IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

SUHAIL NAJIM ABDULLAH AL SHIMARI, ASA'AD HAMZA HANFOOSH AL-ZUBA'E, and HASAN NSAIF JASIM AL-EJAILI, Plaintiffs, v. CACI PREMIER TECHNOLOGY, INC., Defendant,	)	No. 1:08-cv-0827 LMB-JFA
CACI PREMIER TECHNOLOGY, INC., Third-Party Plaintiff, v. UNITED STATES OF AMERICA, and JOHN DOES 1-60, Third-Party Defendants.	)	

DEFENDANT'S OPPOSITION TO PLAINTIFFS' MOTION TO STRIKE THIRD-PARTY COMPLAINT

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I. INTRODUCTION

It is more than passing strange that Plaintiffs, particularly in light of the Fourth Circuit's directive to develop "evidence regarding the specific conduct to which the plaintiffs were subjected and the source of any direction under which the acts took place,"[1] resist including as parties the very persons and entities who Plaintiffs allege actually abused them. For nearly a decade, Plaintiffs accused CACI PT[2] employees of directly mistreating them. Now, however, Plaintiffs concede that this is not the case, and no longer pursue this theory of liability. In opposing dismissal of their Third Amended Complaint, Plaintiffs now allege that only government personnel mistreated them, purportedly at the direction of unidentified CACI PT personnel. Plaintiffs now cast their claims as being based exclusively on theories of "accessory liability," and foreswear any allegation CACI PT personnel "laid a hand on the plaintiffs." Indeed, the Court now has dismissed Plaintiffs' claims alleging direct abuse by CACI PT personnel. Based on this shift in Plaintiffs' theory, which renders CACI PT's liability "secondary" in nature, CACI PT filed a third-party complaint against the United States and any "John Does" who directly mistreated Plaintiffs.

Plaintiffs mostly rely on assertions that CACI PT has failed to comply with the procedural requirements of Federal Rule of Civil Procedure 14 because CACI PT filed its third-party complaint without seeking leave of court. Essentially, Plaintiffs argue that CACI PT could file a third-party complaint without leave of court only if it did so within fourteen days of the filing of its answer to the Amended Complaint in 2009. But Plaintiffs' procedural arguments are

[1] *Al Shimari v. CACI Premier Tech., Inc.*, 840 F.3d 147, 159-60 (4th Cir. 2016) ("*Al Shimari IV*").

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

incorrect for several reasons. CACI PT was entitled to file its third-party complaint as of right because:

- CACI PT filed its third-party complaint within fourteen days of filing its only answer to the operative complaint in this action;
- CACI PT filed its 2009 answer as a prophylactic measure and at a time when the Court was divested of jurisdiction and CACI PT was *barred* from adding parties;
- Plaintiffs current complaint (the Third Amended Complaint) alleges only claims under the Alien Tort Statute ("ATS"), while *none* of the claims in the case when CACI PT filed its 2009 answer were claims asserted under ATS; and
- Plaintiffs' recent change in theory to one of pure "accessory liability" changed the need for impleader and thus made CACI PT's impleader timely.

Moreover, Plaintiffs' claims of unfair prejudice are unsupported and unsupportable. The third-party complaint would not appreciably change the scope of relevant discovery, nor would it unduly delay this case. The only potential "prejudice" to Plaintiffs is that the third-party action might simplify discovery that would demonstrate the lack of connection between Plaintiffs' claims and the actions of CACI PT personnel.

II. ANALYSIS

CACI PT filed its third-party complaint on January 17, 2017, the same day it filed its first Answer to Plaintiffs' Third Amended Complaint. The United States' response to the third-party complaint is due on March 23, 2018. Given that, the Court might consider deferring Plaintiffs' motion so that it can be considered alongside whatever arguments the United States might raise. Regardless of when the Court considers Plaintiffs' motion, it is without merit and should be denied.

A. Impleading the United States and John Does 1-60 Prevents Duplication of Suits Based on Closely-Related Matters

Impleader is liberally allowed "if it will prevent duplication of suits based on closely related matters." *See Dishong v. Peabody Corp.*, 219 F.R.D. 382, 385 (E.D. Va. 2003) (citing *Noland Co. v. Graver Tank Mfg. Co.*, 301 F.2d 43, 50 (4th Cir. 1962)). Plaintiffs have now made clear that ***all*** of their allegations rely on allegations that unnamed persons mistreated them, supposedly at the direction or with the encouragement of unidentified CACI PT employees. *See, e.g.*, 9/22/17 Tr. at 15 ("We are not contending that the CACI interrogators laid a hand on the plaintiffs."). The Court punctuated Plaintiffs' change in theory by dismissing their direct claims (Counts I, IV, and VII) on February 21, 2018. Accordingly, impleading the United States and John Does 1-60 brings into the case the parties with primary liability for Plaintiffs' alleged mistreatment, thereby preventing duplication of the current litigation with a related case based on the same underlying facts.

