govern their claims, the Rashid Plaintiffs could have dispelled any doubt as to the timeliness of their claims by, for example, filing in the Southern District of Ohio to obtain the benefit of Ohio's cross-jurisdictional tolling rule.[1]

Until *Casey*, there was no reason to believe that *Welding's* holding would not apply to unnamed putative members of a class action. Such tolling is permitted under federal law, as held repeatedly by the U.S. Supreme Court. *See American Pipe & Constr. Co. v. Utah*,

[1] As explained in Point II, Plaintiffs do not believe that the extra step of filing in the transferor district is even necessary to secure the application of transferor law where *defendants* have prompted the transfer.

414 U.S. 538, 554 (1974); *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345, 352 (1983) (*American Pipe* tolling applies not only to intervenors, but also to putative class members who file actions of their own). As recently as 2010, this Court held that the limitations period for a plaintiff's state law claims was tolled by the filing of a federal class suit in another jurisdiction in which the plaintiff was a purported class member. *Torkie-Tork v. Wyeth*, 739 F. Supp. 2d 887 893 (E.D. Va. 2010) (relying upon *Welding, Inc. v. Bland Cnty. Serv Auth.*, 541 S.E.2d 909 (Va. 2001) and this Court's Nov. 25, 2008 Mem. Order in this action).

CACI labors to convince the Court that *Casey* did not "change" Virginia law (Defts.' Memo in Support at 10), but that does not decide the retroactivity analysis. As *Fountain* and its progeny cited above make clear, the retroactivity analysis is triggered if the judicial decision "establishe[s] a new principle of law *either* by overruling clear past precedent on which litigants may have relied *or* by deciding an issue of first impression whose resolution was not clearly foreshadowed . . . ." *City of Richmond v. Blaylock*, 440 S.E.2d at 599 (emphasis added). The fact that *Casey* did not expressly overrule any prior Virginia Supreme Court case is of no moment, because *Casey* was the first occasion on which the Court decided that tolling is not available under Virginia law to members of a putative class action. Such a decision of first impression is precisely the type of ruling that triggers retroactivity analysis.

B. Permitting the Rashid Plaintiffs' State Law Claims To Proceed Would Not Undermine Policy Considerations Underlying Virginia's Limitations on Cross-Jurisdictional Tolling

The general policy of Virginia's limitations statutes is "to prevent a plaintiff from purposefully delaying suit to the prejudice of the defendant." *Grimes v. Owens-Corning Fiberglass Corp.*, 843 F.2d 815, 820 (4th Cir. 1988). Such prejudice can arise, for example, where evidence needed to respond to stale claims has not been preserved or the defendant has otherwise acted on the assumption that it was no longer exposed to claims arising from a past

event. Where there is no evidence that Plaintiffs "delayed filing claims in order to sabotage [CACI's] defense," and CACI was "not caught by surprise" when Plaintiffs joined Al Shimari's action with identical claims, *Grimes*, 843 F.2d at 820, a decision not to retroactively apply *Casey* would not undermine Virginia's general policies underlying its limitations statute. Here, CACI has been on notice since at least 2004, when the *Saleh* class action was filed, of its potential exposure to tort claims arising from the Abu Ghraib atrocities. It has known since 2008 specifically that it would have to defend this action, due to the admittedly timely claims filed by Plaintiff Al Shimari. CACI could not have been lulled into repose, nor is it reasonable to believe evidence would not have been preserved. Indeed, the delay in this action is attributable entirely to CACI's defective attempt to appeal this Court's interlocutory rulings.

This action also does not undermine the policy considerations behind Virginia's narrowing of cross-jurisdictional tolling in *Casey*. *Casey* did not expound upon any policy reasons that might undergird its ruling. However, in *Wade* – the case relied upon by CACI in its initial motion to dismiss the Rashid Plaintiffs' claims – the Fourth Circuit suggested that a policy reason why Virginia might not recognize a cross-jurisdictional tolling rule for purported class actions was the potential "flood of subsequent filings once a class action in another forum is dismissed." *Wade*, 182 F.3d at 287. That policy consideration might be a reason to reject tolling on account of a pending class action, but it is not a reason to apply that rejection retroactively. The risk of unfairness to defendants in asking them to defend waves of later-filed claims following denial of class certification is not implicated by withholding retroactive application of *Casey* to the narrowly-defined universe of claimants relying on cross-jurisdictional tolling, like the Rashid Plaintiffs, whose claims were filed before the *Casey* decision and are still pending. As of the date of the *Casey* decision, all potential litigants whose claims may be governed by

Virginia law are on notice not to rely on the pendency of a purported class action in which they would be unnamed class members to toll their claims.

