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
REPLY IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT

I. INTRODUCTION

This case is about four Plaintiffs who allege that they were abused in varying degrees by U.S. Army MPs. With Plaintiffs apparently having concluded that the MPs and the United States were immune from suit, Plaintiffs have sought recovery solely from a defense contractor on theories of aiding and abetting and co-conspirator liability.

Plaintiffs' opposition confirms the central premise of CACI PT's summary judgment motion – that there is no evidence connecting CACI PT personnel to Plaintiffs' alleged mistreatment. In Plaintiffs' thirty-five page opposition, they devote barely one page to describing the supposed connection between CACI PT personnel and their alleged mistreatment.

Pl. Opp. at 4-5. Even the few contacts Plaintiffs recite are innocuous, unsupported by the record, or both. Plaintiffs' case is built on the syllogism that CACI PT should be liable for any mistreatment Plaintiffs may have suffered, without proof that CACI PT personnel had anything to do with Plaintiffs' mistreatment, because a few CACI PT interrogators were accused of (but not prosecuted for) involvement in discrete acts of mistreatment of *a few other detainees they were assigned to interrogate* at Abu Ghraib prison. No principle of law allows Plaintiffs to recover from CACI PT based on the alleged but unproven involvement of CACI PT personnel in the mistreatment of others. Because the facts in the record, as opposed to Plaintiffs' allegations, do not support a finding that CACI PT personnel aided or conspired with anyone to mistreat these Plaintiffs, the Court should grant summary judgment.

CACI PT also is entitled to summary judgment because there is no basis for imposing *respondeat superior* liability for the alleged acts of CACI PT employees' alleged co-conspirators where the United States insisted on and exercised exclusive operational control over the detention and interrogation of detainees at Abu Ghraib prison. For the same reason, and because of the Constitution's commitment of wartime matters to Congress and the Executive, Plaintiffs' claims are preempted.

II. ANALYSIS

A. Plaintiffs Have No Evidence Connecting CACI PT Personnel to Plaintiffs' Alleged Mistreatment

In declining to dismiss Plaintiffs' aiding and abetting and conspiracy claims, the Court recited seven pages of *allegations* from the Third Amended Complaint that the Court, as required, accepted as true. Dkt. #678 at 2-9; *id.* at 2 n.3 ("When reciting the facts in this section, the Court has assumed that the factual allegations in the Complaint are true and has drawn all reasonable inferences in plaintiffs' favor."). The Court also relied heavily on Plaintiffs'

allegation that detainee abuse was so open and notorious, and in a confined space in which interrogators worked, that anyone working there must be part of a "widespread agreement" to abuse detainees. Dkt. #678 at 39. On summary judgment, however, Plaintiffs' allegations are irrelevant. "[I]t is ultimately the nonmovant's burden to persuade [the Court] that there is indeed a dispute of material fact. It must provide more than a scintilla of evidence—and not merely conclusory allegations or speculation—upon which a jury could properly find in its favor." *CoreTel Va., LLC v. Verizon Va., LLC*, 752 F.3d 364, 370 (4th Cir. 2014) (citation omitted). Plaintiffs may not defeat a motion for summary judgment "without offering any concrete evidence from which a reasonable juror could return a verdict in his favor [nor] by merely asserting the jury might, and legally could," disbelieve the movant. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986).

Plaintiffs' opposition breezily represents that "the evidence that Plaintiffs have marshalled in this case is essentially identical to those allegations this Court has found sufficient to state a claim." Pl. Opp. at 1. Plaintiffs' premise is not even remotely true. As detailed below, the evidentiary record does not in any way support a finding or inference that CACI PT personnel assisted or conspired with anyone in abusing these Plaintiffs. Indeed the record refutes such a conclusion. Moreover, the evidentiary record does not support Plaintiffs' allegations that CACI PT personnel broadly aided others and conspired in the abuse of all detainees through some form of overarching agreement or conduct. This lack of evidence is fatal to Plaintiffs' claims and requires entry of summary judgment.