Nevertheless, Plaintiffs repeatedly characterize the third-party complaint as "irrelevant" and likely to "unduly complicate this case." Pl. Mem. at 11, 13. Plaintiffs assert the government's direction and authorization of the conditions about which Plaintiffs complain and the military members being the sole perpetrators of any alleged abuse are "immaterial to Plaintiffs' case [sic] [or] any defense CACI might raise." *Id.* at 6. Indeed, Plaintiffs argue that the Fourth Circuit's analysis in *Al Shimari IV* demonstrates that such evidence is irrelevant. *Id.* at 13 (accusing CACI PT of "seeking to sneak its same arguments through a side door—a third-party complaint" and asserting the Fourth Circuit and this Court determined "these issues are irrelevant to Plaintiffs [sic] claims"). This argument is flawed on at least three levels.

First, the Fourth Circuit's decision in *Al Shimari IV* contains no such holding. In fact, the Court directed just the opposite, instructing this Court to examine as part of its justiciability

analysis the "evidence regarding the specific conduct to which the plaintiffs were subjected and the source of any direction under which the acts took place,"[3] an inquiry that involves the role of the United States and its soldiers in Plaintiffs' treatment and is ***exactly*** the subject matter of CACI PT's third-party complaint.

Second, *Al Shimari IV* concerned ***justiciability only***, and did not purport to rule on the evidence relevant to the merits of Plaintiffs' claims or CACI PT's defenses. *See Al Shimari IV*, 840 F.3d at 159. The Fourth Circuit's decision on justiciability did not address in any form or fashion the relevance of evidence regarding military or governmental involvement in Plaintiffs' treatment to determining CACI PT's potential liability, if any, or to other legal and factual defenses.

Third, Plaintiffs' immateriality argument regarding the respective roles of soldiers and CACI PT personnel in Plaintiffs' treatment is both logically flawed contrary to precedent. There is no logical basis for concluding that it is immaterial or irrelevant to the merits of this case to develop evidence regarding who, if anyone, mistreated these Plaintiffs, and who, if anyone, directed any mistreatment of Plaintiffs. Plaintiffs' argument assumes the conclusion, asserting that it is irrelevant to determine whether witnesses with first-hand knowledge of Plaintiffs' treatment will support or refute Plaintiffs' theory of co-conspirator liability because Plaintiffs are proceeding on a co-conspirator theory of liability. Indeed, the Court is not working from an empty slate in determining relevance here. The Fourth Circuit held in *El-Masri* that "facts central to" the merits of a detainee abuse claim include ***"the roles, if any, that the defendants played in the events [plaintiff] alleges,"*** and also evidence ***"not only that [the plaintiff] was detained and interrogated, but that the defendants were involved in his detention and***

[3] *Al Shimari IV*, 840 F.3d at 159-60.

interrogation in a manner that renders them personally liable to him." *El-Masri v. United States*, 479 F.3d 296, 308-09 (4th Cir. 2007) (emphasis added).

The third-party complaint is designed to identify who, if anyone, mistreated Plaintiffs and who, if anyone, ultimately should be held liable for their alleged injuries. There can be no doubt that those questions go to the heart of Plaintiffs' case and that any evidence addressing those questions is indisputably relevant to both Plaintiffs' claims and CACI PT's defenses. Plaintiffs' arguments to the contrary are based on a transparent fear that revealing the identity of the perpetrators of any alleged mistreatment will impair their ability to seek recovery from CACI PT for their alleged injuries. But as this Court observed when this case was last remanded, "[t]he issues in this case are very important, and both sides plus, frankly, you know, the American people and the people of Iraq have a right to get the full record developed here." 12/16/16 Tr. at 11.

The claims of the third-party complaint are inextricably intertwined with Plaintiffs' lawsuit, involving identical sets of relevant facts. In the interests of judicial economy, CACI PT's third-party claims should be permitted to proceed in the same case as Plaintiffs' claims. Addressing CACI PT's claims through a third-party complaint is far preferable from an efficiency standpoint than having CACI PT file a separate action in this Court against the United States and the John Does and then designating that case as related to the present action. That is exactly the "duplication of suits" that impleaders are designed to prevent. *Dishong*, 219 F.R.D. at 385.

B. The Third-Party Complaint Complies With the Procedural Requirements of Rule 14

Federal Rule of Civil Procedure 14 provides that a defendant need not obtain leave of court to file a third-party complaint unless the defendant "files the third-party complaint more

than 14 days after serving its original answer." Fed. R. Civ. P. 14(a)(1). The term "original answer" is not defined in Rule 14, nor do there appear to be any decisions by the Fourth Circuit or this Court deciding whether "original answer" means the original answer to a particular complaint, or means the first answer to *any* complaint in an action.