C. Retroactive Application of *Casey* Would Be Unfair To Plaintiffs

The equities strongly disfavor the retroactive application of *Casey* in this matter. *Welding* was the law when Plaintiffs' causes of action arose – more than eight years prior to *Casey* – and remained so three and half years into the proceedings initiated to vindicate their claims. *Cf. Chevron Oil Co. v. Huson*, 404 U.S. 97, 105-08 (1971) (declining retroactive application of a decision changing the applicable statute of limitations where the plaintiff's cause of action arose three years before the decision and plaintiff had initiated his lawsuit one year before the decision). The effect of the retroactive application of *Casey* is to deny the Rashid Plaintiffs a state law remedy. *See Fieldcrest Cannon, Inc. v. Marshall*, Record No. 2567-96-2, 1997 Va. App. LEXIS 195, *3 n.1 (Va. Ct. App. Apr. 1, 1997) (noting that where "retrospective application would result in substantial inequity to claimants whose claims in tort are now barred by the statute of limitations," the court would not retroactively apply the judgment); *Piedmont Mfg. Co. v. East*, No. 1546-96-3, 1997 Va. App. LEXIS 90, *3 n.1 (Va. Ct. App. Feb. 25, 1997) (same).

Had the tolling rule in *Casey* been the law in 2008, Plaintiffs could have filed their claims in Ohio, as Plaintiff Al Shimari had, rather than filing directly in this Court. Had they filed in Ohio, where cross-jurisdictional tolling of their claims would have been recognized, they would have dispelled any doubt as to their ability to proceed with their claims either in Ohio (or in Virginia, if their case was transferred here for the sake of judicial economy). Having expressly relied on the state of the law in 2008 – a state of the law this Court itself repeatedly affirmed – Plaintiffs should not now be penalized via dismissal due to a subsequent and unforeseeable change in the law. Indeed, CACI's reliance on *Casey* is more than a little ironic,

as it is only its flawed appeal filed without appellate jurisdiction, and the consequent delay of some three and a half years, that prevented this case from coming to judgment and gives CACI the ability to cite the recently-decided *Casey*.

Plaintiffs' circumstances are manifestly distinguishable from those in the cases upon which CACI relies. First, CACI grossly misreads *Casey*. CACI appears to argue that the *Casey* decision itself – beyond stating a new rule regarding cross-jurisdictional tolling – also compels the retroactive application of this new rule to unrelated cases. Under CACI's logic, *Casey* must be read to apply retroactively to dismiss the state law claims in this case because the claims of the plaintiffs in *Casey* were dismissed. This reasoning is specious. Of course, *Casey* resulted in the dismissal of the claims of the litigants in that case, *Casey v. Merck & Co.*, 678 F.3d 134, 138 (2d Cir. 2012), but whether that decision should apply in other, prior-filed cases is a distinct retroactivity inquiry, governed by the *Fountain* balancing factors. As the Virginia Supreme Court has explained, where "the prevailing litigants are seeking implementation of the decision made in litigation they initiated," as occurred in *Casey*, what they are seeking is "a remedy based on the law of the case, not retrospective application of the decision reached in another case." *Blaylock*, 440 S.E.2d at 599. On the other hand, independent considerations of retroactivity "are normally made in cases where litigants seek the benefit of a change in the law secured by other parties in a prior case." *Id*. The *Casey* judgment itself says nothing about whether the new rule announced in that case should apply retroactively to this distinct litigation – a litigation that was commenced upon reliance by Plaintiffs (and ratification of this Court) nearly four years ago under a different legal rule.

CACI's reliance on *Sanchez* and *Flick* is similarly misleading. The *Sanchez* suit was filed on March 6, 2012, *Sanchez v. Lasership, Inc.*, No. 1:12cv246 (GBL/TRJ), 2012 U.S.

Dist. LEXIS 122404, at *8 (E.D. Va. Aug. 27, 2012), after the Virginia Supreme Court's ruling in *Casey* on March 2, 2012, rather than before it, as CACI incorrectly states. Defts.' Mem. In Support at 12. More importantly, we have found no indication that the question whether *Casey* should be applied retroactively was raised in either *Sanchez* or *Flick v. Wyeth LLC*, No. 3:12-cv-00007-NKM, 2012 U.S. Dist. LEXIS 78900 (W.D. Va. June 6, 2012). That question is squarely raised here.

