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/THIRD-PARTY PLAINTIFF CACI PREMIER TECHNOLOGY, INC.'S REPLY IN SUPPORT OF ITS MOTION TO DISMISS BASED ON THE STATE SECRETS PRIVILEGE

I. INTRODUCTION

In their opposition, Plaintiffs are eager to discuss everything except what really matters – the discovery CACI PT has been denied based on the United States' *three separate assertions* of the state secrets privilege and how such denials impact CACI PT's ability to defend itself. This case is about whether Plaintiffs were mistreated at Abu Ghraib prison and, to the extent any mistreatment occurred, whether CACI PT was involved and can be held liable. Notwithstanding the overheated rhetoric of the Third Amended Complaint, after ten (10) years of litigating this case, Plaintiffs *abandoned* their claims of direct abuse by CACI PT personnel and the Court then

dismissed those claims. That left Plaintiffs' ever-evolving conspiracy theory and aiding and abetting claims for CACI PT to defend.

The Fourth Circuit has detailed the evidence a defendant fairly *needs* to defend against a detainee abuse claim. *El-Masri v. United States*, 479 F.3d 296, 309 (4th Cir. 2007). The Fourth Circuit also gave this Court specific remand instructions regarding the evidence-based analysis required for determining justiciability. *Al Shimari v. CACI Premier Tech., Inc.*, 840 F.3d 147, 160-61 (4th Cir. 2016) ("*Al Shimari IV*"). The United States' invocation of the state secrets privilege has denied CACI PT key evidence bearing on both the merits and justiciability. This includes discovery materials, *e.g.*, the contemporaneous records of what occurred during two Plaintiffs' interrogations and the systematic denial of access to information about the interrogators who interacted with Plaintiffs. These materials are essential to the fair litigation of this case and cannot be replaced by any other evidence.

The state secrets privilege has not only denied CACI PT essential evidence; the evidence that CACI PT has received is both degraded and subject to conditions that prevent its fair use. *These conditions are not susceptible to remedial measures by the Court through trial management*. The identities of all government and CACI PT personnel who participated in Plaintiffs' interrogations is classified, prohibited by the state secrets privilege from disclosure, and their testimony was available only with severe restrictions that resulted in an unidentified, disembodied voice testifying on a speakerphone from an unknown location. CACI PT pseudonymously deposed ten witnesses to Plaintiffs' interrogations in this manner, including one CACI PT employee.[1] One witness remembered the interrogation and testified that no abuse occurred. The other nine testified that the abuses Plaintiffs alleged never occurred in connection

[1] CACI PT will take the pseudonymous deposition of a second CACI PT interrogator (CACI Interrogator G) on February 12, 2019.

with any interrogation they witnessed. But CACI PT lacks the ability to compel these witnesses to testify at trial, or to testify via video link, or to participate in a videotaped *de bene esse* deposition. The state secrets privilege prevents CACI PT from presenting the factfinder with pseudonymous witnesses' names or background evidence bearing on their credibility. These restrictions apply even to CACI PT's own former employees. If the Court allows into evidence excerpts from the Taguba and/or Jones/Fay reports, the state secrets privilege prevents CACI PT from having its own pseudonymous employees testify whether the reports implicate them in wrongdoing. The featured witness in this case would be the Court's law clerk, who would tediously read into the record testimony from every single witness to Plaintiffs' interrogations, with the jury tasked to make a credibility determination without observing witness demeanor or being provided meaningful data points about the witnesses. In no sense of the term is that a fair defense. Rather, it is a measured deprivation of due process, denying CACI PT the essential procedural protections provided by the Federal Rules of Civil Procedures and Evidence.

CACI PT is aware of no case where a court has denied a defendant the ability to present live testimony from all eyewitnesses, or any evidence that would support credibility determinations for those witnesses. CACI PT is aware of no case where a corporate defendant was prohibited from calling *its own employees* as witnesses in its defense. CACI PT is aware of no case that was allowed to proceed when the government's assertion of the state secrets privilege made it impossible to carry out the mandate of the Court of Appeals, a mandate that must be "scrupulously and fully carried out." *Doe v. Chao,* 511 F.3d 461, 464-65 (4th Cir. 2007). These are not minor inconveniences or immaterial limitations. They are outright prohibitions whose prejudice to CACI PT's ability to defend itself is manifest.

