UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

SUHAIL NAJIM ABDULLAH AL SHIMARI, *et al.*,	)	
Plaintiffs,	)	
v.	)	No. 1:08-cv-0827 LMB-JFA
CACI PREMIER TECHNOLOGY, INC.,	)	
Defendant,	)	

DEFENDANT CACI PREMIER TECHNOLOGY, INC.'S MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION *IN LIMINE* TO EXCLUDE THE 2004 MEMORANDUM BY DONALD RUMSFELD CONCERNING THE PROCESSING OF CLAIMS BY IRAQI DETAINEES

I. INTRODUCTION

The U.S. government's involvement in this case presents a thorn in Plaintiffs' side that they are determined to remove. Plaintiffs' annoyance is understandable. This case would be a lot easier for them if CACI[1] interrogators, rather than U.S. military police, had been the ones to commit the abusive acts that Plaintiffs allege. It would be much more straightforward if CACI management, rather than military intelligence, had maintained total control over CACI interrogators' work with detainees. Explaining to a jury why CACI interrogators should be blamed for the acts of military police and why CACI management should be blamed for alleged failures of control and supervision of interrogators within the Army chain of command is rough work. It makes it harder to win when the jury knows that there is a more obvious, (under Plaintiffs' theory of the case) more culpable defendant that Plaintiffs *for some reason* chose not

[1] "CACI" refers to Defendant CACI Premier Technology, Inc.

to pursue and who has only been nominally brought into this case by virtue of CACI's borrowed servant defense.

Indeed, for Plaintiffs, the less the jury knows about the U.S. government's involvement in this case, the better. To that end, Plaintiffs previously sought to exclude evidence and testimony about whether the military or CACI maintained operational control over CACI interrogators (*see* Dkt. #1570 at 3-10). Now, Plaintiffs have (1) moved to exclude mention of the extensive information the government has withheld under the state secrets privilege (Dkt. #1693-1), (2) moved to exclude evidence of Plaintiff Al Zuba'e's implausible claim against the United States (Dkt. #1680-1), and (3) opposed the admission of evidence demonstrating the widespread influence that interrogators from other government agencies had on operations in the hard site (Dkt. #1674 at 1, n.1). In the present motion, Plaintiffs ask the Court to hide from the jury the fact that Plaintiffs had multiple avenues with which to pursue claims against the United States and took none.

Plaintiffs acknowledge the propriety of one of the defenses CACI pursued in this case:

> 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***.

Dkt. #1683-1 at 7 (emphasis added). But in their next breath, Plaintiffs try to torpedo this defense. They seek to exclude evidence that Plaintiffs had a straightforward way to pursue a claim against the United States, which employed all of the soldiers Plaintiffs say abused them and has access to all of the records relating to Plaintiffs' treatment while in U.S. custody. Instead, Plaintiffs chose to proceed solely against a private contractor whose employees never laid a hand on Plaintiffs and which does not have access to the true facts concerning Plaintiffs' treatment. The jury is entitled to understand that Plaintiffs could have brought claims against the people they acknowledge are directly responsible for any wrongdoing against them, but

nonetheless chose to go after CACI instead on a "shaky" conspiracy theory and an aiding and abetting theory for which the Court has acknowledged Plaintiffs do not have any evidence. *See* Dkt. #1630 at 14:15-24 (aiding and abetting count not sustainable on evidence Plaintiffs offered at the first trial).

Likewise, CACI is entitled to attack Plaintiffs' credibility by questioning Plaintiffs' motives for taking a circuitous route to seek damages from an entity with no direct involvement in Plaintiffs' treatment, and which lacks access to the full panoply of facts about Plaintiffs' experiences in U.S. custody. The Rumsfeld memorandum is a key component to that defense, as it shows the United States' commitment to fairly consider and pay claims of detainee abuse, a path Plaintiffs inexplicably declined to pursue either instead of or in tandem with their claims against CACI.

