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 RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION TO PRECLUDE THE BORROWED SERVANT DEFENSE

I. INTRODUCTION

Here we go again. CACI has asserted the borrowed servant doctrine as a defense in this action since it filed its first Answer in this case in April 2009. The deadline for pretrial dispositive motions passed more than five years ago. During the first trial of this action, Plaintiffs repeatedly argued that the borrowed servant doctrine should be ruled inapplicable, or neutered through instructions that as a practical matter would rule it out of the case. The Court properly rebuffed each and every one of these efforts. Now, on the eve of the second trial of this action, Plaintiffs have filed a way-too-late dispositive motion seeking to "preclude" the borrowed servant defense. The Court should not take the bait.

Plaintiffs' motion is not only grossly untimely, but completely lacking in merit. As explained below, the Federal Reporter and Federal Supplement are replete with cases, including Fourth Circuit precedent, holding that the U.S. military was a borrowing employer for contractor personnel. None of these cases could have so held if Plaintiffs were correct that, for policy reasons, the U.S. military can never assume the status of a borrowing employer. While CACI

firmly believes that it is entitled to judgment as a matter of law on the borrowed servant doctrine, this Court was inarguably correct in rejecting Plaintiffs' efforts during the first trial to eliminate or narrow the scope of CACI's borrowed servant defense. The same result is appropriate here.

II. BACKGROUND

Plaintiffs' motion includes no background or procedural history. This is probably not an oversight, as any fair recitation of the facts and procedural history demonstrates the following: (1) Plaintiffs waited *years* too long to file this dispositive motion against a defense CACI has asserted since its very first answer in this case; and (2) the rulings and evidence in this case overwhelmingly support application of the borrowed servant doctrine. *See* Dkt. #107 at 33, ¶12; Dkt. #665 at 51; ¶13, Dkt. #1570; Dkt. #1639 at 2-14; Dkt. #1730; Dkt. #1745-3. The Court has concluded many times over that the borrowed servant doctrine is "definitely relevant," *see, e.g.*, Dkt. #1578, 4/12/2024 H'ring Tr. at 27:13-15 ("So I'm just saying that I think this issue as to who was controlling whom or who had to give orders to whom is definitely relevant, and it's going to stay in the case."), and that its instruction faithfully applies Fourth Circuit precedent, Dkt. #1626 at 8:1-10 ("I've looked again at the *Alvarez* case. I think that our instruction absolutely models the Fourth Circuit's discussion of the borrowed servant doctrine . . . ."). The Court has further concluded, several times, that Plaintiffs' proposed instruction does *not* accurately reflect Fourth Circuit law. *See* Dkt. #1619 at 5:3-6:4 ("[A]s I read *Alvarez*, I don't think it goes as far as you indicate."); Dkt. #1627 at 6:12-7:6 ("I don't agree with your proposal. I think it goes beyond what the Fourth Circuit deems to be the proper formulation."); Dkt. #1630 at 12:1-4 ("We've been through this a couple of times, if the Court was wrong, it was wrong, but that's, in my view, the law of the case at this point.").

III. ANALYSIS

A. Plaintiffs Do Not Meet the Standard for Seeking this Court's Reconsideration of Its Borrowed Servant Doctrine Rulings, Which Are Law of the Case

The Court's application of the borrowed servant doctrine to this matter is law of the case. Dkt. #1630 at 12:1-4 ("that's, in my view, the law of the case at this point"). "A district court may grant a motion for reconsideration under Rule 54(b): (1) to accommodate an intervening change in controlling law; (2) to account for new evidence not available earlier; or (3) to correct a clear error of law or prevent manifest injustice." *Integrated Direct Mktg., LLC v. May*, No. 1:14-CV-1183-LMB-IDD, 2016 WL 7334278, at *1 (E.D. Va. Aug. 12, 2016) (quoting *LaFleur v. Dollar Tree Stores, Inc.*, No. 2:12-CV-00363, 2014 WL 2121563, at *1 (E.D. Va. May 20, 2014) (citing *Hutchinson v. Staton*, 994 F.2d 1076, 1081 (4th Cir. 1993))). None of those circumstances is even arguably present here. "[W]hen a request for reconsideration 'raises no new arguments, but merely requests the district court to reconsider a legal issue or to 'change its mind,' relief is not authorized." *Id.* (quoting *Pritchard v. Wal Mart Stores, Inc.*, 3 Fed. App'x 52, 53 (4th Cir. 2001)).

