**UNITED STATES DISTRICT COURT**
**FOR THE EASTERN DISTRICT OF VIRGINIA**
**ALEXANDRIA DIVISION**

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| **SUHAIL NAJIM ABDULLAH AL SHIMARI *et al*.,** | ) | |
| **Plaintiffs,** | ) | |
| | ) | **Case No. 1:08-cv-827 (LMB/JFA)** |
| ***v.*** | ) | |
| **CACI PREMIER TECHNOLOGY, INC.** | ) | **PUBLIC VERSION** |
| **Defendant** | ) | |

**PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANT CACI PREMIER TECHNOLOGY'S MOTION TO DISMISS PLAINTIFFS' THIRD AMENDED COMPLAINT**

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## INTRODUCTION

Plaintiffs are three Iraqi civilians who endured horrific mistreatment while imprisoned in Tier 1A of the "Hard Site" of the Abu Ghraib prison—the notorious location of internationally condemned "incidents of sadistic, blatant, and wanton criminal abuses,"[1] which the political branches have said were unlawful and demand remediation. *See Al Shimari v. CACI Premier Tech., Inc.*, 758 F.3d 516, 521 (4th Cir. 2014) ("*Al Shimari II*") (citing H.R. Res. 627, 108th Cong. (2004)).[2] Plaintiffs sued CACI under well-established theories of accessory liability—conspiracy and aiding and abetting—for its recognized role participating in and directing the serious physical and mental harm of detainees. *See id.* (referencing two military investigative reports implicating CACI). These abuses resulted in court martial convictions of a number of CACI co-conspirators, including Military Police ("MP") officers. Two of those MPs, Charles Graner and Ivan Frederick II, provided testimony in this case implicating CACI in directing the abuses at Abu Ghraib of the kind suffered by Plaintiffs.

CACI makes a number of fundamental errors in its motion to dismiss Plaintiffs Third Amended Complaint ("TAC"). First, CACI attempts to relitigate issues the Fourth Circuit already resolved, by asserting (incorrectly) that the abusive techniques at issue in this case were authorized by the U.S. military and, therefore, evaluating their legality would cause the court to impermissibly question sensitive military judgments. (Def. Br. 3-12.) CACI has the Fourth Circuit's ruling backwards. If there is a violation of a nondiscretionary legal duty—even if fully authorized by the military—separation-of-powers principles *obligate* the judicial branch to enforce the law, not retreat from it. *Al Shimari v. CACI Premier Tech., Inc.*, 840 F.3d 147, 159

[1] Major General Antonio Taguba, Investigating Officer, AR 15-6 Investigation of the 800th Military Police Brigade 16 (2004) ("Taguba Report").
[2] *See also* White House, Press Release, President Bush Meets with Al Arabiya Television (May 5, 2004) (Abu Ghraib abuses violated U.S. law and policy; calling for "justice to be served.").

(4th Cir. 2016) ("*Al Shimari IV*").

Second, CACI grossly distorts the legal norms at issue. CACI parses the systemic, continuous and accumulatively gruesome constellation of abuses Plaintiffs endured over a period of months into disaggregated fragments and argues that each incident, in isolation, does not amount to torture or cruel, inhuman or degrading treatment ("CIDT"). In addition, CACI excises "*mental* pain or suffering" out of the definition of torture and, by demanding a showing of "risk of death," "burn or disfigure[ment]" or "impair[ment] the function of any body part," sets the "physical pain" threshold for torture and CIDT at a level akin to the discredited "organ failure or death" threshold proffered by patently incorrect and subsequently retracted 2002 Justice Department Office of Legal Counsel ("OLC") Memoranda. This is not the law.

Courts assessing torture or CIDT are obligated to consider an individual's treatment holistically, cumulatively and based on the subjective physical and mental characteristics of individual victims. Here, CACI elides an obvious, critical fact: Plaintiffs were not merely prisoners subject to one-off acts of aggression while in routine detention; they were subjects to a *program of coercive interrogation*—avowedly designed to "soften up" and break detainees. And, as the testimony of Plaintiffs' examining doctor reveals, break them Defendants did. Each Plaintiff—terrified, alone, freezing, beaten, contorted, naked, exhausted, humiliated and degraded continuously over a sustained period—suffered severe physical and mental harm, and still do. Viewed properly, there can be little question that Plaintiffs raise a claim that a reasonable juror could conclude amounts to torture, CIDT and war crimes.

Third, CACI misunderstands Plaintiffs' theory of liability. Plaintiffs plausibly plead an unlawful agreement between CACI employees and the MPs that CACI ordered to abuse detainees; CACI is liable for the foreseeable consequences of its employees' unlawful

agreement. Despite its repeated insistence in this Motion, which *expressly contradicts* a position CACI earlier took in this case, Dkt. 222 at 11, Plaintiffs do not have to connect CACI employees directly to their particular abuse. Under the law, conspiracy liability attaches regardless of whether an individual himself pulls the trigger or cracks the whip.

Fourth, CACI's preemption arguments are unavailing. Under the Constitution, only state laws can be displaced by federal laws or interests; stray, outlying dicta in *Saleh v. Titan* aside, it is hornbook law that federal laws do not preempt other federal laws. Nor is there is any basis for CPA Order 17 or the TVPA to displace the ATS.

## STATEMENT OF FACTS

Plaintiffs each suffered severe physical and mental harm resulting from systemic mistreatment at Abu Ghraib in late 2003 and early 2004. This mistreatment occurred at the hands of low-ranking MPs instructed by CACI employees operating in the prison's well-documented command vacuum that existed in Abu Ghraib prison at the time.

### A. Severe Mistreatment of Salah Al Ejaili at Abu Ghraib

Plaintiff Salah Al Ejaili, 46, was a credentialed reporter for the Al-Jazeera news service. On or around November 3, 2003, he traveled to Iraq's Diyala province to report on an explosion. (Ex. A (Al Ejaili Dep.) at 9:8-15.)[3] Mr. Al Ejaili was detained by U.S. military personnel at the scene and, after being held at several locations for approximately five days (*id.* at 9:16-22, 14:17-19), transferred to Abu Ghraib on or around November 8, 2003 (*id.* at 17:19-18:1, 22:6-10, 28:5-29:9, 35:21-36:3.) He was held at Abu Ghraib for approximately six weeks and subjected to a continuous campaign of psychological and physical abuse, before being released without any charges. (*Id.* at 106:3-13; CACI Ex. 2 (Al Ejaili Rog.) at No. 3.)

After being brought to Tier 1 of the Abu Ghraib Hard Site—a relatively small and

[3] "Ex. __" refers to exhibits to the Declaration of Baher Azmy, Esq.

confined area consisting of cells and nearby interrogation rooms formally under the control of United States forces (pictured in Ex. E)—military personnel and a civilian interpreter forced Mr. Al Ejaili to remove his clothes in a hallway in a crowd of people and told him "you [] will get naked or we will get you naked by ourselves." (Ex. A at 51:22-52:10, 54:13-17, 56:11-21.) They placed a bag over his head, handcuffed him, and screamed at him while he remained naked. (*Id.* at 52:7-17.) He was left naked and hooded in the hallway. (*Id.* at 58:3-18.)

Mr. Al Ejaili was next taken to a room by then-Corporal Charles Graner.[4] (*Id.* at 63:2-12.) Graner told Mr. Al Ejaili to stand up against a wall and handcuffed him to a pipe and left him in this stress position for approximately twelve hours overnight—standing completely naked and bound to a pipe with an orange jumpsuit. (*Id.* at 61:13-18, 64:21-65:2.) While bound, Mr. Al Ejaili was mocked with taunts of "Happy birthday, Al Jazeera" and "Happy anniversary, Al Jazeera." (*Id*. at 65:3-5.) At one point, a female—Mr. Al Ejaili does not recall if she was a soldier or civilian—approached and proceeded to touch Mr. Al Ejaili all over his still naked body, pulling on his hair and pinching his skin. (*Id.* at 65:6-12; CACI Ex. 2 at No. 4.)[5] The severe pain from the stress position made Mr. Al Ejaili ill; he vomited black bile over the course of the night. (Ex. A at 65:9-12; CACI Ex. 2 at No. 4.) A photograph of Mr. Al Ejaili shows him hooded, seemingly nude except for an orange jumpsuit on his shoulders, and standing over a pool of vomit. (Ex. F (photograph); *see* Ex. A at 61:13-18, 63:2-65:16, 68:2-18; 207:2-22.)

After this first night at the Hard Site, Graner returned to the room where Mr. Al Ejaili was held, released him from the stress position, and forced him to clean up his vomit with an

[4] Graner was sentenced by court martial to ten years imprisonment for his role in the Abu Ghraib abuses. He testified to the Criminal Investigation Division ("CID") and in deposition that he mistreated detainees on instructions of CACI interrogators. TAC ¶ 100; Ex. B (Graner Dep.) at 24:5-25:11, 35:17-38:12, 49:22-50:11.

[5] "CACI Ex. __" refers to exhibits to the Declaration of John F. O'Connor. Dkt. 628.

orange jumpsuit that Mr. Al Ejaili was supposed to wear. (Ex. A at 68:2-16.) Mr. Al Ejaili was then taken to a cell, where he tried to wash the vomit off of his jumpsuit. (*Id.* at 69:2-6; CACI Ex. at No. 4.) He was left naked in this cold cell for two days and, when he asked for something to wear while the jumpsuit dried, was given female underwear. (Ex. A at 69:7-16; CACI Ex. 2 at No. 4.) During these two days, Mr. Al Ejaili was provided with only one or two meals and was kept awake by guards during the night. (Ex. A at 72:1-20.)

Following this treatment, Mr. Al Ejaili was brought to an interrogation room in which he was hooded, stripped naked, handcuffed to a pipe, and verbally and physically abused. (*Id.* at 74:1-10, 79:4-16.) He was repeatedly punched, slapped, and kicked in various parts of his body during this interrogation, including in his stomach and head. (*Id*. at 79:4-16; CACI Ex. 2 at No. 4.) He endured similar abuse in connection with the ten to twelve interrogations he was subjected to while at Abu Ghraib, which occurred every two to three days. (Ex. A at 80:4-8221, 89:13-15, 100:1-6; CACI Ex. 2 at No. 4.) During some of the interrogations, Mr. Al Ejaili was also doused with hot tea and cold water. (Ex. A at 100:20-21; CACI Ex. 2 at No. 4.)

Outside of interrogations, Mr. Al Ejaili and other detainees were constantly mistreated by Graner, then-Sgt. Ivan Frederick II,[6] and other MPs in a variety of ways. (Ex. A at 80:1-82:21, 89:9-15, 217:16-219:13.) Mr. Al Ejaili was often denied food and water for periods lasting up to several days. (*Id*. at 101:19-20, 217:20-218:9.) He was kept naked for more than seventy-five percent of the time he spent in Abu Ghraib: "We became like animals in a zoo, cages. When we are in such a case, people coming by, passing by watching us." (*Id*. at 102:10-12; 174:6-13,

[6] Frederick was court-martialed and sentenced to eight years imprisonment for his abuse of detainees. He testified that CACI employees ordered him to "set the conditions" at the Hard Site when Mr. Al Ejaili was detained there. TAC ¶¶ 23, 85; *see also* Ex. C (Frederick Dep.) at 79:11-82:9, 84:6-85:8, 90:19-92:24.