Plaintiffs' response is diversionary. They impugn CACI PT's motives, accusing it of seeking information about Plaintiffs and their interrogations solely to set up a state secrets motion. That premise is absurd, and belied by the express remand directive of the Court of Appeals and by CACI PT's conduct. Plaintiffs also avoid discussing the evidence denied to CACI PT by applying a quantitative metric that focuses on how many documents CACI PT received and how many questions deponents were allowed to answer. Of course, all discovery material is not created equal. The number of pages that the United States has produced does not change, for example, that it has withheld "the tailored interrogation plan actually used for a lengthy interrogation of Al Shimari," a plan that "provides a focused assessment of the approach best suited to assist the interrogators in obtaining his cooperation." Ex. 30 at ¶ 19. It does not change that, for Al Shimari and Al-Zuba'e, the United States has withheld reports "summariz[ing] the results of interrogations [that] were completed close in time to their conclusion." *Id.* at ¶¶ 19, 21. The witnesses' inability to remember Plaintiffs' interrogations aggravates the prejudice from denying CACI PT contemporaneous records of their treatment.

Boiled down, Plaintiffs' argument is that CACI PT does not need any wheat because it has been provided so much chaff. The proper analysis is whether the withheld information is central to the dispute and necessary for the fair litigation of the case. Within that proper framework, it is evident that the state secrets privilege prevents CACI PT from fairly defending itself, and dismissal of this suit is required.

II. ANALYSIS

A. Plaintiffs' Argument That the Withheld State Secrets Are Not Essential to the Disposition of Plaintiffs' Claims Ignores Reality

Dismissal based on the state secrets privilege is required if "the defendants could not properly defend themselves without using privileged evidence." *El-Masri*, 479 F.3d at 309. For

a detainee abuse case, the "main avenues of defense" are that (1) the plaintiff "was not subject to the treatment that he alleges; (2) if he was subject to such treatment, the defendants were not involved in it; or (3) if they were involved, the nature of defendants' involvement does not give rise to liability." *Id.* In *Al Shimari IV*, the Fourth Circuit directed this Court to evaluate justiciability based on the "specific conduct to which the plaintiffs were subjected and the source of any direction under which the acts took place." *Al Shimari IV*, 840 F.3d at 160-61. The jurisdictional test also requires a determination whether any "acts committed by CACI [PT] employees" in relation to these Plaintiffs "were not unlawful when committed and occurred under the actual control of the military or involved sensitive military judgments." *Id.* at 151.

Thus, for both the merits and justiciability, what occurred in connection with Plaintiffs' interrogations are the "central facts" and "very subject matter" of this case. *See El-Masri*, 479 F.3d at 308. Plaintiffs do not dispute that CACI PT has been denied contemporaneous records detailing the events surrounding Plaintiffs' interrogations. For Al Shimari and Al-Zuba'e, the United States has asserted the state secrets privilege to deny CACI PT access to contemporaneous records showing the expected and approved interrogation approaches for their interrogations and reports as to how they were actually treated during their interrogations. Ex. 30 at ¶ 6. These facts are necessary to rebut Plaintiffs' allegations that they were tortured and abused in connection with their interrogations at Abu Ghraib prison and that CACI PT was liable for that alleged treatment. Moreover, the Court cannot comply with the remand instructions in *Al Shimari IV* without evidence of "specific conduct to which the plaintiffs were subjected and the source of any direction under which the acts took place." *Al Shimari IV*, 840 F.3d at 160-61. The absence of these facts is directly traceable to the state secrets privilege.

For example, Al Shimari was subjected to only one intelligence interrogation at Abu Ghraib prison, by CACI Interrogator A and Army Interrogator B. Neither interrogator remembers Al Shimari's interrogation, though both deny that the abuses he alleges occurred in connection with any interrogation in which they participated. Ex. 1 at [redacted] 93-106; Ex. 2 at 49-50, 55-56, 58-62. The United States, however, has detailed records relating to this single interrogation. It has a "tailored interrogation plan actually used for [the] lengthy interrogation of Plaintiff Al Shimari," and this tailored interrogation plan "provides a focused assessment of the approach best suited to assist the interrogators in obtaining his cooperation." Ex. 30 at ¶ 19. The United States also has (and has withheld) portions of interrogator notes and the interrogation report that address "the effectiveness of the approach used, the mood of the detainee, the overall assessment of the detainee during the interrogation and recommended future approaches." *Id.* Al Shimari's sole connection to CACI PT is a single interrogation with one CACI PT interrogator. The records regarding the planned and Army-approved interrogation approaches and reports as to events occurring during the interrogation are of central importance to the Court's jurisdiction, Al Shimari's claim, and to CACI PT's defense.

