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

SUHAIL NAJIM ABDULLAH AL SHIMARI, *et al.*, Plaintiffs, v. CACI PREMIER TECHNOLOGY, INC., Defendant.	No. 1:08–cv–827 (LMB/JFA)
CACI PREMIER TECHNOLOGY, INC., Third-Party Plaintiff, v. UNITED STATES OF AMERICA, and JOHN DOES 1–60, Third-Party Defendants.	

THE UNITED STATES' REPLY MEMORANDUM
OF LAW IN FURTHER SUPPORT OF ITS MOTION TO DISMISS

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INTRODUCTION

Throughout its opposition brief, CACI attempts to tie itself to the United States, arguing at points that CACI's supposed immunity and the United States' actual sovereign immunity are "coextensive," that CACI and the United States "should share the same fate," and that the "same rules must apply" to both CACI and the United States. (*E.g.*, Doc. 731 ("Opp.") at 2, 11, 14, 19.) But the United States and CACI are not joined at the hip. The United States is the Sovereign. CACI is not: it is simply a government contractor that seeks to profit from lucrative contracts with the United States. And although government contractors may benefit from certain immunities in connection with their contracted-for work, "[t]hat immunity . . . unlike the sovereign's, is not absolute." *Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663, 672 (2016). Indeed, the Supreme Court rejected "the notion that private persons performing Government work acquire the Government's embracive immunity" as wholly unsupported. *Id.*

This Court rejected CACI's previous iteration of its argument just last February in the context of CACI's government-contractor preemption argument. In its February opinion, the Court explained that "although Congress has decided that the federal government is not itself amenable to suit for activities arising out of combatant activities, it has ***not*** extended that immunity to private contractors operating alongside military forces." *Al Shimari v. CACI Premier Tech., Inc.*, No. 1:08–cv–827, 2018 WL 1004859, at *22 (E.D. Va. Feb. 21, 2018) (emphasis added).

Simply put, the United States' sovereign immunity does not rise and fall based on the viability of Plaintiffs' claims against CACI. Rather, as the United States explained in its opening memorandum (Doc. 697 ("Mem.")), the United States' sovereign immunity is waived only when Congress expressly and unequivocally says that it is waived. CACI does not come close to carrying its burden of demonstrating any such express and unequivocal statutory waiver.

Accordingly, all of CACI's third-party claims against the United States must be dismissed for lack of subject-matter jurisdiction.

ARGUMENT

I. CONGRESS HAS NOT WAIVED THE UNITED STATES' IMMUNITY TO LIABILITY FOR ALLEGED *JUS COGENS* VIOLATIONS

CACI does not actually argue that the United States can be sued for alleged *jus cogens* violations. Instead, it meekly suggests that the Court "will have to decide whether the United States' retained sovereign immunity is conduct-based immunity" and, if so, the Court then "must decide whether *Yousuf* [*v. Samantar*, 699 F.3d 763 (4th Cir. 2012)] categorically bars the United States from obtaining immunity from suit for *jus cogens* violations." (Opp. at 15.)

As a threshold matter, "[i]t is not enough merely to mention a possible argument in the most skeletal way, leaving the court to do counsel's work, create the ossature for the argument, and put flesh on its bones." *United States v. Zannino*, 895 F.2d 1, 17 (1st Cir. 1990). CACI has therefore forfeited the point. *See id.*

CACI's *jus cogens* argument would fail in any event as CACI fundamentally misunderstands the concept of sovereign immunity. "Lawsuits against the federal government are limited by law to only those types of cases for which the federal government agrees it may be sued." *Feliciano v. Reger Grp.*, No. 1:14–cv–1218, 2014 WL 6685412, at *3 (E.D. Va. Nov. 25, 2014) (Brinkema, J.). "'The basic rule of federal sovereign immunity is that the United States cannot be sued . . . without the consent of Congress.'" *Id.* (quoting *Block v. North Dakota ex rel. Bd. of Univ. & Sch. Lands*, 461 U.S. 273, 287 (1983)). And the Supreme Court has made crystal clear that "[a] waiver of the Federal Government's sovereign immunity must be unequivocally expressed in statutory text and will not be implied." *Lane v. Pena*, 518 U.S. 187, 192 (1996) (citation omitted).

CACI does not cite to any statute that expressly and unequivocally opens the United States to suit for all alleged *jus cogens* violations. And for good reason: no such statute exists. Indeed, CACI does not dispute that the Alien Tort Statute does not waive the United States' sovereign immunity. (*See* Mem. at 4 (discussing, *inter alia*, *Goldstar (Panama) S.A. v. United States*, 967 F.2d 965 (4th Cir. 1992)).)

