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 FOR SUMMARY JUDGMENT

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INTRODUCTION

In 2007—as it defended itself against a putative class action filed by Abu Ghraib detainees in federal district court—CACI Premier Technology, Inc. ("CACI"), a sophisticated government contractor represented by both inside and outside counsel, voluntarily entered into a "full and final" settlement of "all claims and disputes" "arising out of or related to," among other things, the two task orders at issue in this case. (United States' Material and Undisputed Facts, Doc. 1130 ("Undisputed Facts"), at 3–6 ¶¶ 8–14.) In an effort to avoid summary judgment based on this simple, broad, and unambiguous language, CACI effectively asks the Court to hold: (i) that the "full and final" settlement was neither full nor final; (ii) that "all claims and disputes" does not really mean all claims and disputes; and (iii) that CACI's third-party claims do not arise out of, or even relate to, the precise task orders pursuant to which it provided the United States with interrogation services in Iraq—despite the fact that CACI itself alleged in its own Third Party Complaint that Plaintiffs' claims, from which its third-party claims derive, "*aris[e] out of CACI['s] performance of its contract*." (CACI Third Party Compl., Doc. 665, at 64 ¶ 57 (emphasis added).)

CACI disputes *not a single* material fact that the United States enumerated in its opening brief, all of which facts the Court should now treat as admitted. Fed. R. Civ. P. 56(c)(1); E.D. Va. L. Civ. R. 56(B). And CACI does not deny that: (i) *CACI* "'b[ore] the burden to modify the release, before signing it'" if it had sought "'to preserve a right to assert a claim under [a] contract later'" (Doc. 1130 ("USA Mem.") at 10 (quoting *Dairyland Power Coop. v. United States*, 27 Fed. Cl. 805, 811 (1993), *aff'd*, 16 F.3d 1197 (Fed. Cir. 1994)));[1] and (ii) CACI "did not insert any reservation of rights in the 2007 settlement agreement that would preserve its ability to file third-

[1] Tellingly, although CACI cites to over three-dozen cases in its opposition brief (CACI Opp., Doc. 1159, at ii–iv), CACI completely fails to address *Dairyland Power Cooperative*, let alone attempt to distinguish it.

party claims against the United States arising out of the two task orders pursuant to which CACI provided the contract interrogation services at issue in this litigation." (*Id.*)

Though CACI apparently agrees with the United States that "'[a] contractual interpretation that gives a reasonable meaning to all parts will be preferred to one which . . . achieves a weird and whimsical result'" (*compare id.* at 11 (quoting *Julius Goldman's Egg City v. United States*, 697 F.2d 1051, 1058 (Fed. Cir. 1983)) *with* Doc. 1159 ("CACI Opp.") at 9 (quoting same)), CACI spends upwards of twenty-one pages engaging in the precise "narrow, technical, and close construction" forbidden by the Supreme Court, *United States v. William Cramp & Sons Ship & Engine Bldg. Co.*, 206 U.S. 118, 128 (1907), all in an effort to convince this Court that the "full and final" settlement of "all claims and disputes" "arising out of or related to" the precise contractual task orders at issue in this action somehow completely, yet implicitly, excludes CACI's third-party claims. CACI's hyper-technical analysis fails on its own terms, as it relies almost exclusively on: (i) inapposite case law concerning the interpretation of *arbitration agreements*—not settlements with the federal government; (ii) a textual argument that flies in the face of proper grammatical construction; and (iii) the proposition that the contractual task orders at issue in this action are wholly irrelevant to CACI's derivative third-party claims—a proposition that is not only wrong, but also which cannot remotely be squared with the previous rulings of this Court. *See, e.g.*, *Al Shimari v. CACI Premier Tech., Inc.*, 324 F. Supp. 3d 668, 693–97 & n.30 (E.D. Va. 2018).

Law, logic, and the only possible plain-language interpretation of the simple, broad, and unambiguous release language all compel the inescapable conclusion that CACI's third-party claims against the United States "aris[e] out of or relate[] to" the two task orders pursuant to which CACI provided the contract interrogation services at issue in this action. CACI's third-party claims are thus, by definition, included among "all" of the "claims and disputes" that were "full[y]

and final[ly]" settled by CACI in 2007. Assuming *arguendo* that the Court has subject-matter jurisdiction over CACI's third-party claims against the United States, the 2007 settlement agreement entitles the United States to judgment as a matter of law.

ARGUMENT

I. CACI'S THIRD-PARTY CLAIMS AGAINST THE UNITED STATES HAVE LONG BEEN SETTLED

CACI does not dispute that a plaintiff who attempts to avoid the consequences of a "full and final" release "'carries a heavy burden when arguing to the contrary.'" (USA Mem. at 9 (quoting *W&F Bldg. Maint. Co. v. United States*, 56 Fed. Cl. 62, 68 (2003)).) CACI does not—and, indeed, cannot—carry its heavy burden.