176:7-16; 200:13-15; Ex. D (Al Ejaili Xenakis Report) at 4.)[7] He was repeatedly subjected to cold temperatures. (Ex. A at 100:20-21, 200:16-20.) On several occasions Mr. Al Ejaili's clothes, blanket, and bed were removed from his cell and he was left in the cell naked for days during the Iraqi winter.[8] (*Id*. at 102:7-10, 216:17-21.) He was forced to follow a disruptive sleeping regimen permitting him only one or two hours of sleep per night. (*Id.* at 101:15-17, 200:22-201:4; CACI Ex. 2 at No. 4; Ex. D at 4.) He was repeatedly threatened with harm to himself and his family, including threats that were sexual in nature. (Ex. D at 5.) On at least three occasions, unmuzzled dogs were brought close to his head while he was hooded, which left him "terrif[ied]." (Ex. A at 201:16-202:13.)[9]

Outside of formal interrogations, Mr. Al Ejaili was also repeatedly subjected to stress positions, sensory deprivation, isolation, and beatings to the head, chest, and abdomen that occasionally left him unconscious. (*See id.* at 102:2-20, 208:2-22, 218:7-9; CACI Ex. 2 at No. 4; Ex. D at 4.) He was frequently chained to the wall, bars in his cell, or his bed—overnight or for prolonged periods and in stress positions such as binding his outstretched arms behind his body. (Ex. A at 217:16-218:9; CACI Ex. 2 at No. 4.) He was also placed for long periods of time in rooms without any light—once he was taken from his cell and locked in a dark basement room because he spoke to another detainee, and another time he was confined in a pitch-black cell for

[7] In January 2013, Dr. Stephen N. Xenakis, a board certified physician and retired U.S. Army brigadier general, conducted medical examinations of Plaintiffs in Erbil, Iraq. Dr. Xenakis has been qualified as a psychiatric and medical expert in numerous cases concerning detainees and in the Military Courts Martial. (*See* Exs. D, K, and M (confidential reports on Plaintiffs).)

[8] The average low temperature in Baghdad is 48.56 degrees Fahrenheit for November, 41.18 degrees for December, and 38.84 degrees for January. *See* World Weather Information Service—Baghdad, *available at* http://worldweather.wmo.int/en/city.html?cityId=1464).

[9] Photographs of other detainees in Abu Ghraib at the same time Plaintiffs were detained there illustrate the fear unmuzzled dogs were designed to incite. *See* Ex. P. More photos collected in the CID Investigation depicting a range of abuses at Abu Ghraib are available at http://www.salon.com/topic/the_abu_ghraib_files/.

a day and a half. (Ex. A at 101:11-102:1, 218:3-9; CACI Ex. 2 at No. 4.) Another time, he was taken outside of the prison, stripped naked, and beaten with iron pipes. (*See* Ex. A at 102:2-20; CACI Ex. 2 at No. 4.) He was kept hooded for most of these beatings and his abusers were often careful not to leave lasting marks. (Ex. A at 103:5-9; Ex. D at 4.) Much of this abuse took place out in the open where military and civilian personnel could easily view it. (*See* Ex. A at 90:3-92:10.) Mr. Al Ejaili received no medical treatment for his injuries. (CACI Ex. 2 at No. 4.)

The abuse has taken a considerable, enduring toll on Mr. Al Ejaili's physical and mental health. He experiences joint and musculoskeletal pain and headaches from the stress positions and beatings. (Ex. A at 208:2-209:1; Ex. D at 4, 6.) In 2013 he was diagnosed with moderately severe post-traumatic stress disorder ("PTSD") and severe depression stemming from the abuse. (*Id.* at 7.) His related mental and emotional impairments include anxiety, dissociation, memory impairment, irritability, and social withdrawal. (*Id.* at 5-6.) These have at times prevented Mr. Al Ejaili from performing his work duties as a reporter and have left him alienated from friends and family. (*Id.* at 5; Ex. A at 212:18-214:8.) He also has difficulty sleeping and experiences nightmares about his time at Abu Ghraib. (*Id.* at 220:12-20; Ex. D at 5-6.)

**B. Severe Mistreatment of Asa'd Al-Zuba'e at Abu Ghraib**

Plaintiff Asa'ad Al-Zuba'e, a 44 year-old farmer with a third-grade elementary education who raises sheep and lambs, was working as a taxi driver when he was arrested in November 2003. (Ex. G (Al-Zuba'e Dep.) at 14:14-18; 24:12-15; Ex. H (Al-Zuba'e Dep. Errata) at 12:14-15.) On the night of his arrest, Mr. Al-Zuba'e was driving home with a neighbor when, after passing through a military checkpoint without incident, U.S. military followed him and ordered him to stop. (Ex. G at 20:3-28:1.) They searched his car and, after driving him home, searched his home. (*Id.* at 20:3-28:14.) Despite finding nothing, they arrested Mr. Al-Zuba'e and

immediately brought him to Abu Ghraib without cause or explanation. (*Id.* at 20:3-28:14.)

Two days after his imprisonment men in civilian clothing brought Mr. Al-Zuba'e to a room, with at least one woman present, stripped him naked, photographed and ordered him to masturbate in front of them. (*Id.* at 33:18-21, 35:10-37:5.) Despite telling them that an act of masturbation was forbidden by his religion (*id.* at 36: 10-21; Ex. I (Fadel Report) ¶ 24),[10] they repeatedly ordered him to masturbate and, when he objected, one of the men in civilian clothing, while wearing gloves, repeatedly touched and groped his penis until it was erect and then photographed his erect penis. (Ex. G at 40:4-41:9; Ex. H at 46:4-5; *see id.* at 36:14-15 ("[H]e said do this, he played with my penis to make it erect. He told me to do 'fiki-fiki.' (Motioning) I said no this is forbidden in our religion.").)[11] Mr. Al-Zuba'e was then allowed to put his clothes on and was left in a guarded room. (Ex. G at 46:6-48:5.)

A few hours after being stripped and sexually assaulted, the same civilian men bound Mr. Al-Zuba'e's hands together, placed a hood over his head, and transferred him by hummer to the Hard Site. (*Id.* at 48:2-49:9.) Upon arrival, they severely tightened the hood around his neck and dragged him out of the hummer by his neck, causing him to cry out in extreme pain. (*Id*. at 49:21-50:9.) While he cried out, several individuals repeatedly hit, punched, and kicked him—he was unable to identify his assailants because he was hooded. (*Id.* at 50:10-51:13.)

After this beating, someone removed the hood from Mr. Al-Zuba'e's head, and a group of soldiers taunted and derided him for smelling bad. (*Id.* at 52:14-53:3.) They forcibly stripped him and, once he was naked, a soldier hugged him and said, "I'm going to 'fiki-fiki' you." (*Id.*

[10] Professor Mohammed Fadel, Ph.D., an expert in Islamic legal history, theology, and law, submitted a report concerning the significance of the physical, mental, and emotional injuries suffered by Plaintiffs at Abu Ghraib from the perspective of Islamic religious and legal teachings. (*See* Ex. I.)

[11] *See* Ex. J. (Al-Shimari Dep.) at 105:13-107:17 (discussing "fiki-fiki" as a transliteration meaning "fuck you").

at 53:4-21; Ex. H at 53:17-18 (referring to a sexual act).) Mr. Al-Zuba'e began to cry and the soldier forced him into a bathroom upstairs, pushed him under a cold shower with a bar of soap while soldiers, including female soldiers watched (which humiliated him). (Ex. G at 54:3-17, 129:13-22; CACI Ex. 1 (Al-Zuba'e Rog.) at No. 4.) He continued to cry as the soldier continually held or pushed him back under the freezing water and rubbed soap in his eyes, causing pain and preventing him from being able to see clearly. (Ex. G at 54:13-55:17.) Mr. Al-Zuba'e was forced to stay in the shower until he used the whole bar of soap. (CACI Ex. 1 at No. 4.) Mr. Al-Zuba'e does not know how long he was kept in the freezing shower, but at some point his body became so cold that he was unable to stand and fell to the floor. (Ex. G at 55:20-56:20.)

After he fell in the shower, the soldiers dragged him down the stairs to the first floor, still naked. *Id.* at 57:19-58:3. Male and female soldiers were present. (*Id.* at 57:4-14.) Mr. Al-Zuba'e lost consciousness and was awakened by being beaten with a stick all over his body, including on his genitals. (*Id.* at 58:13-59:10, 133:8-135:1, 139:15-19.) He was then forced to crawl on his stomach and chest while being beaten and screaming and crying out in pain and fear—he testified that "[t]hey were hitting me. Hitting me. Hitting me and I was [crawling] and [crawling]. Hitting and hitting and hitting. I was crying and screaming." (*Id.* at 58:13-59:10; *see also* CACI Ex. 1 at No. 4.) Mr. Al-Zuba'e does not know how long they made him crawl, but they continued to beat him for the duration. (Ex. G at 60:2-61:7.) He was bleeding on his chest from the abuse. (*Id.* at 133:13-134:6; CACI Ex. 1 at No. 4.) When he finally stopped crawling, someone brought in an unmuzzled dog and allowed it to bite him on his hand and legs while he screamed and cried. (Ex G at 61:13-22; CACI Ex. 1 at No. 4.) Mr. Al-Zuba'e was then hooded, bound, and placed in a cell where he remained overnight, naked in wintertime

conditions, with no medical treatment for his injuries. (Ex. G at 63:20-65:13.)

In the morning they returned his clothes, removed the hood and bindings, and transferred him to an adjacent cell. (*Id.* at 65:17-66:22.) That afternoon, a guard brought Mr. Al-Zuba'e to an interrogation room with two civilian interrogators and one interpreter. (*Id.* at 67:19-71:5.) After the interrogation, one of the civilians had a conversation in English with the guard who then brought Mr. Al-Zuba'e back to the cell, punched him and threw him so violently against that wall that Mr. Al-Zuba'e hit his head and fell to the ground. (*Id.* at 76:4-19; CACI Ex. 1 at No. 4.) The guard then ordered Mr. Al-Zuba'e to stand and handcuffed him to the upper bed with his arms above his head so that his feet barely touched the floor. (Ex. G at 78:5-79:9; CACI Ex. 1 at No. 4.) He was left in that painful position for a full day. (Ex. G at 81:12-16.)[12]

During the day that Mr. Al-Zuba'e spent handcuffed to the bed with his arms contorted above his head, he cried and screamed to be released and allowed to relieve himself. (*Id.* at 81:16-82:2.) At one point a guard with an interpreter told him that he was under orders not to release him. Mr. Al-Zuba'e remained in this stress position for nearly 24 hours and ended up defecating and urinating on himself. (*Id.* at 82:4-83:21, 135:21-137:5.) Approximately four days later, Mr. Al-Zuba'e was brought back to the interrogation room with the same three individuals. (*Id.* at 84:5-12, 87:9-89:7.) Again, after this interrogation one of the civilian interrogators had a conversation in English with the guard who then escorted Mr. Al-Zuba'e back to the cell, stripped him, and removed everything from the cell except for the bedframe. (*Id.* at 90:22-93:4; CACI Ex. 1 at No. 4.) Mr. Al-Zuba'e was left in that condition for three days—naked, with nothing to keep him warm and no place to sleep except the floor—until he became sick from the cold. (Ex. G at 93:17-22; CACI Ex. 1 at No. 4.)

[12] Photographs of other detainees at Abu Ghraib in the relevant time period in such a stress position are attached as Ex. Q.

After those three days naked, a soldier gave him clothes, tied his hands behind his back, hooded him, shook him and spun him around to disorient him, and then took him "somewhere very cold, other place very cold"—it was "very cold, very cold, very cold. It was very cold. The water, cold. But I couldn't see because there was a [hood]." (Ex. G at 94:1-95:7; Ex. H at 95:17.) For two hours he was subjected to extreme cold as someone repeatedly demanded that he "tell [them] the truth." (Ex. G at 95:8-96:16.) He was then returned to his barren cell and told that he would be left there for 10 days, without receiving any medical attention. (*Id.* at 97:6-99:4.)

Approximately 10 days later, Mr. Al-Zuba'e was interrogated again by the same three individuals, who this time threatened to "bring [his] family" to Abu Ghraib if he did not give them information. (*Id.* at 100:12-101:20.) Mr. Al-Zuba'e again pleaded that he could not tell them anything because he did not know anything. (*Id.*) Following this interrogation, he was taken to his cell and chained to the cell door in a hunched position. (*Id.* at 102:8-103:14.)[13] He estimates that twenty days passed before he was interrogated again, this time by three different civilians. (*Id.* at 104:20-105:17.) At this interrogation, after demanding that he tell the truth, the interrogators threw Mr. Al-Zuba'e against the wall, causing him to fall, and beat him, causing painful swelling and inflammation to his head. (*Id.* at 106:9-108:8.) After this last interrogation, Mr. Al-Zuba'e was moved from the Hard Site to another facility—still without having been charged—until his release in October 2004. (*Id.* at 109:6-110:3, 113:2-13; CACI Ex. 1 at No. 3.)

