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

SUHAIL NAJIM ABDULLAH AL SHIMARI, *et al.*, Plaintiffs, v. CACI PREMIER TECHNOLOGY, INC., Defendant.	No. 1:08–cv–827 (LMB/JFA)
CACI PREMIER TECHNOLOGY, INC., Third-Party Plaintiff, v. UNITED STATES OF AMERICA, and JOHN DOES 1–60, Third-Party Defendants.	

THE UNITED STATES' MEMORANDUM
OF LAW IN SUPPORT OF ITS MOTION TO DISMISS

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INTRODUCTION

Plaintiffs allege that they were tortured at Abu Ghraib prison during the war in Iraq. Jurisdictionally barred from bringing suit against the United States, they instead seek to recover damages from CACI Premier Technology, Inc. ("CACI"), which provided civilian interrogators to the United States military, based on theories that CACI entered into a conspiracy with the United States to commit violations of international law, and aided and abetted in those alleged violations. CACI has now filed a third-party complaint against the United States and sixty unnamed individuals, characterizing them as the actual wrongdoers and demanding that they either contribute to, or entirely indemnify CACI from, any judgment that may be entered against it.

Just as the United States is immune to suit by Plaintiffs, so too is it immune to CACI's third-party claims. The only waiver of sovereign immunity to which CACI refers in its jurisdictional statement is the Federal Tort Claims Act ("FTCA"), but the FTCA does not waive immunity to CACI's claims because: (i) CACI's claims are barred by the FTCA's foreign-country and combatant-activities exceptions; (ii) the FTCA does not apply extraterritorially to alleged federal conduct in Iraq; and (iii) CACI fails to state valid claims under Virginia law, which it contends applies to this action. Although the Alien Tort Statute ("ATS") grants the Court jurisdiction to hear Plaintiffs' claims against CACI, the ATS does not waive the United States' sovereign immunity. Likewise, neither the three general jurisdiction-granting statutes that CACI cites, nor the Little Tucker Act, waives the United States' sovereign immunity in this Court.

At bottom, CACI simply cannot carry its burden of demonstrating that Congress has expressly and unequivocally waived the United States' sovereign immunity to CACI's claims

against the United States. For this reason, CACI's claims against the United States must be dismissed for lack of subject-matter jurisdiction.

BACKGROUND

Plaintiffs—Iraqi nationals who were detained at Abu Ghraib prison in Iraq in 2003 and 2004—commenced this lawsuit in 2008 against CACI, a government contractor that provided interrogation services for the United States military at Abu Ghraib during the relevant time period. *Al Shimari v. CACI Premier Tech., Inc.*, 263 F. Supp. 3d 595, 597 (E.D. Va. 2017) "The essence of plaintiffs' claims, which are all brought pursuant to the Alien Tort Statute . . . is that [CACI's] employees . . . worked with military personnel to abuse plaintiffs." *Al Shimari v. CACI Premier Tech., Inc.*, No. 1:08–cv–827 (LMB/JFA), 2018 WL 1004859, at *1 (E.D. Va. Feb. 21, 2018). "This abuse is alleged to involve torture; cruel, inhuman, or degrading treatment ('CIDT'); and war crimes." *Id.* Although Plaintiffs at one point asserted common-law tort claims against CACI, they voluntarily dismissed those claims with prejudice last year. *Al Shimari*, 263 F. Supp. 3d at 597 n.2.

The Court recently dismissed Plaintiffs' direct-liability ATS claims against CACI, but declined to dismiss Plaintiffs' conspiracy and aiding-and-abetting ATS claims. *Al Shimari*, 2018 WL 1004859, at *17–19. As to Plaintiffs' conspiracy claims, the Court held that Plaintiffs leveled "substantial factual allegations to support an inference that CACI employees entered into an agreement with other personnel at the [Abu Ghraib] Hard Site to subject the detainees at the site, including plaintiffs, to torture, CIDT, and war crimes." *Id.* at *17. Further, Plaintiffs' allegations "constitute plausible evidence of an intent from the highest levels of the company to enter into the conspiracies that had developed among CACI's employees and military personnel." *Id.* at *18. As to Plaintiffs' aiding-and-abetting claims, the Court held that Plaintiffs' allegations

"render plausible the ultimate inference that CACI and its employees purposefully aided the violations of international law in order to facilitate the interrogations of plaintiffs." *Id.* at *19.