1. Plaintiffs' Opposition Confirms That They Lack Evidence of CACI PT Personnel Encouraging or Directing Anyone to Mistreat Them

After forty-seven depositions, many of which were conducted pseudonymously because the witnesses' identities are state secrets,[1] and extensive document production, Plaintiffs' opposition devotes barely one page to describing the purported universe of connections between themselves and CACI PT personnel. All of the contacts described by Plaintiffs are either innocuous or take considerable liberties with the record. None connects CACI PT personnel to the mistreatment Plaintiffs allege.

Plaintiffs' description of so-called contacts between Plaintiffs and CACI PT personnel begins with a whopper – that "all civilian interrogators at Abu Ghraib were CACI employees." Pl. Opp. at 4. This representation is demonstrably untrue. [redacted] Thus, Plaintiffs' implied premise that any American civilian present at Abu Ghraib prison presumably was a CACI PT employee is contradicted by the record.

Plaintiffs allege one contact between CACI PT personnel and Plaintiff Rashid – [redacted] That characterization is highly misleading. The two interrogators participating in Rashid's only intelligence interrogation were both soldiers, with Army Interrogator H as the

[1] The parties have taken twenty-five depositions in this case, and agreed that the twenty-two depositions taken in the related *Saleh* case would be treated as if taken in this case as well.

lead interrogator and Army Interrogator I as the assistant. Ex. 6 at 62; Ex. 11 at 6.[2] The Army assigned a CACI PT employee as Army Interrogator H's section leader for a two-week period during which the Rashid interrogation occurred. Ex. 6 at 74. [redacted]

Plaintiffs' description of the record regarding Plaintiff Al-Ejaili is similarly misleading. Plaintiffs acknowledge that the only abuse of Al-Ejaili was inflicted by two MPs. Pl. Opp. at 5. They state that Al-Ejaili [redacted]

Citing Al-Ejaili's testimony, Plaintiffs represent that "CACI Interrogator [redacted] saw Mr. Al-Ejaili naked in his cell and at that moment appeared to direct the military police in their abusive treatment towards him." Pl. Opp. at 5. However, Al-Ejaili's *actual* testimony was that: (1) [redacted] smiled at Al-Ejaili while Al-Ejaili was being kept naked in his cell; and (2) Al-Ejaili was directed to face the wall in his cell while a group of persons had a conversation in front of the cell, and in response to a leading question from his counsel, Al-Ejaili testified only that it was ***"possible"*** that [redacted] was one of the people in that group. Pl. Ex. 3 at 199:5 - 200:6 (emphasis added). Unsurprisingly, Al-Ejaili is unable to say what was discussed by the

[2] The United States initially listed Interrogator I's affiliation as unknown, but later confirmed that he had been a soldier. Dkt. #897 at 2.

unidentified people in front of his cell, and Al-Ejaili himself testified that he has no basis for asserting that CACI PT personnel had any role in directing his alleged mistreatment. Ex. 13 at 9-10, 66, 73, 194-96, 216.

With respect to Plaintiff Al-Zuba'e, CACI PT's Statement of Material Undisputed Facts ("SF") cites and quotes from Al-Zuba'e's deposition testimony to support the following facts:

> Al-Zuba'e acknowledged that he had no basis for concluding that CACI PT personnel had *any* involvement in the mistreatment he alleges. Al-Zuba'e summed up his knowledge of matters relating to CACI PT thusly: "I don't know anything about CACI or anything."

SF ¶ 18 (citations omitted). Plaintiffs' opposition ***admits*** that these facts are undisputed, with the sole carve-out that Plaintiffs dispute that Al-Zuba'e "has no knowledge of his contact with CACI interrogators." Pl. Opp. at 20. But even that limited caveat is only supported by Paragraph 10 of Plaintiffs' statement of facts, which merely states that Al Shimari and Al-Zuba'e testified that some of their interrogators were civilians. Pl. Opp. at 5.

[redacted] Either way, neither Al-Zuba'e nor anyone else with whom he interacted connected CACI PT personnel to mistreatment suffered by Al-Zuba'e in any way, shape, or form.