Plaintiffs urge that CACI PT violated Federal Rule of Civil Procedure 14 because it did not seek leave from the Court to file the third-party complaint. The procedural history of this case is long and complicated, involving a transfer of this case from another District, three trips to the Fourth Circuit resulting in three panel decisions and one *en banc* decision, dismissal and reinstatement of claims under ATS, dismissal of claims under common law, and three different amendments to Plaintiffs' Complaint along the way. Plaintiffs' technical "procedural" argument omits and/or downplays several aspects of the procedural history of this case that bear directly on whether CACI PT's January 2018 answer is an "original answer" for purposes of Rule 14. As discussed in the sections that follow, these relevant procedural events include the following:

- The only "answer" filed by CACI PT prior to January 2018 was a 2009 answer to the Amended Complaint, a complaint that has been amended (and thus superseded) twice since the time of CACI PT's 2009 answer.
- As CACI PT expressly noted in filing its 2009 answer, the Court was at that time divested of jurisdiction, and CACI PT made its filing only to avoid the distraction of a meritless motion for entry of default by Plaintiffs.
- CACI PT's 2009 answer responded only to claims asserted under common-law; by January 2018, there were no common-law claims in the case and CACI PT's January 2018 Answer responded only to claims brought under ATS.
- In responding to CACI PT's motion to dismiss the Third Amended Complaint, Plaintiffs *for the first time* conceded that they were not alleging any direct mistreatment of Plaintiffs by CACI PT employees, and that their sole theory of liability was "accessory liability." The Court has formalized that change in the case by dismissing Plaintiffs' counts alleging direct mistreatment by CACI PT employees.

These aspects of the procedural history, whether considered individually or together, make clear that CACI PT's January 2018 Answer to the Third Amended Complaint is an "original answer" for purposes of Rule 14, and that CACI PT did not need to obtain leave of court to file its third-party complaint.

1. For Purposes of Rule 14, an "Original Answer" Is the First Answer Filed in Response to a Given Complaint

The law in this Circuit, as Plaintiffs acknowledge (Pl. Mem. at 8), is that Rule 14 should be liberally construed, and applied in a "sufficiently broad and flexible way" to allow the Court to "avoid circuity and multiplicity of actions." *Noland Co.*, 301 F.2d at 50; *see also Dishong*, 219 F.R.D. at 385.

The most natural reading of Rule 14(a)(1), and one consistent with the liberal application of Rule 14 in this Circuit, is that the phrase "original answer" applies to the first answer to a particular complaint. *Nelson v. Quimby Island Reclamation Dist. Facilities Corp.*, 491 F. Supp. 1364, 1387 (N.D. Cal. 1980) (holding that the first answer to an amended complaint is an "original answer" under Rule 14, even if the defendant had filed answers in response to prior complaints). The court in *Nelson* reached this result because "[a]n amended pleading that is complete in itself and makes no reference to nor adopts any portion of the prior pleading supersedes the latter." *Id.* (quoting 3 *Moore's Federal Practice* § 15.08(7), at 15-127 (2d ed. 1979)).

Indeed, the law in this Circuit similarly holds that the amendment of a complaint renders the prior complaint "a nullity" and "without effect." *First Tenn. Bank Nat'l Ass'n v. St. Paul Fire & Marine Ins. Co.*, 501 F. App'x 255, 257 n.2 (4th Cir. 2012) ("The original complaint, which was dismissed without prejudice, became a nullity upon the filing of the amended complaint."); *see also Fawzy v. Wauquiez Boats SNC*, 873 F.3d 451, 455 (4th Cir. 2017)

(amendment of complaint "renders the original complaint of no effect." (internal quotations omitted)); *Young v. City of Mount Ranier*, 238 F.3d 567, 572 (4th Cir. 2001) ("As a general rule, an amended pleading ordinarily supersedes the original and renders it of no legal effect." (internal quotations omitted)); *Jeffrey M. Brown Assocs., Inc. v. Rockville Ctr. Inc.*, 7 F. App'x 197, 202 (4th Cir. 2001) (same); *Kikwebati v. Strayer Univ. Corp.*, No. 2:14-cv-203, 2014 WL 7692396, at *6 (E.D. Va. Oct. 21, 2014) (filing of an amended complaint renders original complaint "a nullity" and "of no legal effect"). While, as Plaintiffs note and CACI PT will address in Section II.C, a few courts have rejected the holding in *Nelson* and adopted a "functional" approach to identifying an "original answer," *Nelson* applies the rule most consistent with this Circuit's treatment of amended complaints rendering those that came before them a nullity.

2. The Protective Answer Filed By CACI PT in 2009 Was a Nullity Because the Court Was Divested of Jurisdiction and CACI PT Could Not At That Time Add Parties to the Case

Plaintiffs' argument that CACI's filing of an "answer" in 2009 should bar it from later asserting third-party claims as of right ignores the context surrounding CACI PT's filing, as this Court was divested of jurisdiction at the time CACI PT filed its protective "answer." Indeed, this Court's lack of jurisdiction at the time of CACI PT's "answer" not only rendered that document a nullity but *prohibited* CACI PT from adding additional parties to the case.