On January 17, 2018—nine-and-a-half years after this case was commenced, nearly nine years after CACI filed its initial answer (Doc. 107), and four months after the Court denied from the bench its latest motion to dismiss (Doc. 649)—CACI filed a third-party complaint against the United States and 60 unnamed individual third-party defendants. (Doc. 665 at 52–65 ("CACI TPC").) Arguing that the United States and the 60 unnamed individuals were the "actual alleged wrongdoers," CACI asserts that its liability to Plaintiffs is "secondary" to these third-party defendants' supposed "primary liability," and demands that these individuals and the United States either contribute to, or entirely indemnify CACI from, any judgment that may be entered against it. (*Id.* ¶¶ 1, 37, 38, 44, 45, 51, 58.) For several reasons, the Court lacks subject-matter jurisdiction over CACI's claims against the United States.

ARGUMENT

"As a sovereign, the United States is immune from all suits against it absent an express waiver of its immunity." *Pornomo v. United States*, 814 F.3d 681, 687 (4th Cir. 2016). "Because the default position is that the federal government is immune to suit, any waiver of that immunity must be strictly construed in favor of the sovereign." *Id.*[1] "For that reason, it is the plaintiff's burden to show that an unequivocal waiver of sovereign immunity exists." *Welch v. United States*, 409 F.3d 646, 651 (4th Cir. 2005). "If the plaintiff fails to meet this burden, then the claim must be dismissed" for lack of subject-matter jurisdiction. *Id.* at 651, 653.

CACI cannot meet its burden of showing that an "express" and "unequivocal" waiver of sovereign immunity exists. *First*, the underlying claims against CACI are rooted in the Alien

[1] Unless explicitly included in a quotation, citations and internal quotation and alteration marks have been omitted.

Tort Statute, but the ATS does not waive the United States' sovereign immunity. *Second*, CACI asserts that the Court has jurisdiction based on three jurisdiction-granting statutes (CACI TPC ¶ 6), but none of those statutes waives the United States' sovereign immunity. *Third*, although CACI suggests that the Federal Tort Claims Act also affords this Court jurisdiction (*id.*), as explained below, it does not. *Finally*, the Little Tucker Act, 28 U.S.C. § 1346(a)(2), does not waive the United States' sovereign immunity as to CACI's breach-of-contract claim in this Court. As CACI cannot demonstrate any express and unequivocal waiver of sovereign immunity, CACI's claims against the United States must be dismissed for lack of subject-matter jurisdiction.

I. THE ALIEN TORT STATUTE DOES NOT WAIVE THE UNITED STATES' SOVEREIGN IMMUNITY

The Court's jurisdiction to hear Plaintiffs' claims against CACI is grounded in the Alien Tort Statute. But the ATS cannot undergird CACI's claims against the United States. "[T]he Alien Tort Statute has been interpreted as a jurisdictional statute only—it has not been held to imply any waiver of [the United States'] sovereign immunity." *Goldstar (Panama) S.A. v. United States*, 967 F.2d 965, 968 (4th Cir. 1992); *see also, e.g.*, *Tobar v. United States*, 639 F.3d 1191, 1196 (9th Cir. 2011) (same); *Sanchez-Espinoza v. Reagan*, 770 F.2d 202, 207 (D.C. Cir. 1985) ("The Alien Tort Statute itself is not a waiver of sovereign immunity.").

II. THE GENERAL JURISDICTION-GRANTING STATUTES IDENTIFIED BY CACI DO NOT WAIVE THE UNITED STATES' SOVEREIGN IMMUNITY

CACI asserts that the Court has jurisdiction over its third-party complaint based on, *inter alia*, 28 U.S.C. §§ 1331, 1332, and 1367(a), which afford district courts federal-question jurisdiction, diversity jurisdiction, and supplemental jurisdiction, respectively. (CACI TPC ¶ 6.) But "[s]ections 1331, 1332, and 1367 are general jurisdictional statutes," none of which "waive[s] the federal government's immunity to suit." *N.J. Sand Hill Band of Lenape & Cherokee Indians v. New Jersey*, No. 09–cv–683, 2011 WL 1322316, at *4 (D.N.J. Mar. 31, 2011) (citing cases);

see, e.g., *Randall v. United States*, 95 F.3d 339, 345 (4th Cir. 1996) ("section 1331 is not a general waiver of sovereign immunity"); *Radin v. United States*, 699 F.2d 681, 685 n.9 (4th Cir. 1983) (same); *Miller v. U.S. Dep't of Hous. & Urban Dev.*, No. 1:05–cv–01045, 2006 WL 2504834, at *5 (M.D.N.C. Aug. 29, 2006) ("neither [§ 1331 nor § 1332] establishes an unequivocal waiver of the United States' sovereign immunity"), *aff'd*, 216 F. App'x 367 (4th Cir. 2007) (per curiam); *United States v. Park Place Assocs., Ltd.*, 563 F.3d 907, 934 (9th Cir. 2009) (section 1367 "does not constitute a waiver of the United States' sovereign immunity").