For his part, Al-Zuba'e was interrogated three times at Abu Ghraib prison, and one of the interrogators for one of the interrogations was a CACI PT employee – CACI Interrogator G. That is Al-Zuba'e's sole connection to CACI PT personnel. CACI Interrogator G will be deposed on February 12, 2019. The other interrogator participating in that interrogation of Al-Zuba'e – Army Interrogator B – testified that he did not remember the interrogation, but that no detainee was ever abused during an interrogation in which he participated. Ex. 2 at 69-71, 85. The United States has detailed interrogator notes from Al-Zuba'e's interrogations that "summarize the results of interrogations and were completed close in time to their conclusion."

Ex. 30 at ¶ 21. The United States withheld on state secrets grounds portions of the reports "regarding the effectiveness of the approach used, the mood of the detainee, the overall assessment of the detainee, and recommended future approaches that would work well." *Id.* Notably, Secretary Mattis advises that "[e]ach of the three interrogator notes is more detailed than the previous notes, offering additional insight into interrogation methods." *Id.* CACI Interrogator G participated in the third of three interrogations of Al-Zuba'e; thus, per Secretary Mattis, the notes regarding his interrogation of Al-Zuba'e are the most detailed.

The importance of contemporaneous records about what actually occurred during Plaintiffs' interrogations is heightened because [redacted] Thus, there is no substitute for these records. [redacted]; Ex. 2 at 49-50, 69-71, 85; Ex. 3 at 57-62; Ex. 4 at 62-66; Ex. 5 at 54-59.

Plaintiffs' opposition acknowledges that the Fourth Circuit held in *El-Masri* that determining whether a plaintiff was treated as he alleges "could be established only by disclosure of the actual circumstances of [plaintiff's] detention, and its proof would require testimony by the personnel involved." Pl. Opp. at 17 (alteration in original). After acknowledging this principle, however, Plaintiffs make the remarkable assertion that "***this is precisely the sort of evidence that CACI was able to obtain from the pseudonymous interrogators/interpreters who allegedly interacted with Plaintiffs***." *Id.* (emphasis in original). Not true.

As CACI PT explained in great detail in its motion to dismiss memorandum, Plaintiffs were subjected to a total of five intelligence interrogations (one of Al Shimari, one of Rashid, and three of Al-Zuba'e). CACI PT took pseudonymous depositions of a total of ten interrogators and translators who participated in one or more of these interrogations. Only ***one*** of the pseudonymous deponents remembers ***anything*** about an interrogation of these Plaintiffs – Army

Interrogator H, who remembers his interrogation of Rashid. For the other nine witnesses, the best CACI PT could do was to obtain testimony that while they did not remember their interrogations, none of the abuses alleged by Plaintiffs occurred in any interrogations they attended. CACI PT Mem. at 9-15. Thus, the documentary record is irreplaceable in detailing the treatment to which Plaintiffs were subjected in connection with their interrogations. The Court needs this evidence on justiciability to determine if any treatment was unlawful and, if not, if it occurred under the actual military control. The jury needs this evidence to determine whether to believe Plaintiffs' accusations or interrogators' assertions that they did nothing wrong.

The plaintiff in *El-Masri* made a similar argument, contending that the defendants had general information about the detention and interrogation program to which he was subjected and that the case could proceed "with special procedures imposed to protect sensitive informative." *El-Masri*, 479 F.3d at 308. The Fourth Circuit has rejected this line of argument – that a detainee abuse case could be tried with diluted, generalized evidence:

> The controlling inquiry is not whether the general subject matter of an action can be described without resort to state secrets. Rather, we must ascertain whether an action can be litigated without threatening the disclosure of such state secrets. Thus, for purposes of the state secrets analysis, the "central facts" and "very subject matter" of an action are those facts that are essential to prosecuting the action or defending against it.

Id.

Plaintiffs also suggest that the defenses outlined in *El-Masri* may not apply here because Plaintiffs allege indirect theories of liability so, in Plaintiffs' view, "CACI cannot defend against Plaintiffs' claims by arguing that it was not directly involved." Pl. Opp. at 17 n.16. That argument makes no sense. No matter if a plaintiff alleges direct or accessorial liability, a critical issue bearing on the defendant's liability is whether the plaintiff was mistreated as he alleges. If Al Shimari was not abused, then no party is liable to him, regardless of his theory of liability.