This is also likely why CACI cannot cite a single case where a court held that the United States can be liable for alleged *jus cogens* violations that do not otherwise fall within an actual statutory waiver of sovereign immunity: to counsel's knowledge, no such case exists. To the contrary, courts have recognized that, absent an express and unequivocal statutory waiver of sovereign immunity, allegations of *jus cogens* violations are *not* cognizable against the United States. *See, e.g.*, *Ameur v. Gates*, 950 F. Supp. 2d 905, 917–18 (E.D. Va. 2013) (holding: (i) "Plaintiff's argument [based on *Yousuf*] that *jus cogens* violations sufficiently rebut the Attorney General's [Westfall] certification is . . . unavailing"; and (ii) "violations of customary law or international law do not trigger the waiver expressed in" the FTCA), *aff'd on other grounds*, 759 F. 3d 317 (4th Cir. 2014); *accord Smith v. Scalia*, 44 F. Supp. 3d 28, 39–40 (D.D.C. 2014); *Gonzalez-Vera v. Kissinger*, No. 02–cv–02240, 2004 WL 5584378, at *4–5 (D.D.C. Sept. 17, 2004); *Perez v. United States*, No. 13–cv–1417, 2014 WL 4385473, at *6 (S.D. Cal. Sept. 3, 2014).

The single case CACI cites in support of its *jus cogens* argument—*Yousuf*—has nothing to do with the United States' sovereign immunity. Rather, *Yousuf* held that "*officials* from *other countries* are not entitled to *foreign official immunity* for *jus cogens* violations." 699 F.3d at 777 (emphases added). And, of course, nothing in *Yousuf* contravenes (or could contravene) the binding Supreme Court precedent holding that waivers of the United States' sovereign immunity

can be effected only through express and unequivocal statutory text. *Lane*, 518 U.S. at 192. As CACI has not carried its "burden [of] show[ing] that an unequivocal waiver of sovereign immunity exists" for alleged *jus cogens* violations, *Welch v. United States*, 409 F.3d 646, 651 (4th Cir. 2005), its *jus cogens* argument must be rejected.

II. THE FEDERAL TORT CLAIMS ACT DOES NOT WAIVE THE UNITED STATES' IMMUNITY TO CACI'S THIRD-PARTY CLAIMS

A. The FTCA's Foreign-Country and Combatant-Activities Exceptions Preserve the United States' Immunity To CACI's Claims

In its opening memorandum, the United States exhaustively explained that where the United States would be immune under the FTCA to certain conduct, the United States is equally immune to third-party claims that derive from that conduct. (Mem. at 10–14). CACI does not dispute this premise. Instead, it half-heartedly argues that (i) Plaintiffs' claims do not arise in a foreign country because the United States had invaded and occupied Iraq (Opp. at 17–18), and (ii) the Court should import an extra-statutory "unlawfulness exception" from the political-question doctrine into the FTCA's statutory combatant-activities exception (*id.* at 19–21). CACI is wrong on both fronts.

1. Plaintiffs' Claims—and Hence, CACI's Derivative Claims—Are Barred by the FTCA's Foreign-Country Exception

As the United States explained in its opening memorandum (Mem. at 6), the Supreme Court held in *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), that "the FTCA's foreign country exception bars all claims based on any injury suffered in a foreign country." *Id.* at 712. CACI does not dispute that: (i) Plaintiffs allege that they sustained injuries at Abu Ghraib; (ii) Abu Ghraib is in Iraq; or (iii) Iraq is a foreign country. Instead, CACI points to *United States v. Spelar*, 338 U.S. 217 (1949), for the proposition "that the foreign country exception applies only to territory 'subject to the sovereignty of another nation'" (Opp. at 17 (quoting *Spelar*, 338 U.S.

at 219)), and argues that the foreign-country exception does not apply because Iraq's "sovereign government had been forcibly displaced by the United States military and its allies" (*id.*).

As a threshold matter, CACI's argument is akin to the one that Justice Stevens advanced in his solo dissent in *Smith v. United States*, 507 U.S. 197 (1993): that the Supreme Court "should favor the interpretation of the term" country "that the Court ha[d] previously endorsed" in *Spelar*. *Smith*, 507 U.S. at 210 (Stevens, J., dissenting). The *Smith* majority, however, rejected the "petitioner's attempt to equate" the word "country" "with 'sovereign state,'" noting in part that "[t]he first dictionary definition of 'country' is simply '[a] region or tract of land.'" *Id.* at 201 (quoting Webster's New International Dictionary 609 (2d ed. 1945)).

And even before *Sosa* and *Smith* were decided, the Fourth Circuit had already considered and rejected CACI's argument based on *Spelar* itself. In *Burna v. United States*, 240 F.2d 720 (4th Cir. 1957), the Fourth Circuit considered, for purposes of the FTCA's foreign-country exception, the status of the Island of Okinawa, which came into the United States' possession after the United States conquered Japan in World War II. *Id.* at 720–21. The plaintiff argued, based on *Spelar*, that Okinawa was not a "foreign country" because the 1951 treaty between the United States and Japan "transferred broad powers and a measure of sovereignty [over Okinawa] to the United States." *Id.* at 721. The Fourth Circuit rejected this argument, explaining that "the transfer temporarily of a measure of sovereignty here is not sufficient to dissolve Okinawa's status as a foreign country." *Id.* Rather, the relevant question was whether "Okinawa ha[d] been incorporated into the United States or that it ha[d] ceased to be foreign." *Id.* at 722.