III. THE FEDERAL TORT CLAIMS ACT DOES NOT WAIVE THE UNITED STATES' IMMUNITY TO CACI'S THIRD-PARTY CLAIMS

"In the FTCA, Congress waived sovereign immunity for claims brought against the United States based on the negligence or wrongful acts or omissions of its employees committed within the scope of employment, accepting liability in the same manner and to the same extent as a private individual would have under like circumstances." *Wood v. United States*, 845 F.3d 123, 127 (4th Cir. 2017).

The Federal Tort Claims Act does not waive immunity to any of CACI's third-party claims against the United States for several reasons. *First*, the FTCA's foreign-country and combatant-activities exceptions preserve the United States' immunity to CACI's claims. *Second*, the FTCA does not apply extraterritorially to allegedly-tortious acts or omissions that took place in Iraq. *Third*, CACI's claims all fail as a matter of Virginia law, which CACI contends applies to its claims against the United States. *Finally*, insofar as it is asserted under the FTCA, CACI's breach-of-contract claim fails for a host of additional reasons: (i) it is subject to the Contract Disputes Act ("CDA"), thus precluding litigation under the FTCA; (ii) it is subject to the FTCA's contractual-interference, discretionary-function, and misrepresentation exceptions; and

(iii) to the extent that it is not a true derivative third-party claim, CACI has not alleged compliance with the FTCA's mandatory administrative-exhaustion requirement.

A. The FTCA's Foreign-Country and Combatant-Activities Exceptions Preserve the United States' Immunity To CACI's Claims

The FTCA's foreign-country and combatant-activities exceptions preserve the United States' immunity to suit by Plaintiffs. Those exceptions equally preserve the United States' immunity to CACI's third-party claims.

1. The FTCA Preserves the United States' Immunity To Suit by Plaintiffs

Had Plaintiffs filed an FTCA suit against the United States, their claims would have been barred for several reasons. The two most-obvious bars are the FTCA's foreign-country exception, and its combatant-activities exception.

(a) Plaintiffs' Claims Would Be Barred by the FTCA's Foreign-Country Exception

The FTCA preserves the United States' immunity to "[a]ny claim arising in a foreign country." 28 U.S.C. § 2680(k). "[T]he FTCA's foreign country exception bars all claims based on any injury suffered in a foreign country, regardless of where the tortious act or omission occurred." *Sosa v. Alvarez-Machain*, 542 U.S. 692, 712 (2004); *see also United States v. Spelar*, 338 U.S. 217, 218–22 (1949) (foreign-country exception applies to action involving death at U.S. air base located in a foreign country).

Plaintiffs' claims in this action are based on alleged injuries sustained in Iraq. (*See, e.g.*, Pls. 3d Am. Compl., Doc. 254, ¶ 1.) Accordingly, had Plaintiffs sued the United States for money damages based on the conduct they allege here, the FTCA's foreign-country exception would have barred their suit.

(b) Plaintiffs' Claims Would Be Barred by the FTCA's Combatant-Activities Exception

The FTCA also preserves the United States' immunity to "[a]ny claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war." 28 U.S.C. § 2680(j). In attempting to assert its FTCA-preemption defense, CACI has consistently taken the position that Plaintiffs' claims "arise from the military's combatant activities." *E.g.*, Brief of Appellants CACI Int'l Inc. & CACI Premier Tech., Inc. at 42, *Al Shimari v. CACI Int'l, Inc.*, 679 F.3d 205, (4th Cir. 2012) (en banc) (No. 09–1335) ("CACI 4th Cir. Br."). CACI is correct: had Plaintiffs sued the United States under the FTCA for the conduct they allege here, the FTCA's combatant-activities exception would have barred their suit.