The story is much the same with Plaintiff Al Shimari. Plaintiffs' opposition admits that Al Shimari cannot connect any CACI PT personnel to his alleged abuse, though Plaintiffs add that Al Shimari and Al-Zuba'e allege that they were interrogated by civilians. Pl. Opp. at 19 (¶

14); *id.* at 5 (¶ 10). CACI PT's Statement of Material Undisputed Facts cites to record evidence that CACI Interrogator A and Army Interrogator B, the two interrogators participating in the only intelligence interrogation of Al Shimari, testified that [redacted] Plaintiffs mostly admit this fact, but add the caveats that [redacted]

Plaintiffs omit that CACI Interrogator A testified that he used stress positions "rarely" and even then the use of a stress position generally would be included in the approved interrogation plan. Ex. 1 at 97-98. Moreover, CACI Interrogator A was specifically asked about the specific stress position alleged by Al Shimari – standing on his toes with his nose against the wall – and he testified that he never participated in an interrogation where that occurred. *Id.* at 99. Regarding Army Interrogator B's testimony about smoke flowing under a detainee's hood, Plaintiffs cleave from their recitation the duration of this alleged event – about three seconds – and also omit that *this is not a type of abuse that Al Shimari alleges he suffered*. Ex. 2 at 57. Finally, Plaintiffs' opposition denies "that CACI Interrogator A testified that [redacted] He most certainly did. Ex. 1 at 111-112 ("Q: Did you ever give MPs instructions on how to treat any detainee who was not assigned to your tiger team? A: No."). That testimony is unrebutted.

2. The Evidentiary Record Does Not Support the Inference That Interrogation Personnel Necessarily Were Aware of Detainee Abuses That Were Occurring at Abu Ghraib Prison

As detailed in Section II.A.1, there is no evidence that CACI PT personnel specifically directed anyone to mistreat these Plaintiffs in any way. In denying CACI PT's motion to dismiss

Plaintiffs' conspiracy and aiding and abetting claims, the Court relied heavily on Plaintiffs' *allegation* that detainee abuse was so open and notorious, and in a confined space in which interrogators worked, that it was reasonable to infer that personnel working in the Hard Site were part of a "widespread agreement" to abuse detainees. Dkt. #678 at 39.

> The TAC alleges that in the small and confined universe of the Hard Site, CACI interrogators explicitly instructed MPs to "soften up" detainees to prepare them for interrogation and that CACI interrogators, including some who were identified by name, ordered various military personnel to "set the conditions" for detainees and "actually ordered" the most serious forms of abuse.

Id. The allegations on which the Court based this inference are not supported by evidence.

Not a single witness has testified that interrogation personnel generally knew about detainee abuse in the Hard Site. Multiple interrogators and MPs testified without contradiction that they were unaware of the abuses occurring at the Hard Site during their tenure there. *See, e.g.*, [redacted]; Ex. 2 at 85 (Army Int. B); Ex. 3 at 64 (Army Int. C) ("It is also my belief that the vast majority of folks working at that time had no sort of agreement or any sort of agreement to abuse detainees."); Ex. 4 at 186 (Army Int. E); Ex. 5 at 83, 94-96, 102-14 (Army Int. F); Ex. 6 at 92-93 (Army Int. H); Ex. 38 at 136-54 (Titan Interpreter K); Ex. 39 at 74-75, [redacted]; Ex. 41 at 91-93 (Sgt. Cathcart). None of this evidence is controverted.