A. CACI's primary argument in opposition is that the phrase "arising out of or related to" incorporates an extra-textual "significant relationship" test found nowhere in the body of the release. (CACI Opp. at 7–8.) CACI then spends over seven pages implausibly arguing that its third-party claims do not significantly relate to the task orders pursuant to which CACI sent interrogators to Iraq. (*Id.* at 10–17.) CACI's hyper-technical argument fails for at least six reasons.

First, the Court need not dwell long on the proper construction of the phrase "arising out of or related to" because, as the United States noted in its opening memorandum: (i) CACI alleged in its Third-Party Complaint that "the United States issued task orders to CACI PT whereby CACI PT provided civilian interrogators to the United States military in order to augment the military's interrogation force in Iraq" (CACI Third Party Compl., Doc. 665, at 55 ¶ 14); (ii) CACI also affirmatively alleged that that Plaintiffs' claims "*aris[e] out of* CACI PT's performance of its contract" (*Id.* at 64 ¶ 57 (emphasis added)); and (iii) CACI's third-party claims against the United States are, by definition, "'derivative' of the plaintiff[s'] claim[s,] for derivative liability is central to the operation of Rule 14." *Scott v. PPG Indus., Inc.*, 920 F.2d 927, 1990 WL 200655, at *3 (4th

Cir. Dec. 13, 1990) (per curiam) (internal quotation marks omitted). As a matter of law and logic, CACI's derivative third-party claims against the United States must *also* "aris[e] out of CACI PT's performance of its contract." (CACI Third Party Compl., Doc. 665, at 64 ¶ 57.) Rather than address its own allegations head-on, CACI buries its response in a footnote. (*See* CACI Opp. at 15 n.8.)[2] And even in that footnote, CACI admits, as it must, that it "alleged that Plaintiffs' claims arise out of [its] performance of its contract." (*Id.* (emphasis omitted).)

Second, if there were any question as to the expansive breadth of the phrase "arising out of," one need only look to the derivative-sovereign-immunity brief that CACI filed *last Thursday*. In its latest effort to extricate itself from this case, CACI argued that the phrase "arising out of" "is 'broad,'" and that "in other areas of the law, 'arising out of' 'denotes *any* causal connection.'" (Doc. 1150 ("CACI DSI Mem.") at 8 (quoting *In re KBR, Inc., Burn Pit Litig.*, 744 F.3d 326, 348 (4th Cir. 2014)) (emphasis in original).) Absent from CACI's derivative-sovereign-immunity brief is any argument that the phrase "arising out of" necessarily incorporates the supposedly "well established" significant-relationship test that CACI advocated for in opposing the United States' summary-judgment motion on the very next day. (CACI Opp. at 7.)

Third, in support of its argument that "[t]he proper construction of the term 'arising out of or related to'" incorporates a supposedly "well established" significant-relationship test (*id.*),

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[2] In its footnoted response, CACI suggests that its "arising out of" allegation in the Third Party Complaint relates only to Plaintiffs' now-dismissed direct claims against CACI. (*See* CACI Opp. at 15 n.8.) Not so. CACI's Third Party Complaint alleges that the United States is "denying CACI PT access to information that would allow CACI PT to defend itself for claims arising out of CACI PT's performance of its contract." (CACI Third Party Compl., Doc. 665, at 64 ¶ 57.) In the *immediately-preceding paragraph*, CACI contends that it "cannot fairly defend against Plaintiffs' claims if they are not provided information regarding the persons with whom Plaintiffs interacted, as that is the only way that CACI PT can challenge . . . Plaintiffs' allegations that whatever unidentified persons mistreated them did so *in furtherance of a conspiracy*." (*Id.* at 64 ¶ 56 (emphasis added).)

CACI points to: (i) two Fourth Circuit cases that concern the interpretation of *arbitration agreements*; and (ii) a Federal Circuit case, on appeal from the Eastern District of Virginia, that considered the interpretation of an *arbitration agreement* "under the law of the relevant regional circuit," *i.e.*, the Fourth Circuit. *Evans v. Bldg. Materials Corp. of Am.*, 858 F.3d 1377, 1380 (Fed. Cir. 2017). (CACI Opp. at 7.) It is no coincidence that CACI refers the Court *only* to arbitration-agreement cases that apply Fourth Circuit precedent. The Fourth Circuit has an unusual line of arbitration cases in which the court injected a significant-relationship test into *arbitration agreements* that use the "arising out of or relating to" formulation. In the later of the two Fourth Circuit cases cited by CACI, *Wachovia Bank, Nat'l Ass'n v. Schmidt*, 445 F.3d 762 (4th Cir. 2006), the Fourth Circuit expressly "recognize[d] that requiring a *significant* relationship in order to compel arbitration . . . appears to be at odds with the language of the . . . arbitration clause, which only requires that [the] claims '*relate to*' the" underlying documents. *Id.* at 767 n.5 (emphases in original). In fact, the panel explicitly noted "that to require such a significant relationship may appear to be in tension with the Supreme Court's mandate that we apply the ordinary tools of contract interpretation in construing an arbitration agreement." *Id.* Nevertheless, the court found that it was "constrained to adhere to [its] precedent" in which it "construed *arbitration agreements* that are materially indistinguishable from the one" in *Wachovia Bank*. *Id.* (emphasis added).