The Fourth Circuit further noted that it was persuaded by an earlier district court opinion that "interpret[ed] a similar phrase"—"'foreign state.'" *Id.* "'In using [the phrase 'foreign state'], the Congress did not have in mind the fine distinctions as to sovereignty of occupied and

unoccupied countries which authorities on international law may have formulated.'" *Id.* (quoting *Hichino Uyeno v. Acheson*, 96 F. Supp. 510, 515 (W.D. Wash. 1951)). "'They used the word in the sense of 'otherness.' When the Congress speaks of 'foreign state,' it means a country which is not the United States or its possession or colony,—an alien country,—other than our own . . . .'" *Id.* at 722–23 (quoting *Hichino Uyeno*, 96 F. Supp. at 515). "'So here, the interpretation called for is that of common speech and not that derived from abstract speculation on sovereignty as affected by foreign military occupation.'" *Id.* at 723 (quoting *Hichino Uyeno*, 96 F. Supp. at 515). So, too, here.[1]

Another district court has held that Iraq circa 2003 was still a "foreign country" for purposes of the FTCA's foreign-country exception. In *Parrish v. United States*, 425 F. Supp. 2d 1283 (M.D. Fla. 2006), the court considered an FTCA suit concerning a traffic accident that took place in May 2003 in or near Iraq. *Id.* at 1284. Like CACI here, the plaintiff in *Parrish* argued that the foreign-country exception did not apply because the Iraqi government "had been deposed by foreign nations, including the United States" and that "no sovereign government or country existed in Iraq." *Id.* at 1285. After noting *Spelar*, *Smith*, and several other cases, the court held that "the ordinary meaning of 'foreign country' under the FTCA includes Iraq, even if

[1] Though *Burna* controls and demands this outcome (to say nothing of *Sosa* and *Smith*), it is worth noting that the Fourth Circuit does not stand alone on this issue. Building on *Burna*, the Ninth Circuit held that the FTCA's foreign-country exception barred an FTCA claim based on allegedly-tortious acts or omissions that "occurred within the physical confines of the American Embassy at Bangkok." *Meredith v. United States*, 330 F.2d 9, 10–11 (9th Cir. 1964). The Second Circuit held that the foreign-country exception barred an FTCA claim arising in the Island of Kwajalein, which was then occupied by U.S. military forces. *Callas v. United States*, 253 F.2d 838, 839–40 (2d Cir. 1958). And a court in the Southern District of New York held that the foreign-country exception barred an FTCA claim that arose in the Island of Saipan while it was under U.S. military occupation. *Brunell v. United States*, 77 F. Supp. 68, 69–72 (S.D.N.Y. 1948) (cited in *Burna*, 240 F.2d at 722 n.1).

Iraq was under military occupation by the United States or other nations at the time of the alleged accident and even if Iraq had no recognized government at that time." *Id.* at 1285–86.

Against this crushing weight of authority, CACI cites *United States v. Passaro*, 577 F.3d 207 (4th Cir. 2009), which simply held that a United States Army outpost in Afghanistan constituted a "mission," such that a federal district court would have federal criminal jurisdiction over crimes that took place at the outpost pursuant to the USA PATRIOT Act of 2001, 18 U.S.C. § 7(9) (2006).[2] *Passaro*, 577 F.3d at 212–16. *Passaro* has nothing to do with the FTCA or its foreign-country exception. And, in any event, *Passaro* made clear "that 'mission' can . . . refer to 'a permanent embassy or legation *in a foreign country*.'" 577 F.3d at 213 (emphases added and omitted). To the extent it is at all relevant, *Passaro* is perfectly consistent with the fact that Iraq under U.S. military occupation was still a "foreign country."

In sum, binding Supreme Court and Fourth Circuit precedent make clear that Plaintiffs' claims—and hence, CACI's third-party claims—arise in a foreign country and thus are barred.

2. Plaintiffs' Claims—and Hence, CACI's Derivative Claims—Are Barred by the FTCA's Combatant-Activities Exception

CACI "agrees, generally speaking, that the combatant activities exception and the principles underlying that exception should foreclose Plaintiffs' claims against . . . the United States." (Opp. at 19–20.) Nevertheless, CACI argues that the Court should import the "unlawfulness exception to the political question doctrine" into the FTCA's combatant-activities exception, supposedly because, in CACI's view, the political-question doctrine and the combatant-activities exception "rest on nearly identical policies." (*Id.* at 20.)

[2] The USA PATRIOT Act extended the "special maritime and territorial jurisdiction of the United States," as that phrase is used in Title 18 of the U.S. Code, to, *inter alia*, "the premises of United States diplomatic, consular, military or other United States Government missions or entities in foreign States." 18 U.S.C. § 7(9)(A).