As a result of the abuse he endured, Mr. Al-Zuba'e suffers from considerable and lasting physical and mental injuries that impair his daily life. (Ex. K (Al Zuba'e Xenakis Report) at 4.) In 2013, he was diagnosed with moderately severe post-traumatic stress disorder and major

[13] A photograph of another detainee at Abu Ghraib during the relevant time period in a similar stress position is attached as Ex. R.

depressive disorder stemming from the abuse that he suffered. (*Id.* at 6.) As with Mr. Al Ejaili, the abuse has left Mr. Al-Zuba'e with numerous mental and emotional impairments associated with PTSD including dissociation, social withdrawal, depressed mood, and diminished concentration, attention, and memory. (*Id*.) The residual damage from the abuse he suffered at Abu Ghraib has significantly affected Mr. Al-Zuba'e's ability to work and has had a negative impact on his social relationships, particularly with his family. (*Id.* at 6-7.) He suffers from very distressing and frequent nightmares, disturbed sleep, and resulting fatigue. (*Id.* at 4.) He also experiences joint and musculoskeletal pain from the stress positions and beatings he endured, as well as severe headaches that are attributable to those beatings. (*Id.* at 6.) He has scars on his head, arms, and legs from beatings and dog bites and marks around his wrists from being bound and shackled. (*Id.* at 5-6; CACI Ex. 1 at No. 4.)

**C. Severe Mistreatment of Suhail Al Shimari at Abu Ghraib**

Suhail Al Shimari, 58, was trained as an engineer and worked as a farmer when he was seized by Coalition forces at his home on November 7, 2003 after they found weapons in a vehicle parked near his house, which did not belong to him. (Ex. J (Al Shimari Dep.) at 20:6-11, 21:4-22:19; CACI Ex. 3 at No. 3.) He was transferred to Abu Ghraib approximately one month later, where he was severely abused and mistreated. (Ex. J at 38:9-12.) He was eventually transferred to a different detention facility and ultimately released nearly five years later, on or about March 27, 2008, without ever being charged with a crime. (*Id.* at 15:13-18:16.) Since his release, Mr. Al Shimari has worked as a middle school mathematics teacher. (*Id.* at 13:19-14:14.)

Upon arrival, Mr. Al Shimari was stripped and examined by non-medical soldiers, and then handcuffed behind his back with a bag over his head. (*Id*. at 38:13-40:19.) Within a day of

his arrival at Abu Ghraib he was taken to his first interrogation session (*id*. at 41:4-7), during which he was hooded and handcuffed, and made to kneel at the feet of the interrogator on sharp, broken stones (*id*. at 41:8-42:4). The sharp stones caused pain, made his knees bleed, and left him with scars, numbness, and difficulty walking. (*Id*. at 118:4-22.) He was pushed and pulled violently while restrained, causing him to fear that his hand would be broken because of the restraints. (*Id*. at 47:9-12, 48:6-12.) Mr. Al Shimari was also hit and punched in the face during this interrogation. (*Id*. at 43:10-44:2.) Either the interrogator or the guards also stepped on Mr. Al Shimari's head, stomach, back, and legs, causing severe pain—enough that he could not initially walk or move. (*Id*. at 48:6-19, 119:1-22.) Following this interrogation, Mr. Al Shimari was taken to a cell in the Hard Site at Abu Ghraib and held for a day without food and barefoot in the cold weather. (*Id*. at 49:12-21, 52:21-53:1, 53:10-19, 54:1-4.)

Mr. Al Shimari was interrogated again the next day, by a male civilian interrogator with a ponytail. (*Id.* at 45:17-46:13; 50:3-17; 120:20-121:1.) Mr. Al Shimari was made to stand on his tiptoes with his nose touching a wall for over three hours, during which the interrogator ordered the guard to push and hit him. (*Id.* at 54:19-21, 55:6-22, 56:13-19, 57:6-8, 57:15-18.) The interrogator threatened to make Mr. Al Shimari stand in this position until the next morning. (*Id.* at 56:13-19; 120:1-19.) After the interrogation, the guard tied Mr. Al Shimari's hands behind his back and beat him all over his body, including his head. (*Id*. at 58:3-7.)

Mr. Al Shimari was interrogated a third time by a civilian, who threatened him with a dog during the interrogation. (*Id.* at 63:2-64:15.) He was forced to kneel by a window, handcuffed in the back, with a dog on the other side as the interrogator threatened to open the window and let the dog bite him. (*Id.* at 63:22-64:5, 64:12-15, 66:1-14.) He was also threatened with attacks from dogs on at least one other occasion: a dog was brought to his cell and allowed to lunge at

him before being pulled back. (*Id.* at 77:16-78:6.) The interrogator then ordered the guards to put a blanket over Mr. Al Shimari's head and make the dog attack and bite the blanket. (*Id.*)

Mr. Al Shimari continued to endure abuses in the approximately 40 days that he was held at the Hard Site. (*Id*. at 121:2-17.) He was repeatedly beaten and testified that the beatings were related to the interrogations because—"[m]ost of the time these things happened always after the interrogation." (*Id*. at 97:11-20, 98:2-8, 105:4-11, 107:20-108:2, 123:14-15.) He was beaten with batons and rifles. (*Id*. at 102:2-5.) Mr. Al Shimari was beaten on his genitals on the way to and from interrogation, while handcuffed, and the guard said "feeki feeki" while doing this, which is a "bad expression" that is "even worse than when they shave your mustache or shave your head." (*Id*. at 105:4-108:2.) Guards inserted fingers into his rectum on multiple occasions, repeatedly humiliating Mr. Al Shimari. (*Id*. at 125:5-126:10.)

Mr. Al Shimari was also choked on multiple occasions when being dragged to and from an interrogation, including once while he was in the middle of prayer: the guards would pull the string on the hood, choking him. (*Id*. at 103:19-104:19.) On another occasion, he was dragged out of his cell, hooded, and the interrogator threatened to detain his wife also. (*Id*. at 90:14-22; Ex. L (Al Shimari Dep. Errata) at 91:19.) Wires were attached to Mr. Al Shimari in an interrogation on his arm or hand, which he was told was a "lie detector," and he was electrocuted, leaving scars on his skin visible to an examining physician nearly ten years later. (Ex. J at 100:5-103:2; Ex. M (Al Shimari Xenakis Report) at 7, 11 (photograph of visible scar on arm).) One interrogator threatened to shoot Mr. Al Shimari after an interrogation. (Ex. J at 100:5-101:8.)

Other abuses and humiliations suffered by Mr. Al Shimari involved forced nudity, isolation, and exposure to the cold. Mr. Al Shimari was forcibly shaved, which he found

extremely distressing: "for me, destruction of my house is better off than the way they mistreated me by shaving my hair and my mustache. This is worse." (*Id*. at 67:19-68:7, 68:12-20; 70:2-9.) Mr. Al Shimari was then compelled at gunpoint by a female guard to shower naked in cold water, in winter, until he had used an entire bar of soap. (*Id*. at 68:20-22, 69:8-18, 72:1-2.) He testified that it was "very cold, very cold, very cold," and his hair felt like "nails sticking out" since he had just been shaved. (*Id*. at 69:8-18.) The guards then soaked his clothes, leaving him only with wet clothes to wear. (*Id.* at 68:1-4, 69:18-70:2.) For approximately thirty days he was kept in a dark, windowless cell—including periods as long as a day when he was kept naked. (*Id*. at 122:1-21.) While in this cell, the guards would also periodically throw water on him and play loud music. (*Id*. at 87:8-20.) The only way for Mr. Al Shimari to keep track of time was to listen for the calls to prayer. (*Id*. at 74:13-21.)

As a result of these abuses, Mr. Al Shimari suffered and continues to suffer physically and mentally. He testified that the abuse gave him a hernia for which he was not initially treated despite complaining about stomach pain. (*Id*. at 91:20-93:19.) He suffers from headaches and vision problems, including seeing arcs of light and needing glasses. (*Id*. at 95:19-22, 96:8-11.) He lost teeth as a result of the beatings. (*Id*. at 96:5, 97:4-14.) He has scars on his legs from being forced to kneel on sharp rocks. (*Id*. at 117:8-16, 118:4-22.) Mr. Al Shimari testified he now has problems with impotence, which he attributes to the abuse. (*Id*. at 127:4-7.)

In addition to these physical injuries, Mr. Al Shimari testified that he is "always angry," no longer feels comfortable or stable, and, unlike prior to his detention in Abu Ghraib, now prefers to be alone. (*Id*. at 127:8-16, 127:18-128:12.) These changes have been difficult on his relationship with his family in particular. (*Id*. at 127:8-16.) Mr. Al Shimari's testimony regarding his injuries was corroborated by his examination by Dr. Xenakis in 2012. Dr.

Xenakis's examination found multiple scars consistent with electric shocks and cuts from sharp rocks, missing teeth consistent with face punches and beatings, postoperative scars from hernia surgery, and signs and symptoms of moderately severe post-concussive syndrome attributable to multiple beatings on the head. (Ex. M at 8-9, 11.) He observed that the beatings and harsh conditions produced recurrent headaches; chronic sleep disturbance; diminished concentration, attention and memory; irritability; and a depressed mood. (*Id*. at 8-9.) He also diagnosed Mr. Al Shimari with PTSD and major depressive disorder. (*Id*. at 9.)

## ARGUMENT

### I. SUFFICIENT EVIDENCE OF TORTURE, CIDT AND WAR CRIMES RENDERS DISMISSAL UNDER THE POLITICAL QUESTION DOCTRINE INAPPROPRIATE.

This Court affirmed that claims for torture, CIDT, and war crimes are actionable under the ATS, and that the content of those norms are defined by domestic and international law. *See* Dkt. 615 at 6-10 (definition of torture); 11-14 (CIDT); 15-17 (war crimes). Properly viewed, the evidence would permit a reasonable juror to conclude each plaintiff endured treatment that constituted not only CIDT but also torture. As such, the political question doctrine ("PQD") poses no bar to adjudicating Plaintiffs claims. *Al Shimari IV*, 840 F.3d at 151 ("conduct by CACI employees that was unlawful when committed is justiciable").

#### A. CACI Fundamentally Misunderstands or Misrepresents the Torture, CIDT and War Crimes Norms

While acknowledging for the first time in nine years that Plaintiffs' allegations are "deplorable" (Def. Br. 12), CACI dismisses the conduct as little more than "simple assaults" and argues that "almost none" satisfy the requirements for torture, CIDT and war crimes (*id.* 13). In so diminishing Plaintiffs' claims, CACI makes a number of dispositive errors, most fundamental of which is to characterize Plaintiffs' treatment as if they were randomized or one-off acts of

excesses one might expect to see in a garden-variety prisoner assault case.[14] This misses the obvious point that detainees at the Hard Site were intentionally subjected to a *program of coercive interrogation* that was executed over time, systematically and with cruelty—through aggregated and escalating forms of physical and psychological violence—in order to accomplish stated aims: to "soften" or break vulnerable, isolated and scared detainees to give up information. That the Plaintiffs had no such information did not serve as a shield to this brutal mistreatment. Having set out on this course of systematic cruelty—and for considerable profit—CACI cannot evade responsibility for the harms their unlawful conduct caused.

**1. Torture and CIDT Must Be Assessed Based on Cumulative Effect, Not Tactic by Tactic**

CACI attempts to splice the various abusive tactics to separate them from each other in time and place. This common defense disregards a basic tenet of assessing torture claims: given the *cumulative* harm that abuse can inflict, fact-finders must examine the *totality* of treatment. One doesn't examine a technique or harm in isolation; it is the cluster and context of aggragated harms—and its subjective physical and mental impact on the victims—that make up a torture or CIDT constellation.