If the United States were asking the Court to interpret an arbitration agreement, CACI might have a point. But CACI's arbitration-agreement cases do not control the interpretation of a *settlement agreement* with the federal government as interpreted under federal common law. And there is no principled reason to extend the holding of these arbitration-agreement cases into a new context—the federal-settlement-agreement context—especially when the Fourth Circuit itself has already expressed reservations about whether those cases were correctly decided in the first place.

If anything, *Wachovia Bank* disproves CACI's argument. Where, as here, the provisions of a settlement agreement "are clear and unambiguous, they must be given their plain and ordinary meaning." *McAbee Constr., Inc. v. United States*, 97 F.3d 1431, 1435 (Fed. Cir. 1996) (internal citations and quotation marks omitted). But *Wachovia Bank* explains that importing a significant-relationship test into the phrase "arising out of or relating to" would *not* be in line with "the ordinary tools of contract interpretation." *See Wachovia Bank Nat'l Ass'n*, 445 F.3d at 767 n.5.

Fourth, for obvious reasons, CACI frames its argument almost exclusively in the context of the inapplicable significant-relationship test (*see* CACI Opp. at 11–17), and does not seriously argue that its third-party claims neither arise out of nor relate to the two task orders pursuant to which CACI provided the contract interrogation services at issue in this action. As noted above, CACI explained just one day before filing its present opposition that the phrase "arising out of" "'denotes *any* causal connection.'" (CACI DSI Mem., Doc. 1150, at 8 (emphasis in original); *see also* CACI Third Party Compl., Doc. 665, at 64 ¶ 57 (admitting that Plaintiffs' claims against CACI, from which CACI's third-party claims derive, "aris[e] out of CACI['s] performance of its contract).) Likewise, "relating to" is a phrase "of substantial breadth." *Todd Constr., L.P. v. United States*, 656 F.3d 1306, 1312 (Fed. Cir. 2011). Indeed, "[t]he term 'related' is typically defined as 'associated; connected.'" *Id.* (quoting three dictionaries).

CACI's third-party claims against the United States are—at the absolute minimum—"associated" and "connected" with the two task orders pursuant to which CACI provided interrogation services to Iraq. Indeed, as CACI stated in its own Third Party Complaint, "the United States issued task orders to CACI PT whereby CACI PT provided civilian interrogators to the United States military in order to augment the military's interrogation force in Iraq." (CACI Third Party Compl., Doc. 665, at 55 ¶ 14.) And any hair-splitting attempt to argue that the two

task orders are wholly unconnected with this action would run afoul of the Supreme Court's admonition in *United States v. William Cramp & Sons Ship & Engine Building Co.*, 206 U.S. 118 (1907), that broadly-worded releases like the one in the 2007 settlement agreement are intended to be all-encompassing and "not to be shorn of their efficiency by any narrow, technical, and close construction." *Id.* at 128.

Unable to take on *William Cramp & Sons* directly, CACI instead argues that: (i) it is an old case; and (ii) the release language in the 2007 settlement agreement was worded slightly differently. (CACI Opp. at 8.) Neither of these arguments matters one whit. As to CACI's former argument, Supreme Court opinions rarely come with expiration dates, and are binding on lower courts unless and until the Supreme Court says otherwise. Indeed, many of the Supreme Court's most-important precedents remain in force despite their early-nineteenth-century vintage. *See, e.g.*, *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803); *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819). And courts continue to rely on *William Cramp & Sons* in construing broad release language. *See, e.g.*, *Augustine Med., Inc. v. Progressive Dynamics, Inc.*, 194 F.3d 1367, 1372–73 (Fed. Cir. 1999); *Advance Prods. & Sys., Inc. v. CCI Piping Sys., L.L.C.*, No. 2:14–cv–2456, 2018 WL 1542100, at * 9 (W.D. La. Mar. 29, 2018).

As to the latter argument, CACI argues that "*Cramp* focused on the language 'claims of any kind or description' and 'by virtue of the contract.'" (CACI Opp. at 8.) But CACI makes no effort to explain how the phrase "all claims and disputes" in the 2007 settlement agreement is substantively narrower than the "claims of any kind or description" language in *William Cramp & Sons*. "All claims" means *all* claims. Likewise, CACI does not expound on how the phrase "by virtue of" is somehow broader than the 2007 settlement agreement's "arising out of or related to" formulation. If *anything*, the "by virtue of" language in *William Cramp & Sons* is narrower: "'By

virtue of' means simply 'by reason of' or 'because of.'" *BFI Waste Sys. of N. Am. LLC v. Freeway Transfer, Inc.*, 867 F. Supp. 2d 1037, 1042 (D. Minn. 2012). If a claim arises "because of" a contract, surely that claim "relates to" that same contract. CACI's failed attempt to distinguish *William Cramp & Sons* only illuminates the futility of its opposition.

