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.	)	Case No. 1:08-cv-827 (LMB/JFA) **REDACTED VERSION**

PLAINTIFFS' REPLY IN SUPPORT OF THEIR MOTION *IN LIMINE* TO PRECLUDE COMMENTS AND STATEMENTS ABOUT THE UNITED STATES' STATE SECRETS PRIVILEGE

CACI's opposition to Plaintiffs' motion *in limine* confirms that CACI's counsel intends to testify and/or comment to the jury about the state secrets privilege rulings in this case. CACI's motivations are also clear: to invite the jury to speculate that the withheld information would have been helpful to CACI and to wrongly suggest to the jury that CACI was the only party hampered by the Government's invocation of state secrets. In so doing, it is clear that CACI seeks to turn this trial into a referendum on the Government's invocation of state secrets over what was ultimately a small amount of non-critical evidence as well as the Court's legal determination that the Government's invocation of the privilege was appropriate. CACI's disagreement with the Government's decision to invoke the state secrets privilege does not justify CACI injecting counsel's testimony or comments—with no evidentiary value—into the trial record, confusing the issues to be tried, and suggesting that the jury should speculate about information subject to the privilege deemed by the Court to have been properly invoked.

ARGUMENT

The propriety of the Government's invocation of its state secrets privilege is a question of law that the Court considered, and resolved, during pretrial discovery. *See* ECF Nos. 850 (denying CACI's motion to compel), 921 (denying CACI's motion to compel), 1012 (denying CACI's motion to compel), 1143 (denying CACI's motion to dismiss); *see also El-Masri v. United States*, 479 F.3d 296, 302 (4th Cir. 2007) (referring to the invocation of state secrets privilege as a "legal determination"); *Sterling v. Tenet*, 416 F.3d 338, 342 (4th Cir. 2005) (same). As Plaintiffs explained in their opening brief, testimony or remarks by counsel about the Court's pretrial rulings on this issue have no place in the jury presentation at trial. *See* ECF No. 1693-1. Yet, as CACI's opposition reveals, CACI *wants* the jury to second-guess the Government's invocation of its state secrets privilege—and the Court's approval thereof—and speculate what would have been revealed but for the assertion of the privilege.

Indeed, in its opposition CACI contends that the jury needs to consider what CACI calls a "nearly dispositive point." ECF No. 1698 at 9. But it would be improper for CACI to put the Government's assertion of the state secrets privilege, a purely legal issue, before the jury again. Further, the Court's ruling that Plaintiffs' claims could proceed despite the Government's invocation of the privilege necessarily means that the Court concluded that Plaintiffs could prove their claims without the information over which the Government claimed privilege—and that CACI could properly defend against those claims without the same. *See Wikimedia Found. v. Nat'l Sec. Agency/Cent. Sec. Serv.*, 14 F.4th 276, 303 (4th Cir. 2021) (explaining "[i]f a proceeding involving state secrets can be fairly litigated without resort to the privileged information, it may continue." (internal citation omitted); *see also Abilt v. Cent. Intel. Agency*, 848 F.3d 305, 313–14 (4th Cir. 2017) (explaining that where state secrets are so central to the

litigation—for example, where "the plaintiff cannot prove the prima facie elements of his or her claim without privileged evidence" or "if the defendants could not properly defend themselves without using privileged evidence"—dismissal is required (internal citation omitted)).

CACI nevertheless insists that it needs to instruct the jury about "why CACI would not present live testimony from or even identify its own interrogators who interrogated Plaintiffs" or "question its interrogators who interrogated Plaintiffs regarding their training and experience." ECF No. 1698 at 6; *see also id*. at 3-4. Setting aside for now that it is the province of the Court, not CACI's counsel, to instruct the jury, CACI's contentions should be rejected for several reasons.

First, CACI seeks to impose a "hurdle" that the law does not require by focusing, yet again, solely on the CACI interrogators' direct involvement with Plaintiffs during Plaintiffs' interrogations. But, as the Court instructed the jury in the April 2024 trial, what Plaintiffs must prove is that CACI "was *indirectly* responsible for the plaintiff being tortured or subjected to cruel, inhuman or degrading treatment either through its interrogators *conspiring* with Army military personnel to have hard site detainees tortured, or to inflict cruel, inhuman or degrading treatment on them or through its interrogators *aiding and abetting* Army military personnel in torturing or inflicting cruel, inhuman or degrading treatment on the plaintiff[s]." ECF No. 1626 (Apr. 22, 2024 Trial Tr.) 91:12-21 (Jury Charge) (emphasis added).