The purpose underlying the combatant-activities exception "'is to foreclose state regulation of the military's battlefield conduct and decisions.'" *In re KBR, Inc., Burn Pit Litig.*, 744 F.3d 326, 348 (4th Cir. 2014) ("*KBR Burn Pit*") (quoting *Harris v. Kellogg Brown & Root Servs., Inc.*, 724 F.3d 458, 480 (3d Cir. 2013)); *accord, e.g., Saleh v. Titan Corp.*, 580 F.3d 1, 7 (D.C. Cir. 2009); *Koohi v. United States*, 976 F.2d 1328, 1334 (9th Cir. 1992). Accordingly, the Fourth Circuit rejected the argument that the phrase "combatant activities" is limited only to actual engagement in physical force, and instead recognized that "viewing 'combatant activities' through a broader lens furthers the purpose of the combatant activities exception." 744 F.3d at 351. The court thus held that the conduct at issue in *KBR Burn Pit*—waste management and water treatment functions to aid military personnel in a combat area—constituted combatant activities. *Id.*

Moreover, the combatant-activities exception does not simply preclude claims for combatant activities; rather, it bars all claims against the United States *arising out of* combatant activities. This "arising out of" language is "broad," and in other areas of the law, "arising out of"

"'denotes *any* causal connection.'" *KBR Burn Pit*, 744 F.3d at 348 (quoting *Harris*, 724 F.3d at 479) (emphasis in original); *see Kosak v. United States*, 465 U.S. 848, 854 (1984) (interpreting "arising in respect of" in 28 U.S.C. § 2680(c) as equivalent to "arising out of" and as an "encompassing phrase" that "seems to sweep within the exception all injuries associated in any way with the 'detention' of goods"). CACI has acknowledged as much, explaining to the Fourth Circuit in this action that "'[a]rising out of' is a broad, general and comprehensive term, ordinarily meaning originating from, growing out of, incident to, or having connection with." CACI 4th Cir. Br. at 41; *see also Al Shimari v. CACI Int'l, Inc.*, 679 F.3d 205, 236 (4th Cir. 2012) (en banc) (Wilkinson, J., dissenting) (combatant-activities exception's "arising out of" language "is among the broadest in the law"; "Congress used some of the broadest language possible when drafting this exception.").

Against this backdrop, the conduct alleged by Plaintiffs arises out of the military's combatant activities. As the Fourth Circuit put it, the United States used Abu Ghraib prison "to detain various individuals, including criminals, enemies of the provisional government, and other persons selected for interrogation because they were thought to possess information regarding Iraqi insurgents." *Al Shimari v. CACI Premier Tech., Inc.*, 758 F.3d 516, 521 (4th Cir. 2014). Plaintiffs allege that they "are among those Iraqis who were caught up in this effort to gain intelligence and to show results, by any means necessary." (Pls. 3d Am. Compl., Doc. 254, ¶ 11; *see also* CACI Mem. in Supp. Mot. To Dismiss, Doc. 627, at 10 ("The current lawsuit challenges the interrogation of detainees in an effort to extract actionable intelligence.").) If waste management in aid of military personnel constitutes a combatant activity, certainly measures to extract actionable intelligence in support of the military's counter-insurgency operations constitute combatant activities as well.

To be sure, the Court indicated in 2009 that it was inclined to adopt a "more limited definition" of combatant activities, which would include only actual physical force. *Al Shimari v. CACI Premier Tech., Inc.*, 657 F. Supp. 2d 700, 721 (E.D. Va. 2009) (Lee, J.), *appeal dismissed*, 679 F.3d 205 (4th Cir. 2012) (en banc). To the extent that the conduct alleged here would not fit within that definition, *KBR Burn Pit* demonstrates that that more-limited definition is no longer good law. Indeed, the *KBR Burn Pit* appellants quoted from the Court's 2009 opinion and explicitly urged the Fourth Circuit to adopt that more-limited definition of combatant activities. *See* Brief of Appellants at 55–56, *KBR Burn Pit*, 744 F.3d 326 (4th Cir. 2014) (No. 13–1430), 2013 WL 2337925 (quoting *Al Shimari*, 657 F. Supp. 2d at 721). But the Fourth Circuit declined to do so, and instead held that "combatant activities . . . extend beyond engagement in physical force." *KBR Burn Pit*, 744 F.3d at 351.