CACI cites no authority for its novel legal theory. Nor could it. Neither the Fourth Circuit nor this Court (nor any other court of which counsel are aware) has held that the political-question doctrine and the FTCA's combatant-activities exception should be understood to apply identically. And while both might apply to some of the same conduct in certain instances, they otherwise are nothing alike. But CACI's effort to align the two is ultimately irrelevant because the dispositive question is whether Congress has expressly and unequivocally waived the sovereign immunity of the United States, and CACI cannot (and does not) seriously argue that Congress has done so here. *See, e.g.*, *Block*, 461 U.S. at 286 (the "basic rule of federal sovereign immunity is that the United States cannot be sued at all without the consent of Congress"). Contrary to CACI's urging (Opp. at 20), judges cannot simply create exceptions to the United States' sovereign immunity. Rather, waivers of sovereign immunity "must be unequivocally expressed in statutory text." *Lane*, 518 U.S. at 192. For this reason, it is CACI's "burden to show that an unequivocal waiver of sovereign immunity exists and that none of the [FTCA's] waiver exceptions apply to [its] particular claim." *Welch*, 409 F.3d at 651.

Far from satisfying its burden, CACI all but admits that the combatant-activities exception bars its claims. (Opp. at 19–20.) CACI does not dispute that Plaintiffs' allegations, and hence its own third-party claims, "aris[e] out of the combatant activities of the military . . . during time of war." 28 U.S.C. § 2680(j). And CACI does not point to any express and unequivocal statutory text that would import an "unlawfulness exception" into the FTCA's combatant-activities exception. *Contra, e.g.*, *Koohi v. United States*, 976 F.2d 1328, 1335 (9th Cir. 1992) (Reinhardt, J.) (combatant-activities exception would apply even if a United States warship had *deliberately* shot down a civilian aircraft). For these reasons, CACI's third-party claims against the United States are barred by the FTCA's combatant-activities exception.

B. The FTCA Does Not Encompass the Extraterritorial Conduct at Issue in This Litigation

The United States explained in its opening brief that the FTCA does not encompass torts committed outside of the United States. (Mem. at 14–16 (discussing *Smith v. United States*, 507 U.S. 197 (1993)).) In response, CACI argues that the presumption against extraterritoriality does not apply because some of the United States' conduct took place within the United States. (Opp. at 18–19.) But for FTCA purposes, torts are deemed to have been committed "'in the jurisdiction where the last act necessary to establish liability occurred.'" *Sosa*, 542 U.S. at 705; *see also Beattie v. United States*, 756 F.2d 91, 121–23 (D.C. Cir. 1985) (Scalia, J., dissenting), *later adopted in Smith v. United States*, 507 U.S. 197 (1993). The "last act" here is the mistreatment Plaintiffs allegedly suffered in Iraq. Just as the FTCA does not "encompass[] torts committed in Antarctica," *Smith*, 507 U.S. at 203–04, neither does it encompass torts committed in Iraq.

In a single, vague sentence, CACI appears to suggest that the Fourth Circuit's opinion in *Al Shimari v. CACI Premier Technology, Inc.*, 758 F.3d 516 (4th Cir. 2014) (*Al Shimari III*), either displaces or limits *Smith*, or otherwise imports into *Smith* the touch-and-concern framework from *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108 (2013). (Opp. at 18.) As a threshold matter, the Court should not upend a Supreme Court decision based on such skimpy analysis. "[I]ssues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived." *Zannino*, 895 F.2d at 17.

In any event, CACI is wrong. *Al Shimari III* considered the presumption against extraterritorial application of the *Alien Tort Statute*. In doing so, the *Al Shimari III* panel based its analysis on *Kiobel*, which also considered the presumption in the ATS context. Neither *Kiobel* nor *Al Shimari III* discusses the presumption in the context of the FTCA, nor does either

opinion even mention *Smith*. As a result, *Smith*, which is directly on point, controls the outcome here unless and until the Supreme Court decides otherwise. "[E]ven were" this Court "to conclude that the Supreme Court has actually *sub silentio*" abrogated or overruled *Smith*, the Court would still "be obligated to follow the rule that the [Supreme] Court has actually articulated," *Stop Reckless Econ. Instability Caused by Democrats v. Fed. Election Comm'n*, 814 F.3d 221, 230–31 (4th Cir. 2016)—that is, the rule articulated in *Smith*.

C. The United States Is Not Liable under State Law—Or Any Law

CACI does not dispute that "the United States waives sovereign immunity under the FTCA only to the extent that the claim can advance under state law." (Mem. at 17 (internal quotation and alteration marks omitted).) As CACI has the "burden to show that an unequivocal waiver of sovereign immunity exists," *Welch*, 409 F.3d at 651, CACI must demonstrate that its claims can advance under state law. But even though the United States laid out the FTCA's requisite choice-of-law analysis in its opening memorandum (*see* Mem. at 15), CACI makes no effort to engage in that analysis.[3] And it is readily apparent why: even assuming *arguendo* that (i) the foreign-country and combatant-activities exceptions did not apply, and (ii) the FTCA could apply extraterritorially, CACI *still* cannot demonstrate a valid state-law claim.