It is universally understood that "[torture] may be committed in one single act or can result from a combination or accumulation of several acts, which, taken individually and out of context, may seem acceptable…. The period of time, the repetition and various forms of mistreatment and the severity should be assessed as a whole." Cordula Droege, "'In Truth the Leitmotiv': The Prohibition of Torture and Other Forms of Ill-Treatment in International

[14] To take two of CACI's most cynical characterizations, they label the long, freezing showers Plaintiffs were forced to take (after days of freezing temperatures and forced nudity) as mere "Forced Hygiene," and liken the painful and degrading sexual assault Mr. Al Zuba'e endured to a routine cavity search.

Humanitarian Law," 867 *Int'l Rev. of the Red Cross* 515, 529 (Sept. 2007), *citing Prosecutor v. Krnojelac*, Case No. IT-97-25-T, Trial Judgment, Mar. 15, 2002, ¶¶ 182; *see also* Alberto Mora Amicus Br. at 20-23, *Al Shimari v. CACI Premier Tech., Inc.*, No. 15-1831 (4th Cir. Sept. 28, 2015). "[T]he severity of the acts should be assessed as a whole to the extent that it can be shown that this lasting period or the repetition of acts are inter-related, follow a pattern or are directed towards the same prohibited goal." *Krnojelac,* ¶ 182.

Likewise, subjective criteria, such as the victim's age, state of health or circumstance, in addition to "the objective severity of the harm inflicted," should be considering in determining whether a particular set of conduct constitutes torture. *Prosecutor v. Kvocka et al.*, No. IT-98-30/1-T, Trial Judgment, Nov. 2, 2001, ¶¶142-43. (*See also* Ex. I (Fadel Report) (assessing the impact of forced nudity and sexual assault under Islamic law and teachings).)

U.S. courts assessing claims of torture follow this guidance, finding a varierty of acts to inflict the requisite physical and/or mental harm to constitute torture. *See, e.g.*, *Abebe-Jira v. Negewo*, 72 F.3d 844, 845 (11th Cir. 1996) (forcing a detainee to undress, binding arms and legs, whipping her, and threatening her with death); *Al-Saher v. INS*, 268 F.3d 1143, 1145-47 (9th Cir. 2001) (binding, blindfolding, and severely beating a detainee); *Surette v. Islamic Republic of Iran*, 231 F. Supp. 2d 260, 264 (D.D.C. 2002); *Xuncax v. Gramajo*, 886 F. Supp. 162, 169 (D. Mass. 1995); *Yousuf v. Smantar*, 2012 U.S. Dist. LEXIS 122403 at *18-21 (E.D.Va. 2012).

International and U.S. courts have similarly assessed torture—as well as CIDT claims—by viewing abuses comprehensively. *See, e.g., Conclusions and Recommendations of the Committee Against Torture - Israel*, 18th Sess., U.N. Doc. A/52/44, ¶ 257 (Sept. 10, 1997) (painful restraints, hooding, loud music and sleep deprivation for prolonged periods, threats, and extreme temperatures constitute torture, "particularly [] where such methods of interrogation are

used in combination"); *Xuncax*, 886 F. Supp. At 187.

**2. Torture Includes Both Severe Physical *and* Mental Harm**

Tellingly, CACI literally excises the element of mental harm wholly out of the definition of torture. (*See* Def Br. 14 ("The relevant definition of 'severe *mental* pain or suffering' requires servere *physical* pain or suffering.").) In fact, every definition of torture includes the infliction of severe physical *and mental* pain and suffering. *See* 18 U.S.C. § 2340(1); 18 U.S.C. § 2441(d)(1)(A); 28 U.S.C. § 1350, note sec. 3(b)(1)-(2) (1992); CAT, Art. 1 (1) (entered into force June 26,1987). The statute's definition of "severe mental pain or suffering," which includes "threatened" harm to the victims or third persons (often family members), also makes clear that physical force is not a pre-requisite for torture. *See* 18 U.S.C. § 2340(2).[15]

There is also no requirement that a torture survivor exhibit physical marks or scars of the harm inflicted, as CACI suggests. Indeed, the absence of scars can exacerbate the mental harm:

> Mock executions, sleep deprivation, the abuse of specific personal phobias, prolonged solitary confinement, etc. for the purpose of extracting information, are equally destructive as physical torture methods. […] Moreover, their suffering is very often aggravated by the lack of acknowledgement, due to the lack of scars, which leads to their accounts very often being brushed away as mere allegations.[16]

Numerous bodies have observed that some of the most long-lasting and profound forms of cruelty are those inflicted on the psychological level. *See* Nigel Rodley, The Treatment of Prisoners Under International Law (3d ed. 2009) at 97-98 (collecting cases); *Xuncax*, 886 F. Supp. at 170 (describing suffering of plaintiff who witnessed the torture or cruel treatment of his father and others and was made to believe his mother and siblings had been killed); *Prosecutor v.*

[15] Notably, neither the Convention Against Torture (Art. 1 (1)) nor the War Crimes Act in effect in 2003-2004 require that the mental harm be "prolonged."

[16] U.N. Special Rapporteur on Torture and Other Cruel Inhuman or Degrading Treatment or Punishment, Manfred Nowak, Study on the Phenomenon of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in the World, Including an Assessment of Conditions of Detention, U.N.Doc. A/HRC/13/39/Add.5, ¶ 55 (Feb. 5, 2010).

*Kunarac*, Case No. IT-96-23-A, Appeal Judgment, June 12, 2002, ¶ 150 ("sexual violence necessarily gives rise to severe pain or suffering, whether physical or mental, and in this way justifies its characterization as an act of torture").

Some of the tactics that cause prolonged mental harm include exploiting phobias such as fear of dogs, breaking sexual taboos or sexual abuse for cultural reasons (i.e., forced nudity including in front of opposite gender, threats of a sexual nature or lewd remarks, groping genitals), which is of particular concern to practicing Muslims such as Plaintiffs (*see* Ex. I (Fadel Report) at ¶¶ 24-39), and use of solitary confinement and sleep deprivation. *See* Hernán Reyes, "The Worst Scars Are in the Mind: Psychological Torture," 867 *Int'l Rev. of the Red Cross* 591, 604-611 (Sept. 2007); *see also* David Luban and Henry Shue, *Mental Torture: A Critique of Erasures in U.S. Law*, 100 Geo. L.J. 823, 824 (2012). These tactics were deployed in the majority of the cases cited in Section I(A)(1).

### 3. CACI Seeks to Redefine Torture by Advancing a Discredited Standard for "Severe" Pain or Suffering

CACI cherry-picks and isolates examples of torture in an effort to recalibrate the threshold for torture, arguing that "extreme conduct" rather than "severe" harm is required. (Def. Br. 13-15.) CACI relies primarily on *Price v. Socialist People's Libyan Arab Jamahirya*, 294 F.3d 82, 92-93 (D.C. Cir. 2002), to argue that conduct *must* be "intense, lasting or heinous" or entail "systematic beating….to sensitive parts of the body…that cause[s] extreme pain" to qualify as torture. (Def. Br. 14 (quoting Senate Report, 101-30, CACI Ex. 12).) This confuses a description with a requirement: such conduct *should* qualify as torture, but *Price* sets no such definitional floor. Rather, *Price* affirms that the torture definition derives from the TVPA, 294

F.3d at 91-92, and its touchstone is infliction of "severe" mental or physical pain or suffering.[17]

Moreover, what *Price* found lacking was not the severity of the allegations of "kicking, clubbing, and beatings," as CACI argues (Def. Br. 15), but rather "*useful details about the nature* of the kicking, clubbing, and beatings," 294 F.3d at 93, and accordingly remanded to allow plaintiffs to amend. The district court subsequently found that forcing the two plaintiffs to watch other prisoners being beaten while being threatened with similar mistreatment if they did not confess to espionage constituted mental torture. *Price v. Socialist People's Libyan Arab Jamahiriya,* 274 F. Supp. 2d 20, 25 (D.D.C. 2003). After affirmance by the D.C. Circuit, the case resulted in a judgment of nearly $18 million dollars. *Price v. Socialist People's Libyan Arab Jamahiriya,* 384 F. Supp. 2d 120, 128 (D.D.C. 2005) ("[w]hile plaintiffs' physical incarceration ended some twenty-five years ago, the effects did not.").[18] Similarly, in *Padilla v. Yoo*, the Court only asked whether it was "beyond debate" whether the conduct at issue employed against "enemy combatants" entitled a government official, John Yoo, to qualified immunity in a *Bivens* action. 678 F.3d 748, 767-68 (9th Cir. 2012). *Compare* Dkt. 615 at 10 ("in the face of clearly stated statutory definition of torture, debates within the Executive Branch

[17] CACI also selectively quotes from the 1990 Senate Report regarding ratification of the Convention Against Torture. (*See* Def. Br. 14-15; CACI Ex. 12 at 14-15.) Notably, CACI relies on text from the Reagan administration analysis that was subsequently *rejected* by the Bush administration "for setting too high a threshold of pain for an act to constitute torture." (CACI Ex. 12 at 9; *id.* at Appendix A.)

[18] CACI mischaracterizes the holdings of other cases upon which it relies, none of which held that the relevant conduct did not meet the statutory definition of torture. (Def. Br. 16-17.) For example, *Ahmed v. Keisler*, 504 F.3d 1183, 1201 (9th Cir. 2007), *Djonda v. United States AG*, 514 F.3d 1168 (11th Cir. 2008), and *Cai Luan Chen v. Ashcroft*, 381 F.3d 221 (3d Cir. 2004), each addressed a different statutory question—whether petitioners met their burden to show past persecution or likelihood of future persecution—and *Kazemzadeh v. United States AG*, 577 F.3d 1341, 1347 (11th Cir. 2009), only recited without reviewing the Immigration Judge's conclusion that the conduct at issue was not torture.

regarding interrogation techniques do not undermine the clarity or force of the prohibition").[19]

Indeed, CACI's standard for torture of "risk of death," "physical pain," "burn or disfigure" and "impair the function of any body part" (Def. Br. 19), echoes the standard in the discredited and retracted OLC memos of John Yoo and Jay Bybee[20]—not the standard found in domestic and international case-law set out above. Those opinions have been rightfully condemned as inaccurate.[21]

**4. CACI Mistates the Definition of CIDT**

CACI likewise incorrectly applies a heightened definition of CIDT. (*See* Def. Br. 21, 22.) CACI, however, relies on the *2006* War Crimes Act, which amended the 2002 War Crimes Act to add section (d), which includes the narrowing qualifiers for "serious physical pain or suffering" for CIDT. *See* 18 U.S.C. §2441 (d)(2)(D) (2006) and amendments. Accordingly, CACI's rejection of tactics including "assaults," conditions of confinement, so-called "forced hygiene," stress positions, threats, use of dogs, use of electric shock and sexual assault (Def. Br. 22-26) because they do not *inter alia* lead to the risk of death is based on a flawed premise—a

[19] CACI's assertion that "[m]uch of the alleged conduct involves practices that were expressly permitted by the executive branch" is false. (Def. Br. 14.) Neither the Senate Armed Services Committee Report (CACI Ex. 7) nor the September 2003 IROE (in place *before* the Plaintiffs arrived at Abu Ghraib) permit infliction of severe physical or mental harm, CIDT, or other war crimes on Plaintiffs or other detainees.

[20] Bybee submitted that "severe pain" must be equivalent to the pain of "death, organ failure, or serious impairment of body functions." Office of the Legal Counsel, Dep't of Justice, Memorandum of Law for Alberto R. Gonzales, Counsel to the President Re; Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340-2340A, Aug. 1, 2002 at 6.