Similarly, if CACI PT personnel interrogating Plaintiffs used only non-abusive approaches, CACI PT is not liable under any theory even if MPs independently abused Plaintiffs. Thus, the contemporaneous records setting forth the specific interrogation approaches that were sought and used in connection with Plaintiffs' interrogations – which would include any efforts to alter detention conditions – are essential, irreplaceable evidence in this case.

Plaintiffs argue that the records of Plaintiffs' interrogations are unnecessary because it is "implausible" that abuse would be documented. Pl. Opp. at 19 n.17, 22. But in opposing summary judgment, Plaintiffs made clear that they seek damages for alleged abuses [redacted] such as use of working dogs, stress positions, isolation, sleep management, and environmental manipulation. *Compare* Dkt. #1086 at 3-4 (Pl. summary judgment opp.) *with* [redacted] Thus, many of the alleged abuses for which Plaintiffs seek recovery were interrogation approaches that the U.S. Army authorized and which therefore would have been included in an approved interrogation plan and report if they were used.

Plaintiffs argue that interrogation records are of limited importance because their claims "are largely premised on abuse that that occurred at the hands of the MPs outside of interrogations." Pl. Opp. at 22. But that argument misses the point. Most of the approved interrogation approaches listed above involved conditions of confinement necessarily implemented outside of the interrogation itself.

Plaintiffs analogize this case to *DTM Research, L.L.C. v. AT&T Corp.*, 245 F.3d 327, 333 (4th Cir. 2001), to argue that interrogation records are not central to CACI PT's defense. *DTM Research*, however, bears no resemblance to this. In *DTM Research*, AT&T sought discovery from the non-party United States in a trade secrets case to show that the technology at issue was

"generally known in the industry." *Id.* The Fourth Circuit explained that denying state secrets to AT&T did not "preclude AT&T from presenting evidence that it created its own technology prior to or independently of its contacts with [the Plaintiff]." *Id.* at 334. Under those circumstances, it is unremarkable that the court held that the withheld evidence was "potentially relevant to some aspects of AT&T's defense," but "not central" to the question of liability.[2]

Here, unlike *DTM Research*, CACI PT is precluded from discovering and presenting evidence about the conduct and identity of *its own personnel* – personnel who are supposedly the very source of CACI PT's liability. And there is no reasonable substitute for these contemporaneous records. The interrogators do not remember Plaintiffs' interrogations, though they deny engaging in the abuses Plaintiffs allege with any detainee. It is entirely unfair to require CACI PT to engage in this credibility battle while depriving CACI PT and the factfinder access to the contemporaneous records that detail with the planned and actual approaches for the interrogations as well as other contemporaneous narratives regarding the interrogations.

To gloss over the importance of the withheld material, Plaintiffs suggest that somehow the quantity of material produced by the United States overcomes the significance of what was withheld. For example, Plaintiffs rely on the percentage of the United States' production that was withheld and the number of "unique redactions" in the Plaintiffs' detainee files. *See* Pl. Opp. at 2, 4 n.2, 5 n.3. But these "statistics" say nothing about the importance of the evidence withheld. For example, according to Plaintiffs, the Interrogation Notes from Al Zuba'e's third

[2] Plaintiffs cite *In re Mitchell & Jensen*, an out of circuit district court opinion, for the proposition that dismissal is not required. Pl. Opp. at 18. However, Plaintiffs omitted that in *Mitchell & Jensen*, the court did not order dismissal, as "no party argue[d] dismissal is required by assertion of the state secrets privilege." *See* Order at 8, 21, *In re Mitchell & Jensen*, No. 16-MC-0036 (E.D. Wash., May 31, 2017), ECF No. 91. As *El-Masri*, makes clear, a state secrets determination is a case-specific assessment based on the issues in a particular case and the nature of the materials withheld as privileged state secrets. *El-Masri*, 479 F.3d at 309.

interrogation, "were produced with minimal redactions, mostly concerning an assessment of Al Zuba'e's attitude during the interrogation and recommendation for future interrogation." Pl. Opp. at 5 (referencing AS-USA-035431-32). The document says otherwise. [redacted] Pl. Opp. at 2, 5, the government has withheld contemporaneous documentation of what occurred at Al Zuba'e's interrogation – a central issue in this case.[3]

