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

SUHAIL NAJIM ABDULLAH AL SHIMARI, et al.,	
Plaintiffs,	Case No. 1:08-CV-00827-LMB-JFA
v.	
CACI PREMIER TECHNOLOGY, INC,	
Defendant.	

REPLY OF DEFENDANT CACI PREMIER TECHNOLOGY, INC. IN SUPPORT OF ITS MOTION FOR 28 U.S.C. § 1292(b) CERTIFICATION OF THE COURT'S ORDER OF JULY 31, 2023

I. INTRODUCTION

Plaintiffs' opposition is an exercise in willful blindness. There is no doubt that the Court's Memorandum Opinion ("Mem. Op.") involves controlling questions of law, nor is there any reasonable doubt that there are substantial grounds for differences of opinion as to the questions of law resolved by the Court. And there is no doubt that a resolution of these legal issues in CACI's favor would materially advance the ultimate resolution of this case; if CACI is right on the law, the case is over at the trial court level. For these reasons, the Court should certify its July 31, 2023 Order for interlocutory appeal pursuant to 28 U.S.C. § 1292(b).

II. ANALYSIS

A. Controlling Questions of Law

1. Extraterritoriality

As CACI's memorandum explained, there are clear questions of law on which the Court rests its decision that Plaintiffs' claims are a domestic application of the Alien Tort Statute ("ATS"). The Court concluded, as matter of law, that the multi-factor test applied in *Al Shimari v. CACI International Inc*, 758 F.3d 516, 530-31 (4th Cir. 2014) ("*Al Shimari III*"), remains the legally correct approach either as part of the "focus" test or as an alternative to the "focus" test. The Court could not have been clearer on that point:

> In sum, even after *Nestlé*, "CACI's status as a United States corporation," the "United States citizenship of CACI's employees," "facts in the record showing that CACI's contract to perform interrogation services in Iraq was issued in the United States" by the United States government, *Al Shimari III*, 758 F.3d at 530-31, as well as Iraq's status as territory under United States control, all show that plaintiffs' claims involve a domestic application of the ATS.

Mem. Op. at 20. CACI's view of the law is that the "focus" test requires the Court to assess extraterritoriality based on "conduct" and that for secondary liability claims – all that remain in this case – the only relevant conduct is the place where the alleged primary violation occurred. *United States v. Elbaz*, 52 F.4th 593, 602 (4th Cir. 2022); Brief of the United States as Amicus Curiae at 28, *Nestlé USA, Inc. v. Doe*, No. 19-416 (Sept. 2020) ("To the extent a cause of action for aiding and-abetting is cognizable under the ATS at all, its 'focus' is the underlying principal conduct."), available at 2020 WL 5498509. That place is Iraq.

Plaintiffs argue that the Court's extraterritoriality decision is "fact-based" rather than one involving "abstract" issues of law. Pl. Opp. at 10. Plaintiffs miss the point. To be clear, CACI believes that some of the facts cited by the Court in the Memorandum Opinion cannot be squared

with the actual record, but that is not the basis on which CACI seeks § 1292(b) certification. CACI's motion does not seek certification because it believes the Court got the facts wrong; it seeks certification because it believes the Court erred in making the abstract determination of what facts are relevant to an extraterritoriality inquiry for secondary liability claims under ATS. Relevance is a question of law decided by judges, not a fact issue decided by juries. Fed. R. Evid. 401. Thus, CACI's point, for purposes of this motion, is not that the fact on which the Court relied are wrong, but that the Court should not have considered them at all.

2. Implied Causes of Action

Remarkably, Plaintiffs argue that there is no controlling question of law at issue with respect to the Court's creation of implied causes of action because "CACI has not pointed to any intervening binding precedent that is contrary to the Court's prior rulings." Pl. Opp. at 15. But CACI has cited *Nestlé*, *Egbert* (which adopts the *Nestlé* plurality's formulation of the test for implied causes of action), *Dyer* (in which the Fourth Circuit relies on the *Nestlé* plurality's formulation of the test for implied causes of action, and *Bulger*. And there is no question that the Court disagrees with and refused to apply CACI's proffered test for extraterritoriality, that "even a single sound reason to defer to Congress" will be enough to require a court to refrain from creating a substantive cause of action. *Dyer*, 56 F.4th 271, 281 (4th Cir. 2022) (quoting and applying plurality opinion from *Nestlé USA, Inc. v. Doe*, 141 S. Ct. 1931, 1937 (2021)). The Court made clear its disagreement with CACI on this abstract point of law on page 38 of its Memorandum Opinion, where it stated its view that the "single sound reason" test is limited to *Bivens* actions and "***is therefore not controlling law with respect to ATS***." Mem. Opp. at 37-38 n.18 (emphasis added). Thus, the Court itself characterized whether the "single sound reason" test applied to claims brought under ATS as a question going to "controlling law."

Thus, while CACI disagrees with many of the recitations of fact in the Court's Memorandum Opinion, it is not relying on any of those disagreements with respect to its request for certification. Rather, with respect to both extraterritoriality and implied causes of action, CACI seeks review as to whether the Court applied the correct tests as required by intervening binding precedent.