[21] *See* Dep't of Justice, Office of Professional Responsibility, Investigation into the Office of Legal Counsel Memoranda Concerning Issues Relating to the CIA's Use of Enhanced Interrogation Techniques on Suspected Terrorists, July 29, 2009 (repudiating legitimacy of so-called OLC "Torture Memos"); Adam Liptak, *Legal Scholars Criticize Memos on Torture*, NY Times, June 25, 2004 (quoting Cass Sunstein, "It's egregiously bad . . . just short of reckless").

change in statutory law that post-dated the mistreatment Plaintiffs experienced by several years.[22]

Likewise, sexual humiliation in the form of prolonged nudity and forced masturbation is not only "undoubtedly humiliating," as CACI admits (Def. Br. 19), it clearly constitutes degrading treatment under the *law* in effect in 2003-04:

> [S]tripping detainees naked, particularly in the presence of women and taking into account cultural sensitivities, can in individual cases cause extreme psychological pressure and can amount to degrading treatment, or even torture. The same holds true for the use of dogs, especially if it is clear that an individual phobia exists. Exposure to extreme temperatures, if prolonged, can conceivably cause severe suffering. . . . [T]he *simultaneous use of these techniques is even more likely to amount to torture.*

U.N. Report on Situation of Detainees at Guantánamo Bay, 62nd Sess., U.N. Doc. E/CN.4/2006/120, ¶¶ 51-52 (Feb. 27, 2006) (emphasis added).

**5. Torture and CIDT of Detainees Are War Crimes**

CACI revives its argument that war crimes can only be committed against "innocent civilians." (Def. Br. 26.) CACI misunderstands *In re Xe Servs. Alien Tort Litig*., 665 F. Supp. 2d 569, 582 (E.D. Va. 2009), which involved decisions regarding who could be targeted for attack. Armies may lawfully target and kill combatants, and civilians may lose certain protections when they "directly participate in hostilities."[23] But all detainees, whether civilians or soldiers rendered *hors de combat,* are entitled to protection from the war crimes including torture and CIDT. *See, e.g*., *Hamdan v. Rumsfeld*, 548 U.S. 557, 629-30 (2006); *Doe v. Drummond Co., Inc.*, 2010 WL 9450019, at *25 n.16 (N.D. Ala. Apr. 30, 2010) ("no authority

[22] In addition to differing in "the degrees of mistreatment the victims suffers," *Al-Quraishi v. Nakhla*, 728 F. Supp. 2d 702, 759 (D. Md. 2010), CIDT is distinguished from torture in that it does not require harm be *for the purpose* of obtaining information, inflicting punishment, intimiation or coersion of the victim or a third person. *See* 28 U.S.C. § 1350, note, sec. 3(b)(1); 18 U.S.C. § 2441 (d)(1)(A); CAT, Art. 1 (1). *See also El-Masri v. Former Yugoslav Republic of Macedonia*, E.Ct.H.R, Judgment, Dec. 13, 2002, ¶ 197.

[23] *See* Interpretative Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law, Nils Melzer, ICRC, May 2009.

for the contention that . . . civilian status is an element of a war crimes claim").[24]

### B. The Evidence Shows Each Plaintiff Suffered Torture, CIDT and War Crimes or, at a Minimum, a Reasonable Juror Could so Find.

Plaintiffs suffered similar forms of mistreatment to each other and numerous other victims of atrocities at Abu Ghraib, as part of a systemic, intentional pattern to abuse and humiliate detainees for purposes of interrogation. Courts must view such treatment holistically and cumulatively, not tactic-by-tactic. The question is not whether sustained exposure to a freezing shower on its own constitutes torture (though it likely does, given the serious risk of hypothermia or death), but rather what effect this had in combination with sustained nudity in freezing temperatures, humiliating sexual degradations, repeated beatings, terrifying intimidation by humans and dogs, an emotional state of utter helplesness,[25] and threats to Plaintiffs and their families. Notably, CACI does not question the credibility of Plaintiffs' accounts of mistreatment. Accordingly, once CACI's misdirection about the law is cleared away, it becomes plain that a reasonable juror could view this mistreatment—especially given the severe physical and mental harm Plaintiffs continue to suffer—constitutes torture or, at a minimum, CIDT. The court therefore has jurisdiction to hear the merits of the case. *See Al Shimari IV*, 840 F.3d at 154 (when, as here, jurisdictional facts are inextricably interwined with the merits, a court should proceed to the merits of the case).

Mr. Al Ejaili was subjected to physical and emotional abuse and cultural and religious degradation for approximately six weeks. He endured extreme sleep deprivation that resulted in

[24] Plaintiffs were "civilian internees," not "enemy combatants," *Al Shimari II*, 758 F.3d at 521 n. 2.

[25] "It is the powerlessness of the victim in a given situation that makes him or her particularly vulnerable to any type of physical or mental pressure." Report of the Special Rapporteur on the Question of Torture, Manfred Nowak, *Civil and Political Rights, Including the Questions of Torture and Detention,* U.N.Doc. E.CN.4/2006/6, ¶ 39 (Dec. 23, 2005).

his sleeping only one or two hours a night. He was kept naked for most of the time he was detained, in cold winter temperatures, and subjected to multiple instances of public nudity. He was denied water and food for days at a time, subjected to extreme temperatures, sensory deprivation, and solitary confinement, and verbally taunted and intimidated (including while naked). Over 10-12 interrogations, he was repeatedly punched, slapped and kicked, including on his stomach and head. He was intimidated by unmuzzled dogs which left him "terrified," placed in stress positions for prolonged periods and systematically beaten, including with a metal pipe. This treatment led Mr. Al Ejaili to vomit bile and lose consciousness in separate instances. As a result, he suffers from severe PTSD along with other physical and mental side effects.

Mr. Al Zuba'e was stripped naked in the presence of a woman, ordered to masturbate, and had his penis repeatedly groped and photographed by someone in civilian clothes. He was threatened with sexual violence, beaten while hooded, taunted for smelling bad then forced to shower, while a woman watched, in freezing water for so long that he collapsed. He was dragged naked, beaten on his genitals and forced to crawl on his stomach while being beaten, causing him to bleed from his chest. An unmuzzled dog was unleashed on him and bit his hands and legs. He was repeatedly left naked and contorted in painful stress positions for long periods of time by guards, despite his pleas, until he defecated and urinated on himself. He was subjected to freezing temperatures for days while naked, and guards threatened to bring his family to Abu Ghraib if he didn't give up information, of which he had none. He was diagnosed with moderately severe PTSD and a range of associated psychological impairments. He suffers headaches and joint pain and bears scars on his body from beatings, bites and shackling.

Mr. Al Shimari was forced to sit on sharp stones, causing numbing, bleeding and extreme pain (and leaving lasting scars), punched and stepped on by guards, forced to maintain painful

stress positions for hours, beaten with rifles and batons, and beaten on his genitals regularly before and after interrogations. Guards choked him by pulling the string on his hood, including during his prayer, threatened to detain his wife, and electrocuted his arms with wires, leaving visible scars years later. He was forcibly shaved, causing anguish and pain he likens to losing his house; forced, by a female guard pointing a gun, to shower in freezing temperatures until the bar of soap was used up; and threatened with sexual violence. Demonstrating that this was part of a premeditated system of cruelty and not a routine act of "hygiene," guards left him with clothes soaked in freezing water. He has been diagnosed with PTSD and major depressive disorder resulting from his experiences at Abu Ghraib, and bears scars consistent with electrical shocks and cuts from rocks, missing teeth consistent with face punching, and symptoms of moderately severe post-concussive syndrome attributable to multiple beatings on the head.

Under U.S. and international law, all of these techniques, on their own and especially in combination, can constitute torture, including: "[e]lectric shock[;] [i]nfliction of pain through chemicals or bondage (other than legitimate use of restraints to prevent escape)[;] [f]orcing an individual to stand, sit, or kneel in abnormal positions for prolonged periods of time[;] [f]ood deprivation[;] [a]ny form of beating" and "[m]ock executions[;] [a]bnormal sleep deprivations[;] [c]hemically induced psychosis." U.S. DEP'T OF ARMY, FIELD MANUAL 34-52, INTELLIGENCE INTERROGATION (Sept. 28, 1992) at 1-8. The UN Committee Against Torture, likewise has found that the following are predicates for torture: "(1) restraining in very painful conditions, (2) hooding under special conditions, (3) sounding of loud music for prolonged periods, (4) sleep deprivation for prolonged periods, (5) threats, including death threats, (6) violent shaking, and (7) using cold air to chill." *Conclusions and Recommendations of the Committee Against Torture – Israel*, 18th Sess., U.N. Doc. A/52/44, ¶ 257 (1997).

As the renowned expert on interrogation and torture Darius Rejali opined in this case, restraint techniques, positional techniques, exhaustion exercises, sleep deprivation and extreme temperatures can cause intense pain and have been widely characterized, including by the U.S. government, as torture. (Ex. N (Rejali Report) at 10-11; *see id.* at 8, 10 ("Long-term restraint in virtually any position will produce screaming muscles" and "forced standing and other normal positions can be made into powerful vehicles for delivering pain to the body"); *id* at 16 ("Depriving someone of sleep has well known physical effects, *rending other pains* more excrutiating") (emphasis added).) Also, it is well known that hypothermia can set in through prolonged—especially *naked* exposure—to temperatures even above 40 degrees (present then at Abu Ghraib) and the risk would have been substantially exacerbated by the sustained, freezing showers two Plaintiffs endured—a condition that can lead to heart failure or death.[26] Additionally, considering, as the Court must, the subjective vulnerabilities of these plaintiffs—including the intense cultural sensitivities to nudity—constant sexual humiliation and degradation of Plaintiffs (and threats to family) undoubtedly exacerbated their mental anguish. As Dr. Fadel established, "a Muslim would ordinarily feel deep shame, if not outright humiliation, at being forced to be naked in front of other members of the same sex, to say nothing of being naked in front of members of the different sex." (Ex. I (Fadel Report) ¶ 38;

[26] *Natural Disasters and Severe Weather: Hypothermia*, Ctrs. for Disease Control & Prevention, https://www.cdc.gov/disasters/winter/staysafe/hypothermia.html (last visited Aug. 17, 2017). Indeed, a detainee in CIA custody, Gul Rahman, died from hypothermia after being shackled, half-naked in 36-degree temperatures and following subjection to freezing showers for up to 20 minutes. *See* Jane Mayer, *Who Killed Gul Rahman?*, New Yorker, Mar. 31, 2010. Notably, the family of Mr. Rahman recently settled (after surviving summary judgment) a similar aiding and abetting case against two private government contractors who, Plaintiffs allege, developed the CIA torture program and were responsible for a plaintiff's torture and death directly caused by officials in Afghanistan. *See* Sheri Fink, *Settlement Reached in C.I.A. Torture Case*, NY Times, Aug. 17, 2017.

*accord id.* ¶¶ 24, 26,39.)[27]

U.S. courts have held that individuals can establish a claim for torture after being subjected to only a subset of the types of abuse that Plaintiffs endured over time at Abu Ghraib. In *Al-Saher v. INS*, the Ninth Circuit found that the plaintiff's treatment amounted to torture after he spent approximately five weeks in detention where he was subjected to repeated beatings while his hands were tied behind his back and he was blindfolded. 268 F.3d at 1145, 1147. The Eleventh Circuit has similarly found that the severe beating of a naked and bound detainee is sufficient to constitute torture. *See Abebe-Jira*, 72 F.3d at 845-46. There is a similar understanding at the international level. *See Prosecutor v. Krojelac*, No. IT-97-25-I, ¶¶5.17-5.26 (ICTY Indictment, June 17, 1997) (eight instances of physical beatings during interrogations); *Aydin v. Turkey*, No. 57/1996/676/866, ¶ 84 (E.Ct.H.R. Judgment of Sept. 25, 1997) (detention over three days, blindfolded, disorientated "in a constant state of physical pain and mental anguish" caused by beatings and "apprehension of what would happen next," and being "paraded naked in humiliating circumstances").

Sexual violence, including forced nudity, can constitute torture, *Prosecutor v. Furundžija*, No. IT-95-17/1-T, Trial Chamber, Dec. 10, 1998, and the prolonged nudity endured here would likely cross that threshold. Similarly, the types of "deprivation of basic human necessities" that all Plaintiffs endured, naked, cold and sleep deprived as they were, can constitute torture. *See Daliberti v. Republic of Iraq*, 97 F. Supp. 2d 38, 45 (D.D.C. 2000) (one plaintiff was confined for eleven days without water, a toilet, or a bed and another was confined for four days in the dark in similar conditions and threatened with electrocution).