II. ALTERNATIVELY, THE COURT SHOULD APPLY THE SAME LAW OF LIMITATIONS THAT THE TRANSFEROR COURT WOULD HAVE APPLIED – THE LAW OF OHIO – UNDER WHICH THE CLAIMS OF ALL PLAINTIFFS ARE TIMELY

The Rashid Plaintiffs believe that *Casey* clearly does not apply retroactively to their claims, and that the Court need go no further to affirm its 2008 decision and deny this motion. Nonetheless, in the event this Court were to determine that *Casey* must be applied retroactively, it would then have to reach the larger question whether Virginia limitations law applies at all to this case.

A. The Court Should Apply the Law that Would Be Applied by the Transferor Court

This action was commenced in the Southern District of Ohio and transferred to this Court on motion of CACI pursuant to 28 U.S.C. § 1404(a) (See Dkt. No. 16). In *Van Dusen v Barrack*, 376 U.S. 612 (1964), the Supreme Court unanimously held that, in such a case, the district court to which the case is transferred must apply the same law as the transferor court would have done: the transfer should result merely in a change in courtroom, not a change in law. *Id*. at 639. The *Van Dusen* decision leaves no doubt that the law of the transferor court should govern the entire case – including matters that arose after transfer. The Court approvingly cited *H.L. Green Co. v MacMahon*, 312 F.2d 650 (2d Cir. 1962), in which the Court of Appeals approved a transfer from the Southern District of New York to the Southern District

of Alabama, noting that "[t]he case should remain as it was in all respects but location." 376 U.S. at 633 (quoting *H.L. Green Co.*, 312 F.2d at 652-53). The plaintiffs argued that they wished to add a common law claim to the complaint, and resisted transfer for fear that less favorable law in the transferee court would govern the amendment. The Supreme Court agreed with the Second Circuit that that was no impediment to transfer, because the transferee court would apply New York law even to matters added by amendment after transfer:

> The Court [of Appeals] made the import of this rule plain by expressly declaring first that the transferee court sitting in Alabama should apply New York law in ruling on the motion to add to the complaint and, secondly, that if the complaint were thus amended, the transferee court "will apply New York law (including any relevant New York choice-of-law rules)."

Id. at 633 (quoting *H.L. Green Co.*, 312 F.2d at 654).

The principle is the same here: amendments to the complaint after transfer, whether to add claims or plaintiffs, are controlled by the law that the transferor court would have applied. A transfer under section 1404(a) results in a change of courtroom, not a change of law.

The rule of *Van Dusen*, which considered a transfer requested by defendants, was extended in *Ferens v. John Deere Co.*, 494 U.S. 516 (1990) to a case in which plaintiffs moved for a transfer from the district in which they had filed the action to a more convenient district. Even in such a case, where the plaintiffs transparently filed in a particular forum to obtain the benefit of the favorable statute of limitations of the transferor court, the Supreme Court held that the law of the transferor court should be applied: "[W]e have seen § 1404(a) as a housekeeping measure that should not alter the state law governing a case . . . ." *Id*. at 526. It is significant that the Court referred to the "law governing a case," not the law governing a party or a claim. The Court observed that a rule applying transferee law in some instances

> would produce undesirable complications. The rule would leave unclear which law should apply when both a defendant and a plaintiff move for a transfer of venue or when the court transfers venue on its own motion . . . *or when only one of several plaintiffs requests the transfer*, or when circumstances change through no fault of the plaintiff making a once convenient forum inconvenient.

Id. at 530-31(emphasis added) (citation omitted).

Avoidance of such needless complications and arbitrary results is likewise an important consideration here, which counsels the Court to apply the single body of law of the transferor court to this case in its entirety after transfer, rather than to individual plaintiffs based on when they joined the case. Doing so will properly result in all four Plaintiffs, who have substantially identical claims, having an equal chance to seek redress on the merits.[2]

In keeping with *Van Dusen* and *Ferens*, lower courts that have dealt with the addition of plaintiffs following a transfer have adhered to the principle that the transferee court should apply the same law that the transferor court would have done even when new plaintiffs appear in the transferee court by way of an amendment to the complaint. An example is *Pappion v. Dow Chemical Co.*, 627 F. Supp. 1576 (W.D. La. 1986). That case was transferred pursuant to section 1404(a) from the Eastern District of Texas to the Western District of Louisiana. After transfer, a number of additional plaintiffs sought to join the suit by amendment of the complaint. It was established that the transferor court would have applied a two-year statute of limitations based on Texas law, while the law of Louisiana in which the transferee court sat would apply a one-year limitation. The court tested the timeliness of the additional would-be plaintiffs' claims