Likewise, Plaintiffs skip over the fact that the complete interrogation plan for Al Shimari's only interrogation was withheld ***in its entirety***. *Compare* Ex. 30 at ¶ 19 (justifying assertion of privilege for the entirety of Al Shimari's interrogation plan because it "would reveal the subjective judgments made by the interrogation team involved in developing, using, and modifying an interrogation plan in an attempt to obtain this information from Plaintiff Al Shimari) *with* Pl. Opp. at 6 ("Most of the interrogation-related documents . . . were produced with few redactions, if any."). In an absurdist sense, it is true that Al Shimari's interrogation plan was not "redacted" at all, as it was withheld *in toto*, but this inconvenient fact undermines Plaintiffs' representations concerning the extent of the materials withheld.[4]

[3] The Plaintiffs repeatedly distort the record. For example, they claim that the United States "clarified . . . that much of the privileged information in the detainee files and report annexes was unrelated to Plaintiffs or the defenses in this litigation." Pl. Opp. at 10. In reality, Secretary of Defense Mattis' Declaration states that the redactions include "certain records of intelligence interrogations, detainee debriefings, or intelligence questioning related to transcribed interrogator notes, summary interrogation reports, an interrogation plan, and other related records pertaining to the plaintiffs" Ex. 30 at ¶ 3; *see also id*. at ¶ 6.

[4] Plaintiffs argue that the Court should disregard the effect of state secrets on CACI PT's sovereign immunity and *respondeat superior* defenses because those defenses supposedly lack merit. Pl. Opp. at 20-22. Plaintiffs' position is circular and contrary to the law of this Circuit.

B. Pseudonymous Witness Testimony Prevents CACI PT from Fairly Litigating the Case

Beyond the denial of crucial documentation of Plaintiffs' interrogations, the Court's rulings sustaining three separate invocations of the state secrets privilege prevent fair use of the limited discovery CACI PT was permitted to obtain. Plaintiffs' allegations regarding their treatment do not match anything their interrogators testified occurred in the interrogations they conducted. *See* CACI PT Mem. at 16 (outlining irreconcilable conflicts between Plaintiffs' version of events and interrogators' testimony). The Court's rulings sustaining the state secrets privilege unfairly and severely prejudice CACI PT's ability to rebut Plaintiffs' testimony. Most obviously, Plaintiffs presumably will tell their stories live or by video link, allowing the jury to view their demeanor and consider their backgrounds in assessing their credibility. Plaintiffs' interrogators, by contrast, will appear as phantoms – their identities, backgrounds, experiences, and corroborating evidence unknown and unknowable when their deposition transcripts are read in court.[5] No case management wizardry can allow a jury to make credibility determinations regarding the critical eyewitnesses under such circumstances.

Plaintiffs respond that the pseudonymous nature of the testimony does not prevent CACI PT from calling the witnesses at trial; rather, the subpoena power of the court is the limiting factor. *See* Pl. Opp. at 23 n.22. What Plaintiffs' argument ignores is that, absent the Court's state secrets rulings, CACI PT would be able to introduce videotaped depositions of interrogators

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Plaintiffs' argument would require the Court to know the contents of the withheld documents in order to assess whether the defense is meritorious, an approach prohibited by *El-Masri*, 479 F.3d at 309 (state secrets an analysis must be conducted without review of the secrets at issue).

[5] In response to this motion, the United States revealed that none of the pseudonymous deponents is within the subpoena power of this Court, despite repeatedly instructing the witnesses not to answer questions that would have elicited that information. *See* Dkt. #1068 at 3.

who are beyond the Court's subpoena power. The difference between reading in a transcript from an unidentified deponent versus watching videotaped testimony cannot be overstated.

Curiously, Plaintiffs cite to the *Sandidge v. Salen Offshore Drilling Co.*, 764 F.2d 252, 259 n.6 (5th Cir. 1985), for the proposition that deposition testimony is entitled to just as much weight as live witness testimony. Pl. Opp. at 24. But *Sandidge* supports CACI PT's point. In *Sandidge*, the court compared video depositions to live testimony, noting that both forms of evidence presentation allow the factfinder to view the witnesses' demeanor in assessing credibility. *Id.* ("Courts often refer to the fact-finder's unique advantage in evaluating evidence which comes from observing the demeanor of witnesses appearing in court.").