[27] CACI is also wrong to minimize the intense torment Mr. Al Shimari testified he endured from his forced shaving. *See* Trial of Tanaka Chuici, 11 LRTWC 62 (Australian Military Court, Rabaul, July 12, 1946), excerpted in 60 International Law Studies, Documents on Prisoners of War 344 (1979) (maltreatment of Sikh prisoners exacerbated by their forced shaving).

When the correct definition of CIDT is applied, *see supra* I(A)(4), it is plain that Plaintiffs endured it. The constellation of degradation and cruelty they suffered included intentional exploitation of cultural and religious triggers including: forced nudity, masturbation in front of women, anal probes, attacks by unmuzzled dogs, and threats to family. *See* , *e.g.*, *Mehinovic v. Vuckovic*, 198 F. Supp. 2d 1322, 1348-49 (N.D. Ga. 2002) (defendant had ridden certain plaintiffs like a horse, shouted anti-Muslim epithets while beating them, and forced them to lick their own blood—abuse often conducted "in front of others, exacerbating the humiliation"). *See also* Ex. A at 102:10-11) (we "became like animals in a zoo").[28]

### C. Because Defendant's Conduct Was Unlawful, There Is No Political Question.

CACI spends considerable time attempting to relitigate issues it surfaced—and lost—in the Fourth Circuit. (Def. Br. 3-12.) First, CACI argues that *Al Shimari IV*, in opining on the standards for PQD, has somehow *also* changed the extant law of conspiracy liability. CACI asserts that part of the lawfulness inquiry under the PQD framework is to ask whether there is evidence that "*CACI PT personnel*" are the ones who specifically injured Plaintiffs. (*Id.* at 3 (emphasis in original).) *Al Shimari IV* says no such thing. When *Al Shimari IV* speaks of identifying "*conduct by CACI employees* that was unlawful" (*Id.* at 5 (quoting *Al Shimari IV*, 840 F.3d at 151) (emphasis in original)), the court was necessarily referencing the theory of Plaintiffs' case—the alleged unlawful conspiracy to engage in mistreatment of detainees. *Al Shimari IV* imposed no novel requirement that CACI's liability turns only upon a showing that

[28] It cannot be reasonably disputed that it was cruel and degrading to force Mr. Al Ejali to stand in his own vomit overnight, while hooded and shackled, then clean it with his jumpsuit and be offered only women's underwear to clothe himself, and to ignore Mr. Al Zuba'e's pleas to be released from a painful stress position in which he was shackled overnight, while naked, so he would not be forced to urinate and defecate on himself. *See Surette*, 231 F. Supp. 2d at 263 ("dehumanizing and humiliating experience" when plaintiff was forced to defecate on himself).

CACI employees themselves directly tortured Plaintiffs—a legal principle CACI understands, as it has previously argued in a motion to this court. *See* Dkt. 222 at 11; *see also infra* Section II(B)(3).

Second, CACI retreads the argument that the unlawful conduct alleged here was authorized or ordered by the military. (Def. Br. 5-12.) As a factual matter, this has been intensely contested by the parties.[29] But CACI's arguments fail for a more fundamental reason of law: as *Al Shimari IV* makes plain, the military cannot lawfully authorize CACI to engage in the violations of non-discretionary legal norms alleged here. *Al Shimari IV*, 840 F.3d at 159. As such, PQD does not apply and the Court must undertake its duty to assess CACI's liability.

## II. PLAINTIFFS' THOROUGH ALLEGATIONS STATE A PLAUSIBLE CLAIM THAT CACI ENGAGED IN A CONSPIRACY OR AIDED AND ABETTED TORTURE, CIDT AND WAR CRIMES.

This is at least CACI's third attempt to dismiss Plaintiffs' conspiracy claims, and it raises no new arguments. In this attempt, as in prior ones, CACI repeatedly demands proof of a phantom requirement: that CACI personnel directly abused these Plaintiffs. (*See* Def. Br. 1, 27, 32.) On that incorrect premise, CACI argues that any abuses Plaintiffs endured were only the result of "parallel conduct" of supposedly disconnected MPs, of the kind deemed insufficient in *Twombly*. (Def. Br. 31.) However, contradicting the position they take here, CACI has previously argued (in briefing to stay discovery) the demonstrably correct proposition of law:

> [a] fundamental feature of conspiracy claims is that a party to a conspiracy can be held liable for actions of co-conspirators in furtherance of the conspiracy, *even if the defendant had no involvement with the actions that injured the plaintiff*.

Dkt. 222 at 11 (*citing Tire Eng'g & Distribution, LLC v. Shandong Linglong Rubber Co.*, 682

[29] Plaintiffs have presented ample evidence, including testimony from MPs (co-conspirators Graner and Frederick) and military investigative reports, showing that there was (i) a command vacuum at the Hard Site at Abu Ghraib (ii) that permitted more senior CACI employees to assert positions of authority and (iii) caused CACI employees to direct MPs to abuse detainees in precisely the ways Plaintiffs endured. *See* Dkt. 527, 528.

F.3d 292, 313 n.10 (4th Cir. 2012)) (emphasis added). Once Plaintiffs allege, as they have, an unlawful agreement between CACI employees and MPs to mistreat detainees, under hornbook conspiracy law, CACI is responsible for the foreseeable consequences—here the mistreatment of Plaintiffs—of the unlawful agreement.[30]

### A. CACI's Prior Attempts to Dismiss Plaintiffs' Conspiracy Claims

In 2009, this Court denied CACI's motion to dismiss the conspiracy claims in the First Amended Complaint ("FAC"), finding that, "the use of code words makes a conspiracy plausible because the personnel would have to reach a common understanding of the code in order to effectively respond to it," Dkt. 94 at 66-67, and that the "possib[ility] that the personnel at Abu Ghraib acted individually in pursuit of some perverse pleasure" was too remote to undermine the plausibility of Plaintiffs' claims, *id*. at 68. It held that the FAC sufficiently alleged direct involvement by CACI employees in the conspiracy, *id.* at 68-69, and "ma[de] a sufficient showing" of CACI's corporate liability, *id.* at 64. Plaintiffs filed their Second Amended Complaint ("SAC") on December 26, 2012, adding additional allegations regarding the conspiracy to those already deemed sufficient in 2009. *See* SAC ¶¶ 64-69, 71-77, 80-86, 91-94, 102-03. Nevertheless, on March 8, 2013, the Court granted CACI's motion to dismiss Plaintiffs' conspiracy claims without prejudice. Dkt. 215.

On March 28, 2013, Plaintiffs filed their TAC with detailed factual allegations supporting the same two theories of CACI's liability for a conspiracy. First, supporting CACI's *respondeat*

[30] In two sentences, with no legal support, CACI argues that Plaintiffs' direct claims should be dismissed because the "TAC does not allege that a CACI PT employee directly injured Plaintiffs." (Def. Br. 26.) Although the gravamen of Plaintiffs' complaint is conspiracy and aiding and abetting, the TAC does include allegations of direct contact between CACI and Plaintiffs. *See* TAC ¶ 124 ([redacted]); ¶¶ 141- 142 (CACI interrogator Johnson saw Al Ejaili naked in his cell and appeared to direct the military police to abuse Al Ejaili); ¶ 133 ([redacted]).

*superior* liability, the TAC includes allegations about: (i) military investigations implicating CACI employees in torture and abuse at Abu Ghraib, *see* TAC ¶¶ 81-84, 87-88; (ii) testimony from military co-conspirators about CACI employees ordering MPs to "soften up" detainees prior to interrogations, *see* TAC ¶¶ 85, 98-101, 109-123, 126-127; (iii) CACI personnel occupying positions of actual or perceived authority at Abu Ghraib, *see* TAC ¶¶ 16-18, 96-115, 138; and (iv) CACI employees obscuring their identities and using code words to describe well-understood types of abuse, *see* TAC ¶¶ 91-95, 117-123, 129. Second, supporting CACI's direct liability, the TAC alleges that CACI: (i) willfully ignored reports of its employees' role in abuse, *see* TAC ¶¶ 148-152; (ii) failed to discipline and instead promoted its employees involved in the conspiracy, *see* TAC ¶¶ 146-155; and (iii) covered up the conspiracy by concealing the central role its employees played, *see* TAC ¶¶ 171-183. The TAC also details how Plaintiffs were harmed by the conspiracy, including connections between CACI employees' participation and the harms Plaintiffs suffered. *See* TAC ¶¶ 23, 110, 116, 119-125, 131-34, 138-142.

CACI's motion to dismiss the conspiracy claims in the TAC (but not the aiding and abetting claims) was mooted by the Court's dismissal of the case under *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013). *See* Dkt. 460.

**B. The TAC States Valid Claims of CACI's Conspiracy Liability**

On a 12(b)(6) motion, the Court "must take the complaints' factual allegations as true and draw all reasonable inferences in plaintiffs' favor." *Robertson v. Sea Pines Real Estate Cos.*, 679 F.3d 278, 284 (4th Cir. 2012). Courts must read a complaint as a whole to decide whether a "claim has facial plausibility," *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009))—that is, a plaintiff need only "plead[] factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Robertson*, 670 F.3d at 287.

The elements of conspiracy liability under the ATS are: (1) two or more persons agreed to commit a wrongful act; (2) defendant joined the conspiracy knowing of at least one goal of the conspiracy and intending to help accomplish it; and (3) one or more violations were committed by a member of the conspiracy and in furtherance of the conspiracy. *Cabello v. Fernandez-Larios*, 402 F.3d 1148, 1158 (11th Cir. 2005). The elements of a common law conspiracy are similar. *See Tysons Toyota v. Globe Life Ins. Co.*, Nos. 93-1359, 93-1443, 93-1444, 1994 U.S. App. LEXIS 36692, at *14 (4th Cir. Dec. 29, 1994).

**1. The TAC Adequately Alleges an Unlawful Agreement**

"A conspiracy claim does not require an express agreement; proof of a tacit understanding suffices." *Tysons*, 1994 U.S. App. LEXIS 36692, at *15. Where the complaint "points to complementary and interlocking actions by the defendants which together suggest a conspiratorial scheme," the allegations "support an inference that the conspiracy existed." *Id*.

The TAC alleges facts to support an inference of an unwritten "conspiratorial agreement" to torture and abuse Plaintiffs. In the confined universe of Tier 1A of the Hard Site, more senior CACI interrogators instructed low level MPs guarding detainees to "'soften up' detainees at the Hard Site for interrogation" by creating "extreme and abusive" and "torturous conditions . . . to which Plaintiffs were subject." TAC ¶¶ 12, 18; *see* TAC ¶¶ 85, 98-101, 109-123, 126-127. Two CACI interrogators "had actually ordered" co-conspirator Frederick "to set the conditions for abusing detainees," TAC ¶ 85, and ordered other lower-level soldiers to torture and abuse detainees, *see* TAC ¶¶ 100, 111. Multiple military investigative reports confirmed that CACI employees ordered or worked alongside court martialed MPs to abuse detainees. TAC ¶¶ 81-84, 87-88. CACI interrogators "used code words or terms such as 'special treatment,' 'soften up,' 'doggie dance,' and related code-words to signal to their military co-conspirators to employ

torture and other abusive techniques." TAC ¶ 117. CACI interrogators and soldiers understood those terms equated to serious physical abuse and mental harm in an attempt to make detainees more responsive to questioning. TAC ¶ 118. The TAC sums up the unlawful agreement as follows:

> Because the abuse of Plaintiffs by guards at the Hard Site was unquestionably perpetrated by [MPs] under the charge and control of Frederick, and because Frederick testified that he took direct orders to engage in such behavior (and to order or tolerate his subordinates in doing so) towards those detainees at the Hard Site from the CACI PT interrogators, those CACI PT employees filled a necessary role in the accomplishment of the cruel and inhuman conduct that occurred at Abu Ghraib and specifically the serious harms visited on Plaintiffs.

TAC ¶ 22.