[2] The one respect in which *Ferens* found a distinction between cases in which transfer was sought by the plaintiff rather than by the defendant is that "[p]laintiffs in the position of the Ferenses must go to the distant forum because they have no guarantee, until the court there examines the facts, that they may obtain a transfer." 494 U.S. at 532. That requirement has no application here, where CACI sought and obtained the transfer to this Court.

not according to the law of Louisiana, but according to the law of the transferor court: "the applicable two-year Texas statute of limitations." *Id*. at 1582.

The principle that amendment of a complaint after transfer does not affect the applicability of transferor-court law has continued to govern in more recent cases and has been invoked in a variety of circumstances. For example, in *Brown v. Hearst Corp.*, the First Circuit applied the choice-of-law rules of the transferor court to determine the substantive law that applied despite the fact that the plaintiff had subsequently filed an amended complaint with the transferee court. 54 F. 3d 21, 24 (1st Cir. 1995). In *Riddle v. Shell Oil Co.*, the court also applied the choice-of-law rules of the transferor court in Mississippi to a post-transfer amended complaint, which resulted in the application of Mississippi's statute of limitations. 764 F. Supp. 418, 420-22 (W.D. Va. 1990). The amended complaint added an additional defendant to the action, and the court rejected the new defendant's argument that the transferee forum's law applied.

> [D]efendants argue that what could have been does not matter; since [defendant] was added to the complaint in Virginia rather than Mississippi, the law of Virginia governs. If this court were to apply [defendant]'s reasoning, a plaintiff would have to go back to the court where the case was originally filed whenever the plaintiff wanted to amend his complaint. Such an argument not only contravenes the policy of judicial economy, but also ignores the fact that this court is sitting as a Mississippi court. Although served in Virginia, defendant Unocal was made party to an action governed by the law of Mississippi."

Id. at 423.

In sum, CACI's admonition that "a federal district court sitting in diversity must apply the choice of law rules of the state in which it sits" (Defts' Memo in Support at 4, citing *Klaxon Co. v. Stentor Elec. Mfg. Co*., 313 U.S. 487, 496 (1941)) is at best an incomplete statement of the law and one that can be misleading in a case like this one that is in the present

venue solely due to a section 1404(a) transfer. We need look no further than *Van Dusen* itself to correct CACI's error:

> Although we deal here with a congressional statute apportioning the business of the federal courts, our interpretation of that statute fully accords with and is supported by the policy underlying *Erie R. Co. v. Tompkins*, 340 U.S. 64. This Court has often formulated the *Erie* doctrine by stating that it establishes "the principle of uniformity within a state," *Klaxon Co. v. Stentor Elec. Mfg. Co., Inc.*, 313 U.S. 487, 496, and declaring that federal courts in diversity of citizenship cases are to apply the laws "of the states in which they sit," *Griffin v. McCoach*, 313 U.S. 498, 503. A superficial reading of these formulations might suggest that a transferee federal court should apply the last of the State in which it sits rather than the law of the transferor State. Such a reading, however, directly contradicts the fundamental *Erie* doctrine which the quoted formulations were designed to express. . . .
>
> . . . . What *Erie* and the cases following it have sought was an identity or uniformity between federal and state courts; and the fact that in most instances this could be achieved by directing federal courts to apply the laws of the States "in which they sit" should not obscure that, in applying the same reasoning to § 1404(a), the critical identity to be maintained is between the federal district court which decides the case and the courts of the State in which the action was filed.

376 U.S. at 637-39 (footnotes omitted)

For these reasons, the Court should apply the same statute of limitations as the transferor court, the Southern District of Ohio, would have applied had CACI not successfully moved to transfer the action here.

B. This Action is Timely Under the Transferor Court's Governing Law of Limitations

To insure compliance with the principles set forth in *Van Dusen*, the transferee court would consult the same choice-of-law rules that would govern the transferor court. Here, the Southern District of Ohio would look to Ohio's choice-of-law rules. *See Klaxon Co.*, 313 U.S. 487.