1. The FTCA's Choice-of-Law Analysis Would Require the Prohibited Application of Iraqi Choice-of-Law Rules

As the United States explained, "the substantive law applied in an FTCA action is 'the whole law (including choice-of-law rules) . . . of the State where the [allegedly tortious federal] act or omission occurred.'" (Mem. at 15 (quoting *Sosa*, 542 U.S. at 708 n.5).) Because torts are

[3] CACI's refusal to grapple with the FTCA's choice-of-law analysis is reason enough to dismiss its claims against the United States as the FTCA's choice-of-law provision "delineates the scope of the United States' waiver of sovereign immunity." *Smith*, 507 U.S. at 201.

deemed to have been committed "'in the jurisdiction where the last act necessary to establish liability occurred,'" *Sosa*, 542 U.S. at 705, the FTCA's choice-of-law analysis would require the application of Iraq's choice-of-law rules. *See Seabulk Offshore, Ltd. v. Am. Home Assurance Co.*, 377 F.3d 408, 418–19 (4th Cir. 2004) (choice-of-law rules constitute substantive law).

But CACI does not dispute that "Congress 'was unwilling to subject the United States to liabilities depending upon the laws of a foreign power.'" (Mem. at 15 (quoting *Spelar*, 338 U.S. at 221); *see also* CACI Mem. in Supp. Mot. To Dismiss, Doc. 627, at 40–41 (same).) And even if Iraqi choice-of-law rules could be applied here, CACI has not carried its burden of demonstrating what those rules are, or to which jurisdiction's tort law they would lead.

2. Even If the Relevant Conduct Occurred in Virginia, Virginia's Choice-of-Law Rules Point To the Application of Iraqi Law

Despite *Sosa*'s last-act-necessary rule, CACI insists that the relevant federal conduct occurred in Virginia. (Opp. at 21.) But even if CACI were correct (and it is not), the FTCA's choice-of-law analysis requires the application of Virginia's whole law, including its choice-of-law rules. *Sosa*, 542 U.S. at 708 n.5; *Richards v. United States*, 369 U.S. 1, 3, 11 (1962).

CACI's opposition conspicuously omits any reference to Virginia's choice-of-law rules. In fact, Virginia's choice-of-law rules for tort actions provide that: (i) "it is the place of the wrong (lex loci delicti) that determines which State's substantive law applies in a tort action brought in Virginia"; and (ii) "[t]he place of the wrong for purposes of the lex loci delicti rule [is] the place where 'the last event necessary to make an act[or] liable for an alleged tort takes place.'" *Quillen v. Int'l Playtex, Inc.*, 789 F.2d 1041, 1044 (4th Cir. 1986) (applying Virginia law); *accord Consulting Eng'rs Corp. v. Geometric Ltd.*, 561 F.3d 273, 280 n.6 (4th Cir. 2009). As explained above, the last event here is the alleged mistreatment of Plaintiffs in Iraq. Accordingly, a proper application of Virginia's whole law would seemingly necessitate the application of Iraqi

tort law to this action—which, again, would run afoul of the Supreme Court's admonition in *Spelar*, and which, in any event, CACI has not briefed and has therefore waived.

3. All of CACI's Claims Fail As a Matter of Virginia Law

As explained above, Virginia tort law has no relevance whatsoever to CACI's third-party claims. *See also Smith*, 507 U.S. at 202 n.3 ("Nor can the law of the plaintiff's domicil, Oregon here, be substituted in FTCA actions based on torts committed in Antarctica."). In any event, all of CACI's claims fail as a matter of Virginia law.

(a) Virginia Law Does Not Have Extraterritorial Effect

CACI was right the first time: Virginia law does not have extraterritorial effect. (CACI Mem. in Supp. Mot. To Dismiss, Doc. 364, at 21.) CACI does not cite a single Virginia case suggesting that Virginia's tort law should apply overseas. Instead, CACI seeks to import into Virginia law the *Kiobel–Al Shimari III* Alien Tort Statute extraterritoriality framework. But these cases have no bearing on whether Virginia courts would hold that Virginia tort law should apply overseas. And the Supreme Court "repeatedly has held that state courts are the ultimate expositors of state law," and that even the Supreme Court is (except in "extreme circumstances") "bound by their constructions." *Mullaney v. Wilbur*, 421 U.S. 684, 691 (1975).

(b) The United States Cannot Be Liable To Plaintiffs So It Cannot Be Liable To CACI

CACI does not dispute that under Virginia law, a party that cannot be liable to a first-party plaintiff as a matter of law also cannot be held liable to a third-party plaintiff in an action for contribution or common-law indemnification. (Mem. at 17–18.) As Plaintiffs could not

recover damages from the United States, CACI cannot assert contribution, indemnification, or exoneration[4] claims against the United States as a matter of Virginia law.[5]

(c) This Is Not a Negligence Action

Although CACI espouses "liv[ing] with [the] law of the case as it exists" (Opp. at 8 n.7), it refuses to acknowledge that "the present case involves allegations of intentional acts." *Al Shimari v. CACI Premier Tech., Inc.*, 840 F.3d 147, 156 (4th Cir. 2016) (distinguishing this action from "a negligence case"). If CACI is willing to be held liable to Plaintiffs on a negligence standard, so be it. But that does not change the fact that the fundamental nature of this case concerns alleged intentional conduct and moral turpitude. *See generally Al Shimari*, 2018 WL 1004859, at *22 (the ATS "only recognizes a small number of particularly egregious intentional torts"). Accordingly, CACI cannot assert third-party claims against the United States as a matter of Virginia law. (*See* Mem. at 18–20 (contribution and common-law indemnity permitted only in negligence cases).)