In insisting otherwise, CACI conspicuously avoids (1) the evidence that CACI interrogators instructed that the military police to set the conditions for interrogation and soften up detainees (including Plaintiffs) before or after the interrogations, i.e., outside the interrogation room; (2) the "systemic" nature of the abuses implemented on detainees (including Plaintiffs) pursuant to such instructions; and (3) the extent of the evidence directly implicating CACI

personnel in directing or otherwise furthering the commission of these unlawful abuses. *See* ECF No. 1649 at 10-12. Furthermore, the proof at trial showed that CACI interrogators sought to "soften up" detainees *before* or *between* interrogations to create conditions where it was more likely the detainee would provide information during the interrogation itself. *See id*. at 18. The United States itself explained that the information over which it has invoked privilege is a very small proportion of the documents it has produced. *See, e.g*., ECF No. 1068 at 2. Thus, CACI's attempt to inject information about the Government's invocation of state secrets into the record is not relevant to any issue and is only being offered to confuse the issues.

Second, CACI complains that CACI needs to be able to explain the reason it is not allowed to "present live the witnesses who directly controvert Plaintiffs' evolving tales of torment" and that not allowing CACI to call live witnesses allowed Plaintiffs to "enhance and inflate their allegations of abuse." ECF No. 1698 at 2, 4. As an initial matter, CACI's formulation of Plaintiffs' experience is, to put it mildly, offensive. Nor does CACI identify a single live witness who it could have called. Even its star witness, Steven "Big Steve" Stefanowicz, could not bring himself to the Court, and CACI has made no effort to call the other two culprits in its employ—Daniel Johnson and Timothy Dugan—who were specifically found by our country's military leaders as having been involved in the abuse at Abu Ghraib. *See* Declaration of Muhammad U. Faridi dated Sept. 30, 2024 ("Faridi Decl."), Ex. 1, PTX-23; *id*. at Ex. 2, PTX-171 at 11-12. In any event, CACI does not need to lecture the jury as to the *reason* why CACI is not allowed to call live witnesses (assuming it has any) to defend itself at the trial. The Court's explanation on the state secret privilege (if it decides to give one) is more than sufficient.

Third, CACI's complaint about lacking the ability to present information about its

own interrogators also makes no sense, and it is actually largely self-inflicted. *See* ECF No. 1698 at 3-4. CACI, of course, is the employer of all CACI employees, and CACI has had decades to inquire into what its employees did at Abu Ghraib (and indeed, as it reported in its book OUR GOOD NAME, CACI did conduct its own investigation of CACI's conduct). CACI knows the identities of the employees that it hired and sent to Abu Ghraib to fulfill CACI's contracts with the Army.[1] *See, e.g.*, ECF No. 1639 at 18 (CACI management "knew where its interrogators were deployed within Iraq."). Thus, as it did with Mr. Stefanowicz, CACI could have called every one of its employees who worked as an interrogator at Abu Ghraib to testify and ask them what they did and saw, and about their background and qualifications, even if they would not be able to connect their interrogations to specific detainees per the Government's invocation of the state secrets privilege. That CACI does not want to do so (likely because the individuals would provide testimony detrimental to CACI's defense) is no justification for airing a pretrial legal issue about the Government's state secrets invocation before the jury at the upcoming retrial. Relatedly, despite CACI's current complaints that it could not demonstrate its employees' credentials, CACI *did* actually adduce evidence of its employees' training and

[1] CACI spends some candle arguing that its management's ability to learn about what was happening at Abu Ghraib has been impaired by the Government's assertion of state secret privilege. ECF No. 1698 at 9. That assertion is belied by the substantial evidentiary record, including statements made by CACI in its book, OUR GOOD NAME, about its investigations. Indeed, CACI's counsel is aware of the identity of an interrogator who interrogated one of the Plaintiffs. ECF No. 1041 at 21-22 (public version) (in CACI's motion to dismiss, explaining that there is "one CACI PT interrogator who identified himself to CACI PT's litigation counsel but who CACI PT cannot identify in its presentation of evidence due to the privilege."). Further, CACI the company is aware of the identity of another interrogator, and [redacted]. ECF No. 1041 at 20 n.9 (public version) (explaining in "[t]he United States located CACI Interrogator G and CACI PT is working with the United States to procure counsel for him and to schedule his deposition" but that "[u]ndersigned counsel has not been advised of his identity"); Faridi Decl., Ex. 3, Interrogator G Dep. Tr. 148:22-160:8 ([redacted]).

experience at the April 2024 trial. *See, e.g.*, ECF No. 1634 (Apr. 19, 2024 Trial Tr.) 7:4-8:23 (Northrup); ECF No. 1634 (Apr. 19, 2024 Trial Tr.) 84:13-86:17 (Porvaznik). Thus, CACI's contention rings hollow.