Ohio has adopted the Second Restatement of Conflict of Laws for its choice-of-law analysis. *See Am. Interstate Ins. Co. v. G & H Serv. Ctr.*, 861 N.E.2d 524, 527 (Ohio 2007) ("The *Morgan* court adopted the Restatement in its entirety."); *Morgan v. Biro Mfg. Co.*, 474 N.E.2d 286, 288-289 (Ohio 1984) (adopting Restatement). According to the Restatement, "[a]n action will be maintained if it is not barred by the statute of limitations of the forum, even though it would be barred by the statute of limitations of another state." *Cole v. Mileti*, 133 F.3d 433, 437 (6th Cir. 1998) (quoting Restatement (Second) of Conflict of Laws § 142(2) (1971 ed.)). As a result, Ohio applies its own limitations rules regardless of what substantive law applies to a claim. *See Dudek v. Thomas & Thomas Attys. & Counselors at Law, LLC*, 702 F. Supp. 2d 826, 834 (N.D. Ohio 2010) ("Ohio courts are required to apply Ohio's statute of limitations to an action filed in Ohio even if that action would be time-barred in another state."); *Capital One Bank (USA), N.A. v. Rodgers*, 2010 Ohio 4421, P18 (Ct. App. 2010) (same); *D.A.N. Joint Venture III, L.P. v. Armstrong*, 2007 Ohio 898, P28 (Ct. App. 2007) (same).

Ohio also recognizes cross-jurisdictional equitable tolling for all members of a purported class. In *Vaccariello v. Smith & Nephew Richards, Inc.*, the Ohio Supreme Court held that "the filing of a class action, whether in Ohio or the federal court system, tolls the statute of limitations as to all asserted members of the class who would have been parties had the suit been permitted to continue as a class action." 763 N.E.2d 160, 163 (2002); *accord, Wyser-Pratte Mgmt. Co. v. Telxon Corp.*, 413 F.3d 553, 567 (6th Cir. 2005). Therefore, under an application of Ohio law, the statute of limitations in this case would have been tolled during the course of the *Saleh* litigation for the Rashid plaintiffs, just as this Court determined that the analogous pre-*Casey* Virginia law acted to toll Virginia's statute of limitations.

There is no dispute that tolling of the statute of limitations during the approximately three-and-one-half years pendency of the *Saleh* class action (June 9, 2004-Dec. 6, 2007) means that the claims of the Rashid Plaintiffs are timely. As CACI analyzes the case, the claims of those Plaintiffs accrued while they were in detention, and the lapse of time between their release and the filing of their claims was no longer than approximately four years, seven months (Defts.' Memo in Support, at 4). Deducting the tolling period while *Saleh* was pending as a class action means that none of the claims in question was filed more than two years from accrual, and the claims of two of the three Rashid Plaintiffs were filed less than one year from accrual.[3]

CONCLUSION

For the reasons stated above, the Court's 2008 Order denying CACI's motion for partial summary judgment based on the statute of limitations should be affirmed.

Date: November 20, 2012

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[3] *See, e.g.*, *Yeager v. Local Union 20, Teamsters*, 6 Ohio St. 3d 369, 375 (1983) (residual limitations period of 4 years provided in Ohio Rev. Code Ann. 2305.9(D) governs claim for intentional infliction of emotional distress), *abrogated on other grounds by Welling v. Weinfield*, 866 N.E.2d 1051, 1059 (2007); Ohio Rev. Code Ann. 2305.10(A) (2012) (2 year limitation period for claims based on negligence). The Rashid Plaintiffs also reserve the right to assert, to the extent relevant, that the limitation period applicable to their claims is extended because they did not discover their claims against CACI until far later than their release from Abu Ghraib. Finally, Ohio's "borrowing statute," Ohio Rev. Code Ann. 2305.03 (2012), does not apply here because the claims in this case arose before the statute became effective. *Dudek v. Thomas & Thomas Attys. & Counselors at Law, LLC*, 702 F. Supp. 2d 826, 837-38 (N.D. Ohio 2010)*; Executone of Columbus, Inc. v. Inter-Tel, Inc.*, 665 F. Supp. 2d 899, 918-19 (S.D. Ohio 2009); *D.A.N. Joint Venture III, L.P. v. Armstrong*, 2007 Ohio 898, P29 (Ohio Ct. App. 2007).

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CERTIFICATE OF SERVICE

I hereby certify that on November 20, 2012, I electronically filed the Plaintiffs' OPPOSITION TO DEFENDANTS' MOTION FOR RECONSIDERATION through the CM/ECF system, which sends notification to counsel for Defendants.

/s/ Susan L. Burke
Susan L. Burke (VA Bar #27769)