Plaintiffs rely on Rule 54(b), but ignores the above standard, to ask the Court to reconsider its multiple decisions applying the borrowed servant doctrine in this case because "new facts and arguments [have] come to light." Dkt. #1747 at 10 (quoting *Phoenix v. Amonette*, 95 F.4th 852, 857 (4th Cir. 2024) (omitting citation to *Carlson*, *infra*)). Plaintiffs fail to mention that the Court's discretion under Rule 54(b) "is not limitless," but "cabined . . . by treating interlocutory rulings as *law of the case*." *Carlson v. Bos. Sci. Corp.*, 856 F.3d 320, 325 (4th Cir. 2017) (emphasis added). Plaintiffs urge that the Court has not yet considered its new argument that military law and policy foreclose applying the borrowed servant doctrine to a military contractor. Dkt. #1747 at 10.

But Plaintiffs scrambling to come up with some new basis for precluding a defense that has been in the case for fifteen years is not the change in controlling law or clear legal error required for reconsideration. *Integrated Direct Mktg., LLC*, No. 1:14-CV-1183-LMB-IDD, 2016 WL 7334278, at *1. Plaintiffs also say the Court has not considered their argument that multiple employers can be subjected to liability, Dkt. #1747 at 10, but that is comically false. *See, e.g.*, Dkt. #1619 at 5:3-6:4 ("I do get it. You've made your argument."); Dkt. #1627 at 6:12-7:6 ("you've made your record on that issue); Dkt. #1630 at 12:1-4 ("We've been through this a couple of times, if the Court was wrong, it was wrong, but that's, in my view, the law of the case at this point."). Finally, the "new facts" Plaintiffs offer are not facts at all, but Plaintiffs' speculation about what prevented the jury from reaching a verdict. Dkt. #1747 at 10.

The Court's interpretation and application of borrowed servant doctrine are law of the case and faithfully apply binding Fourth Circuit precedent. Plaintiffs do not even come close to meeting the standard for asking the Court to reconsider its multiple rulings.

B. Plaintiffs' Recycled Argument that Unrelated Rulings in this Matter Somehow Preclude the Borrowed Servant Doctrine Remain Invalid

Plaintiffs' reiteration of their failed argument that unrelated pretrial rulings in this case – all of which the Court either authored or read – somehow preclude CACI from asserting the borrowed servant doctrine is so far off the mark that a return to first principles is necessary to explain its frivolousness. Plaintiffs claim that the borrowed servant doctrine is "nearly identical" to the political question doctrine defense, the derivative sovereign immunity defense, and statutory preemption arguments. According to Plaintiffs, the tie that binds the borrowed servant doctrine with all of these defenses is that they "deflect liability" from CACI to the military "based on the common premise that CACI interrogators were under the control of the military" when they purportedly mistreated detainees. Dkt. #1718-1 at 5-6 (claiming, incorrectly, that this

Court and the Fourth Circuit have both rejected that premise). Plaintiffs are wrong; none of these defenses address liability.

The political question doctrine addresses justiciability, not liability. The doctrine arose from Chief Justice Marshall's admonition in *Marbury v. Madison* that "[q]uestions, in their nature political, of which are, by the constitution and laws, submitted to the executive, can never be made in this court." 5 U.S. (1 Cranch) 137, 170 (1803). The purpose of the doctrine is to protect this nation's separation of powers by deeming a matter nonjusticiable "when its adjudication would inject the courts into a controversy which is best suited for resolution by the political branches." *Wu Tien Li-Shou v. United States*, 777 F.3d 175, 180 (4th Cir. 2015) (citation omitted). The political question test has nothing to do with identifying the liable party, but instead resolves whether the action at issue is the type of action over which a court may exercise its authority.