Fifth, even assuming that the debatable significant-relationship test from the unrelated arbitration-agreement context should be transplanted into the federal-settlement-agreement context (and it should not be), CACI's third-party claims still must be dismissed. Despite CACI's attempts to pitch the significant-relationship test as narrow and difficult to satisfy, the Fourth Circuit—in a case cited by CACI—explained that "[b]oth the Supreme Court and this court have characterized [variations of the phrase 'arising out of and relating to'] to be broad arbitration clauses capable of an expansive reach." *Am. Recovery Corp. v. Computerized Thermal Imaging, Inc.*, 96 F.3d 88, 93 (4th Cir. 1996); *see also id.* (describing a "similarly broad arbitration clause" as containing "sweeping language"). Indeed, in the arbitration context, the phrase "arising out of" does not "'limit arbitration to the literal interpretation or performance of the contract, but embrace[s] *every dispute between the parties* having a significant relationship to the contract *regardless of the label attached to the dispute*.'" *Id.* (quoting *J.J. Ryan & Sons v. Rhone Poulenc Textile, S.A.*, 863 F.2d 315, 321 (4th Cir. 1988)) (emphases and alteration marks altered).

Despite CACI's repeated declarations that the contractual relationship between it and the United States is somehow "irrelevant" to—and even "entirely divorced from"—this case (CACI Opp. at 2, 3, 10, 11, 12, 14, 15), CACI's position cannot be squared with: (i) its Third Party Complaint (*see* CACI Third Party Compl., Doc. 665, at 55 & 64 ¶¶ 14, 57); (ii) its exhibit list, which includes exhibits relating to the two task orders pursuant to which it provided the United States with interrogation services in Iraq (*see* CACI's Rule 26(a)(3) Disclosures, Doc. 971, at 29

¶¶ 12–13); (iii) its recent derivative-sovereign-immunity motion, which is *premised entirely* on the contractual relationship between CACI and the United States (*see generally* CACI DSI Mem., Doc. 1150); or (iv) the previous holdings of the Court, which have expressly discussed the significance of CACI's contract to Plaintiffs' claims. For example, as the Court explained in its February 21, 2018, opinion, "CACI had a contract with the United States government to provide interrogation services and CACI's contract . . . w[as] dependent on those interrogations yielding high-quality intelligence that CACI could provide to the military." *Al Shimari*, 324 F. Supp. 3d at 694 n.30. Accordingly, "[t]o the extent that CACI or its employees believed that the [Alien Tort Statute] violations described in the [Third Amended Complaint] could 'soften up' detainees and encourage them to provide additional information in interrogations, it is clear that they would have a plausible motive for entering into the conspiracies." *Id.*; *see also id.* at 697 ("In addition, plaintiffs have plausibly alleged that CACI's and its employees' actions to aid the abuses were undertaken with the necessary purpose of facilitating the abusive conduct because the goal of the abusive regime was to 'soften up' the detainees to convince them to cooperate with CACI's interrogators."); Doc. 1145, 2/27/2019 Hr'g Tr., at 10:19–11:5 ("THE COURT: . . . the case is a case based on conspiracy, a theory of conspiracy and aiding and abetting, and the motivation for that conduct was to soften up the detainees for interrogation purposes"). CACI's opposition provides no principled reason for the Court to revisit its earlier holdings.

Finally, as CACI explains elsewhere in its opposition, "'[t]he rule for releases is that absent special vitiating circumstances, a general release bars claims based upon events occurring prior to the date of the release.'" (CACI Opp. at 18 (quoting *Augustine Med. Inc. v. Progressive Dynamics,*

Inc., 194 F.3d 1367, 1373 (Fed. Cir. 1999)) (emphasis omitted).)[3] The United States agrees with CACI on this point wholeheartedly. (*See* USA Mem. at 13.) Since CACI acknowledges in its opposition that the release language in the 2007 settlement agreement constitutes a "general release" (CACI Opp. at 3 (discussing "the general release set forth in the [2007] settlement agreement")), and CACI's three tort-based third-party claims are indisputably based on events occurring prior to the 2007 execution of the settlement agreement, CACI's tort-based third-party claims are barred and must be dismissed.

B. CACI's secondary argument in opposition is that the only claims released by the settlement agreement are claims for things like "interest, general administrative costs, [and] direct and indirect costs." (CACI Opp. at 9–10.) CACI's strained interpretation, which impliedly deletes the word "all" from "all claims and disputes," violates the well-established last-antecedent rule and should be rejected. The operative language of the 2007 settlement agreement includes three clauses, demarcated by bracketed numbers, as follows: "DOI's payment of the Settlement Amount shall constitute full and final payment, settlement, and accord and satisfaction of [1] all claims and disputes by DOI and CACI arising out of or related to the terminated Task Orders, [2] including those in CBCA No. 546, [3] including but not limited to all claims for interest, general administrative costs, direct and indirect costs of all kinds whatsoever relating to the terminated Task Orders." (Settlement Agreement, Doc. 1130–3, at 1.) CACI effectively argues that the third clause leapfrogs the second clause and limits the first "all claims and disputes" clause. It does not.