By contrast, *Sandidge* cited a number of cases for the common sense proposition that reading transcribed depositions into the record is inferior to live testimony or presentation of a videotaped deposition because the factfinder has no ability to assess the witness's demeanor. *Id.*; *see also Weiss v. Wayes*, 132 F.R.D. 152, 154 (M.D. Pa. 1990) ("A videotape which captures the sight and sound, as well as the demeanor of the witness, would be the preferred way of submitting deposition testimony to a jury."); *Rice's Toyota World v. S.E. Toyota Dist.*, 114 F.R.D. 647, 649 (M.D.N.C.1987) ("A video deposition better serves these objectives [accuracy, trustworthiness, and improved judicial procedures] by permitting the fact-finder to utilize a greater portion of his perceptive processes than when merely reading or listening to a stenographic deposition . . . [and] . . . without the filtering process that occurs when one listens to a deposition being read . . .".). Here, the Court's state secrets rulings have left CACI PT with no ability to present videotaped depositions because, by order of the Court, CACI PT was prohibited from having the depositions of pseudonymous personnel videotaped. *Sandidge*, if anything, recognizes the prejudice flowing from a party being prohibited from videotaping depositions.

Plaintiffs point to *James v. Jacobson*, 6 F.3d 233 (4th Cir. 1993), as endorsing pseudonymous litigation, but the constraints imposed in this case are fundamentally different. For example, in *James*, the plaintiffs seeking to proceed pseudonymously proposed that

> anonymity in this case would be limited to the pseudonym that they use, ***not to who they are in every other respect***. That is, their profession, where they come from, what they do, what they stand for; and all of the other portions of cross-examination would be there. The only thing that would be absent would be their true name to protect the identity of their children.

Id. at 241 (emphasis added). Notably, the Fourth Circuit did not actually endorse the plaintiffs' request for pseudonymous participation in *James*, but remanded the issue for reconsideration because the district court apparently believed it lacked discretion to permit it. *Id.* at 242-43. In any event, this case is readily distinguishable. In *James*, the request for pseudonymous participation contemplated live, face-to-face depositions and trial testimony, and no restrictions whatsoever on the facts that may be discovered about the Plaintiffs other than their names. In fact, the Fourth Circuit recognized that the Plaintiffs' proposal "obviously accepts some risks of indirect identification." *Id.* at 241. Here, the United States directed the witnesses not to respond to any questions where the answer, by itself *or combined with other information*, could divulge the witness's identity and prevents live, in-person depositions and trial testimony.

Next, perplexingly, Plaintiffs argue that CACI PT was not prevented from "eliciting testimony from the pseudonymous witnesses that could potentially bolster their credibility." Pl. Opp. at 24. In reality, CACI PT was prevented from obtaining background information about Plaintiffs' interrogators, analysts, and translators, including but not limited to: [redacted]

[redacted] Thus, CACI PT is left asking the factfinder to believe witnesses who are not identified, whose demeanor cannot be viewed, and about whom the factfinder knows next to nothing beyond their service at a location that was the subject of sensational media coverage for years.

Finally, Plaintiffs suggest that the state secrets privilege does not prevent CACI PT from litigating the relevance and weight properly accorded to the Taguba and Jones/Fay reports if portions of them are admitted at trial. Pl. Opp. at 25. The Taguba report stated suspicions of detainee abuse about only one CACI PT employee. Ex. 32 at 48. The Jones/Fay report makes findings regarding only three CACI PT employees – the employee mentioned in the Taguba report and two others. Plaintiffs' recently-filed motion *in limine* specifically states that they seek to introduce at trial portions of these reports detailing alleged misconduct by these three CACI PT employees to argue that their alleged misconduct supports an inference that they had some role in Plaintiffs' alleged mistreatment. Dkt. #1080 at 2.

CACI PT's prejudice from the Court's state secrets rulings would be manifest if the Court allows these report excerpts into evidence. If the two CACI PT interrogators who participated in intelligence interrogations of Plaintiffs are not among the three CACI PT employees identified in the Taguba and Jones/Fay reports, that fact severely affects the admissibility and weight of the reports. That is, if the CACI PT employees who interrogated Plaintiffs are not implicated in the reports, it is difficult to see how alleged misconduct by *other CACI PT employees* is relevant to whether the CACI PT employees interacting with these Plaintiffs had any role in detainee abuse. On the other hand, if one or both of these pseudonymous interrogators *is* named in the Taguba or Jones/Fay report, the Court's state secrets rulings prevent CACI PT from having that interrogator

deny the allegations made against him and/or explain why those allegations do not support an inference that he had any role in the mistreatment of these Plaintiffs.

