No. 09-1335
IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

SUHAIL NAJIM ABDULLAH AL SHIMARI, et al.,
Plaintiffs-Appellees
v.
CACI INTERNATIONAL INC, et al.,
Defendants-Appellants

MOTION TO DISMISS CACI'S APPEAL

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Appellees-plaintiffs move pursuant to Fed. R. App. P. 27 to dismiss as premature the appeal filed by appellants CACI International Inc. and CACI Premier Technology, Inc. ("CACI"). CACI filed a notice of appeal from the District Court's (J. Lee) March 18, 2009, Memorandum Order granting in part and denying in part CACI's motion to dismiss. CACI concedes it has no direct right of appeal under 28 U.S.C. § 1291. *See* Docketing Statement, April 9, 2009. CACI instead seeks to portray the District Court's ruling as a final decision on immunity, and thus immediately appealable on an interlocutory basis under *Mitchell v Forsyth*, 472 U.S. 511 (1985) and *Mangold v. Analytic Services, Inc.*, 77 F.3d 1442 (4th Cir. 1996). *Id.* at Sec. B(2)(b).

This appeal is premature, however, because the District Court did not deny CACI's immunity claim. Instead, the District Court held more facts were needed before it could properly analyze whether CACI, a private, for-profit corporation, could stand in the shoes of the United States and enjoy immunity from suit. The District Court properly reasoned that the immunity analysis turns on whether the Court looks to the facts alleged by plaintiffs in their Complaint, or the facts asserted without evidentiary basis by CACI in its moving papers. Under these circumstances, it would be premature for the Court of Appeals for the Fourth Circuit to hear this appeal. *Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 573 (1985) ("The reviewing court oversteps the bounds of its duty under Rule

52(a) if it undertakes to duplicate the role of the lower court."). This appeal should be dismissed.

PROCEDURAL BACKGROUND

On September 15, 2008, Plaintiffs filed their Amended Complaint, alleging that they were imprisoned at Abu Ghraib in Iraq and subjected to torture and abuse by CACI and its co-conspirators. (All Plaintiffs were released without charge by the United States military.)

On October 2, 2008, CACI filed a motion to dismiss the Amended Complaint ("Complaint"), arguing that the lawsuit should be dismissed because CACI was entitled to stand in the shoes of the government, and enjoy derivative sovereign immunity. In arguing for immunity, CACI relied not on the allegations as plead by Appellees-Plaintiffs, but rather on CACI's own view of the facts. CACI alleged that "[i]nteractions with and interrogation of detainees were clearly within the responsibilities delegated to CACI PT interrogators in Iraq." (CACI Motion to Dismiss ("MTD") at 16). CACI alleged ". . . the CACI PT interrogators' actions occurred in the course of performing the duties they were assigned . . ." (MTD at 16); and ". . . the official responsibilities of the CACI PT employees involved interrogation of detainees, consistent with the interrogation rules of engagement established by the United States, to obtain intelligence to save lives." (MTD at 16 n.10). CACI also alleged CACI employees were working with

government employees side-by-side and performing the same duties (MTD at 17); and CACI interrogators' delegated function was interrogating detainees in a military combat zone detention facility. (CACI Reply in Support of CACI's Motion to Dismiss, at 9). CACI's moving papers are attached hereto as Exhibit A. CACI did not attach any evidence to support CACI's allegations, and did not seek to convert the motion to dismiss into a motion for summary judgment.

On March 18, 2009, in a lengthy Memorandum Order, ("Memorandum Order"), the District Court (J. Lee) denied CACI's motion to dismiss. The Memorandum Order is attached hereto as Exhibit B. The District Court held that discovery was needed in order for the Court to rule on CACI's claims of derivative immunity.[1] *See generally* Memorandum Order at 26-40; *see also* Memorandum Order at 26-27 (citing need for discovery to fully consider CACI's derivative absolute official immunity argument); *id.* at 29 (stating that the District Court has "insufficient information at this stage of the litigation" to make conclusive findings regarding CACI's arguments); *id.* at 34 ("The scope of Defendants' contract is thus an open issue that requires discovery.") *id.* at 35 ("discovery…is necessary"); *id.* at 37 ("discovery is needed").

[1] The District Court granted CACI's motion to dismiss claims premised on the Alien Tort Statute, 28 U.S.C. § 1350.

On March 23, 2009, CACI filed a notice of appeal without having sought any of the discovery needed to substantiate the facts CACI claims compel immunity.

On April 9, 2009, CACI filed a Docketing Statement with the Court of Appeals for the Fourth Circuit ("Docketing Statement") seeking interlocutory review of the District Court's refusal to grant CACI immunity.[2] CACI admitted that the appeal did not raise an issue of first impression.