"[T]he grammatical 'rule of the last antecedent'" provides that "a limiting clause or phrase . . . should ordinarily be read as modifying only the noun or phrase that it immediately

[3] CACI's citation incorrectly suggests that *Augustine Medical* was issued by the Fourth Circuit. (CACI Opp. at 18.) In fact, *Augustine Medical* is a decision from the Federal Circuit.

follows." *Barnhart v. Thomas*, 540 U.S. 20, 26 (2003); *see also, e.g.*, *Virginia v. Browner*, 80 F.3d 869, 877 (4th Cir. 1996) ("An elementary principle of statutory construction is the 'last antecedent' rule, which holds that ordinarily a clause modifies only its nearest antecedent."). The second clause explains that the "claims and disputes" settled in the 2007 settlement agreement "includ[e]"—but are not limited to—"those in CBCA No. 546." The third clause illuminates the *second* clause by explaining that the resolved claims *in CBCA No. 546* include not only the underlying payment disputes but also any ancillary claims for things like interest and costs. Properly interpreted, the "claims and disputes" released in the 2007 settlement agreement certainly include those in CBCA No. 546 (which, in turn, include not just the underlying claims for payment but also interest, costs, and the like), and *also* include any other claims that arise out of or relate to the terminated task orders, such as CACI's third-party claims. Again, "all claims" means all claims.

C. Lastly, CACI admits, as it must, that its breach-of-contract claim "unquestionably arises out of and relates to the" task orders. (CACI Opp. at 17–18.) CACI's admission should sound the death knell of its breach-of-contract claim. Instead, CACI argues that its breach-of-contract claim should nevertheless survive because it supposedly did not accrue until after the execution of the settlement agreement. (*Id.*) While it is true that general releases bar claims based on events occurring prior to the execution of the release (which is one of the many reasons why CACI's three tort-based third-party claims must be dismissed, *see supra* at 9–10), general releases, like the one in the 2007 settlement agreement, may operate prospectively as well. (*See* USA Mem. at 12–13.) This is especially true where, as here, the underlying contract had been terminated before CACI claims it was breached, thereby eliminating any prospective contractual duties. And as the United States explained in its opening memorandum, "the 2007 settlement agreement does

not speak in terms of 'past and present claims.' The agreement settled '*all* claims,' and the phrase 'all claims' includes future claims." (*Id.* at 12.) To this, CACI offers no response.[4]

* * *

With the benefit of hindsight, CACI now clearly regrets entering into the 2007 settlement agreement. But the 2007 settlement agreement, like all settlement agreements, necessarily "embodie[d] a compromise." *United States v. Armour & Co.*, 402 U.S. 673, 681 (1971). "[I]n exchange for the saving of cost and elimination of risk, the parties each g[a]ve up something they might have won had they proceeded with the litigation." *Id.* In the case of the 2007 settlement agreement, the United States gave up its right to defend the contract action and paid CACI $200,000. (Undisputed Facts, Doc. 1130, at 5–6 ¶¶ 10–14.) In exchange, CACI did more than simply dismiss its pending appeal—it executed a simple, broad, and unambiguous release that expansively gave up "all claims and disputes" "arising out of or related to," among other things, the two task orders at issue in this case.

The government hardly can be said to have snookered CACI into signing the settlement agreement. A sophisticated government contractor whose entire business model is based on profiting from contracts with the government, CACI was represented both by inside and outside

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[4] CACI also argues that "whether [a] release encompasses a particular claim is a question of fact." (CACI Opp. at 5.) But the federal-common-law cases they cite stand for a different proposition: that "[i]f the release is ambiguous as to its scope of coverage, we construe its language to effect the parties' intent at the time they executed the release. . . . The parties' intent is a question of fact." *Dureiko v. United States*, 209 F.3d 1345, 1356 (Fed. Cir. 2000); *see also Fort Vancouver Plywood Co. v. United States*, 860 F.2d 409, 414 (Fed. Cir. 1988). Here, however, CACI has not argued that the general release in the 2007 settlement agreement is ambiguous. And even if CACI had lodged such an argument, CACI has not provided the Court with any parol evidence as to the "parties' intent at the time they executed the release," *Dureiko*, 209 F.3d at 1356, let alone evidence sufficient to create a genuine issue of material fact that could preclude summary judgment here. (*Cf.* CACI Reply, Doc. 1119, at 2 ("This was Plaintiffs' chance to marshal facts supporting justiciability, and they decided to take a pass. The absence of factual support for justiciability requires dismissal.").)

counsel at the time the 2007 settlement agreement was executed. (*See* Settlement Agreement, Doc. 1130–3, at 2; Undisputed Facts, Doc. 1130, at 4 ¶ 7.) And CACI was well-aware of the possibility that it might incur significant Abu Ghraib-related liability, as it was concurrently defending itself against the massive putative class-action *Saleh* lawsuit when it executed the 2007 settlement agreement. (Undisputed Facts, Doc. 1130, at 3–6 ¶¶ 6–11.) CACI, through any one of its attorneys, could easily have insisted on inserting a reservation-of-rights provision in the 2007 settlement agreement, as was indisputably its burden had it wished to preserve future Abu Ghraib-related claims against the government. (*See* USA Mem. at 10 (quoting *William Cramp & Sons*, 206 U.S. at 128; *Dairyland Power Coop.*, 27 Fed. Cl. at 811).) It did not. As a result, CACI must live with the deal it struck, and the 2007 settlement agreement "must be construed as it is written, and not as it might have been written." *Armour & Co.*, 402 U.S. at 682.