Plaintiffs' response is to argue that it is unnecessary for CACI PT to elicit testimony as to whether Interrogators A and G – the only CACI PT employees who conducted an intelligence interrogation of any Plaintiff – were named in the reports because CACI PT could call the three former employees who *were* named in the reports to testify. Pl. Opp. at 25. But once called, CACI PT could not ask these former employees whether or not they were CACI Interrogators A or G, or if they ever conducted any interrogations of Plaintiffs. Thus, the state secrets privilege prevents CACI PT from presenting evidence concerning the connection, or lack thereof, between the Taguba and Jones/Fay reports and the few CACI PT employees who actually interacted with Plaintiffs. CACI PT cannot fairly defend against the reports under such restrictions.

C. CACI PT Had No Basis to Challenge the United States' State Secrets Assertion and There Is No Basis to Impose Such an Obligation

CACI PT has repeatedly informed the Court that it does not challenge, and lacks the ability to challenge, the Court's determination that the United States' invocation of the state secrets privilege was well grounded. *See, e.g.*, Dkt. #808 at 3; Dkt. #901 at 6. Despite Plaintiffs' protestations to the contrary, CACI PT has no basis to challenge the government's assertion of the state secrets privilege or the Court's determination thereof. As it has stated, CACI PT lacks access to the information bearing on Secretary Mattis's determination that producing the withheld materials would endanger interrogation personnel and aid America's enemies.

Nonetheless, Plaintiffs claim that they would have expected CACI PT to challenge the validity of the state secrets determination "as litigants routinely do when faced with purported prejudice from such withholding." Pl. Opp. at 1. Plaintiffs continue that CACI PT should have challenged the United States' assertion of state secrets because "the Mattis Declarations contain

a number of contestable assertions." Pl. Opp. at 13. Oddly, Plaintiffs do not elaborate on what those "contestable assertions" are, nor do they explain how they know more about national security than the Secretary of Defense. Plaintiffs also do not explain their own inaction once the United States asserted the state secrets privilege. If Plaintiffs viewed some of the privilege assertions as "contestable," they could have challenged the privilege assertions and tried to gain access to records of their own interrogations. Their silence is telling.

From there, Plaintiffs impugn CACI PT's motives and suggest that it sought materials about Plaintiffs' interrogations for the sole purpose of setting up a state secrets dismissal motion. Pl. Opp. at 12-13. The record tells a different story. As an initial matter, it is hardly a stretch that a defendant in a detainee abuse case alleging mistreatment at the hands and direction of interrogators might want to know who interrogated the plaintiffs what happened during the interrogations. Moreover, all three of CACI PT's motions began as motions to compel, as the United States had not formally invoked the state secrets privilege at the time CACI PT filed its motions. Dkt. #736, 835, 947. It was only when the United States responded to the motions that it invoked the state secrets privilege. With respect to CACI PT's motion to compel production of documents, the United States, through negotiations with CACI PT, narrowed the scope of its assertion of the state secrets privilege so that it could produce additional documents that had originally been withheld as privileged. As the United States explained:

> Between September 21 and October 5, CACI PT and the United States met and conferred regarding CACI's proposed challenges. Ultimately CACI PT agreed not to move to compel on five of the Fay witness statements and six of the Jones-Fay report annex documents.

Dkt. #992 at 6. This continued after CACI PT filed its motion to compel. *Id.* at 6-7 ("[S]ince CACI PT filed its motion to dismiss [sic], the United States and CACI PT have continued to narrow CACI PT's challenges."). Magistrate Judge Anderson applauded the United States' and

CACI PT's "continuing efforts to try and get the matter resolved or at least narrowed down, and you-all have made some substantial progress on that." 11/30/18 Tr. at 3. If CACI PT's true aim was to set up a motion to dismiss, it would not have negotiated to obtain additional documents and thus narrowed the universe of materials withheld on state secrets grounds. CACI PT has been categorical in its denial of Plaintiffs' heinous accusations. CACI PT's objective always was to obtain the discovery it needed to prove their falsity and to address the effect of a state secrets assertion only if disclosure was absolutely impossible through negotiation.