Specifically, on March 18, 2009, the Court issued an order granting CACI PT's motion to dismiss any claims relying on the ATS as a jurisdictional basis but denying CACI PT's motion to dismiss claims based on common law. Dkt. #94. CACI PT noticed an appeal from the Court's ruling on March 23, 2009. Dkt. #96. Four days later, after CACI PT's notice of appeal had already been docketed in the Fourth Circuit, Plaintiffs filed a patently frivolous motion *in the district court* asking this Court to rule on the propriety of the Fourth Circuit's exercise of

jurisdiction and to strike CACI PT's notice of appeal. Dkt. #99. The same day, Plaintiffs filed a motion to lift the stay of discovery notwithstanding the fact that CACI PT had filed a notice of appeal. Dkt. #101. This Court promptly denied Plaintiffs' motion to strike CACI PT's notice of appeal, correctly observing that the court with power to consider the propriety of CACI PT's appeal was the Fourth Circuit. Dkt. #109. On April 1, 2009, CACI PT filed a protective answer that explicitly denied that the Court had jurisdiction. CACI PT's protective answer further stated that CACI PT was filing the answer in order to protect against an anticipated (but frivolous) argument from Plaintiffs that this Court had not been divested of jurisdiction and CACI PT was in default for not answering the Amended Complaint. As CACI PT stated in the first paragraph of the protective answer:

> CACI PT is of the view that its filing of a Notice of Appeal from the Court's March 18, 2009 Memorandum Order denying in part the CACI Defendants' motion to dismiss has the effect of ***divesting this Court of jurisdiction in this action. As a result, CACI PT has no obligation at this time to file an Answer to Plaintiffs' Amended Complaint***. Whether the Court is divested of jurisdiction is an issue raised in motions pending before the Court. However, it is not expected that the Court will rule on these issues prior to the deadline that would exist for filing an Answer if the Court were to conclude that it was not divested of jurisdiction. ***Therefore, out of an abundance of caution, CACI PT is filing this Answer to ensure that there is no risk that the Court might erroneously conclude that it had not been divested of jurisdiction and that CACI PT had allowed the deadline for responding to the Amended Complaint pass without filing an Answer.***

Dkt. #107 at 1 (emphasis added). The day after CACI PT filed its protective answer, Magistrate Judge Anderson entered an order denying Plaintiffs' motion to vacate the stay of discovery on the grounds that the Court had refused to strike CACI PT's notice of appeal. Dkt. #111. The case remained stayed from March 2009 until Fourth Circuit's remand in mid-2012.

Consistent with CACI PT's stated positon in 2009, "[i]n general, filing of a notice of appeal confers jurisdiction on the court of appeals and divests the district court of control over

those aspects of the case involved in the appeal." *Marrese v. A. Academy of Orthopaedic Surgeons*, 470 U.S. 373, 378-79 (1985); *see also Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 458 (1982) (same); *Dickson v. United States*, ___ F. App'x ___, 2018 WL 798252, at *1 (4th Cir. 2018) ("As an initial matter, a timely filed notice of appeal transfers jurisdiction of a case to the court of appeals and strips a district court of jurisdiction to rule on any matters involved in the appeal." (internal quotations omitted)); *Dixon v. Edwards*, 290 F.3d 699, 709 n.14 (4th Cir. 2002) (same); *United States v. Christy*, 3 F.3d 765, 767 (4th Cir. 1993) (same).

While a district court may exercise jurisdiction on matters "collateral to the appeal" or that "aid[] the appellate process," *Doe v. Pub. Citizen*, 749 F.3d 246, 258 (4th Cir. 2014), the Fourth Circuit has held emphatically that such limited retention of jurisdiction by the district court *does not permit parties to be added at the district court level while a case is being appealed*. *Id.* at 258-59 (holding that the district court lacked authority to rule on a motion to intervene). As the Fourth Circuit held, "[a] district court does not act in aid of the appeal when it "alter[s] the status of the case as it rests before the court of appeals." *Id.* at 259 (quoting *Coastal Corp. v. Tx. E. Corp.*, 869 F.2d 817, 820 (5th Cir. 1989)). Thus, CACI PT could not have impleaded the United States or the John Does at the time it filed its protective answer in 2009.

Because the Court lacked jurisdiction at the time it was filed, CACI PT's 2009 answer cannot qualify as an original answer that would forever bar CACI PT from filing a third-party complaint as of right.

3. Prior to its January 2018 Answer, CACI PT Had Never Answered Claims Brought Under ATS, and ATS Claims Are All That Remain

Plaintiffs argue that CACI PT's 2009 protective answer should count as its "original answer" in this case, but ignore that there was not a single claim under ATS in this case when

CACI filed its protective answer in 2009, and the case now has *only* claims brought under ATS. Thus, CACI PT has never answered a single claim that remains in this case.

The Court's March 18, 2009 order dismissed ATS as a basis for Plaintiffs' claims in this action, but allowed Plaintiffs' claims to proceed if they were grounded in common law. Dkt. #94. Thus, when CACI PT filed its protective answer on April 1, 2009, it was responding solely to common-law claims.[4] More than three years later, after the Fourth Circuit had remanded the case to this Court, the Court granted a motion brought by Plaintiffs to reinstate ATS as a basis for their claims, resulting in claims brought under ATS and common law. Dkt. #159 (11/1/12). After the most recent remand, Plaintiffs voluntarily dismissed their common-law claims, and elected to proceed only with claims brought under the ATS. Dkt. #574. Although no order had yet issued with respect to CACI PT's motion to dismiss the Third Amended Complaint, CACI PT agreed at the January 3, 2018 conference before Magistrate Judge Anderson to file an Answer, and also to file its third-party complaint, and did so on January 17, 2018. Dkt. #665.