II. CACI'S BREACH-OF-CONTRACT CLAIM FAILS FOR THE ADDITIONAL REASON THAT CACI HAS NOT IDENTIFIED ANY EXPRESS CONTRACTUAL OBLIGATION THAT WOULD SUPPORT THAT CLAIM

In its opening brief, the United States demonstrated that CACI's claim for breach of the implied duty of good faith and fair dealing fails to identify what provision, obligation, or opportunity in its contract with the United States would imply a duty to assist in third-party discovery, the failure of which, in turn, could support a claim of a breach of the implied duty of good faith and fair dealing. (USA Mem. at 14–16; *see also* Undisputed Facts, Doc. 1130, at 6 ¶ 15.) In its opposition, CACI again fails to identify any obligation created by the contract to assist in third-party discovery, and instead attempts to sow confusion over the pertinent legal standard to distract the court from its inability to anchor its claim in the contract itself.

CACI's premise is that an implied duty need not rest on an express contractual provision, but instead must only be "'keyed to the obligations and opportunities established in the contract.'" (CACI Opp. at 18–20 (quoting *Dobyns v. United States*, No. 2015–5020, -- F.3d --, 2019 WL

453486, at *5 (Fed. Cir. Feb. 6, 2019)).) CACI's semantical argument ignores the more-important fact that the implied duty is "a duty of good faith and fair dealing *in [the contract's] performance and enforcement*." *Metcalf Constr. Co. v. United States*, 742 F.3d 984, 990 (Fed. Cir. 2014) (emphasis added) (quoting Restatement (Second) of Contracts § 205 (1981)). That is, a plaintiff must show that performance under the contract impliedly required that the defendant had a duty to act, or refrain from acting, in a certain expected way, and, to show that a breach of good faith has occurred, such that defendant's action frustrated performance under the contract. Put another way, "a specific promise must be undermined for the implied duty to be violated." *Dobyns*, 2019 WL 453486, at *8.

Even a cursory review of the case law shows that courts have always considered the implied duty of good faith and fair dealing in the context of performance of specific contract obligations. In *Precision Pine & Timber, Inc. v. United States*, 596 F.3d 817 (Fed. Cir. 2010), the court looked at a specific provision allowing the government to suspend performance to comply with a court order. In *Dobyns*, the court considered whether performance of a duty to "protect[] Agent Dobyns [was] included with the expectation of Paragraph 10 [in light of parol evidence]." *Dobyns*, 2019 WL 453486, at *9. In *Metcalf*, on which CACI so heavily relies in its opposition, the court not only looked at specific provisions in the contract related to differing site conditions, but analyzed those provisions on appeal and held that the trial court had misinterpreted them.

Unlike each of these cases, there is nothing in CACI's contract with the United States related to litigation or discovery and no aspect of performance under the contract created a duty on the part of the United States owed to CACI regarding third-party litigation. (Undisputed Facts, Doc. 1130, at 6 ¶ 15.) No language, terms, or performance obligations in the contract between CACI and the United States intimate that the parties would have contractually-enforceable

discovery obligations in third-party litigation. CACI's opposition nowhere identifies what obligation in the contract it purports to rely upon, and that failure is fatal to its claim. (CACI Opp. at 20 (asserting it relies on a duty to assist without identifying any such duty); Undisputed Facts, Doc. 1130, at 6 ¶ 15.) In an effort to cover its failure, CACI mentions its own obligation to comply with various military rules, but it makes no connection between those rules and a different duty it seeks to impose upon the United States.

As the United States explained in its opening memorandum, in an argument CACI failed to address, CACI's breach-of-contract theory would produce the absurd result that all contracts, regardless of their terms, would include an implied duty to assist with third-party litigation. (USA Mem. at 15–16.) No law supports that contention. Put simply, where a party like CACI is seeking to impose a duty upon its contractual counterparty without reference to the particular bargain struck in its contract, it is seeking to "expand a party's contractual duties beyond those in the express contract." *Precision Pine & Timber, Inc. v. United States*, 596 F.3d 817, 831 (Fed. Cir. 2010). CACI's effort to expand the duties the United States agreed to assume should be rejected.

