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-827 (LMB/JFA)
v.	)	
CACI PREMIER TECHNOLOGY, INC.,	)	
Defendant.	)	

PLAINTIFFS' MEMORANDUM IN SUPPORT OF THEIR MOTION *IN LIMINE* TO EXCLUDE THE 2004 MEMORANDUM BY DONALD RUMSFELD CONCERNING THE PROCESSING OF CLAIMS BY IRAQI DETAINEES

During the April 2024 trial, CACI offered into evidence DX-37 (attached hereto as Exhibit A), a 2004 memorandum by Secretary of Defense Donald Rumsfeld establishing a foreign claims commission under the Foreign Claims Act, 10 U.S.C. § 2734, to investigate claims by Iraqi detainees ***against the United States Army***. The Court admitted DX-37 over Plaintiffs' objection only because it had also taken judicial notice, per Plaintiffs' request, of two facts bearing on subject matter jurisdiction for Plaintiffs' claims under the Alien Tort Statute ("ATS"), 28 U.S.C. § 1350. CACI then made DX-37 a centerpiece of its defense, emphasizing repeatedly in its closing that the jury should find against Plaintiffs because they have sued the wrong party and they can pursue relief from the Army instead. CACI's arguments, which are legal issues that should not be presented to the jury and which the Court already decided, successfully and improperly sowed confusion regarding the propriety of Plaintiffs' claims against CACI.

At the retrial, Plaintiffs do not intend to introduce into evidence either through judicial notice or otherwise the two jurisdictional facts that together served as a predicate for CACI's application to admit DX-37 and were foundational to the Court's decision to admit it. Plaintiffs have notified CACI as such, and Plaintiffs also asked CACI to confirm that CACI will no longer seek to admit DX-37. But CACI has insisted that it may nonetheless offer DX-37 into evidence at the retrial.

For the reasons set forth below, Plaintiffs respectfully submit that the Court should exclude DX-37 pursuant to Federal Rules of Evidence 401 and 403 because it is irrelevant, misleads the jury, and confuses the issues. And the Court should preclude CACI from telling the jury to find for CACI because Plaintiffs can instead pursue relief for their torture and inhumane treatment at Abu Ghraib from the Army. The fact that Plaintiffs may have recourse against the Army for its personnel's role in the perpetuation of brutality against Plaintiffs does not absolve CACI of its own liability.

BACKGROUND

I. THE COURT ADMITTED DX-37 AT THE APRIL TRIAL ONLY BECAUSE IT TOOK JUDICIAL NOTICE OF PLAINTIFFS' FACTS REGARDING COALITION PROVISION AUTHORITY ORDER 17

In the April trial, upon Plaintiffs' request, the Court took judicial notice of two facts taken from the Court's July 2023 opinion denying CACI's motions to dismiss on jurisdictional grounds. These facts were that Coalition Provisional Authority Order 17 (i) displaced Iraqi law, subjecting coalition personnel and contractors to the exclusive jurisdiction of their parent states, and (ii) provided that third-party claims for personal injury would be dealt with by the parent states in a manner consistent with their national laws. Although the Court ruled that jurisdictional issues were not going to the jury, nonetheless, out of an abundance of caution,

Plaintiffs offered these facts to ensure that the Court's bases for finding subject matter jurisdiction were part of the trial record. *See* ECF No. 1633 (Apr. 17, 2024 Afternoon Trial Tr) 9:25-10:8. The Court agreed to take notice of these facts because they would "help the jury in understanding some of the background about this case." *Id.* at 19:23-20:1.

In response, CACI requested judicial notice of DX-37, a 2004 memorandum by Secretary of Defense Donald Rumsfeld. *See* ECF No. 1594. This memorandum describes a process by which the Secretary of the Army would review claims by Iraqi detainees based on allegations of abuse by military personnel and "act on them in his discretion."[1] Decl. of Muhammad U. Faridi dated September 6, 2024 ("Faridi Decl."), Ex. A. But the memorandum does not purport to provide any mechanism for Iraqi detainees to sue a government contractor or even the United States or any government employee in any court. More importantly, the memorandum does not prohibit the victims of abuse at Abu Ghraib from suing government contractors such as CACI for their own role in the perpetuation of brutality at Abu Ghraib. Indeed, the Court ruled as much when it denied CACI's motion to dismiss on the basis that the Foreign Claims Act and CPA 17 "preempt" Plaintiffs' ATS claims. *See Al Shimari v. CACI Premier Tech., Inc.*, 324 F. Supp. 3d 668, 700-01 (E.D. Va. 2018) (Brinkema, J.).

The Court admitted DX-37 over Plaintiffs' objection. ECF No. 1634 (Apr. 19, 2024 Trial Tr.) 123:12-24. The Court explained to Plaintiffs' counsel: "I'm putting it in because I put your two [facts] in as well. So if you don't want yours in, I won't put that one in." *Id.* at 123:18-20.

[1] According to DX-37, as part of this review, a foreign claims commission would investigate the claims and issue a report about whether the claim was "payable under the Foreign Claims Act or other claims statutes." Faridi Decl., Ex. A.