As the foregoing procedural history makes clear, the *first* time that CACI PT filed an answer to claims brought under the ATS was when CACI PT voluntarily filed its Answer to the Third Amended Complaint on January 17, 2018. Dkt. #665. The distinction between claims brought under ATS and claims brought under common-law is significant as it relates to the United States' involvement as a party. Although CACI PT respectfully disagrees with aspects of the Court's ruling on the elements of Plaintiffs' ATS claims, the Court ruled in several instances that claims under ATS require some nexus between the conduct and the actions of the State. Dkt. #615 at 9 (holding that a torture claim under ATS may be brought against a private actor if

[4] Plaintiffs' Amended Complaint did not specify which counts were brought under ATS and which were brought under common law. Accordingly, CACI PT filed an answer that responded to all counts to the extent such counts were asserted under common law.

"there is such a close nexus between the State and the challenged action that seemingly private behavior may be fairly treated as that of the State itself" (internal quotations omitted)); *Id.* at 13 (noting that a CIDT claim brought under ATS is "closely akin to or [an] adjunct of torture" involving "agents of the state"). The required close relationship between the challenged conduct and the actions of the United States, which may or may not exist under Plaintiffs' claims to the extent such claims are cognizable at common law, is a significant difference between the common-law claims at issue when CACI PT filed its protective answer in 2009, and the ATS claims at issue when CACI PT first filed an answer to ATS claims in 2013.

At bottom, there is no legal overlap between Plaintiffs' common-law-only Amended Complaint that CACI PT answered in 2009 and the ATS-only Third Amended Complaint CACI PT answered in 2018. Under these circumstances, even if the Court had not been entirely divested of jurisdiction in 2009, the radical change in theories of recovery prevents an answer to the Amended Complaint being viewed as the "original answer" to the claims that remain in the Third Amended Complaint.

C. Even Under a "Functional" Approach to Rule 14, CACI PT's Third-Party Complaint Is Proper

As Plaintiffs recognize, *see* Pl. Mem. at 10 (citing cases), some courts have eschewed the holding in *Nelson* that an "original answer" for purposes of Rule 14 is the first answer filed in response to a particular complaint. Instead, these courts have employed a "functional" or "pragmatic" approach. *See, e.g.*, *Reynolds v. Rick's Mushroom Serv., Inc., M.A.Y.*, 2003 U.S. Dist. LEXIS 22154 *4 (E.D. Pa. 2003); *Guar. Co. of N. Am. v. Pinto*, 208 F.R.D. 470, 473 (D. Mass. 2002). Under this view, a second or later answer filed in a case is an "original answer" if the plaintiffs have set forth new theories of liability, although simply including new factual allegations in a complaint generally is not enough. *Reynolds*, 2003 U.S. Dist. LEXIS 22154,

2003 WL 22741335, at *4 (citing *Oberholtzer v. Scranton*, 59 F.R.D. 572, 575 (E.D. Pa. 1973)). If the third-party complaint is filed in conjunction with the first answer filed after the new theory of liability is alleged, leave of court is not required.

The most obvious reason why CACI PT satisfies this "functional" test is that Plaintiffs' principal theory of liability changed between the time CACI PT filed a protective answer to the Amended Complaint in 2009 and when CACI PT filed its Answer to the Third-Amended Complaint in January 2018. As set forth in Section II.B.2, *supra*, the Court dismissed ATS as a theory of liability under the Amended Complaint in 2009, and the *only* theory of liability at issue when CACI PT answered the Amended Complaint in 2009 was that CACI PT was liable under the common law of some unidentified jurisdiction. By the time CACI PT answered the Third Amended Complaint in January 2018, Plaintiffs had dismissed all of their common-law claims and their *only* remaining theory of liability was that CACI PT was liable under ATS. There could not be a clearer case of a change in Plaintiffs' theory of liability.

Beyond the shift from a common-law case to an ATS case, for the first nine years of this case, Plaintiffs alleged that CACI PT personnel *directly* abused them *contrary* to U.S. policy. *See*, *e.g.*, Dkt. #53 at 1 ("The [Amended] Complaint alleges that Plaintiffs were tortured and subjected to severe pain by" three named CACI PT employees) (citing Am. Compl. ¶¶ 1, 4-7, 64-65); *id.* at 4 ("Had CACI followed U.S. policies, CACI employees would not have tortured Plaintiffs.") (citing Am. Compl. ¶¶ 95-100); *id.* at 24 (Plaintiffs "are seeking damages from CACI for brutally torturing them – without permission or direction from the military to do so – while they were detained in military prisons"); *id.* at 28 ("The [Amended Complaint] alleges that CACI employees Steven Stefanowicz, Daniel Johnson, and Timothy Dugan tortured, and instructed soldiers to torture, the Plaintiffs.") (Am. Compl. ¶¶ 1, 64-68). Although Plaintiffs