Nor can there be any serious dispute that the conflict in Iraq during the relevant time period constituted a "time of war." § 2680(j). "On October 11, 2002, Congress authorized the President to use military force to 'defend the national security of the United States against the continuing threat posed by Iraq' and 'enforce all relevant United Nations Security Council resolutions regarding Iraq.'" *United States ex rel. Carter v. Halliburton Co.*, 710 F.3d 171, 179 (4th Cir. 2013) (quoting Authorization for the Use of Military Force Against Iraq, Pub. L. 107–243, 116 Stat. 1498 (2002) ("AUMF")), *aff'd in part and rev'd in part on other grounds sub nom. Kellogg Brown & Root Servs., Inc. v. United States ex rel. Carter*, 135 S. Ct. 1970 (2015). "Although not a formal recognition of war, the AUMF signaled Congress's recognition of the President's power to enter into armed hostilities." *Id.* Accordingly, the Fourth Circuit held "that

the United States was 'at war' in Iraq from the date of the AUMF issued by Congress on October 11, 2002." *Id.*[2]

For these reasons, had Plaintiffs sued the United States for money damages based on the conduct they allege here, the FTCA's combatant-activities exception also would have barred their suit.

2. The FTCA Equally Preserves the United States' Immunity To Suit by CACI

Just as the United States is immune to suit by Plaintiffs, so too is it immune to CACI's third-party claims. Like Plaintiffs' claims, CACI's third-party claims are barred by the FTCA's foreign-country exception because they are "based on an[] injury suffered in a foreign country." *Sosa*, 542 U.S. at 712. And CACI's claims also "aris[e] out of" the military's combatant activities because they "originat[e] from, grow[] out of, [are] incident to, or hav[e] [a] connection with" those activities. CACI 4th Cir. Br. at 41–42. Third-party FTCA claims like CACI's "are prohibited . . . when permitting the claims to go forward effectively would defeat the purposes of a particular exception to the government's waiver of sovereign immunity." *Beneficial Consumer Disc. Co. v. Poltonowicz*, 47 F.3d 91, 96–97 (3d Cir. 1995) (FTCA bars third-party claim subject to the FTCA's misrepresentation and deceit exceptions); *see Malone v. United States*, 581 F.2d

[2] Like the Wartime Suspension of Limitations Act at issue in *Carter*, the combatant-activities exception does not require a formal declaration of war. *Compare Carter*, 710 F.3d at 178 ("the [Wartime Suspension of Limitations] Act does not require a formal declaration of war") *with, e.g.*, *Koohi*, 976 F.2d at 1333–34 ("an express declaration of war" is unnecessary; "Whether . . . combat is formally authorized by the Congress or follows less formal actions of the Executive and Legislative branches would seem to be irrelevant to Congress's objectives."). Courts have uniformly found that the FTCA's combatant-activities exception applies even in the case of undeclared wars. *See, e.g.*, *Koohi*, 796 F.2d at 1335 (Tanker War); *Arnold v. United States*, No. 97–50779, 140 F.3d 1037, 1998 WL 156318, at *2 (5th Cir. Mar. 18, 1998) (per curiam) (Persian Gulf War); *Minns v. United States*, 974 F. Supp. 500, 506 (D. Md. 1997) (same), *aff'd on other grounds*, 155 F.3d 445 (4th Cir. 1998); *Vogelaar v. United States*, 665 F. Supp. 1295, 1302 (E.D. Mich. 1987) (Vietnam War).

582, 583–84 (6th Cir. 1978) (FTCA bars third-party claim subject to the FTCA's discretionary-function exception); *accord DuPont Glore Forgan Inc. v. AT&T Co.*, 428 F. Supp. 1297, 1308 (S.D.N.Y. 1977), *aff'd*, 578 F.2d 1367 (2d Cir. 1978). The United States accordingly remains immune to CACI's claims.

CACI cannot seriously contend that its third-party claims somehow differ fundamentally from Plaintiffs' claims. After all, third-party claims "must be 'derivative' of the plaintiff's claim[,] for derivative liability is central to the operation of Rule 14." *Scott v. PPG Indus., Inc.*, 920 F.2d 927, 1990 WL 200655, at *3 (4th Cir. Dec. 13, 1990) (per curiam). Indeed, CACI acknowledges that its third-party complaint derives from Plaintiffs' underlying claims. In the very first paragraph of its third-party complaint, CACI asserts that "Plaintiffs are seeking to hold CACI PT liable on a co-conspirator theory for the alleged tortious conduct of," among others, the United States. (CACI TPC ¶ 1.) Thus, CACI argues, its "liability [to Plaintiffs] is secondary to the [United States'] primary liability." (*Id.*)