Moreover, the interrogation operation did not occur in a "small and confined" space. Abu Ghraib prison is a sprawling complex, and military and CACI PT interrogators conducted interrogations within the Hard Site, at nearby interrogation booths, and at open-air tent camps where most detainees were held. *See, e.g.*, Ex. 1 at 19-20, 35-40 (CACI Int. A) (conducted interrogations at tent camps, in interrogation booths, and, for one detainee, in the detainee's cell); Ex. 4 at 23-24, 36, 39 (Army Int. E) (conducted 50% of his interrogations at the tent camps and

the other 50% within the Hard Site); Ex. 6 at 23-25, 32 (Army Int. H) (conducted 80% of his interrogations at tent camps and the other 20% at the Hard Site). Plaintiffs' opposition appears to walk away from the notion that detainee abuse was ubiquitous and regularly observed by interrogation personnel, as Plaintiffs now concede that "[m]any of the abuses at Abu Ghraib occurred outside these formal interrogation sessions, at night and frequently in the detention blocks." Pl. Opp. at 10 (¶ 32). For abuses allegedly occurring outside of interrogations, Plaintiffs have no evidence whatsoever that whichever MPs inflicted such abuses was aided by or conspired with *any* interrogation personnel, much less CACI PT employees. Thus, while the Court relied on Plaintiffs' allegation that detainee abuse occurred openly in a confined universe such that interrogators necessarily were aware as it happened, that inference is unwarranted at the summary judgment stage when evidence, and not mere allegations, controls the analysis.

3. The Record Refutes the Inference That CACI PT Interrogators' Instructions to MPs Included General Instructions to Abuse Detainees

As set forth in Section II.A.1, the record is barren of evidence that CACI PT personnel instructed anyone to mistreat these Plaintiffs. Acknowledging that reality, Plaintiffs argue that some CACI PT interrogators provided MPs with instructions regarding detainee treatment, and this supports an inference that CACI PT interrogators provided general instructions that encompassed mistreatment of these Plaintiffs. Based on Plaintiffs' *allegations*, the Court accepted this premise at the motion to dismiss stage. Dkt. #678 at 39 ("CACI interrogators explicitly instructed MPs to 'soften up' detainees to prepare them for interrogation and that CACI interrogators . . . ordered various military personnel to 'set the conditions' for detainees and 'actually ordered' the most serious forms of abuse."). However, the undisputed evidentiary record explicitly *refutes* the premise that CACI PT interrogators, or military interrogators for that

matter, provided general instructions to MPs regarding detainee treatment, as opposed to case-by-case instructions regarding the treatment of their own assigned detainees.

Plaintiffs cite to the deposition testimony of Private Frederick and Private Graner, two MPs convicted of detainee abuse, for the proposition that [redacted] Pl. Opp. at 10-11. But Plaintiffs' recitation of their testimony omits the crucial fact that [redacted] Frederick [redacted] testified that instructions from a military or CACI PT interrogator were always specific to the treatment of a particular detainee assigned to that interrogator. Ex. 28 at 208-09, 226-27; [redacted] That undisputed aspect of Frederick's [redacted] testimony eliminates any permissible inference that CACI PT personnel provided MPs with instructions encompassing the treatment of Rashid and Al-Ejaili, neither of whom was assigned to a CACI PT interrogator. With respect to Al Shimari, the uncontroverted evidence is that CACI Interrogator A only provided instructions to MPs regarding detainee treatment for one detainee – a detainee other than Al Shimari – [redacted] There is no evidence of CACI Interrogator A providing any other instructions to an MP regarding treatment of a detainee.[3]

4. There Is No Evidence That CACI PT Personnel Ordered the Most Serious Forms of Abuse at Abu Ghraib Prison

At the motion to dismiss stage, the Court relied on Plaintiffs' allegation that CACI PT personnel "'actually ordered' the most serious forms of abuse" at Abu Ghraib prison. Dkt. #678 at 39. This allegation is unsupported by evidence. Plaintiffs mostly rely on the Taguba and Jones/Fay reports for their premise that CACI PT personnel directed mistreatment of some

[3] With respect to Al-Zuba'e, CACI Interrogator G, who allegedly participated in an interrogation of Al-Zuba'e, is scheduled to be deposed on February 12, 2019.

detainees (Pl. Opp. at 6-10), though neither report alleges that CACI PT personnel directed mistreatment of Plaintiffs. CACI PT's response to Plaintiffs' motion *in limine* explains in detail why the portions of the reports on which Plaintiffs rely are not admissible. Dkt. #1104. [redacted]