The TAC specifically names the conspirators, TAC ¶ 78, and alleges that the agreement was made "no later than October 2003, when the named conspirators were stationed at the Hard Site and when acts of 'sadistic, blatant, and wanton criminal' abuse . . . were found to have occurred," *id.*, and ended "in approximately February 2004." TAC ¶ 79.

These precise and detailed allegations of conspiracy stand in sharp contrast to the vague and conclusory allegations at issue in the cases CACI relies upon. (*See* Def. Br. 27-32.)

**2. The TAC Adequately Alleges CACI's Intentional Participation in the Conspiracy**

The TAC need only state a plausible claim of conspiracy, which is not akin to a probability requirement. *See S. Appalachian Mt. Stewards v. Penn Va. Operating Co. LLC*, No. 2:12CV00020, 2013 U.S. Dist. LEXIS 457 at *5 (W.D. Va. Jan. 3, 2013). At the 12(b)(6) stage, the Court may not choose the more likely among competing inferences. *Iqbal*, 556 U.S. at 678.

Plaintiffs' conspiracy allegations are more than plausible. While the atrocities committed at Abu Ghraib may have been unthinkable before the publication of photographs in April 2004 documenting the abuse, it is now not only plausible but historical record, that a small group of

ill-trained and largely unsupervised individuals in a closed prison environment could collectively decide that what was wanted of them was to extract intelligence by whatever means necessary. The TAC alleges precisely that: in the existing command vacuum, CACI interrogators exploited and encouraged the ill-trained and largely unsupervised MPs to "soften up"—a code word for abuse—detainees, so they would be vulnerable to CACI's interrogations. TAC ¶ 117.

CACI asserts that because participation in such a conspiracy is unlawful and violates its contract with the U.S. government, it could have "no incentive whatsoever" to do so. (Def. Br. 33.)[31] On the contrary, CACI—through and along with its employees—did have an incentive to participate in such a conspiracy: to "extract more information from detainees to please their client" so that CACI could "secure more profitable contracts" from its "single most important customer," the United States government. TAC ¶156; *see* TAC ¶¶ 10, 157, 183, 186. Profit motive is as plausible an explanation for corporate behavior as any imaginable, even where the conduct alleged is unlawful or prohibited. Even if CACI had no *corporate* motive for misconduct, it would still have *respondeat superior* liability for its employees' actions.

CACI argues that the TAC must disprove alternative theories and allege a motive that "tends to exclude the possibility of independent conduct." (Def. Br. 29.)[32] At the 12(b)(6) stage, however, Plaintiffs need not disprove every conceivable alternative. They need only allege enough facts to support the plausibility of an unlawful agreement. *See Starr v. Sony BMG Music*

[31] This position is in considerable tension with CACI's claim that it was only following lawful orders and protocols set by the U.S. military.

[32] CACI cites *Wag More Dogs, LLC v. Cozart*, 680 F.3d 359, 365 (4th Cir. 2012), for this proposition (Def. Br. 29), but that case—affirming a decision of this Court concerning a First Amendment challenge to a sign ordinance—has nothing whatsoever to do with the pleading standards for a conspiracy claim. In *Loren Data*, the complaint affirmatively *incorporated* a letter from the defendant that set forth an explanation for defendant's conduct that was more plausible than participation in a conspiracy. *Loren Data Corp. v. GXS, Inc.*, No. 11-2062, 2012 U.S. App. LEXIS 26471, at *13-15 (4th Cir. Dec. 26, 2012).

*Entm't*, 592 F.3d 314, 325 (2d Cir. 2010) (*quoting Twombly*, at 554, 556). Unlike the facts in *Twombly* and other antitrust cases, where parallel behavior among independent actors could be expected, the conduct here is *only plausible* if there was an understanding among the participants to encourage, condone, and not report the abuse in Abu Ghraib. *See* TAC ¶ 21. If CACI interrogators and MPs acted independently, they each would have taken on the unreasonable risk "that his or her conduct would be reported to higher authority and punished." *Id*. The possibility that the extensive and well-documented abuses at Abu Ghraib were not systematic, but rather a collection of coincidental acts by independent actors, is itself the height of implausibility.

### 3. The TAC Adequately Alleges that the Conspiracy Harmed Plaintiffs

As CACI has previously conceded in this case, there is no requirement that CACI personnel directly carry out the abuses on Plaintiffs. *See* Dkt. 222 at 11 (citing Fourth Circuit Law). A defendant may be held liable for the substantive offenses that his *co-conspirators* committed in furtherance of a conspiracy when their commission is reasonably foreseeable. *See United States v. Oliver*, No. 12-4047, No. 12-4052, 2013 U.S. App. LEXIS 4741, at *9 (4th Cir. Mar. 8, 2013); *Brown v. Gilner*, No. 1:10-cv-00980 (AJT/IDD), 2012 U.S. Dist. LEXIS 138662, *24 (E.D. Va. Sept. 25, 2012) (applying Virginia law). Plaintiffs need only sufficiently allege CACI participated with knowledge of the conspiracy to be liable for any conspirator's "overt act that caused injury, so long as the purpose of the act was to advance the overall object of the conspiracy." *Halberstam v. Welch*, 705 F.2d 472, 487 (D.C. Cir. 1983).

As the object of this conspiracy was to torture and mistreat detainees at Abu Ghraib to "soften" them up for interrogation, harm to Plaintiffs, as part of that defined group, was reasonably foreseeable. *See In re Chiquita Brands Int'l, Inc. Alien Tort Statute & S'holder Derivative Litig.*, 792 F. Supp. 2d 1301, 1344-45 (S.D. Fla. 2011) (plaintiffs only needed to

"allege that Chiquita intended for the AUC to torture and kill civilians in Colombia's banana growing regions, which is the conduct that allegedly harmed or killed Plaintiffs' relatives"); *Ungar v. Islamic Republic of Iran*, 211 F. Supp. 2d 91, 100 (D.D.C. 2002). And in any event, the TAC also directly connects CACI interrogators to the harms suffered by Plaintiffs as a result of the conspiracy. *See* TAC ¶¶ 85, 116, 119-126, 131-135, 141- 142.

CACI asserts that Plaintiffs' allegations "would have to assume . . . that every act of mistreatment . . . was directed by a CACI PT participant." (*See* Def. Br. 31.) In addition to ignoring the fact that the very conduct that CACI instructed be carried out on all detainees was done to these Plaintiffs, CACI ignores the logical inference here: these "parallel" conspiracies could not be pulled off unless there was at least tacit agreement that the interrogators and MPs would not report to the authorities about each others' conspiracies. Such a tacit agreement is evidence of a larger conspiracy that resulted in the abuse of detainees, including the Plaintiffs.

**4. The TAC Adequately Alleges CACI's Corporate Liability**

In its 2009 decision, this Court held that "[u]nder the theory of respondeat superior, an employer may be held liable in tort for an employee's tortious acts committed while doing his employer's business and acting within the scope of the employment when the tortious acts were committed." Dkt. 94 at 63 (*citing Plummer v. Ctr. Psychiatrists, Ltd.*, 476 S.E.2d 172, 174 (Va. 1996)). This is true "even for an employee's unauthorized use of force if 'such use was foreseeable in view of the employee's duties.'" (*Id*. (*quoting Martin v. Cavalier Hotel Corp.*, 48 F.3d 1343, 1351 (4th Cir. 1995)).) The Court also found that "it was foreseeable that Defendants' employees might engage in wrongful tortious behavior while conducting the interrogations because interrogations are naturally adversarial activities." (*Id*. at 64-65.) The Court reaffirmed these statements of the law when it dismissed without prejudice the conspiracy

claims in the SAC. (*See* March 8, 2013 Hr'g Tr. 32:5-8, 34:17-24 (affirming framework for *respondeat superior* liability).) It is therefore the law of the case.

The allegations in the TAC satisfy this *respondeat superior* standard. Plaintiffs have alleged an employer-employee relationship between CACI and its employees involved in the conspiracy, *see* TAC ¶ 78, and explained how individual CACI employees' participation in the conspiracy fell within the scope of their employment even if their conduct supposedly violated CACI's formal policies, *see* TAC ¶¶ 15, 156. As alleged, CACI interrogators could not have reached an agreement with their military co-conspirators and committed acts in furtherance of the conspiracy "were it not for [their] employment" with CACI and the authority that this position carried in the prison. *Heckenlaible v. Va. Peninsula Reg'l Jail Auth.*, 491 F. Supp. 2d 544, 552 (E.D. Va. 2007).

This conduct was foreseeable in view of CACI employees' duties as interrogators, and thus, CACI may be held liable for their actions. *See* Dkt. 94 at 63. *See also Commercial Business Sys. v. Bellsouth Servs.*, 453 S.E.2d 261, 265-66 (Va. 1995). Abuse of detainees in high-stress environments by interrogators under intense pressure to produce actionable intelligence is plausible and foreseeable. *See* TAC ¶¶ 19, 144-145. As explained in the Expert Report of Dr. Philip Zimbardo, who conducted the famous Stanford Prison Experiment, "[i]ndividuals involved in detention and interrogation operations in high-stress environments without actual mission-specific training or fully operational oversight are likely to escalate abuse of prisoners and even torture them without regard for human rights regulations governing such situations." TAC ¶ 145; Ex. O (Zimbardo Report). *See Heckenlaible*, 491 F. Supp. 2d at 552 (corporate liability where "[c]ircumstances related to [its employees'] employment facilitated" the misconduct).

Corporate defendants may be held liable for their employees' participation in a conspiracy. *See Commercial Business Sys.*, 453 S.E.2d 261 (recognizing *respondeat superior* liability for employee's participation in a conspiracy); *Stith v. Thorne*, 488 F. Supp. 2d 534 (E.D. Va. 2007); *United States v. Stevens*, 909 F.2d 431, 433 (11th Cir. 1990) ("liability for a conspiracy may be imputed to the corporation itself on a *respondeat superior* theory"). *Oki Semiconductor Co. v. Wells Fargo Bank, N.A.*, 298 F.3d 768 (9th Cir. 2002), and *Day v. DB Capital Group, LLC*, No. DKC 10-1658, 2011 U.S. Dist. LEXIS 25303 (D. Md. Mar. 11, 2011), cited by CACI (Def. Br. 33-34), confirm that a corporation can be held liable for its employee's participation in a conspiracy on a theory of *respondeat superior* liability. *Oki Semiconductor* explains the reasons for this rule: to "encourage[] employers to monitor closely the activities of their employees to ensure that those employees are not engaged in racketeering" and to "serve[] to compensate the victims of racketeering activity." 298 F.3d at 776. While the court applied an exception to the *respondeat superior* rule set forth in *Oki Semiconductor* and *Day* for self-dealing employees who participated in conspiracies outside the scope of their employment and not to benefit their employers, Plaintiffs here allege that CACI employees entered into the conspiracy in their role as interrogators, a "naturally adversarial activit[y]," *see* Dkt. 94 at 65, to serve CACI's interest in obtaining intelligence, *see* TAC ¶ 102,118, 156.[33]

In addition to *respondeat superior* liability, the TAC alleges direct participation in the conspiracy by CACI's management based on the corporation's knowledge and acquiescence in abuse by employees. *See* TAC ¶¶ 143-153, 176. CACI turned a blind eye to reports of abuse,

[33] There is no support for CACI's assertion of a novel requirement that Plaintiffs "identify[] any person with authority" to enter into a conspiracy on CACI's behalf. *Hill v. Lockheed Martin Logistics Mgmt.* is inapposite because it concerns actions brought under certain anti-discrimination statutes that intentionally "place some limits on the acts of employees for which employers . . . are to be held responsible.'" 354 F.3d 277, 287 (4th Cir. 2004).

TAC ¶¶ 163-167, and actively tried to cover up the conspiracy and the role of its employees, including by destroying or failing to preserve evidence, failing to report torture and abuse, and falsely proclaiming that none of its employees was involved in the abuses at Abu Ghraib despite evidence to the contrary, TAC ¶¶ 171-182. *See In re American Honda Motor Co.*, 958 F. Supp. 1045, 1052-54 (D. Md. 1997) (contribution to a conspiracy may be made in the form of efforts to "conceal that which has occurred").