Perhaps not surprisingly, derivative sovereign immunity addresses immunity from suit, not liability. The United States may not be sued in tort without its consent. *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 411-12 (1821) ("[N]o suit can be commenced or prosecuted against the United States; that the Judiciary Act does not authorize such suits."). Contractors enjoy the same immunity as the United States if "([1]) the contractor performed services for the sovereign under a validly awarded contract, and ([2]) the contractor adhered to the terms of the contract." *Al Shimari v. CACI Premier Tech., Inc.*, 368 F. Supp. 3d 935, 968 (E.D. Va. 2019) (citing *Cunningham v. Gen. Dynamics Info. Tech., Inc.*, 888 F.3d 640, 646-47 (4th Cir. 2018) (citation omitted)) The test for derivative immunity has nothing to do with identifying the liable party, but instead resolves whether a party (liable or not) can be subjected to suit in the first place.

Preemption addresses the preeminence of federal law, not liability. Federal law must prevail when there are significant conflicts between federal interests and state law. *Suhail Najim Abdullah Al Shimari v. CACI Premier Tech., Inc.*, 300 F. Supp. 3d 758, 788-89 (E.D. Va. 2018). The combatant activities exception under the Federal Torts Claim Act ("FTCA") bars "state regulation of the military's battlefield conduct and decisions." *In re KBR, Inc., Burn Pit Litig.*, 744 F.3d 326, 348 (4th Cir. 2014). The relevant test for preemption has nothing to do with identifying the liable party, but instead resolves whether the FTCA forecloses the asserted tort claims because they would regulate "the military's battlefield conduct and decisions."[1]

Plaintiffs overtly ignore the fundamental differences between these legal inquiries, each of which determines whether a lawsuit may proceed, and the borrowed servant doctrine, which places vicarious liability on the entity best positioned to prevent the tortfeasor's conduct. Instead, Plaintiffs extract phrases from pretrial rulings to say essentially that the military cannot lawfully order contractors to commit torture or CIDT and urge that, *ipso facto*, CACI contractors could not have been under the military's control when they allegedly conspired or aided and abetted in the abuse of detainees. Dkt. #1718-1 at 3-5 (abracadabra omitted). But the borrowed servant doctrine does not require that the borrowing employer ordered the borrowed employee to engage in the specific act for which the employee is accused. Such a requirement would be nonsensical as it would obviate the need for vicarious liability in the first place. *See L. v. Hilton Domestic Operating, Co., Inc.*, No. 3:20CV145 (DJN), 2020 WL 7130785, at *7 (E.D. Va. Dec.

[1] Plaintiffs like to mischaracterize the appellate record in this case. On appeal, a Fourth Circuit panel concluded that Plaintiffs' claims were, in fact, preempted by federal law under the Supreme Court's decision in *Boyle v. United Technologies Corp.*, 487 U.S. 500 (1988). *See Al Shimari v. CACI Int'l, Inc.*, 658 F.3d 413 (4th Cir. 2011). On rehearing *en banc*, the Fourth Circuit vacated the panel decision and dismissed CACI's appeal *not on the merits*, but because they determined it was interlocutory. *Al Shimari v. CACI Int'l, Inc.*, 679 F.3d 205 (4th Cir. 2012) (en banc).

4, 2020) ("A corporate defendant . . . 'may be liable as a primary tortfeasor (independent of respondeat superior liability) if it authorized, directed, ratified, or performed the tortious conduct.'"); *compare* RESTATEMENT (THIRD) OF AGENCY § 7.03(1) (addressing direct liability) *with* RESTATEMENT (THIRD) OF AGENCY § 7.03(2) (addressing vicarious liability).