The Jones/Fay report only made findings regarding a few acts of alleged detainee abuse by CACI PT personnel. MG Fay found that Mr. Stefanowicz had made unauthorized use of working dogs, used his foot to push a detainee into his cell, and directed that a detainee's head be shaven and that he be placed in women's underwear. Ex. 33 at 134. MG Fay found that Daniel Johnson had interrogated one person (an Iraqi police officer who smuggled a pistol in to a detainee) while the interrogee squatted in a plastic chair; encouraged an MP to twist the cuffs on an Iraqi police officer; allowed the same MP to cover the officer's nose and mouth for a few seconds; and threatened to bring an MP back into the interrogation of the Iraqi police officer. *Id.* at 132.[4] MG Fay found that Timothy Dugan had engaged in one inappropriate act with a detainee – pulling an Iraqi general from a jeep and dragging him to an interrogation booth. *Id.* at 131. That's the list. Notably absent are allegations in the reports or from eyewitnesses

[4] At the motion to dismiss stage, the Court relied on the Third Amended Complaint's description of Al-Ejaili's testimony to the effect that Mr. Johnson "was among the people who ordered 'Al-Ejaili to face the wall and then proceed[ed] to talk about "what to do with" him.'" Dkt. #678 at 38. As explained in Section II.A.1, [redacted]

implicating CACI PT personnel in the beatings, broken bones, sexual assaults, forced and simulated sex acts, naked pyramids, or simulated electric shocks that indisputably occurred.

Thus, even if the hearsay-laden Taguba and Fay reports were credited on summary judgment, they still involve, at most, allegations of discrete acts of misconduct not directed at Plaintiffs, and directed specifically to these interrogators' assigned detainees. The record does not support an inference that CACI PT personnel directed detainee abuse generally, nor does it implicate them in the most serious abuses at Abu Ghraib prison. Thus, while the Court adopted these inferences at the motion to dismiss stage based on Plaintiffs' *allegation*s, the lack of evidentiary support precludes the same inferences at the summary judgment stage.

5. There Is No Evidence That CACI PT Management Knew About and Concealed Detainee Abuse or Rewarded Personnel Accused of Abuse

At the motion to dismiss stage, the Court held that it was permissible to infer CACI PT's participation in a conspiracy based on Plaintiffs' factual allegations that CACI PT management personnel knew about and directed detainee abuse and rewarded employees engaging in detainee abuse. Dkt. #678 at 40. The record does not support these allegations.

Plaintiffs' opposition cites to the testimony of CACI PT executive Charles Mudd for the proposition that CACI PT conducted operational supervision of interrogations. In fact, Mr. Mudd testified that he visited Iraq periodically to check on employee welfare, and that he walked through the interrogation booth at Abu Ghraib prison to get an idea of the conditions under which CACI PT employees operated, he had no role in supervising the operational mission, which was the sole province of the U.S. Army. Mudd Dep. at 28-29, 57-58, 63-65, 75, 93, 99, 108-11, 132-33, 143, 145, 178. Mr. Mudd's testimony is uncontroverted.

Plaintiffs' opposition cites CACI PT interrogator Daniel Porvaznik's deposition in an attempt to elevate the CACI PT site lead position at Abu Ghraib prison to one involving

operational supervision. Pl. Opp. at 12-13. But Mr. Porvaznik and other witnesses unequivocally testified that the CACI PT "site lead" was merely a point of contact for administrative matters only and involved no operational supervision. Ex. 51 at 103-104, 132-33, 161-62, 317-18, 325-26 (Porvaznik Dep.); Ex. 27 at ¶ 18 (Porvaznik Decl.); Ex. 24 at ¶ 5 (Col. Brady Decl.); Ex. 52 at 140-42 (Maj. Holmes Dep.) (describing CACI PT site lead as an "administrative go-to guy" with no role in making operational decisions).