Plaintiffs ask the Court to exclude evidence that they could have submitted claims under the Foreign Claims Act ("FCA") or potentially other authorities because (1) who Plaintiffs can sue is a "legal issue" that they claim the Court resolved prior to trial, (2) it confused and misled the jury to know that Plaintiffs could have filed suit against the people who they claim actually abused them, and (3) Plaintiffs are not offering evidence showing they could not file suit in Iraq and, somehow, that means they get to prevent CACI from offering evidence that they could have filed claims against the U.S. Army in the United States. Plaintiffs are wrong on all counts.

First, the Court determined that "the FCA does not bar Plaintiffs' claims under the ATS," *Al Shimari v. CACI Premier Tech., Inc.*, 324 F. Supp. 3d 668, 700-01 (E.D. Va. 2018), but did not consider, let alone rule, that Plaintiffs had no other mechanisms (including the FCA) under which they could pursue claims against the government. As Plaintiffs are aware, CACI never suggested to the jury that the availability of claims against the government meant Plaintiffs could

not sue CACI under the ATS. Second, there is nothing confusing or misleading about the fact that Plaintiffs could have pursued claims against their alleged abuser's employer but were motivated to pursue a convoluted (*i.e.*, "shaky") theory to implicate CACI instead. Last, Plaintiffs' decision *not* to sue their perpetrators or their perpetrators' employer is independently relevant and in no way contingent on Plaintiffs offering regarding Coalition Provisional Authority Order 17. It is relevant and probative that Plaintiffs forewent filing suit against the entity most capable of rebutting their self-serving and unsubstantiated claims of mistreatment.

II. ANALYSIS

Plaintiffs do not allege that anyone from CACI ever laid a hand on them. That point is so clear that the Court instructed the jury venire as much at the first trial of this action. Dkt. #1622 at 15:17-18 ("The plaintiffs do not claim that any CACI interrogator directly abused them."). Plaintiffs do not identify a single instance in which they observed a CACI interrogator having input into abusive treatment that they received. Plaintiffs have, however, alleged a wide array of abuses that they say were inflicted on them by U.S. soldiers, for which they contend three CACI employees *who had nothing to do with their interrogations or detention* are secondarily liable, for which they in turn contend that CACI is vicariously liable.

Shortly after his release from Abu Ghraib prison, Plaintiff Al-Ejaili drafted a report of his detention in which he alleges abuse by U.S. soldiers and makes exactly zero allegations against CACI personnel or other civilians. Ex. 1. In his trial testimony, Al-Ejaili specifically identified disgraced former solider Charles Graner as one of his chief tormentors. Dkt. #1631 (Apr. 15, 2024 PM Tr.) at 42:19-43:10, 44:24-45:6, 61:24-62:1, 62:12-14. While still in U.S. custody, Plaintiff Al Zuba'e descried his alleged abuses, and all of which he said were committed by U.S. soldiers with no allegations whatsoever of civilian involvement. Ex. 2. At trial, Plaintiff Al Shimari testified about abuse inflicted on him by U.S. soldiers and made only vague references

to potential civilians (*i.e.*, an interrogator in a black shirt and "[c]amel color pants" and an interrogator with a ponytail). Dkt. #1624 (Apr. 17, 2024 AM Tr.) at 15:19-16:15, 53:15-23, 54:13-25, 57:19-23.