III. THE COURT SHOULD FIRST DETERMINE WHETHER IT HAS SUBJECT-MATTER JURISDICTION OVER CACI'S CLAIMS BEFORE DECIDING THE UNITED STATES' SUMMARY-JUDGMENT MOTION

The United States and CACI agree that the Court should first decide whether it has subject-matter jurisdiction over CACI's third-party claims. (*Compare* USA Mem. 2 *with* CACI Opp. at 1.) Only if the Court determines that it has subject-matter jurisdiction over CACI's third-party claims (and the Court should not), should the Court then grant the United States' Motion for Summary Judgment.

The United States is mindful that its sovereign immunity can lead to seemingly harsh results. *See, e.g.*, *Welch v. United States*, 409 F.3d 646, 648–49 (4th Cir. 2005) (sovereign immunity precluded relief for an individual detained for 422 days without a bail hearing under an

immigration statute later determined to be unconstitutional). That said, "[t]he jealous protection of the sovereign from suit is deeply rooted in the common law and has been considered a part of the plan of our Constitution since before its ratification." *Research Triangle Inst. v. Bd. of Governors of the Fed. Reserve Sys.*, 132 F.3d 985, 987 (4th Cir. 1997) (footnote omitted). In 1907, "Justice Holmes reaffirmed the doctrine of sovereign immunity 'not because of any formal conception or obsolete theory, but on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends.'" *Id.* at 987–88 (quoting *Kawananakoa v. Polyblank*, 205 U.S. 349, 353 (1907)).[5] And just yesterday, the Fourth Circuit, in a scholarly opinion, strongly reaffirmed the continuing vitality of the United States' sovereign immunity, and that its sovereign immunity "can *only* be waived by statutory text that is unambiguous and unequivocal" as "it remains the province of the political branches, not the courts, to weigh the costs and benefits of exposing the federal government to civil litigation." *Robinson v. U.S. Dep't of Educ.*, No. 18–1822, -- F.3d --, 2019 WL 1051585, at *2 (4th Cir. Mar. 6, 2019) (emphasis added).[6] (*See generally* USA Mot. To Dismiss Mem., Doc. 697, at 3–30; USA Mot. To Dismiss Reply, Doc. 744, at 2–20.)

Moreover, it is not as if Plaintiffs, who have not sued the United States, are without a possible remedy. The United States' sovereign immunity will not necessarily preclude Plaintiffs from recovering damages from CACI. (*See* Order, Doc. 1143 (denying CACI's dispositive

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[5] "The modern policy basis justifying sovereign immunity" stems from "three principal themes," chief among which is that, "under traditional principles of separation of powers, courts should refrain from reviewing or judging the propriety of the policymaking acts of coordinate branches." *Gray v. Bell*, 712 F.2d 490, 511 (D.C. Cir. 1983).

[6] The United States filed a Notice of Supplemental Authority regarding this new decision yesterday. (USA Notice, Doc. 1166.)

motions in large part).) And the U.S. Army Claims Service was willing to "compensate detainees who establish[ed] legitimate claims for relief under the Foreign Claims Act, 10 U.S.C. § 2734." *Saleh v. Titan Corp.*, 580 F.3d 1, 2 (D.C. Cir. 2009).[7] Yet none of the Plaintiffs ever sought compensation under the Foreign Claims Act.[8] As to CACI, its decision to contract with the United States (and accept millions in taxpayer dollars) to provide interrogation services to Iraq without demanding an express, contractual indemnification clause constituted a risk that it knowingly undertook in light of the United States' sovereign immunity—and a risk that a sophisticated government contractor should have priced into the contract.

All that being said, there are at least four grounds on which the Court may grant the United States' pending Motion To Dismiss (Doc. 696) without needing to address whether there is an implicit, extra-statutory *jus cogens* exception to the United States' sovereign immunity:

First, CACI has failed to carry its burden of proving the Court's subject-matter jurisdiction over its third-party claims, as is its undisputed burden. (*See generally* USA Mot. To Dismiss Reply, Doc. 744, at 2; USA Notice, Doc. 1163.)[9]

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[7] The United States has already explained that the Foreign Claims Act "is a matter of legislative grace" and does not "waive[] the United States' sovereign immunity" from suit. (USA Mot. To Dismiss Reply, Doc. 744, at 13 n.5.)

[8] *See* Ex. 9, Plaintiff Al Shimari's Resps. To CACI's First Set of Interrogatories, Interrogatory Resp. 15; Ex. 10, Plaintiff Al-Ejaili's Resps. To CACI's First Set of Interrogatories, Interrogatory Resp. 15; Ex. 11, Plaintiff Al-Zuba'e's Resps. To CACI's First Set of Interrogatories, Interrogatory Resp. 15. All exhibits to this reply memorandum are attached to the contemporaneously-filed Second Declaration of Elliott M. Davis.