Finally, the Third Amended Complaint included allegations, credited by the Court at the motion to dismiss stage, that CACI PT management (1) covered up detainee abuse, (2) promoted employees accused of detainee abuse, and (3) refused the U.S. Army's demand that it remove an employee from the contract who had been accused of detainee abuse. Dkt. #678 at 40. These allegations are refuted by the record. With respect to CACI PT management supposedly covering up detainee abuse, Plaintiffs cite an email in which a former CACI PT employee advised a program manager that he thought Army interrogators were not adequately supervised and referenced an ongoing Army investigation into an unauthorized interrogation *by a soldier*. Pl. Ex. 54 at 1. [redacted] More

important, CACI PT *did not terminate Nelson's employment* – he resigned of his own volition – and CACI PT management actually tried to convince Nelson to take another position in Iraq on a different contract rather than resigning. *Id.* at 58-59; Ex. 53 at 72-77.

The Court's motion to dismiss ruling relied on Plaintiffs' allegation that CACI PT promoted Steven Stefanowicz to site lead "even after the military recommended disciplining him for his role in the abuse" and refused to remove Daniel Johnson from the contract despite "an explicit request from military officials" to do so. Dkt. #678 at 40. The summary judgment record refutes these allegations. Mr. Stefanowicz replaced Dan Porvaznik as site lead on a temporary basis in early February 2004 and then permanently, at the U.S. Army's suggestion, in early March 2004 when Mr. Porvaznik left Abu Ghraib. Ex. 51 at 155, 173-75. The Abu Ghraib scandal did not become known until Seymour Hersh reported on the leaked Taguba report in the May 10, 2004 issue of *The New Yorker*,[5] an article that for the first time noted allegations against Mr. Stefanowicz. Indeed, CACI PT executive Charles Mudd testified, without contradiction, that CACI PT had no idea that Mr. Stefanowicz was being accused of detainee abuse until the Taguba report became public, and until that time had been told by Army officials that its employees "are not in any type of trouble." Ex. 54 at 121-22. Thus, the record does not support the premise that CACI PT made Mr. Stefanowicz site lead after being advised he was suspected of detainee mistreatment.

With respect to Mr. Johnson, [redacted]

[5] *See* https://www.newyorker.com/magazine/2004/05/10/torture-at-abu-ghraib.

[redacted]

B. Plaintiffs Have Not Presented Facts Sufficient to Support a Jury Verdict on Their Aiding and Abetting Claims

Plaintiffs' argument regarding their aiding and abetting claims ignores the threshold flaw in their claims – that even if we assume Plaintiffs' allegations of abuse are true, there is no evidence that the tortfeasor received practical assistance from *anyone*, much less from CACI PT employees. CACI PT's summary judgment memorandum made this argument explicitly, and cited record evidence of detainee abuses that were cases of MP sadism, with no connection at all to the interrogation mission. CACI PT Mem. at 11-12, 20. Plaintiffs' opposition ignores their obligation to show evidence that the person mistreating them was aided in some way by CACI PT personnel, as Plaintiffs have no legal or record-based response.

Moreover, Plaintiffs' opposition elides the different tasks involved in assessing Rule 12(b)(6) motions and motions for summary judgment. Plaintiffs' opposition oddly represents that "there is more than sufficient evidence to allow the jury to find" for Plaintiffs, but repeatedly recites this Court's discussion of Plaintiffs' *allegations* in its motion to dismiss ruling. Most brazenly, Plaintiffs quote the Court for the proposition that "[t]he evidence shows 'who committed or directed particular forms of abuse, what the abuse involved, who was aware of the abuse and concealed it, and the motivation for committing the abuses.'" Pl. Opp. at 30 (quoting Dkt. #678 at 45). Plaintiffs would have done well to include the first part of the sentence they

quoted, in which the Court states that, in its view, "plaintiffs' TAC in this civil action contains a wealth of factual *allegations*" describing these things. Dkt. #678 at 45 (emphasis added).

Indeed, Plaintiffs' one-page aiding and abetting argument quotes the Court's motion to dismiss ruling three different times for the proposition that they have evidentiary support for their aiding and abetting claims, each time excising from their quote the Court's recitation that its comment relates to Plaintiffs' *allegations*, and not to any facts in the record. As CACI PT set forth in considerable detail in Section II, the record contains no evidence that CACI PT personnel aided anyone in mistreating these Plaintiffs and specifically refutes that interrogators provided general instructions to MPs regarding detainee treatment.