Fourth, CACI barely engages with the authorities cited by Plaintiffs in their opening brief. And CACI's halfhearted attempt to do so falls totally flat. CACI cites *In re Zetia (Ezetimibe) Antitrust Litig*., 2023 WL 4155408, at *2 (E.D. Va. 2023) to suggest that the Government's decision to invoke state secrets *during* this case is relevant. ECF No. 1698 at 6-7. But the passage that CACI quotes stands for the proposition that, for example, an executive's decision to mark a memorandum as "confidential"—a decision *predating* any lawsuit—may have evidentiary value and become relevant later at trial, depending on the facts and claims involved. But here, the Government's decision as a non-party to invoke its state secrets privilege did not, by definition, predate this lawsuit. Instead, the Government's invocation was made during discovery, *after* this litigation commenced—a decision akin to a party designating information as "confidential" during pretrial discovery, which has *no* evidentiary value. The Government's invocation of the privilege is thus irrelevant. *See Midwest Mfg, LLC v. Curt Mfg., LLC*, 2024 WL 4164250, at *2–3 (D.S.D. 2024) (granting motion *in limine* "to the extent that all confidentiality designations placed on any trial exhibits which were applied after Midwest filed this lawsuit and as part of litigation should be removed or redacted"); *Wise v. C.R. Bard, Inc*., 2015 WL 541933, at *11 (S.D.W. Va. Feb. 10, 2015) ("[W]hether a party designates a document as confidential during the litigation process is absolutely irrelevant.") (citation and quotation marks omitted); *see also* ECF No. 1693-1 at 4 (citing caselaw).

Notably, CACI does not even engage with, let alone distinguish, the other cases cited by Plaintiffs that support the preclusion of deposition designations that consist only of questions

from counsel and the Government's state secrets objection. *See* ECF No. 1693-1 at 4-5 (citing caselaw). Again, such exchanges between counsel during discovery depositions lack any evidentiary value and are thus irrelevant to the facts being tried. And now that CACI's aim in presenting these exchanges is clear, the Court should preclude CACI from doing so in the retrial.

CACI relies on *United States v. Crockett*, 813 F.2d 1310 (4th Cir. 1987) in opposition, ECF No. 1698 at 5-6, but that case only provides an *additional* reason why CACI should not be permitted to inject its own view about the Government's state secrets privilege into the record. In *United States v. Crockett*, the Fourth Circuit determined that the trial court properly prevented counsel from presenting a definition of "reasonable doubt," on the grounds that it would be more confusing than helpful to the jury. *Crockett*, 813 F.2d at 1317. Here, too, it would be more confusing than helpful to the jury to have CACI's counsel unilaterally comment—or attempt to testify—on a question of law, *i.e.*, the invocation of the Government's state secrets privilege, which was resolved pretrial by the Court.

Lastly, CACI argues that an explanation about the Government's state secrets privilege assertion is needed to avoid jury confusion. To the extent such an explanation is appropriate, it is for the Court to give the jury that explanation in a balanced manner, not CACI's counsel through his or her testimony to the jury, and not through the playing of dozens of deposition designations where the question asked is followed only by a direction not to answer by the Government on the basis of the state secrets privilege. *See, e.g.*, ECF No. 1598-3, Ex. C, Interrogator G Dep. Tr. (including 55 questions from counsel to which the Government objected on state secrets grounds); ECF No. 1598-5, Ex. E, Interrogator F Dep. Tr. (including 24 questions to which the Government objected on state secrets grounds). Thus, and to the extent that the Court determines that it is necessary to provide an explanation to the jury on this issue, a

jury instruction along the lines the Court gave previously should more than suffice to address CACI's concern. *See* ECF No. 1693-1 at 7.[2]

CONCLUSION

For the foregoing reasons, and in light of what appears to be substantial agreement between the parties on this issue, Plaintiffs request that the Court grant their motion *in limine* to preclude arguments or attempted testimony by counsel about the Government's state secrets privilege, and the invocation of state secrets objections by the Government.

Respectfully submitted,

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[2] As a final matter, CACI states that it intends to present to the jury the three declarations by Secretary of Defense James Mattis in support of the Government's invocation of state secrets "because CACI counsel's statements related to the state secrets privilege are, by themselves, insufficient to allow the jury to consider this nearly dispositive point." ECF No. 1698 at 9. Such information is not properly the subject of judicial notice for several reasons, and to the extent CACI does make that request, Plaintiffs reserve all rights to oppose it.

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Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on September 30, 2024, I electronically filed the foregoing, which sends notification to counsel for Defendant.

/s/ Charles B. Molster, III
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