B. Substantial Grounds for Difference of Opinion

Plaintiffs acknowledge that there are substantial grounds for a difference of opinion when there is "a genuine doubt as to whether the district court applied the correct legal standard in its order." Pl. Opp. at 6. CACI's memorandum in support of its motion for certification explains at length why there are substantial grounds for a difference of opinion as to the tests and legal standards applied by this Court with respect to extraterritoriality and implied causes of action. CACI will not repeat that analysis here.

Obviously, in every 28 U.S.C. § 1292(b) motion, the district court believes it applied the correct legal standards; otherwise it would have applied a different standard. Thus, the test for certification is not whether the district court believes it applied the correct legal standard, but whether reasonable minds could conclude that a different legal standard applied. Here, the Court took nearly two years to decide CACI's extraterritoriality motion. The Court's decision was not especially long, so CACI presumes that the Court spent considerable time deliberating as to the correct result. If this was an easy case, one for which there were no grounds for difference of opinion, the Court presumably would have decided the motion earlier than it did. The same is true of CACI's motion regarding implied causes of action, which was fully briefed for eleven months before it was decided.

When the Fourth Circuit decided extraterritoriality in *Al Shimari III*, it was writing on a near-empty slate. The court recognized that the Supreme Court's decision in *Kiobel* "did not state a precise formula for our analysis," and that "the 'touch and concern' language in *Kiobel* may be explained in greater detail in future Supreme Court decisions." *Al Shimari III*, 758 F.3d at 529. That is in some ways to where this Court is today. The Supreme Court has shown considerable interest in extraterritoriality in the past several Terms, deciding cases such as *Kiobel*, *RJR Nabisco*, *Nestlé*, and *Abitron*, and the Fourth Circuit has wrestled with these decisions in cases such as *Roe*, *Ojedokun*, and most recently in *Elbaz*.

Similarly, the Supreme Court has decided a number of cases over the past several years narrowing the availability of judge-made causes of action. These cases include *Ziglar v. Abbasi*, 137 S. Ct. 1858 (2017), *Jesner v. Arab Bank*, PLC, 138 S. Ct. 1386, 1402 (2018), *Hernandez v. Mesa*, 140 S. Ct. 735 (2020), and *Nestlé*, 141 S. Ct. at 1937. As CACI explained in its motion to dismiss these cases cite to ATS and *Bivens* cases indiscriminately in discussing the appropriate test for when a court can imply a cause of action. This Court concluded that the test for implying causes of action is different, and more lenient, for claims brought under ATS, notwithstanding the Supreme Court's citation to *Nestlé* (an ATS case) for the "single sound reason" test it applied in *Egbert*, 142 S. Ct. 1793, 1803 (2022), a *Bivens* case. The Fourth Circuit did the same thing in *Dyer*, citing to the plurality opinion in *Nestlé* as establishing the test for implying causes of action for *Bivens* claims. *Dyer*, 56 F.4th at 281.

The Court need not agree with CACI as to the appropriate tests for extraterritoriality and implied causes of action, only that the recent developments in binding precedent create substantial grounds for a difference of opinion. CACI easily meets that standard here.

C. Interlocutory Appeal Would Materially Advance the Ultimate Termination of this Case

The questions for which CACI seeks certification are case dispositive. If CACI is correct, the case is over. If there is one thing that is clear from this case, it is that a trial of this action will be difficult and messy. The manner of Plaintiffs' participation in their own case is unclear. The presentation of evidence from every single person with first-hand knowledge of Plaintiffs' treatment at Abu Ghraib prison will be pseudonymous, and it is unclear how that pseudonymous testimony would be presented. The trial would walk a tightrope through three invocations of the state secret privilege by the United States, all of which have been up[held by the Court. The time that would be devoted to a 28 U.S.C. § 1292(b) appeal to resolve potential case-dispositive questions of law is well worth the modest delay that would accompany such an appeal.

III. CONCLUSION

For these reasons, the Court should grant CACI's motion.

Respectfully submitted,

/s/ John F. O'Connor
John F. O'Connor
Virginia Bar No. 93004
Linda C. Bailey (admitted *pro hac vice*)
Molly Bruder Fox (admitted *pro hac vice*)
STEPTOE & JOHNSON LLP
1330 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 429-3000 – telephone
(202) 429-3902 – facsimile
joconnor@steptoe.com
lbailey@steptoe.com
mbfox@steptoe.com

William D. Dolan, III
Virginia Bar No. 12455
LAW OFFICES OF WILLIAM D. DOLAN, III, PC
8270 Greensboro Drive, Suite 700
Tysons Corner, VA 22102
(703) 584-8377 – telephone
wdolan@dolanlaw.net

Counsel for Defendant CACI Premier Technology, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on the 24th day of August, 2023, 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:

Cary Citronberg, Esq.
Zwerling/Citronberg, PLLC
114 North Alfred Street
Alexandria, VA 22314
cary@zwerling.com

/s/ John F. O'Connor
John F. O'Connor
Virginia Bar No. 93004
Attorney for Defendant CACI Premier Technology, Inc.
STEPTOE & JOHNSON LLP
1330 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 429-3000 – telephone
(202) 429-3902 – facsimile
joconnor@steptoe.com