In other words: if Plaintiffs did not submit their jurisdictional facts, then the Court would not have admitted DX-37.

II. CACI USED DX-37 TO TELL THE JURY TO FIND AGAINST PLAINTIFFS BECAUSE THEY COULD SUE THE GOVERNMENT INSTEAD

CACI proceeded to misuse DX-37 to mislead and inflame the jury. The last thing CACI did before resting its case was to read DX-37 to the jury. Then, in its closing, CACI repeatedly argued that the jury should find against Plaintiffs because they could pursue claims against the government instead—arguments that are legally wrong, highly prejudicial, and irrelevant. CACI first told the jury they could "sympathize with the plaintiffs … and also come to the conclusion you sued *the wrong defendant*," and that if Plaintiffs had "sued Frederick, Grainer [sic], the U.S. Army, this would be a much simpler case." ECF No. 1626 (Apr. 22, 2024 Trial Tr.) 42:8-13 (emphasis added), 44:14-15. Then CACI asked the jury:

> *Why didn't [Plaintiffs] sue the people who actually abused them?* … Why is the United States not a defendant here? Or why didn't they file an administrative claim? You saw Secretary Rumsfeld's memo. If there's claims of detainee abuse we will consider them and pay them if appropriate … So they could have done that, but there's no publicity kick in suing the United States.

Id. at 45:2-12 (emphasis added). And CACI ended its closing by saying:

> So we're left with the government has agreed that it will pay bona fide claims of detainee abuse … *[t]he right answer here is if you believe they were abused … just tell them to make their claim against the United States*[,] against the soldiers who abused them, against the U.S. Army that was in charge of everything that happened at Abu Ghraib prison.

Id. at 65:14-15, 65:20-65:25 (emphasis added).

III. CACI INSISTS THAT IT MAY OFFER DX-37 AT THE RETRIAL EVEN THOUGH PLAINTIFFS WILL NOT OFFER THEIR JURISDICTIONAL FACTS

Plaintiffs have informed CACI that they will not present facts concerning Coalition Provisional Authority 17 at the retrial. Given the Court's prior statement that it would not admit DX-37 if Plaintiffs did not submit their jurisdictional facts, and in an effort to avoid the need for this Court's intervention, Plaintiffs asked CACI to agree not to offer DX-37 into evidence at the retrial. *See* Faridi Decl., Ex. B. CACI refused to do so. *See* Faridi Decl., Ex. C.

ARGUMENT

The Court should exclude DX-37 pursuant to Federal Rules of Evidence 401 and 403 because it is irrelevant and because CACI's use of it—i.e., telling the jury that Plaintiffs sued the wrong party and should sue the government instead, with the implication that suing CACI is improper—is likely to mislead the jury and confuse the issues.

I. DX-37 IS NOT RELEVANT TO ANY ISSUE IN THIS CASE

The existence of a review process for detainees' claims against the Army has no relevance to Plaintiffs' claims against CACI. As the Court found, any such claim against the Army is not preclusive and to suggest that by suing CACI, Plaintiffs are suing the wrong party or that they should bring claims against the Army under Secretary Rumsfeld's memorandum is misleading and unfairly prejudicial. Yet as demonstrated by its closing argument, CACI's reason for offering DX-37 was to tell the jury that Plaintiffs should have pursued relief from the government instead of from CACI. But whether Plaintiffs could have filed claims against another tortfeasor is irrelevant to any issue that the jury must decide. The Court recognized this when it forbade CACI from asking Plaintiff Salah Al-Ejaili whether he sued Sergeant Ivan Frederick, ECF No. 1631 (Apr. 15, 2024 Afternoon Trial Tr.) 69:15-19, just as the Court did

when it ruled that the FCA does not bar Plaintiffs' claims under the ATS, *Al Shimari*, 324 F. Supp. 3d at 700-01. Because a jury may not find against Plaintiffs on the basis that they should have sued another party, it is improper to argue as much to the jury. In other words, a jury may not "tell [Plaintiffs] to make their claim against the United States," as CACI asked the jury to do. ECF No. 1626 (Apr. 22, 2024 Trial Tr.) 65:22-23. All the jury may consider is whether CACI is liable under the applicable legal standard, and DX-37 has no bearing on that.

Further, whatever basis the Court had for admitting Exhibit DX-37 is now moot given that Plaintiffs will not submit facts regarding Coalition Provisional Authority Order 17 to the jury. Thus, there is no reason for the jury to hear about the Army's claims review process other than to mislead the jury. The government is not a party. The Army's claims review process (whatever it may be and whatever claims it may process) are not at issue. Under the plain terms of DX-37, Plaintiffs were not required to seek compensation from the Army before bringing this case and bringing claims against the Army would not have precluded them from bringing claims against CACI for its role in abusing them. *Al Shimari*, 324 F. Supp. 3d at 700-01.