The borrowed servant doctrine, as dictated by the Fourth Circuit and implemented by this Court, requires a determination of (1) "whose work was being performed by the interrogators" based on (2) "who had the power to control and direct the interrogators in the performance of their work at Abu Ghraib." Dkt. #1626 at 94:7-15; *Est. of Alvarez by & through Galindo v. Rockefeller Found.*, 96 F.4th 686, 693-94 (4th Cir. 2024) (quoting *Standard Oil Co. v. Anderson*, 212 U.S. 215, 220 (1909)) ("'[W]e must inquire whose is the work being performed;' this question 'is usually answered by ascertaining who has the power to control and direct the servants in the performance of their work.'"). Plaintiffs cite no legal basis for adding their made-up requirement that the specific misconduct alleged against the employee must have been ordered or delegated by the borrowing employer. In short, Plaintiffs' reasserted argument that prior rulings in this case foreclose application of the borrowed servant doctrine has no merit and should not be reconsidered.

C. Plaintiffs' Argument that Military Law and Policy Bar the Borrowed Servant Doctrine Is Spurious on Its Face and Demonstrably Wrong

In what can only be described as an exercise in cognitive dissonance, Plaintiffs rely on *Boyle v. United Technologies Corp.*, 487 U.S. 500 (1988) – ***the same case a Fourth Circuit panel relied upon to conclude these Plaintiffs' claims are preempted***, *see* n.1, *supra* – to argue (without ever actually using the word "preemption") that "uniquely federal interests" preempt application of the borrowed servant doctrine in this case. Dkt. #1718-1 at 6-13. This argument

is misplaced from the outset insofar as the borrowed servant doctrine is not purely a creature of state common law, but is very much a part of federal common law.

Indeed, this Court applied the Fourth Circuit's ruling in *Alvarez*, which applied federal common law as set forth by the Supreme Court and stated in the Restatement (Second) of Agency. *Alvarez*, 96 F.4th at 694 (quoting *Standard Oil*, 212 U.S. at 221-22; RESTATEMENT (SECOND) OF AGENCY § 227 cmt. a (1957)). This is hardly unique. Federal courts use common law agency principles regularly to determine whether – under federal law – a person should be treated as an employee or an independent contractor. *See, e.g.*, *Logue v. United States*, 412 U.S. 521, 526-27 (1973) (using common-law test from the Restatement of Agency to distinguish between an employee and contractor for purposes of the FTCA); *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 323 (1992) (using common-law test to distinguish between "employee" and "independent contractor" under Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 *et seq.*); *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 739-40 (1989) (using common-law test to distinguish between "employee" and "independent contractor" under Copyright Act of 1976, 17 U.S.C. § 101 *et seq.*); *NLRB v. United Ins. Co. of America*, 390 U.S. 254, 256 (1968) (using common-law test to distinguish between "employee" and "independent contractor" under NLRA). Federal law does not preempt federal law, rendering Plaintiffs' preemption argument – no matter how carefully they avoid using that terminology – dead on arrival.[2]

[2] The *two* cases Plaintiffs rely upon to make their creative "federal interests" argument both deal with federal authority preempting state authority. Dkt. #1718-1 at 6-7 (citing *Boyle*, 487 U.S. 500 (federal interests preclude state tort claim) and *In re Tarble*, 80 U.S. (13 Wall) 397 (1871) (giving federal authorities supremacy over state authorities in the event of a conflict)).

In any event, the so-called uniquely federal interests that Plaintiffs tout do not conflict with the borrowed servant doctrine. The entire point of the borrowed servant doctrine is to hold the entity that was better situated to prevent the alleged tortious acts from occurring liable for the consequences of those acts. The profound interest all governments and humans have in preventing torture is best served by holding the entity in the best position to do so responsible if it fails. Nothing is accomplished (except a payday for Plaintiffs) by pinning liability on a lending employer who had no real ability to even know what was happening on a day-to-day basis with its employees, let alone control their work.