ARGUMENT

This Court should dismiss CACI's appeal as premature. CACI, a publicly-held for-profit corporation, seeks derivative sovereign immunity. Such immunity has been bestowed on rare occasions on private parties to protect discretionary governmental functions. *See, e.g. Mangold v. Analytic Services, Inc.,* 77 F.3d 1442 (4th Cir. 1996); *see also Boyle v. United Technologies Corp.,* 487 U.S. 500 (1988). CACI filed a motion to dismiss, seeking immunity not based on the allegations made in the Complaint but instead based on unsubstantiated allegations made in its moving papers about CACI's interactions with the United States. The District Court analyzed CACI's immunity argument at length, but held that "the Court

[2] CACI also raised the District Court's lack of subject matter jurisdiction and pendent jurisdiction as additional issues to be raised on appeal. For the reasons set forth herein, it is also premature for this Court to consider the District Court's the lack of subject matter jurisdiction. Because there is no basis for the appeal based on immunity or lack of subject matter jurisdiction, there is no appellate jurisdiction over any other pendent claims.

cannot determine the scope of Defendants' government contract, the amount of discretion it afforded Defendants in dealing with detainees, or the costs and benefits of recognizing immunity in this case without examining a complete record after discovery has taken place." *See* Memorandum Order at 26.

Now, CACI relies on the collateral order doctrine set forth in *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949) to seek immediate appeal of the District Court's order that discovery proceed. CACI is not entitled to appeal under the *Cohen* doctrine, however, because the District Court did not conclusively determine the immunity question. The District Court simply ruled that more facts were needed before it could rule on the immunity issue. CACI has improperly sought this Court's jurisdiction to hear its appeal before conducting the required discovery. *See South Carolina State Board of Dentistry v. F.T.C.*, 455 F.3d 436, 441 (4th Cir. 2006).

I. STANDARD OF REVIEW

Appeals raising issues prematurely (called "piece-meal" appeals) are "universally disfavored." *Penn-Am. Ins. Co. v. Mapp*, 521 F.3d 290, 294-295 (4th Cir. 2008). This jurisdictional finality requirement is essential to the "interests of judicial efficiency and also serves to limit litigation costs." *Penn-Am. Ins. Co.*, 521 F.3d at 295. *See also Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 374 (1981) (finality rule ensures that piece-meal appeals do not "undermine the

independence of the district judge"); *MDK v. Mike's Train House, Inc.*, 27 F.3d 116, 119 (4th Cir. 1994) (finality rule preserves the primacy of the district court as the arbiter of the proceedings before it").

In the absence of a final judgment, the only other path to appeal as of right is the "collateral order" doctrine.[3] That doctrine, established by the Supreme Court in *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949), interprets 28 U.S.C. § 1291 to permit "appeals from orders other than final judgments when they have a final and irreparable effect on the parties." *Cohen*, 337 U.S. at 545-46. In order to be immediately appealable, an order must meet three stringent conditions: it must (i) conclusively determine the disputed question; (ii) resolve an important issue completely separate from the merits of the action; and (iii) be effectively unreviewable on appeal from a final judgment. *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978); *see also South Carolina State Board of Dentistry v. F.T.C.*, 455 F.3d 436, 441 (4th Cir. 2006).

If any one of the *Cohen* requirements is not satisfied by a lower court's decision, it is not an immediately appealable collateral order. *Carefirst of Md., Inc. v. Carefirst Urgent Care Ctr.*, 305 F.3d 253, 258 (4th Cir. 2002) (transfer order failed the third prong of the collateral order test and was not immediately review/able). Courts have consistently noted the "strong bias of §1291 against

[3] CACI did not seek to certify the Order.

piece-meal appeals." *See, e.g., Digital Equipment Corp. v. Desktop Direct*, 511 U.S. 863, 872 (1994). [4]

II. THE DISTRICT COURT DID NOT CONCLUSIVELY DETERMINE THE DISPUTED IMMUNITY ISSUE

Private contractors such as CACI who seek protection from tort suits are not within the zone of those entitled to invoke the doctrine of absolute official immunity. Absolute official immunity is properly bestowed almost exclusively on government officials in order to protect them from suits arising from official acts, because "[i]n the absence of immunity . . . executive officials would hesitate to exercise their discretion in a way injuriously affecting the claims of particular individuals, even when the public interest required bold and unhesitating action." *Nixon v. Fitzgerald,* 457 U.S. 731, 744-45 (1982) (internal quotations and citations omitted).

Here, as the District Court noted, "[h]ere Defendants ask this Court to do for government contractors what the Supreme Court was unwilling to do for government officials: adopt a per se rule that the benefits of immunity necessarily outweigh the costs. Defendants cite no authority for this proposition." *See*

[4] As the Fourth Circuit noted in *South Carolina State Board of Dentistry,* 455 F.3d at 441 (quoting *Wil v. Hallock,* 546 U.S. 345, 346 (2006)), the Supreme Court recently stressed the limited scope of the collateral order doctrine, noting that "only a very few types of interlocutory orders can qualify as immediately appealable collateral orders, lest the doctrine "overpower the substantial finality interests §1291 is meant to further.'"

Memorandum Order at 36. Thus, even had the District Court flatly denied CACI's claim to derivative sovereign immunity, such a ruling against a non-governmental for-profit entity likely would not give rise to appeal under the collateral order doctrine. *See, e.g., South Carolina State Bd. of Dentistry* 455 F.3d at 444-45 (defendants were not entitled to collateral order appeal of district court's denial of immunity defense); *Huron Valley Hosp., Inc v. City of Pontiac;* 792 F.2d 563, 567 (6th Cir. 1986) (same). *See also Doe v. Exxon Mobil Corp.,* 473 F.3d 345, 348-353 (D.C. Cir. 2007).