C. Plaintiffs Have Not Presented Facts Sufficient to Support a Jury Verdict on Their Conspiracy Claims

In ruling on CACI PT's motion to dismiss, the Court relied on cases applying domestic law to determine the availability of co-conspirator liability. Dkt. #678 at 38. Plaintiffs' opposition argues that the Court should perpetuate its error under the law of the case doctrine. Pl. Opp. at 27-28 & n.9. But as Plaintiffs acknowledge, the law of the case doctrine does not apply in cases of clear error. Pl. Opp. at 26-27. The Fourth Circuit's holding that courts must look to "international law to determine the standard for imposing accessorial liability" would seem to qualify the Court's application of domestic law as clear error. *Aziz v. Alcolac, Inc.*, 658 F.3d 388, 398 (4th Cir. 2011). As CACI PT has explained, *Aziz* relied on the Second Circuit's analysis in *Presbyterian Church of Sudan v. Talisman Energy, Inc*, 582 F.3d 244 (2d Cir. 2009). *Talisman* observed that if co-conspirator liability exists under international law at all, it does not extend to all acts in furtherance of the conspiracy, but only to international law offenses the defendant acted with the *purpose* of committing. *Id.* at 260 & n.10.

Whether the Court applies the international law standard set out in *Talisman*, or continues to apply domestic law, the facts do not support imposing co-conspirator liability on CACI PT. As with aiding and abetting, Plaintiffs repeatedly quote from the Court's motion to dismiss ruling, a ruling based on Plaintiffs' *allegations*, as supposedly showing that their conspiracy claims have evidentiary support. But the factual record bears little resemblance to the Third Amended Complaint and does not support the recitation of "facts" in Plaintiffs' opposition. In particular:

- The record shows very little contact between CACI PT personnel and these Plaintiffs, and there is no evidence that CACI PT personnel directly abused or encouraged anyone else to mistreat these Plaintiffs. Section II.A.1, *supra*.

- The record refutes that detainee abuse was so widespread and open that interrogation personnel could be assumed to have known it was occurring and conspired in such abuses. Section II.A.2.

- While military and CACI PT interrogators sometimes gave MPs instructions regarding detainee treatment, these instructions were always case-by-case instructions for detainees assigned to that interrogator. Section II.A.3, *supra*.

- The record refutes that CACI PT personnel were involved in the worse abuses at Abu Ghraib prison. The record shows only unproven allegations that three CACI PT employees engaged in discrete acts of misconduct, none of which involved severe pain or injury and none of which involved these Plaintiffs. Section II.A.4, *supra*.

- The record refutes that CACI PT management condoned or concealed abuses, or rewarded employees accused of detainee abuse. Section II.A.5, *supra*.

When Plaintiffs' mere allegations are stripped away as refuted and/or unsupported by the evidentiary record, it effectively guts the conspiracy analysis in the Court's motion to dismiss ruling, as these allegations formed the entire foundation for the Court's ruling.

In addition, as CACI PT pointed out in its summary judgment memorandum, even if co-conspirator liability is permissible under international law, it is not enough for Plaintiffs to show entry by CACI PT personnel into such a conspiracy. Rather, Plaintiffs also would have to prove

that whoever mistreated them was part of the *same* conspiracy, as opposed to a malefactor acting on his own without participation by CACI PT personnel. CACI PT Mem. at 20. [redacted] *Id.* (citing Ex. 28 at 215-18, 221-26). Plaintiffs' response? Nothing at all. They simply ignore their obligation to present evidence not only that CACI PT personnel were part of a conspiracy, but also that the persons who allegedly mistreated them did so as part of that conspiracy. The fact that five employees conspire to embezzle from their employer does not make them liable for another theft in the same office by an employee who was acting on his own.