added facially-deficient[5] conspiracy claims to their Amended Complaint (Am. Compl. ¶¶ 1, 64-73), they maintained allegations that CACI PT employees directly mistreated Plaintiffs. *See* Am. Compl. ¶¶ 113-16 (allegations CACI PT employees tortured Plaintiffs), 126-30 (allegations CACI PT employees committed cruel inhuman or degrading acts against Plaintiffs), 140-45 (allegations CACI PT employees committed war crimes against Plaintiffs), 155-60 (allegations CACI PT employees assaulted and battered Plaintiffs), 170-75 (allegations CACI PT employees sexually assaulted Plaintiffs); *see also* Dkt. #53 at 1, 4, 24, 28 (describing Amended Complaint allegations of direct torture committed contrary to U.S. policy); Dkt. #145 at 13 ("Plaintiffs allege that CACI and its co-conspirators engaged in a panoply of acts, such as beatings, electric shocks, sexual assaults, sensory deprivations, mock executions . . . .") (citing Am. Compl. at 3-6).

Indeed, Plaintiffs included counts in their Third Amended Complaint alleging direct abuse by CACI PT personnel. *See* TAC ¶¶ 210-13, 227-31, 245-50, 264-69, 279-84, 295 (counts based on direct mistreatment). Plaintiffs now admit that this is not true, and that their sole theory of liability is "accessory liability"—that CACI PT supposedly conspired with or aided those who allegedly mistreated Plaintiffs. *See* 9/22/17 Tr. at 15 ("We are not contending that the CACI interrogators laid a hand on the plaintiffs."); *see also* Dkt. #639 at 31 n.30 (the "gravamen of Plaintiffs' complaint is conspiracy and aiding and abetting"); *id.* at 1 ("Plaintiffs sued CACI under well-established theories of accessory liability."). This Court formalized the shift in

[5] Plaintiffs' conspiracy allegations in the Amended Complaint were sufficiently deficient that they voluntarily and unsuccessfully amended their complaint to flesh them out. *See* Dkt. #387 n.1 ("Plaintiffs filed a Second Amended Complaint following discussions with CACI regarding the sufficiency of Plaintiffs' conspiracy allegations and in an attempt to obviate the filing of a motion to reconsider the Court's 2008 ruling"). The more fulsome SAC was subsequently dismissed. *See* Dkt. #215 (dismissing Plaintiffs' conspiracy claims for lack of detail, clarity, and plausibility); *see also* 3/8/2013 Tr. at 32:5-8, 34:17-24, 35:14-15, 37:8-10, 40:14-43:11; 44:19-45:7.

Plaintiffs' theory by dismissing Plaintiffs' direct counts (Counts I, IV, and VII) and leaving only conspiracy and aiding and abetting counts in the case. Dkt. #679 at 37-38 (holding that Plaintiffs' allegations of direct "contact" with CACI PT personnel "are insufficiently plausibl[e] to establish CACI's direct liability").

Of course, CACI PT has—as Plaintiffs describe in their motion (Pl. Mem. at 3, 5)—said for years that Plaintiffs have no factual basis for asserting any direct liability by CACI PT or its employees. Indeed, Plaintiffs have obtained all of the discovery they sought and have no evidence of CACI PT involvement in any abuse they allegedly suffered. But at this stage of the litigation, challenging the pleadings, CACI PT has to take Plaintiffs' allegations as it finds them, and Plaintiffs for years have been permitted to keep their claims alive by pointing to their allegations rather than actual proof. *See Robertson v. Sea Pines Real Estate Cos.*, 679 F.3d 278, 284 (4th Cir. 2012) (For a Rule 12(b)(6) motion to dismiss, a court "must take the complaints' factual allegations as true and draw all reasonable inferences in plaintiffs' favor."). Indeed, even with respect to CACI PT's challenge to subject matter jurisdiction, this Court has held that Plaintiffs' claims could proceed based on the sufficiency of their *allegations*, with no need for Plaintiffs to support their claims with proof. Dkt. #620 at 1-2.

Thus, despite CACI PT's views as to the sufficiency of Plaintiffs' allegations, or the results of discovery, CACI PT has until the Court dismissed Plaintiffs' direct claims on February 21, 2018, had to address claims for both direct and accessorial liability based on what Plaintiffs *alleged*, without regard to what CACI PT knows or believes the true facts to be. With Plaintiff's watershed admissions that their consistent claims of direct mistreatment were groundless, And the Court's dismissal of Plaintiffs' direct claims, that day has passed. CACI PT is now able to

litigate this case accused only of secondary liability to the acts and omissions of the United States and its employees.

The fact that CACI PT now stands accused only of secondary liability changes CACI PT's ability to seek recompense from the United States and the individuals responsible for Plaintiffs' alleged mistreatment. "In the infinite variety of circumstances where indemnity has been sought the courts have used various terms to distinguish between the grade of fault attributable to the participating wrongdoers so as to justify the imposition of the entire loss on the one who is regarded as the principal offender." *United States v. Savage Truck Line, Inc.*, 209 F.2d 442, 447 (4th Cir. 1953).