Regardless, the law is clear that a court considering a state secrets assertion must "independently and carefully determine whether, in the circumstances, the claimed secrets deserve the protection of the privilege." *El-Masri v. Tenet*, 437 F. Supp. 2d 530, 536 (E.D. Va. 2006), *aff'd sub nom. El-Masri v. United States*, 479 F.3d 296 (4th Cir. 2007); *Mohamed v. Jeppesen Dataplan*, 614 F.3d 1070, 1081 (9th Cir. 2010). That independent assessment occurred here. 5/4/18 Tr. at 33-34; 7/27/18 Tr. at 11-12; 11/30/18 Tr. at 4. Thus, Plaintiffs' suggestion that CACI PT somehow sandbagged them because CACI PT, like Plaintiffs, did not challenge the United States' state secrets assertion misses the mark. The Court independently ruled three different times that the United States' assertions of the privilege were well taken.

D. Plaintiffs' "Prejudice" Analysis is Entirely Irrelevant

Plaintiffs suggest that dismissal under the state secrets doctrine should turn on the comparative prejudice to the parties. Pl. Opp. at 27. That is directly contrary to *El-Masri*, 479 F.3d at 309. Where, as here, a defendant cannot properly defend itself because of withheld state secrets, the mandated result is dismissal. *Id.* If the withholding of state secrets also negatively impact the plaintiff's ability to prove its case, that *strengthens* the basis for dismissal, creating two independent grounds for dismissal. *Id.* Otherwise, a state secrets assertion that makes all of

the key evidence unavailable would result not in dismissal, but in flipping a coin to see who prevails because both parties are equally prejudiced.

Next, Plaintiffs argue that it is "highly prejudicial to Plaintiffs" that one of CACI PT's litigation counsel knows the identity of Interrogator A and that CACI PT has access to internal investigation documents. Pl. Opp. at 28. That is an odd assertion given that Plaintiffs *never sought the identities of their interrogators in discovery*, and explicitly told the Court that it could deny such information to CACI PT because the interrogators' identities were not needed for this case.[6] CACI PT previously explained the circumstances by which one of its counsel came to know CACI Interrogator A's identity,[7] but the United States' successful assertion of the state secrets privilege prevents CACI PT from using that information in any way. As examples, the United States' privilege assertion prevented CACI Interrogator A from testifying to a variety of things, including whether he was named in the Taguba or Jones/Fay reports; which shift he worked on at Abu Ghraib prison; when he stopped going to the Hard Site; whether the Interrogator Rules of Engagement changed while he was at Abu Ghraib; and why he knew he did not interrogate Plaintiff Al Shimari after December 15, 2003. CACI PT Mem. at 8. Moreover, CACI PT would not be able to elicit any background information about Interrogator A that

[6] Dkt. #328 at 1("Plaintiffs do not oppose CACI's motion to compel the identities of the interrogation personnel who interrogated Plaintiffs but note that this information is not necessary to resolve this case."); Dkt. #780 at 2 ("Plaintiffs do not oppose CACI's motion to compel the identities of the interrogation personnel assigned to Plaintiffs, but write to underscore that, contrary to CACI's position, this information is not necessary to resolve this case."); Dkt. #875 at 1-2 ("Plaintiffs do not oppose the disclosure of linguist or analyst identities, but do not agree that such disclosure is "essential" or "critically important" in this case." (footnote omitted)).

[7] A day or two after the United States served CACI Interrogator A with a deposition subpoena, he telephoned undersigned counsel, identified himself by name, and advised that he had been subpoenaed. This call effectively revealed his identity to undersigned counsel. Undersigned counsel promptly reported the call to the United States. None of CACI PT's other litigation counsel has been advised of CACI Interrogator A's identity. [redacted]

would bear on his creditability. Fundamentally, one of CACI PT's counsel's knowledge of Interrogator A's identity does not assist CACI PT in defending this case.

Plaintiffs' complaint about lacking access to investigative materials from CACI PT's counsel has nothing to do with the state secrets privilege. Plaintiffs never sought to compel production of such materials, making their claim of prejudice even stranger. We note, however, that there was no investigation report prepared, and communications between CACI PT's counsel and CACI PT employees are privileged in any event. Plaintiffs' inability to obtain discovery of CACI PT's communications with its personnel is no different from CACI PT's inability to sit in on Plaintiffs' counsel's meetings with their own clients. Neither has anything to do with the United States' state secrets assertion or the proper disposition of this case.

III. CONCLUSION

For the foregoing reasons, the Court should dismiss Plaintiffs' claims.

Respectfully submitted,

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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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