There is, likewise, no conflict between the supposed general rule (referenced in Army policy and guidance materials, hardly a "uniquely federal interest" capable of supporting preemption)[3] that military personnel usually should not supervise contractor personnel and the borrowed servant doctrine. The borrowed servant doctrine could not apply to a case where the military did not have the power to supervise and control contractors. Here, rightly, wrongly, or somewhere in between, the U.S. military directly controlled and supervised CACI interrogators,

[3] Conversely, Congress has passed laws to protect the federal interest supported by using personal services contracts to ensure close supervision and control by the military of contractors who "directly support the mission of a defense intelligence component." *See* 10 U.S.C. § 129b(d); 48 C.F.R. § 237.104(b)(i)(7)(iii) ("DFARS") (same). This makes good sense given the government's "uniquely federal interest" in controlling intelligence operations, particularly during active combat, and given the classified nature of those operations. Indeed, under current law as implemented by DoD Instructions, contract interrogators may be used *only if* "[a] sufficient number of properly trained and certified DoD military and/or DoD civilian interrogators supervise and closely monitor the contract interrogator in real time throughout the interrogation process to ensure that the contract interrogator does not deviate from the government-approved interrogation plan or otherwise perform any IG function." *See* DoD Instruction 1100.22, Policy and Procedures for Determining Workforce Mix, at 25, available at https://www.esd.whs.mil/portals/54/documents/dd/issuances/dodi/110022p.pdf; *see also* 10 U.S.C. § 801 note; 48 C.F.R. § 237.173-4 (procedure for use of contract interrogators at DoDI 1100.22).

treated them the same as uniformed military interrogators, and integrated them into the military's chain of command.

The United States has admitted that CACI interrogators were:

> ***subject to the direction of the military chain of command***, beginning with their military section leader, an Army non-commissioned officer, who was briefed both prior to and following the interrogation to ensure that the interrogators were focused on answering CJTF-7's priority intelligence requirements, human intelligence (HUMINT) requirements, and source directed requirements. The military section leader was also responsible for strictly enforcing the interrogation rules of engagement (IROE). . . .
>
> ***No CACI personnel were in this chain of command.*** While the CACI site manager at Abu Ghraib, Dan Porvaznik, managed CACI personnel issues and the ICE OIC relied on him as one source of information regarding the abilities and qualifications of CACI interrogators, ***the military chain of command controlled the interrogation facility, set the structure for interrogation operations, and was responsible for how interrogations were to occur during both planning and execution phases***.

Dkt. #1745-2 (DX-2) at 8 (emphasis added); *see also id.* at 14 (with minor differences). At the first trial, the evidence of the Army's total control over CACI interrogators' work with detainees was so ubiquitous that the Court commented:

> It has been said a million times in this case, ***the military controls what they do***; CACI controls the administrative elements of their employment, which means pay, promotions, where they sleep, vacations.

Dkt. #1634, 4/19/24 Trial Tr. at 51:1-6 (emphasis added); *see also* Dkt. #1745-3 (chart of evidence related to Army command and control).

None of the policy statements that Plaintiffs cite change that reality; indeed, Plaintiffs have no evidence whatsoever that anyone in the military even considered these purported limitations. To the contrary, the evidence proves they did not. *See* Dkt. #1745-5 (excerpt from *de bene esse* deposition of Col. Thomas Pappas (commander of the forward operating base and

the military intelligence unit at Abu Ghraib) who had never seen the Army Field Manual 3-100.21); Dkt. #1745-1 at 53 (PTX-23, Jones/Fay Report finding, "No doctrine exists to guide interrogators and their intelligence leaders (NCO, Warrant Officer, and Officer) in the contract management or command and control of contractors in a wartime environment."). As such, these policy documents are not just plainly insufficient to preclude the borrowed servant doctrine, but totally irrelevant to the jury's consideration of that defense. *See* Dkt. #1745.