D. *Respondeat Superior* Liability Is Not Available

In moving for summary judgment, CACI PT argued that it cannot be held liable on a "double vicarious liability" theory – whereby CACI PT is held liable for the torts of its employees' alleged co-conspirators. As the Fourth Circuit held in *Aziz*, the scope of liability under ATS must be determined based on principles that are universally-accepted components of international law. *Aziz*, 658 F.3d at 398. Establishing a theory of recovery universally accepted under international law is Plaintiffs' burden. They have not cited a single authority recognizing such a theory of liability, and CACI PT is not aware of any. That, standing alone, requires entry of summary judgment. CACI PT Mem. at 24.

CACI PT also presented authorities for the principle that CACI PT cannot be held liable on a *respondeat superior* theory for the actions of employees who were subject to U.S. Army supervision. CACI PT Mem. at 22-24. In that situation, any *respondeat superior* liability flows to the United States as the entity that undertook responsibility for supervising CACI PT interrogators' dealing with detainees. *Id.*. Plaintiffs have cited no international authorities supporting *respondeat superior* in such a situation, which is their burden. Moreover, Plaintiffs

argue that the question whether the United States took responsibility for supervising CACI PT interrogators' operational conduct is a fact-intensive inquiry inappropriate for summary judgment. Pl. Opp. at 32. The flaw in Plaintiffs' reasoning is that, as explained in Section II.A.5, the record unilaterally refutes Plaintiffs' allegations that CACI PT controlled operations at Abu Ghraib prison. *See also* SF ¶¶ 23-28 (citing record evidence).

E. Plaintiffs' Claims Are Preempted

Plaintiffs' discussion of preemption begins with the curious statement that "[a]s with most of its summary judgment motion, in asserting 'preemption,' CACI does not attack the sufficiency of Plaintiffs' evidence." Pl. Opp. at 33. This statement is wrong on two levels. On its most basic level, CACI PT devoted the vast majority of its summary judgment memorandum to presenting record evidence and argument that Plaintiffs' aiding and abetting claims are unsupported by the evidence. Moreover, Plaintiffs' preemption argument, like its *respondeat superior* argument, *does* challenge the sufficiency of Plaintiffs' evidence in that Plaintiffs lack evidence of CACI PT supervision and control over operational matters.

Plaintiffs advise the Court that it already decided preemption on CACI PT's Rule 12(b)(6) motion, and there is no reason to revisit the issue. The fundamental difference between CACI PT's Rule 12(b)(6) motion and its summary judgment motion is that CACI PT was stuck with Plaintiffs' rendition of the facts at the motion to dismiss stage, and now Plaintiffs must support their allegations with actual facts. As CACI PT set forth in Section II.A, *supra*, there is a substantial disconnect between Plaintiffs' allegations and the facts in the record. The actual evidence shows that CACI PT personnel were integrated into the U.S. Army chain of command and were subject to the operational supervision not of CACI PT personnel, but of the U.S. Army. SF ¶¶ 23-28. Under those circumstances, preemption of Plaintiffs' ATS claims is required. *Saleh v. Titan Corp.*, 580 F.3d 1, 16-17 (D.C. Cir. 2009).

The D.C. Circuit decided *Saleh* on the same facts in the record here, and while Plaintiffs wave *Saleh* off as a 2-1 decision, the full D.C. Circuit denied a petition for *en banc* review. Moreover, while Plaintiffs' opposition seems to treat *Saleh* as an outlier to be ignored, the Fourth Circuit agreed with the preemption test established in *Saleh* for preempting state-law claims, recognizing that federal interests weigh against allowing tort claims against a contractor when its employees are integrated into the military chain of command. *In re KBR, Inc., Burn Pit Litig.*, 744 F.3d 326, 351 (4th Cir. 2014). Those federal interests precluding state-law torts are no less implicated when a federal court applies the tort norms of foreign sovereigns to regulate the types of injuries that are compensable as a result of the United States' prosecution of war.

III. 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 6th day of February, 2019, 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 counsel. A copy of the version of this memorandum that is filed under seal also will be sent by email on the same date to the below-listed counsel:

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