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[4] CACI makes no effort to explain whether exoneration is a tort in Virginia, and if so, whether it is anything other than a rebranded claim for common-law indemnification. (*See* Mem. at 16 & n.3.)

[5] CACI suggests that it may recover against the United States because "Plaintiffs could have and should have recovered against the government" under the Foreign Claims Act ("FCA"), 10 U.S.C. § 2734 (discussed in *Saleh v. Titan Corp.*, 580 F.3d 1, 2–3 (D.C. Cir. 2009)). (*See* Opp. at 22.) But the FCA is a matter of legislative grace, "[t]o promote and to maintain friendly relations." 10 U.S.C. § 2734. To that end, the FCA "grant[s] . . . discretionary authority to the Executive" to pay claims, *Doe v. United States*, 95 Fed. Cl. 546, 558 (2010), and the discretionary authority it allows "is final and conclusive," 10 U.S.C. § 2735; *see also Saleh*, 580 F.3d at 32 n.27 (Garland, J., dissenting) ("[P]laintiffs have no 'rights' under [the FCA], which merely authorizes designated officials to make (or not make) certain payments as a matter of their unreviewable discretion."). Nothing in the FCA waives the United States' sovereign immunity. *See Tobar v. United States*, No. 07–cv–817, 2008 WL 4350539, at *8 (S.D. Cal. Sept. 19, 2008), *aff'd in relevant part*, 639 F.3d 1191 (9th Cir. 2011); *Lloyd's Syndicate 609 v. United States*, 780 F. Supp. 998, 1001 (S.D.N.Y. 1991). Accordingly, Plaintiffs never had any FCA-based cause of action against the United States.

(d) The United States Cannot Be Held Liable on Theories of Indemnification or Exoneration

In its opening brief, the United States explained that it is liable only on a vicarious basis, and "'where two parties are held liable, if at all, only vicariously, there is no common law right of indemnification between them.'" (Mem. at 20–21.) CACI argues that the United States' employees were more culpable than its own employees, but even to the extent that is true, that does not change the fact that the United States remains "a vicariously liable passive tortfeasor" from which indemnification cannot be sought. *E.g.*, *Rudelson v. United States*, 602 F.2d 1326, 1333 (9th Cir. 1979); *see also, e.g.*, *Johnson v. Sawyer*, 47 F.3d 716, 730 (5th Cir. 1995) ("All FTCA liability is *respondeat superior* liability."). CACI has not carried its burden of showing that it can obtain common-law indemnification in these circumstances under Virginia law.

4. International Law Plays No Part in the FTCA Analysis

CACI does not argue that the United States may be held liable under the FTCA for violations of international law. Nor could it. The FTCA permits the United States to be held liable in certain circumstances "in accordance with the law of the place where the act or omission occurred." 28 U.S.C. § 1346(b)(1). "The 'law of the place' refers to state law only." *Ameur*, 950 F. Supp. 2d at 918 (citing *Kerns v. United States*, 585 F.3d 187, 194 (4th Cir. 2009)); *accord FDIC v. Meyer*, 510 U.S. 471, 478 (1994). "Thus, violations of customary law or international law do not trigger the waiver expressed in § 1346(b)(1)." *Ameur*, 950 F. Supp. 2d at 918; *accord, e.g.*, *Sobitan v. Glud*, 589 F.3d 379, 389 (7th Cir. 2009); *Al Janko v. Gates*, 831 F. Supp. 2d 272, 283 (D.D.C. 2011), *aff'd on other grounds*, 741 F.3d 136 (D.C. Cir. 2014).

D. CACI Does Not Dispute That Its Breach-of-Contract Claim Is Not Cognizable under the FTCA

CACI elides which waiver of sovereign immunity (if any) it believes to apply to its breach-of-contract claim. To the extent that CACI seeks to bring its breach-of-contract claim

under the Federal Tort Claims Act, it cannot do so as—putting aside all of the reasons explained above—it is undisputed that the claim: (i) does not constitute a tort under Virginia law (Mem. at 21); (ii) is barred by the FTCA's contractual-interference exception (*id.* at 23–24); (iii) is barred by the FTCA's discretionary-function exception (*id.* at 24–25); and (iv) is barred by the FTCA's misrepresentation exception (*id.* at 25).

III. THE LITTLE TUCKER ACT PROVIDES NO WAIVER OF SOVEREIGN IMMUNITY FOR CACI'S CLAIM FOR BREACH OF ITS CDA CONTRACT

CACI continues to avoid stating the basis for its allegation that this Court possesses jurisdiction to entertain its breach of contract claim. Although it still has not clearly invoked the Little Tucker Act as a basis for this Court's jurisdiction, CACI now attempts to waive recovery of any damages in excess of $10,000 in a vain attempt to satisfy that statute's jurisdictional prerequisites. (Opp. at 29). The Little Tucker Act does not provide a valid waiver of sovereign immunity for CACI's breach of contract claim, however, because the Little Tucker Act expressly precludes jurisdiction in this Court for claims, such as CACI's, that are based on a contract subject to the Contract Disputes Act of 1978 ("CDA"), 41 U.S.C. §§ 7101 *et seq*.