In other words, DX-37 has no relevance in determining whether Plaintiffs were abused or whether CACI is liable for that abuse.[2] Nor does DX-37 provide relevant context to any other trial evidence, in part because neither the Army nor any foreign claims commission ever issued any report pursuant to Secretary Rumsfeld's memorandum regarding whether Plaintiffs should

[2] Indeed, the Court has already admonished CACI for wasting the jury's time by contesting whether Plaintiffs were abused at all. *See, e.g.*, ECF No. 1634 (Apr. 19, 2024 Trial Tr.) 130:13-16 ("Are you still going to spend time, your precious 45 minutes, arguing to the jury that the plaintiffs in this case were not subjected to improper treatment? I'm giving you a rhetorical question."). There is no need to waste another jury's time by making it hear about a non-party's claims review process so CACI can again improperly ask the jury to "tell [Plaintiffs] to make their claim against the United States." ECF No. 1626 (Apr. 22, 2024 Trial Tr.) 65:22-23.

be compensated. Whether or not "the government has agreed that it will pay bona fide claims of detainee abuse," as CACI erroneously put it in its closing argument, simply does not matter in a lawsuit against CACI. ECF No. 1626 (Apr. 22, 2024 Trial Tr.) 65:14-15.

There is not a single "fact [that] is of consequence in determining [this] action" that DX-37 tends to make more or less probable. Fed. R. Evid. 401(b). Thus, the Court should exclude DX-37.

II. CACI'S USE OF DX-37 IS UNFAIRLY PREJUDICIAL AND LIKELY TO MISLEAD THE JURY AND CONFUSE THE ISSUES

The Court should also exclude DX-37 pursuant to Federal of Evidence 403 because its probative value is substantially outweighed by the danger of misleading the jury and confusing the issues.

CACI's primary strategy in the April trial was to blame the Army alone for the abuse Plaintiffs suffered. Plaintiffs do not quarrel with CACI seeking to pursue that defense. But what CACI may not do is tell the jury that it should find against Plaintiffs for CACI's wrongful conduct because Plaintiffs can procure relief from the government instead. Just as evidence that a defendant is insured or indemnified or that another tortfeasor is also liable is generally inadmissible because it may "induce juries to decide cases on improper grounds," *see* Fed. R. Evid. 411, 1972 Advisory Committee Notes, and a defendant in a case with joint and several liability "cannot be permitted to argue against a finding of fault based upon misleading speculation about" who may end up paying the damages award, *see Lacy v. CSX Transp. Inc.*, 520 S.E.2d 418, 431 (W. Va. 1999), *superseded by rule on other grounds as stated in Miller v. Allman*, 813 S.E.2d 91 (2018), so too should the Court exclude evidence that Plaintiffs could

receive compensation from a third party instead of the defendant and that somehow failing to pursue claims against the Government precludes them from suing CACI.

Making matters worse, CACI grossly mischaracterized DX-37 in its closing argument. DX-37 does not permit Plaintiffs to "sue" the United States, ECF No. 1626 (Apr. 22, 2024 Trial Tr.) 45:2-8, nor does it indicate that "the government has agreed that it will pay bona fide claims of detainee abuse," *id.* at 65:14-15. Rather, it "asks" the Secretary of the Army to "review all claims … and act on them in his discretion"—hardly a promise to pay any bona fide claim.[3] The Court should preclude CACI from repeating these mischaracterizations at the retrial.

Yet another reason to exclude DX-37 is that its admission would waste time by creating a minitrial on a sideshow issue—and one that has already been addressed, as a legal matter. To dispel CACI's false assertion that it should somehow be let off the hook because Plaintiffs could sue the government instead, Plaintiffs would need to explain to the jury that DX-37 does not preclude or otherwise affect their claims against CACI and does not enable Plaintiffs to sue the government. Indeed, because of DX-37's potential to confuse the jury, the Court saw fit at the April trial to give a clarifying instruction that "[n]othing in the Foreign Claims Act … prevents a plaintiff from bringing a civil action in a domestic court under the Alien Tort Statute." ECF No. 1626 (Apr. 22, 2024 Trial Tr.) 79:19-22. None of this would be required if the Court excludes DX-37.

[3] In fact, according to media reports, there is no public evidence that the United States government has ever provided compensation for torture or other cruel, inhuman, or degrading treatment to any Abu Ghraib detainee. *See* Human Rights Watch, *Iraq: Torture Survivors Await US Redress, Accountability*, (Sept. 25, 2023), https://www.hrw.org/news/2023/09/25/iraq-torture-survivors-await-us-redress-accountability. So, it is simply not the case that the government "has agreed that it will pay bona fide claims of detainee abuse," as CACI told the jury, ECF No. 1626 (Apr. 22, 2024 Trial Tr.) 65:14-15.

As the Court has recognized, "this is a very complicated case" for a jury to decide. ECF No. 1637 (Apr. 24, 2024 Trial Tr.) 8:16-17. As demonstrated by its improper arguments in April, CACI's motive in offering DX-37 in the upcoming trial would be to complicate the case further and confuse the jury by highlighting the irrelevant issue of whether Plaintiffs can obtain relief from other parties. The Court should not permit CACI to do this again.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court grant their motion *in limine* to exclude DX-37 from the retrial and preclude CACI from telling the jury that Plaintiffs should obtain relief from the government instead.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on September 6, 2024, I electronically filed the foregoing, which sends notification to counsel for Defendants.

/s/ Charles B. Molster, III
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