Plaintiffs can marshal every squib of military policy, regulation, instruction, directive, guidance, and presentations (that admittedly "do not represent the official position of the United States Army Combined Arms Support Command, the United States Army, or the Department of Defense") but none of them matter. The legality of the relationship between the military and the contractor is irrelevant. *Trevino v. Gen. Dynamics Corp.*, 626 F. Supp. 1330, 1339 (E.D. Tex. 1986), *aff'd in part, vacated in part*, 865 F.2d 1474 (5th Cir. 1989)) ("even though the master/servant relationship was proscribed, the Court may still find that such a relationship did, in fact, exist between [the Navy] and the General Dynamics employees"). "[T]he test of whether or not a person is a borrowed servant is factual," not legal. *Id.* The facts of this case show, without exception, that the CACI interrogation contracts were "administered" as personal services contracts, 48 C.F.R. § 2.101(b), under which CACI interrogators operated under "the relatively continuous supervision and control" of the military intelligence chain of command, *id.* § 37.104(c)(1). *See* Dkt. #1640-6 (CACI interrogators "perform[ed] under the direction and control of the unit's MI chain of command or Brigade 52"); Dkt. #1648 at 25 (contract required that CACI interrogators "perform under the direction and control of the unit's MI chain of command."); *see also* Dkt. #1640-5 at 6 ("Identified personnel supporting this effort will be integrated into MIL/CIV analyst, screening, and interrogation teams (both static/permanent

facilities and mobile locations), in order to accomplish CDR CJTF-7 priorities and tasking IAW Department of Defense, US Civil Code, and International Regulations.").

Plaintiffs tout that "because military law and policy prohibits military supervision of contractors . . . CACI is foreclosed as a matter [sic] from invoking the state common law defense of borrowed servant." Dkt. #1718-1 at 13. But that is simply untrue. Courts, including the Fourth Circuit, have applied the borrowed servant doctrine and determined that the military exercised sufficient control over a contract employee to be deemed a borrowing employer. *See, e.g.*, *McLamb v. E. I. Du Pont De Nemours & Co.*, 79 F.2d 966 (4th Cir. 1935) (directed verdict in favor of contractor based on U.S. Army's status as borrowing employer); *Al-Khazraji v. United States*, 519 F. App'x 711, 714 (2d Cir. 2013) (Army deemed "special employer" of borrowed servant civilian contractor); *Luna v. United States*, 454 F.3d 631 (7th Cir. 2006) (U.S. Navy deemed borrowing employer); *United States v. N. A. Degerstrom, Inc.*, 408 F.2d 1130, 1132 (9th Cir. 1969) (contractor permitted to recover from the Department of the Army, as the borrowing employer, for damage to contractor's property caused by the borrowed employee, for whom contractor was the general employer).

The Fourth Circuit's decision in *McLamb* is particularly instructive. In *McLamb*, the U.S. Army requested that a contractor send experts to determine the advisability of using explosives to dredge an inland waterway. 79 F.2d at 967. The contractor sent two experts who advised the Army that explosives were a good option and were then retained by the Army "to instruct [laborers] and advise[] them in the handling and use of the explosive." *Id.* The laborers, in turn, were told to follow the contractors' instructions. *Id.* The contractor experts determined the locations of the explosives, the amount of the charges, and the timing for setting them off. *Id.* Unfortunately, an accident occurred and a laborer was injured. *Id.* The laborer sued the

contractor. The district court – and subsequently the Fourth Circuit – determined, however, that the contractor experts "became for the time being the servants of the United States." *Id.* at 968. Despite the contractors being experts who advised the Army engineer and who instructed the laborers with respect to the project, the courts determined that "the control of the undertaking was never relinquished by the United States." *Id.* Moreover, the courts determined that the contractor's provision of experts did not "indicate that it had assumed control of the dredging operation, or become responsible for its results." *Id.*

It is worth noting that the U.S. military itself will take advantage of the borrowed servant doctrine to deem itself a contractor's borrowing employer in order to avoid liability under worker compensation laws. Most typically, this arises in the context of a contractor bringing suit against the military for an injury that occurred on a military installation. For example, in *Dumais v. United States*, No. 22-CV-112-PB, 2024 WL 406576 (D.N.H. Feb. 2, 2024), a contractor filed suit against the United States pursuant to the FTCA seeking damages arising out of injuries he suffered while working as a New Hampshire firefighter at the Pease Air National Guard Base. *Id.* at *1. The United States moved to dismiss on the grounds that it was the contractor's "borrowing employer" and, thus, immune from suit under the exclusivity provision of New Hampshire's workers' compensation law. *Id.* The district court agreed and, despite finding that the military did not directly exercise its clear right to day-to-day control over the contractor's work, determined the contractor was the borrowed employee of the United States. *Id.* at *6.