This general rule holds true under Virginia law,[6] where a defendant with primary liability is typically precluded from seeking exoneration, contribution, or indemnity from a joint tortfeasor. *See Uptagrafft v. United States*, 315 F.2d 200, 202-03 (4th Cir. 1963) (citing *Sykes v. Stone & Webster Eng'g Corp.*, 186 Va. 116 (1947)) ("unless the primary or basic liability rests in the joint tortfeasor, there no right of exoneration); Va. Code Ann. § 8.01-34 (permitting contribution "when the wrong results from negligence and involves no moral turpitude"); *E.I. Dupont De Nemours & Co. v. Kolon Indus.*, 688 F. Supp. 2d 443, 464 (E.D. Va. 2009) ("Consequently, contribution is unavailable if the third-party plaintiff was either 'actively negligent' or engaged in intentional conduct." (citing *Philip Morris, Inc. v. Emerson*, 235 Va. 380, 412, (1988))); *VEPCO v. Wilson*, 221 Va. 979 (1981) (The principles with respect to

[6] Virginia law likely governs CACI PT's claims against the United States and the John Does. *See* 6 Wright & Miller, *Federal Practice & Procedure* § 1450, at 473-74 (3d ed. 2010) ("However, in other types of actions, such as for contribution or on an implied indemnity theory, although a uniform federal standard might be desirable, state law generally is followed in the absence of a federal statute.") (collecting cases).

contribution are "equally applicable to indemnity," the only distinguishing feature being that "indemnity must necessarily grow out of a contractual relationship.")).

Although the Virginia Supreme Court has recognized that there may be indemnity among tortfeasors, the court limited that right to "where a party is only a technical wrongdoer, and did not actually participate in the wrongful act." *McLaughlin v. Siegel*, 166 Va. 374, 377 (1936). No longer facing factual allegations of direct participation in any of Plaintiffs' mistreatment, CACI PT is now free to pursue these types of claims against the alleged primary offenders.

Plaintiffs' decision to recant their consistent allegations of direct misconduct by CACI PT, and the Court's dismissal of Plaintiffs' direct counts, altered CACI PT's need *and ability* to implead the United States and its employees. Thus, under the pragmatic test adopted by multiple courts, CACI PT's current answer functions as its "original answer" for purposes of Rule 14.

D. The Scheduling Order Does Not Preclude the Third-Party Complaint

Plaintiffs assert the third-party complaint should be stricken for violating the Court's November 2008 Scheduling Order. This argument fails for two reasons. First, by its terms, the Scheduling Order does not address pleadings, but rather "[a]ny *motion* to amend the pleadings or to join a party." *See* Dkt. #75, ¶ 6 (emphasis added). CACI PT has not filed a motion to amend its pleadings as none is necessary. Second, even if the Scheduling Order could be stretched to apply to CACI PT's filing of the third-party complaint, CACI PT did, in fact, file its third-party complaint once the need for it became clear. Plaintiffs first made their admissions that this case is one solely involving "accessory" liability, and conceded that they "are not contending that the CACI interrogators laid a hand on the plaintiffs" (9/22/17 Tr. at 15), in opposing CACI PT's motion to dismiss the Third Amended Complaint. As explained in Section II.C, *supra*, Plaintiffs' concessions in litigating CACI PT's motion to dismiss changed the entire character of this case and CACI PT promptly impleaded the United States without even waiting for the Court

to issue an order on CACI PT's motion to dismiss. Thus, CACI PT has complied with both the letter *and* the spirit of the Scheduling Order.

E. CACI PT's Third-Party Complaint Does Not Unfairly Prejudice Plaintiffs

Plaintiffs argue that the third-party complaint will unfairly prejudice them by somehow unreasonably broadening the scope of this case and delaying movement of a case that supposedly is on the verge of trial. Neither argument has merit.

As the Fourth Circuit has made clear, whether Plaintiffs' claims are justiciable will require a "discriminating analysis" of "the evidence regarding the specific conduct to which the plaintiffs were subjected and the source of any direction under which the acts took place." *Al Shimari IV*, 840 F.3d at 159. Similarly, as the Fourth Circuit held in an analogous case, the merits of a claim of detainee mistreatment cannot proceed merely on "general terms." Rather, "facts central to" the merits include "the roles, if any, that the defendants played in the events [plaintiff] alleges," and also evidence "not only that [the plaintiff] was detained and interrogated, but that the defendants were involved in his detention and interrogation in a manner that renders them personally liable to him." *El-Masri*, 479 F.3d at 308-09.

Thus, subject matter jurisdiction and the merits require a determination of who interacted with Plaintiffs, what, if anything, persons interacting with Plaintiff did, and, if anyone mistreated Plaintiffs, the source of any direction to do so. The scope of evidence relevant to determining jurisdiction and the merits *is exactly the same whether the United States and the John Does are parties or not*. Indeed, the United States is the entity in possession of all of the information regarding Plaintiffs' treatment while in United States custody, so it presumably will have little in the way of discovery needed to determine what, if anything, happened with respect to Plaintiffs. Moreover, discovery likely is simplified with the United States as a party, as party discovery is

more streamlined and efficient under the Federal Rules than it is for third parties. *See* Fed. R. Civ. P. 45(d).