The CDA applies to "any express or implied contract . . . made by an executive agency for [*inter alia*] the procurement of services." 41 U.S.C. § 7102. CACI does not dispute that the CDA generally applies to the contract at issue in this case. Rather, it attempts to avoid the CDA by referencing a small number of cases in which courts have held that the CDA was inapplicable to claims for primarily non-monetary relief based on torts or constitutional, statutory, or regulatory violations. (Opp. at 27). Although none of the plaintiffs in those cases pleaded a breach of contract, CACI asks this Court to go out on a limb and apply this principle in reverse: to wit, it asks the Court to look past the label that CACI itself selected—presumably to invoke Little Tucker Act jurisdiction—and find that the essence of its *breach of contract* claim is

something other than contractual. CACI's reading of CDA case law is plainly incorrect, and this Court does not possess jurisdiction to entertain CACI's breach of contract claim under the Little Tucker Act.

A. The Federal Acquisition Regulation Defines a Claim under the CDA

CACI argues that "[t]he CDA does not define the type of 'claim' that it governs." (Opp. at 27). Although the CDA itself does not define the term "claim," courts have consistently held that the definition adopted in the Federal Acquisition Regulation (FAR) governs. *Todd Constr., L.P. v. United States*, 656 F.3d 1306, 1310 (Fed. Cir. 2011). The FAR defines a claim as "a written demand or written assertion by one of the contracting parties seeking, as a matter of right, the payment of money in a sum certain, the adjustment or interpretation of contract terms, or other relief arising under or relating to the contract." 48 C.F.R. § 2.101 (FAR 2.101). The definition of "claim" is extremely broad in scope, as was Congress's intent in enacting the CDA. *Todd Constr.*, 656 F.3d at 1311. Especially broad is the phrase "other relief arising under or relating to the contract." *Id*. Even in the event that a contractor does not seek a sum certain or contract interpretation, a claim is subject to the CDA provided it "[has] some relationship to the terms or performance of a government contract." *Id*. at 1312.

CACI's breach of contract count falls within the expansive definition of a CDA claim. Moreover, in the event that CACI is correct and its claim does not meet this definition, then logically it is not a contract claim at all. If it is not a contract claim, then it does not provide this Court with jurisdiction under the Little Tucker Act, which waives sovereign immunity for small claims founded on an express or implied contract with the United States. CACI's refusal to specify its theory of jurisdiction regarding its contract claim is, thus, perhaps unsurprising—if CACI acknowledges that its claim is a contract claim, it must concede this Court lacks

jurisdiction; if it admits that it is not a contract claim, then the Little Tucker Act provides no waiver of sovereign immunity.

B. The Cases CACI Cites Are Inapposite

In each of the cases on which CACI relies, courts have looked beyond the claim's label and to the nature of the claim only because the plaintiffs in those cases had pleaded non-contract claims that the United States had argued were in fact contractual. Although the courts were unwilling to go so far as to say that "the mere fact that a court may have to rule on a contract issue [would] automatically transform an action based on [tort or non-contract law] into one on the contract and deprive the court of jurisdiction," these courts were primarily concerned with "'disguised' contract claims," emphasizing that "a plaintiff whose claims against the United States are essentially contractual should not be allowed to avoid the jurisdictional (and hence remedial) restrictions of the Tucker Act by casting its pleadings in terms that would enable a district court to exercise jurisdiction *under a separate statute*." *Megapulse Inc. v. Lewis*, 672 F.2d 959, 967–69 (D.C. Cir. 1982) (emphasis added). The courts looked at the "essence" of claims brought in tort or under constitutional, statutory, or regulatory provisions to avoid extending beyond the United States' limited waiver of immunity with regard to federal contracts "merely because an artful pleader is able to term [its claim] a tort," when in fact it is a claim for breach of contract. *United States v. J & E Salvage Co.*, 55 F.3d 985, 990 (4th Cir. 1995). Unsurprisingly, none of these cases involved claims pleaded as breach of contract. No "artful pleader" would raise a breach of contract claim in an attempt to avoid the laws applicable to contracts.

None of the cases CACI cites suggest that courts should look past the breach of contract label to the essence of breach of contract claims, as CACI asks the court to do here. Instead, the courts in several of these cases specifically pointed out that the plaintiffs had not filed claims for