Plaintiffs' pseudo-preemption argument is legally defunct and does not raise any significant policy issues that should cause this Court to reconsider its multiple rulings with respect to the application of the borrowed servant doctrine in this case.

D. As the Court Has Concluded Many Times, Plaintiffs' Requested Instruction Regarding the Borrowed Servant Doctrine Is Inconsistent with Binding Fourth Circuit Precedent

Plaintiffs (again) ask the Court to change its mind with respect to the borrowed servant jury instruction. CACI sees no need to waste the Court's time by responding to Plaintiffs' regurgitated arguments regarding a so-called "dual servant doctrine" that this Court has repeatedly rejected. The Court has already said it best, several times:

> THE COURT: Right. ***You have to read the whole opinion. It goes on to say in terms of determining liability, you have to determine who is actually controlling the work of the employee.*** I'm adding – because I think it's clear within the opinion – "the work of the employee when the misconduct occurs," because that's the only relevant time period.
>
> . . . I do get it. You've made your argument. But if it were a complete relinquishment, a complete relinquishment, then effectively they wouldn't be an employee in my view.
>
> MR. AZMY: Yeah.
>
> THE COURT: ***I mean, I understand your concern. We may be wrong, but as I read Alvarez, I don't think it goes as far as you indicate.*** It still is a factual determination. The jury has to determine whether or not CACI, in fact, abandoned control over the work that was being performed at Abu Ghraib. That's a factual issue this jury has to decide.

Dkt. #1619 at 5:3-6:4 (emphasis added).

> MR. AZMY: Your Honor, we filed papers last night related to the borrowed servant instruction.
>
> THE COURT: First of all, there's no pending question about the borrowed servant, so I'm not going to *sua sponte* assume that that's what's holding them up. There are other issues which could very well be holding them up. Number two, ***even if that were the question, I don't agree with your proposal. I think it goes beyond what the Fourth Circuit deems to be the proper formulation***. So I've read it, but I already told the jury you can wear two hats. I put that – I added that verbally. The first sentence of that instruction clearly says you can be working for two people at the same time. The issue is clearly from the Fourth Circuit's viewpoint, and I

> think appropriately under my view from my viewpoint as well, is whether or not the conditions of work that the person is performing are who's controlling it. That's the question. And I think that's fairly articulated in the instruction plus the supplement that they have. But you've made your record on that issue.

Dkt. #1627 at 6:12-7:6 (emphasis added); Dkt. #1630 at 12:1-4 ("We've been through this a couple of times, if the Court was wrong, it was wrong, but that's, in my view, the law of the case at this point.").

The only new arguments Plaintiffs offer are their attempts to alter binding Fourth Circuit precedent, which unequivocally rests the borrowed servant inquiry on identifying who has the right to control the employee, with various state courts' precedents. Dkt. #1718-1 at 15-18 (citing Virginia Supreme Court cases and Fourth Circuit cases applying Virginia, West Virginia, North Carolina, and South Carolina law). As Fourth Circuit precedent is mandatory authority and the state courts precedents are, at best, persuasive authority and, at worst, in conflict with binding precedent, these arguments go nowhere fast.

IV. CONCLUSION

For the foregoing reasons, Plaintiffs' motion to preclude the borrowed servant defense should be denied.

Respectfully submitted,

/s/ John F. O'Connor

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CERTIFICATE OF SERVICE

I hereby certify that on the 11th day of October, 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 counsel:

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