### C. CACI's Motion to Dismiss the Aiding and Abetting Claims Also Fails

In 2013, when CACI filed its 12(b)(6) motion to dismiss the conspiracy claims in the TAC, it elected not to move to dismiss the aiding and abetting claims. CACI thus is barred from raising a 12(b)(6) motion to dismiss those claims. *See* Fed. R. Civ. P. 12(g)(2); *Smith v. Integral Consulting Serv.*, No. 14-cv-3094, 2015 U.S. Dist. LEXIS 102376, at *2 (D. Md. July 27, 2015) (barring Defendant from raising 12(b)(6) defense "because Defendant failed to raise this defense in its first Rule 12 motion").

Even if the Court permits CACI to proceed, CACI's motion to dismiss Plaintiffs' aiding and abetting claims fails for the same reasons that its motion to dismiss the conspiracy claims fails. The same, foregoing allegations support an aiding and abetting claim: CACI's directions were *practical assistance* to the MPs who engaged in torture that had a *substantial effect* on their conduct, and were *knowingly* given with the *purpose of inducing and facilitating* the MPs' illegal abuse of detainees in the hopes of eliciting information in their interrogations. *See Aziz v. Alcolac*, 658 F.3d 388, 396 (4th Cir. 2011); Restatement (Second) of Torts § 876 (cited in Def. Br. 34). This is a far cry from the attenuated link between the manufacturer and the perpetrators of gas attacks in Iraq that *Aziz* found insufficient to state a claim. *Aziz*, 658 F.3d at 396.

## III. CACI'S PREEMPTION DEFENSE IS UNAVAILING.

### A. Rule 12(g) Waiver

CACI has already unsuccessfully attempted to raise a preemption defense against Plaintiffs' state law claims before this Court, *Al Shimari v. CACI Premier Tech., Inc.*, 657 F. Supp. 2d 700, 720-25 (E.D. Va. 2009), *appeal dismissed for lack of jurisdiction*, 679 F.3d 205 (4th Cir. 2012), and the outcome should be no different here.[34] As an initial matter, CACI has waived its right to raise its preemption defense in this pre-answer motion because it elected not to raise the preemption defense in its prior pre-answer motion directed to the TAC. Dkt. 313.[35] *See* Fed. R. Civ. P. 12(g)(2); *Smith*, 2015 U.S. Dist. LEXIS 102376, at *2; *In re Apple iPhone Antitrust Litig.*, 846 F.3d 313, 318 (9th Cir. 2017) ("[A] defendant who fails to assert a failure-to-state-a-claim defense in a pre-answer Rule 12 motion cannot assert that defense in a later pre-answer motion under Rule 12(b)(6).").

### B. Plaintiffs' Federal ATS Claims Cannot Be "Preempted"

Even if the Court were to entertain CACI's preemption defense on the present motion, it is inapplicable to the federal claims at issue in this case and should be denied.

#### 1. Preemption Only Applies to State Law Claims

It is textbook law that federal preemption, a doctrine that emerges from the Supremacy Clause and its articulation of superseding federal interests, only operates to displace *state* laws. *See, e.g., Norfolk Southern Ry Co. v. City of Alexandria*, 608 F.3d 150, 156 (4th Cir. 2010) ("[T]he doctrine of preemption—rooted in the Constitution's Supremacy Clause—permits

[34] Plaintiffs dismissed their state law claims with prejudice in January 2017. Dkt 575.
[35] CACI added a footnote that it was a "ready to brief" the issue of preemption, but chose not to brief it and so its opportunity to raise this issue in a pre-answer motion has now passed. *See, e.g., Tate v. Smith*, No. 1:14-cv-125, 2016 U.S. Dist. LEXIS 112102, at *11-*22 (M.D.N.C. Aug. 23, 2016) (defendant's footnote attempting to reserve the right to bring a defense held insufficient to preserve the defense).

Congress to expressly displace state or local law in any given field."). It is conceptually impossible in our constitutional system for one federal law to "preempt" or displace another one.

As the Supreme Court explained *Boyle v. United Technologies Corp.*, federal preemption displaces *state law* where: there is a clear statutory prescription, direct conflict between federal and state law, or, in "a few areas, involving 'uniquely federal interests,' [that] are so committed by the Constitution and laws of the United States to federal control that *state* law is preempted and replaced [by] 'federal common law.'" 487 U.S. 500, 504 (1988) (emphasis added); s*ee also In re KBR, Inc., Burn Pit Litig.*, 744 F.3d 326, 348 (4th Cir. 2014) (explaining that the FTCA's combatant activities exception forecloses certain *state* regulation). Federal preemption thus cannot extend to claims under the Alien Tort Statute because they are brought under federal common law pursuant to a federal statute, not state law. *See Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004). CACI may not like that the ATS allows plaintiffs to advance claims that are derived from international law—which CACI erroneously places outside the boundaries of U.S. law (Def Br. 35), *but see The Paquete Habana*, 175 U.S. 677, 700 (1900) ("International law is part of our law")—but the Supreme Court has twice recently affirmed this *congressionally*-affirmed right to non-citizens. *See Sosa*, 542 U.S. at 724-25, 729, 732; *Kiobel*, 133 S.Ct at 1663.

CACI's sole support for preemption of ATS claims based on the combatant activities exception to the Federal Tort Claims Act ("FTCA") is *Saleh*. (*See* Def. Br. 37 (quoting *Saleh v. Titan Corp.*, 580 F.3d 1, 16 (D.C. Cir. 2009)).) *Saleh* is neither binding nor persuasive authority on this issue. First, in *Saleh*, the D.C. Circuit only raised the preemption doctrine with respect to the ATS claims in *dicta*, after it had decided that the conduct alleged in that case did not meet the requirements of *Sosa*. 580 F.3d at 14-16. Finding that, among other reasons, the "congressional stated policy" in the FTCA barred "tort action on the battlefield," the court concluded that it was

not settled international law that torture claims could be brought against private actors. *Id.* at 13, 15-16. That finding is contrary to the findings of this Court, which twice affirmed that torture, war crimes, and CIDT are actionable against private actors. Dkt. 159, 615.

Second, the Fourth Circuit has expressly rejected *Saleh*'s view that the federal interest that the combatant activities exception is designed to protect is the "elimination of tort from the battlefield." Finding this view too broad since it would result in preemption of regulation of conduct not controlled by the military, the Fourth Circuit requires that federal law preempt only "state regulation of the *military*'s battlefield conduct and decisions." 744 F.3d at 348 (emphasis added). As the analysis in *Al Shimari* dictates, even if the military were in formal control of CACI,[36] the military has no discretion to order the unlawful conduct alleged. *Al Shimari IV*, 840 F.3d at157; *see also Burn Pit*, 744 F.3d at 351 (in discussing "military control" under preemption, referring to the "military control" factor of the *Taylor* test for political question). Military, or even presidential, policies cannot stand in conflict with duly established domestic law or international law. *Al Shimari IV*, 840 F.3d at 157, 159-160; *id*. at 162 (Floyd, J. Concurring). As the court in *Al Shimari IV* concluded in rejecting CACI's political question argument, adjudication of Plaintiffs' claims *advances* the federal interests of preventing, punishing and redressing torture, war crimes and CIDT, as reflected in federal statutory law as well as the policies of the executive and legislative branches. *Id.* at 157-158.

Finally, the sole support cited in *Saleh* for the FTCA "preempting" a federal cause of action was a case involving a conflict between executive action and a federal statute. *See Saleh*, 580 F.3d at 16 (citing *Chamber of Commerce of the U.S. v. Reich*, 74 F.3d 1322, 1332-39 (D.C.

[36] The level of military control over CACI is a hotly contested issue of fact that likewise precludes dismissing on preemption grounds as preemption is an affirmative defense, which can be the basis of dismissal only in the rare case that the complaint on its face demonstrates the defense will bar the claim. *See Goodman v. PraxAir, Inc.*, 494 F.3d 458, 466 (4th Cir. 2007).

Cir. 1996)). By contrast, both the ATS and the FTCA are duly enacted statutes and Plaintiffs are aware of no decisions (and CACI cites none) endorsing or following *Saleh* on this point.[37]

**2. CPA Order 17 Does Not Bar Plaintiffs' ATS Claims**

CACI's attempt to convert Order 17's immunity from Iraqi law into an "exclusive claims regime for Iraqis injured during the occupation" is unavailing even if Order 17 does apply. CACI ignores the entirety of Order 17 (which did not provide blanket immunity) to focus exclusively on the exception provision for third-party claims, which requires that they be dealt with "in a manner consistent with the national laws of the Parent State (CACI Ex. 23, § 6.) CACI incorrectly reads this language to mean that the exclusive remedy against contractors is to bring an administrative claim in their home country. Yet the plain language simply calls for third-party claims to be brought in accordance with the laws of the contractor's home country, which is what the Plaintiffs have done by bringing ATS claims in a U.S. court. *See McGee v. Arkel Int'l, LLC*, 671 F.3d 539, 544 (5th Cir. 2012) (interpreting the analogous language in a later version of Order 17 as a choice-of-law provision that "does not create an immunity from Iraqi laws relating to tort claims brought in federal court in the United States.").[38]

**3. TVPA Does Not Displace the ATS**

CACI revives its prior argument that the Torture Victim Protection Act, 28 U.S.C. § 1350, note ("TVPA") or other federal statutes seeking to prevent and punish torture, war

[37] The Supreme Court has made clear that the federal interest served by the "foreign country" exception to the FTCA is to avoid the application of foreign substantive law. *Sosa*, 542 U.S. at 707. Plaintiffs' ATS claims do not involve foreign substantive law—they are "private claims under *federal common law* for violations of any international law norm." *Id.* at 732 (emphasis added); *see also* Dkt. 615 at 4.

[38] The Foreign Claims Act, 10 U.S.C. § 2734, provides compensation for injuries caused by the military, including civilian employees of the military, but does not apply to government contractors. *See id.* § 2734(a). The statute's natural construction is that it preserves common law remedies against uncovered tortfeasors, not (as CACI suggests) that it impliedly confers immunity on such tortfeasors.

crimes and CIDT preempt, or displace, the ATS. *See* Dkt 154 at 13-16. Its argument is no more availing now. At the time the TVPA was enacted, Congress made clear that its intent was to reaffirm, not question, the ATS as a vehicle for redressing law of nations violations, *see* H. R. Rep. No. 102-367, p 3 (1991) (noting the TVPA "establish[es] an unambiguous and modern basis for a cause of action "has been successfully maintained under an existing law," the ATS), and to extend its reach to U.S. citizens asserting claims of torture or extra-judicial killing. S. Rep. No. 102-249, at 4 (1991) (affirming viability of parallel ATS claims); *see also Al-Quraishi*, 728 F. Supp. 2d at 755; *Kadić v. Karadžić*, 70 F.3d 232, 241 (2d Cir. 1995) ("the scope of the Alien Tort Act remains undiminished by enactment of the Torture Victim Act").

## IV. CACI HAS NO DERIVATIVE IMMUNITY

The Court should likewise reject CACI's half-hearted attempt to preserve a claim for derivative immunity. (Def. Br. 45.) This effort should be soundly rejected. Any recent developments in the law disfavors CACI. In *Campbell-Ewald Co. v Gomez*, the Supreme Court confirmed that contractors do not share the Government's unqualified immunity liability. 136 S. Ct. 663, 672 (2016). It further confirmed contractors can be held liable when they "exceeded [their] authority" or when governmental authority "was not validly conferred." *Id.* at 673; *see also Yearsley v. W.A. Ross Const. Co.*, 309 U.S. 18, 20-21 (1940); *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 689 (1949). The Statement of Work required CACI to comply with the Geneva Conventions and federal law prohibiting torture and war crimes.

## CONCLUSION

For all of the foregoing reasons, CACI's motion to dismiss should be denied.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on August 18, 2017, I electronically filed the Plaintiffs' Memorandum in Opposition To Defendant CACI Premier Technology's Motion to Dismiss Plaintiffs' Third Amended Complaint through the CM/ECF system, which sends notification to counsel for Defendants.

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