Given Plaintiffs' repeated and detailed allegations of abuse at the hands of U.S. soldiers, in some cases even knowing the identities of these soldiers, CACI is entitled to ask the jury to consider why Plaintiffs have not pursued claims, in court or administratively, against either their abusers or the United States, as employer of the soldiers Plaintiffs contend abused them. Indeed, it is a tried, true, and appropriate defense to identify some other person or entity, either the "empty chair" not sued by the plaintiff or another defendant in the case, as the real culprit that should bear responsibility if the jury believes the plaintiffs' testimony. *See, e.g.*, *Cooper v. Smith & Nephew, Inc.*, 259 F.3d 194, 202 (4th Cir. 2001) (defendant is permitted to defend on the ground that the cause of injury is attributable to something other than its conduct); *Afoa v. China Airlines, Ltd.*, 817 F. App'x 369, 371 (9th Cir. 2020) ("empty chair" defense); *Pitts v. Johnson*, 727 F. App'x 285, 287 (9th Cir. 2018) (same); *Mullinex v. John Crane, Inc.*, No. 4:18-cv-33, 2021 WL 8086707, at *3 (E.D. Va. Oct. 5, 2021); *Atanassova v. Gen. Motors LLC*, No. 2:20-cv-1728, 2021 WL 1946504, at *3 (D.S.C. Mar. 3, 2021) (same); *Tinsley v. Streich*, 143 F. Supp. 3d 450, 463 (W.D. Va. 2015). The defense is particularly relevant in this case, in which Plaintiffs chose not to pursue their alleged abusers/abusers' employer in favor of suing a defendant with vastly inferior access to evidence with which to defend itself.

The Rumsfeld memorandum is directly relevant to that defense. The jury has the right and obligation to question why a Plaintiff would seek to hold a company vicariously liable for the alleged secondary liability of its employees, rather than targeting the people they claim actually hurt them. The jury also has the right and obligation to consider whether the reason

Plaintiffs took this convoluted approach is because their narratives cannot withstand scrutiny from a defendant with unfettered access to witnesses and documents cataloging what actually occurred. It is only fair that the jury understand that Plaintiffs had a better-than-equal opportunity to pursue claims against the U.S. government. The Rumsfeld memorandum shows that Plaintiffs could have pursued claims under the FCA or potentially other authorities and this Court explicitly held that the United States does not have sovereign immunity for claims, such as Plaintiffs', alleging violations of international *jus cogens* norms. *Al Shimari v. CACI Premier Tech., Inc.*, 368 F. Supp. 3d 935, 958-68 (E.D. Va. 2019). Suing the United States, however, would have involved litigating against an entity not hamstrung by the state secrets privilege from knowing exactly what happened to Plaintiffs' while in United States' custody.

Regardless, even if the Rumsfeld memorandum were excluded, CACI would still be entitled to cross-examine Plaintiffs on why they chose the serpentine route of suing a private contractor whose employees, by Plaintiffs' own admission, never laid a hand on them. And CACI is entitled to ask the jury to consider why Plaintiffs would pursue a case against a private entity with at best indirect liability for abuses inflicted by soldiers instead of the sovereign perfectly situated to refute any allegations Plaintiffs might make that are not true. That entirely-proper defense, however, is strengthened by the Rumsfeld memorandum, which states a willingness on the part of the United States to make administrative claims payments to bona fide victims of detainee abuse. When that available route to compensation is considered, Plaintiffs' decision to pursue a "shaky" claim against a (under their theory of the case) less-culpable private contractor, whose employees did not lay so much as a hand on Plaintiffs, becomes curiouser and curiouser. The jury must be allowed to consider whether Plaintiffs' otherwise inexplicable choices reflect credibility concerns.

Plaintiffs are desperate to cast the jury's unwillingness to rule in their favor as the product of confusion caused by CACI. The fact is that, true to the Court's description, Plaintiffs faced a smart jury that, at least to some extent, understood the direct culpability of the U.S. military in the abuses at Abu Ghraib versus the relative disconnect between CACI and anything related to detainees. The United States is not some far-fetched red herring that CACI invoked to distract the jury, but rather a central player that Plaintiffs would rather obscure than address. The jury is entitled to consider why.

For all of these reasons, the Court should deny Plaintiffs' attempt to exclude the Rumsfeld memorandum. Excluding that memorandum is inconsistent with Plaintiffs' acknowledgement that CACI is entitled to argue that blame for any abuse Plaintiffs may have suffered lies solely with the United States, an entity Plaintiffs conspicuously chose not to pursue.

III. CONCLUSION

For the foregoing reasons, the Court should deny Plaintiffs' motion.

Respectfully submitted,

/s/ John F. O'Connor

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CERTIFICATE OF SERVICE

I hereby certify that on the 20th day of September, 2024, 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:

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