Similarly unavailing is Plaintiffs' argument that the third-party complaint will unduly delay the litigation of this case. Plaintiffs suggest that this action is on the verge of being ready for trial, but this is not the case at all. Although CACI PT (joined by Plaintiffs) argued *in December 2016* that the first step on remand should be filing and litigating Rule 12 motions to dismiss, the Court rejected this approach (*see* Dkt. 571, 614) and did not permit CACI PT to file a Rule 12 motion until June 28, 2017. Dkt. #616. The Court held a hearing on CACI PT's motion to dismiss on September 22, 2017, and issued its decision on February 21, 2018.

Since the first post-remand hearing on December 16, 2016, the only discovery CACI PT has been permitted to take are videotaped depositions of two Plaintiffs. Dkt. #571. CACI PT has noted to the Court its need for discovery from the United States at least twelve different times since the Fourth Circuit's most recent remand.[7] CACI PT has not been permitted to take such discovery as of yet, although the parties attended a discovery conference before Magistrate Judge Anderson on January 3, 2018, and a motion is pending before the Court that would allow the discovery process to begin. Dkt. #674. Moreover, because discovery has not been

[7] Dkt. #564 at 19-21 (status report filed two days after issuance of Fourth Circuit mandate); Dkt. #569 at 2-3 (response to Plaintiffs' post-remand status report, filed on 12/13/16); 12/16/16 Tr. at 11-12 (first post-remand status conference); Dkt. #576 at 3 (CACI PT's court-ordered memorandum on governing law, filed on 1/17/17); Dkt. #582 at 12-13 (CACI PT's memorandum in support of its motion for reconsideration of procedures for Plaintiffs' depositions, filed on 2/3/17); Dkt. #592 at 7-8 (CACI's opposition to Plaintiffs' motion to exclude Rashid from the court's deposition order, filed on 4/20/17); 4/28/17 Tr. at 8-9 (hearing on Plaintiffs' motion to excuse Rashid from the court's deposition order); Dkt. #602 at 3 (CACI PT's opposition to Plaintiffs' motion to sever Rashid's claims, filed on 5/31/17); 6/9/17 Tr. at 9-12 hearing on Plaintiffs' motion to sever Rashid's claims); Dkt. #618 at 4 (memorandum supporting CACI's motion for leave to file two Rule 12 motions and to the clarify the court's order regarding Rule 12 motions, filed on 6/30/17) Dkt. #627 at 6-7 (memorandum in support of CACI PT's motion to dismiss); Dkt. #645 at 3-4 (reply in support of CACI PT's motion to dismiss).

completed, the parties have not yet briefed summary judgment motions, which, as this Court noted, could result in judgment being entered on all of Plaintiffs' claims. 9/22/17 Tr. at 22 ("This case will still take some significant time to get fully developed, and at the end of the day, at summary judgment, it may not survive, or if it survives summary judgment, who knows how it will work out at trial."). The issues that will be addressed on summary judgment include issues such as immunity and preemption, as well as whether Plaintiffs can meet their obligation of presenting evidence sufficient to support a jury verdict in their favor. Thus, in its current posture, the Court's observation is correct that "[t]his case will still take some significant time to get fully developed," *id.*, and there is no reason to believe that discovery from the United States as a party will delay the case any longer than would be involved in addressing third-party discovery from the United States.

Finally, in the unlikely event that the presence of the third-party defendants in some unpredictable way appears to be causing prejudice to Plaintiffs, the Court can address that when it occurs through ordinary case management. *See also* Fed. R. Civ. P. 14(a)(4).

F. If the Court Concludes That Rule 14 Requires Leave of Court for CACI PT to File Its Third-Party Complaint, the Court Should Grant Leave

As CACI PT has explained, leave of court was not required for CACI PT to file the third-party complaint. The Answer CACI PT filed in January 2018 qualifies as an "original answer" under Rule 14 under the facts and procedural history of this case. Moreover, Plaintiffs are not unfairly prejudiced by a third-party complaint filed in response to Plaintiffs' significant shift in their theory of recovery. Accordingly, it would be error to hold that Rule 14 required CACI PT to obtain leave of court in order to file the third-party complaint.

That said, if the Court were to hold that leave of court is required, the Court should grant leave. Striking the third-party complaint likely would result in CACI PT having to file a separate

action, in this Court, with such separate action designated as a related case to the present action. No purpose would be served by requiring CACI PT to pursue this course of action. Moreover, CACI PT and the United States, subject to approval by the Court, have reached agreement on a process for CACI PT to begin pursuing discovery from the United States, and this agreement is terminated if the third-party complaint is stricken by the Court. *See* Dkt. #674. There is no good reason to put the parties back at "square one" regarding discovery from the United States, even if the Court were to disagree with CACI PT's well-supported conclusion that leave of court was not required to file the third-party complaint.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 21st day of February, 2018, I will electronically file the foregoing with the Clerk of Court using the CM/ECF system, which will then send a notification of such filing (NEF) to the following:

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