But here, there is even less merit in CACI's premature attempt to appeal because the District Court did not deny CACI's immunity argument. Instead, the District Court explained that "the Court cannot determine the scope of Defendants' government contract, the amount of discretion it afforded Defendants in dealing with detainees, or the costs and benefits of recognizing immunity in this case without examining a complete record after discovery has taken place." *See* Memorandum Order at 26-27. The District Court refrained from ruling on CACI's immunity defense until after the parties developed the factual record necessary to evaluate such claims. *See, e.g.,* Memorandum Order at 26-27 (citing need for discovery to fully consider CACI's derivative absolute official immunity argument); *id.* at 29 (stating that the District Court has "insufficient information at this stage of the litigation" to make conclusive findings regarding CACI's

arguments); *id.* at 34 ("The scope of Defendants' contract is thus an open issue that requires discovery.") *id.* at 35 ("discovery…is necessary"); *id.* at 37 ("discovery is needed").

CACI cannot appeal the District Court's decision to defer ruling on whether CACI is immune from suit. Although seeking immunity via a motion to dismiss, CACI disputed the facts alleged in the Complaint. CACI made a litany of unsubstantiated allegations directly contrary to the Complaint allegations, and constructed its immunity argument on this shaky foundation. For example, CACI claimed that "[i]nteractions with and interrogation of detainees were clearly within the responsibilities delegated to CACI PT interrogators in Iraq." (CACI Motion to Dismiss ("MTD") at 16). CACI alleged "CACI PT interrogators' actions occurred in the course of performing the duties they were assigned" (MTD at 16); CACI employees were working with government employees side-by-side and performing the same duties (MTD at 17); and CACI interrogators' delegated function was interrogating detainees in a military combat zone detention facility. (CACI Reply in Support of CACI's Motion to Dismiss, at 9). These allegations are not in the record. Indeed, the CACI contract is not in the record, a fact noted by the District Court. *See* Memorandum Order at 34 ("The Court is completely bewildered as to how Defendants expect the Court to accept this scope of contract argument when the contract is not before the Court on this motion.").

Under such circumstances, the factual disputes must be resolved before the appellate court is able to rule on immunity. *See Buonocore v. Harris*, 65 F.3d 347, 359-60 (4th Cir. 1995) (no immediate appeal where trial court's immunity decision rested on a dispute of material fact); *see also Thompson v. Farmer*, 945 F. Supp. 109, 112 (W.D.N.C. 1999) (denying police officers' motion for summary judgment based on qualified immunity because material issues of fact remained, and "this is precisely the sort of evidentiary determination that precludes an interlocutory appeal from a denial of qualified immunity under the rule stated in *Johnson v. Jones, 515 U.S. 304 (1995)*.

The District Court properly held that the factual record was far too undeveloped to permit the Court to address CACI's immunity claims. Without the benefit of discovery on matters including the provisions of CACI's government contract or the conduct of CACI's employees in Iraq, the Complaint allegations control. *Mylan Lab., Inc. v. Matkari*, 7 F.3d 1130, 1134 (4th Cir. 1993) (on defendants' Rule 12(b)(6) motion to dismiss, the District Court must construe the Complaint in the light most favorable to the Plaintiffs, read the Complaint as a whole, and take the facts asserted therein as true). For this reason, the District Court required discovery, holding "[t]here are many ways in which discovery will answer unresolved questions that must be answered before the Court can reasonably determine whether Defendants are entitled to immunity."

Memorandum Order at 34. The District Court properly held it was impossible to determine whether derivative sovereign immunity exists without reviewing the government contract and the other facts serving as CACI's basis for the immunity. Memorandum Order at 34.

CACI invites this Court to commit reversible error by wading into this lawsuit before there has been the requisite discovery needed to establish the bona fides of the immunity defense. *Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 573 (1985) ("The reviewing court oversteps the bounds of its duty under Rule 52(a) if it undertakes to duplicate the role of the lower court.").

CONCLUSION

Appellees respectfully request that this Court dismiss CACI's appeal for lack of jurisdiction. The underlying Memorandum Order does not definitely rule on whether CACI is entitled to immunity; it merely defers that issue until such time as an adequate record exists. As a result, the Memorandum Order cannot be appealed as of right. This Court should dismiss CACI's appeal.

/s/

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STATEMENT OF NOTIFICATION AND CONSENT

Pursuant to Local Rule 27(a), counsel for plaintiffs certifies that counsel for the other parties to the appeal have been informed of the intended filing of this motion. The other parties do not consent to the granting of the motion, and intend to file responses in opposition.

/s/
Susan L. Burke

CERTIFICATE OF SERVICE

I certify that I caused a true copy of the foregoing Opposition to be served via e-mail and first class U.S. mail this 27th day of April 2009, on the following counsel of record:

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_____/s/_____
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