breach of contract. *See Commercial Drapery Contractors, Inc. v. United States*, 133 F.3d 1, 4 (D.C. Cir. 1998) (emphasizing that the contract issue in the case was "not an independent cause of action"); *Megapulse*, 672 F.2d at 969 ("[Plaintiff] has gone to great lengths to demonstrate that it is not relying on the contract at all. It does not claim a breach of contract."). CACI's emphatic statement that "*the claim asserted was a breach of contract claim*" (Opp. at 27) (emphasis in original) in *Commercial Drapery Contractors, Inc.* is false. As the district court noted, the plaintiffs had filed claims "alleging violations of due process, the Administrative Procedure Act, Federal Acquisition Regulations, the Small Business Act, and the Competition in Contracting Act." 967 F. Supp. 1, 3 (D.D.C 1997); *see also* Brief for Appellants at 23–27, *Commercial Drapery Contractors*, 133 F.3d 1, 1997 WL 34643532. Moreover, the D.C. Circuit panel specifically noted that although the violations at issue stemmed from the parties' contractual relationship, the court's consideration of the contract was "embedded within" those broader constitutional, statutory, and regulatory claims, and was "not an independent cause of action" in the case. *Commercial Drapery*, 133 F.3d at 4. The court found it important that the plaintiffs had specifically not sought "damages for breach of contract." *Id.* The case law simply does not support the proposition that the essence of a breach of contract claims can be non-contractual.

The essence analysis that these courts conducted cannot be applied in both directions—that is, courts might watch for a contractual essence in statutory claims, but not a statutory essence in contract claims—because the CDA and Tucker Act provide limited avenues for bringing suit against the United States in the context of the government's general immunity from liability. *E.g. Blackhawk Indus. Prods. Grp. Unltd., LLC v. United States*, 348 F. Supp. 2d 662, 668–69 (describing how the CDA's jurisdictional limitations operate to "preserve the Tucker

Act's limited and conditioned waiver of sovereign immunity in contract actions.") (quoting *Megapulse*, 672 F.2d at 959). In the cases CACI cites, the parties had raised causes of action that carried separate waivers of immunity: for example, the FTCA for tort claims. Here, CACI has not provided any alternative source of the United States' waiver of sovereign immunity that should apply. To the degree that CACI might be implying that its breach of contract claim is, in essence, a tort claim, that claim may not be brought under the FTCA for the reasons explained above.

C. The "Essence" of CACI's Claim for Breach of Contract Is Contractual

Even if the Court were to look to the essence of CACI's breach of contract claim, the essence of its claim is contractual. The first factor CACI proposes that the Court examine is the type of relief sought. CACI seeks money damages, where the plaintiffs in the cases it cites sought injunctive relief. *Commercial Drapery*, 133 F.3d at 4 ("[Plaintiffs] seek only equitable relief, rather than money damages."); *Ingersoll-Rand*, 780 F.2d 74, 79 (D.C. Cir. 1985) ("[Plaintiff] has sought only injunctive relief (rather than the typical contractual damages remedy)."); *Megapulse*, 672 F.2d at 969 ("[Plaintiff] has limited its request for relief to [an injunction against releasing] six documents . . . , it seeks no money damages against the United States."). Regardless of whether the original source of the debt is a tort judgment against it, CACI's legal justification for the transfer of that debt to the United States is money damages based on an alleged breach of contract.

CACI's proposed other factors are the basis of the claim and the expertise of the Court of Federal Claims. Here, CACI argues that its breach of contract claim should not be subject to the CDA because "the express terms of the agreement between CACI PT and the Department of Interior are irrelevant to the dispute." (Opp. at 28). Although "a breach of the implied duty of good faith and fair dealing does not require a violation of an express provision in the contract,"

courts still must look to the contract terms because that duty "is limited by the original bargain." *See Metcalf Constr. Co. v. United States*, 742 F.3d 984, 991, 994 (Fed. Cir. 2014) (emphasis removed). Courts have thus repeatedly held that disputes over the implied duty of good faith and fair dealing are contractual in nature and not reviewable in federal district courts. *Romano v. U.S. Army Core of Eng'rs*, No. 3:17–cv–00930–JD, 2017 WL 6448221, at *2 (N.D. Cal. Dec. 18, 2017); *Goel v. Shah*, No. C–13–3586–SBA, 2014 WL 2154005, at *6 (N.D. Cal. May 22, 2014); *Bowles v. U.S. Postal Serv.*, No. 5:13–cv–80, 2014 WL 12729330, at *2, 3 (D. Vt. Jan. 3, 2014); *Champagne v. United States*, 15 F. Supp. 3d 210, 221–22 (N.D.N.Y. 2014); *United States v. Slaey*, No. 06–cv–4930, 2008 WL 2845351, at *4 (E.D. Pa. July 23, 2008). Finally, the Court of Federal Claims unsurprisingly has significant experience in addressing the implied duty of good faith and fair dealing related to government contracts, having issued opinions in hundreds of such cases.[6]

In sum, even under CACI's essence test, its breach of contract claim is contractual in nature.

CONCLUSION

As explained in this memorandum and the United States' opening memorandum, CACI has not carried its burden of demonstrating an express and unequivocal waiver of sovereign immunity that would allow its claims against the United States to proceed. Accordingly, those claims must be dismissed for lack of subject-matter jurisdiction.

[6] A Westlaw search for "good faith" in the same sentence as "fair dealing" and the United States as a party yields 566 opinions in the Court of Federal Claims, compared to 13 in the Eastern District of Virginia.

Dated: April 5, 2018

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on April 5, 2018, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which sent a notification of such filing (NEF) to the following counsel of record:

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