[9] CACI labors under the misimpression that it need not prove subject-matter jurisdiction because its third-party claims are "classic alternative claim[s]." (CACI Resp., Doc. 1164 at 2.) Nothing could be further from the truth. It is blackletter law that Federal Rule of Civil Procedure 14 "prescribes only the *procedural circumstances* in which [third-party claims] may be asserted." 3 *Moore's Federal Practice* § 14.41[1] (2019) (emphasis in original). "In addition to satisfying the procedural prerequisites, every claim asserted in federal court *must* invoke a basis of federal subject matter jurisdiction" because "[t]he Federal Rules may not effect subject matter jurisdiction." (cont'd)

Second, CACI has waived, forfeited, and/or abandoned any argument in favor of the Court's subject-matter jurisdiction, at the time it filed its March 2018 opposition (*see* USA Mot. To Dismiss Reply, Doc. 744, at 2), and further at the time it filed its February 2019 derivative-sovereign-immunity motion. (*See* USA Notice, Doc. 1163.)

Third, "[f]ederal courts are courts of limited jurisdiction" and "possess only that power authorized by Constitution and statute . . . which is not to be expanded by judicial decree." *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 378 (1994). The only statute identified by CACI that could possibly vest the Court with subject-matter jurisdiction is the supplemental-jurisdiction statute, 28 U.S.C. § 1367. (*See* CACI Resp., Doc. 1164, at 4.) Putting aside the fact that CACI forfeited its new supplemental-jurisdiction argument *nearly a year ago*,[10] the law is clear that the Court may not exercise supplemental jurisdiction over claims asserted against the United States because the supplemental-jurisdiction statute does not effect a waiver of the United States' sovereign immunity and therefore cannot serve as the basis for the Court's subject-matter jurisdiction over CACI's third-party claims against the United States. *E.g.*, *United States v. Park Place Assocs., Ltd.*, 563 F.3d 907, 934 (9th Cir. 2009); *United States v. Certain Land Situated in*

Id. (emphasis added). Though CACI is permitted to assert alternative *merits* claims, CACI is still obligated to prove that the Court has subject-matter jurisdiction over those alternative claims. And simply asking the Court to "consider whether immunity is available to the United States" (CACI Mot. To Dismiss Opp., Doc. 713, at 14 (initial capitalization omitted)) is a far cry from actually *proving* the Court's subject-matter jurisdiction. *See United States v. Zannino*, 895 F.2d 1, 17 (1st Cir. 1990) ("It 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.").

[10] *Compare* USA Mot. To Dismiss Mem., Doc. 697, at 4–5 (explaining that the supplemental-jurisdiction statute does not waive the United States' immunity) *with* CACI Mot. To Dismiss Opp., Doc. 713 (failing to argue otherwise).

the City of Detroit, 361 F.3d 305, 307 (6th Cir. 2004); *Palmer v. Comm'r*, 62 F. App'x 682, 685 (7th Cir. 2003); *Wilkerson v. United States*, 67 F.3d 112, 119 n.13 (5th Cir. 1995).

Finally, even assuming that the Court could exercise subject-matter jurisdiction through the supplemental-jurisdiction statute (and it cannot), the Court should exercise its discretion to decline to exercise that jurisdiction based on the "exceptional circumstances" presented by this unique case and its idiosyncratic posture. 28 U.S.C. § 1367(c) & (c)(4) ("The district courts may decline to exercise supplemental jurisdiction over a claim . . . if . . . in exceptional circumstances, there are other compelling reasons for declining jurisdiction."). CACI's third-party claims implicate the question of whether the United States' sovereign immunity is subject to an implicit, extra-statutory *jus cogens* exception. But CACI has not yet sustained a judgment in favor of Plaintiffs and, as CACI freely admits, its third-party claims "arise only if CACI PT fails to prevail on each and every one of [its many legal] defenses *and* a jury finds CACI PT liable at trial." (CACI Opp. at 5 (emphasis in original).) Accordingly, CACI's third-party claims remain contingent in nature.

To the extent that CACI wins at trial, or loses at trial but prevails on appeal, the Court will have no need to pass on this question of law. Only if CACI loses at trial, and then fails to win a reversal of the judgment after exhausting all appellate options, would the question of whether there exists an implicit, extra-statutory *jus cogens* exception become ripe. Under these circumstances, the exercise of supplemental jurisdiction may even constitute an abuse of discretion. *See, e.g.*, *Ameritox, Ltd. v. Millennium Labs., Inc.*, 803 F.3d 518, 537–41 (11th Cir. 2015) (vacating an eight-figure, post-trial judgment; district court abused its discretion in retaining supplemental jurisdiction when such retention did not further the goals of, *inter alia*, judicial economy); *Voda v. Cordis Corp.*, 476 F.3d 887, 899–900 (Fed. Cir. 2007) (abuse of discretion to exercise

supplemental jurisdiction when doing so "could undermine the obligations of the United States under [international] treaties").

CONCLUSION

The United States respectfully requests that the Court grant its pending Motion To Dismiss (Doc. 696). But assuming *arguendo* that the Court determines that it has subject-matter jurisdiction over CACI's third-party claims against the United States, the Court should grant the United States' Motion for Summary Judgment, and enter judgment as a matter of law on all of CACI's third-party claims against the United States.

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