But, as explained above, the United States could not be liable to Plaintiffs—on a "primary" basis or otherwise. And the FTCA does not waive the United States' sovereign immunity for derivative third-party claims where it would not waive the United States' sovereign immunity for the underlying claims. As a matter of law and logic, the "legitimacy" of CACI's derivative third-party claims is, as the Fourth Circuit has held, necessarily "dependent upon the injured [plaintiff's] ability to maintain a direct action against the third party defendant." *Horton v. United States*, 622 F.2d 80, 83 (4th Cir. 1980) (per curiam); *see also* Restatement (Third) of Torts: Apportionment of Liability §§ 22 & cmt. c, 23 & cmt. j (2000) (indemnity and contribution each require that two or more entities be liable to the same person for the same harm); 1 Lester S. Jayson & Robert C. Longstreth, *Handling Federal Tort Claims* § 5.10 (2017)

(third-party plaintiff cannot assert third-party FTCA claims against the United States when the United States "has not waived its sovereign immunity on the underlying claim").

For this reason, court after court has dismissed derivative third-party claims brought under the FTCA where the underlying action, if asserted against the United States, would be barred by one of the FTCA's statutory exceptions. *See, e.g.*, *Orion Shipping & Trading Co. v. United States*, 247 F.2d 755, 756 (9th Cir. 1957); *Powell v. Siedlecki Constr. Co.*, No. 16–cv–2502, 2016 WL 6996168, at *3 (S.D.N.Y. Nov. 29, 2016); *Squicciarini v. United States*, No. 12–cv–2386, 2013 WL 620190, at *1, 6 (S.D.N.Y. Feb. 15, 2013); *Trico Dev. Assocs. Ltd. P'ship v. O.C.E.A.N., Inc.*, No. 10–cv–2847, 2010 WL 3614214, at *4 (D.N.J. Sept. 8, 2010); *Wynn v. Mo. Highway Patrol*, No. 06–cv–0203, 2006 WL 1875411, at *3–4 (W.D. Mo. June 30, 2006); *Alexander v. Keystone Credit Union*, No. 94–cv–463, 1994 WL 314319, at *2–3 (E.D. Pa. June 28, 1994); *Fairchild Republic Co. v. United States*, 712 F. Supp. 711, 715–16 (S.D. Ill. 1988); *Nakasheff v. Cont'l Ins. Co.*, 89 F. Supp. 87, 89–90 (S.D.N.Y. 1950); *cf. Terminal R. Ass'n of St. Louis v. United States*, 182 F.2d 149, 151–52 (8th Cir. 1950) (no indemnity under the FTCA where underlying tort was committed before the enactment of the FTCA's waiver of sovereign immunity); *Oahu Ry. & Land Co. v. United States*, 73 F. Supp. 707, 708–09 (D. Haw. 1947) (similar with respect to contribution claim).

In *Orion Shipping & Trading Co*, for example, a seaman obtained a verdict against a shipping company for injuries he sustained based on the company's negligent handling of government cargo while docked in Korea. 247 F.2d at 756. The shipping company had filed a third-party complaint against the United States, which the district court dismissed. *Id.* On appeal, the Ninth Circuit held that the shipping company's suit could not be asserted under the FTCA: "It is obvious that Orion cannot recover under the Tort Claims Act since 28 U.S.C.

§ 2680(k) excepts from the act 'any claim arising in a foreign country' as here at Pier 2 in Pusan, Korea." *Orion Shipping & Trading Co.*, 247 F.2d at 756. Simply put, "the statutory exceptions to the United States' waiver of sovereign immunity codified in section 2680 are equally enforceable against third parties asserting [derivative] claims as they are against the plaintiff injured by the actions of the United States." *Wynn*, 2006 WL 1875411, at *3; *see also Harbury v. Hayden*, 522 F.3d 413, 423 (D.C. Cir. 2008) (plaintiff who sustained emotional distress in the United States based on her husband's death in Guatemala cannot recover under the FTCA: "A plaintiff in Harbury's situation cannot plead around the FTCA's foreign-country exception simply by claiming injuries such as 'emotional distress' that are derivative of the foreign-country injuries at the root of the complaint."); *accord S.H. ex rel. Holt v. United States*, 853 F.3d 1056, 1061–63 (9th Cir. 2017); *Gross v. United States*, 771 F.3d 10, 12–13 (D.C. Cir. 2014); *Placencia v. United States*, No. 3:16–cv–02354, 2017 WL 3017708, at *2–3 (S.D. Cal. July 13, 2017); *Torres-Colón v. United States*, No. 15–cv–3037, 2017 WL 571484, at *2 (D.P.R. Feb. 13, 2017).

This conclusion is in full accord with the text and structure of the FTCA. In *United States v. Yellow Cab Co.*, 340 U.S. 543 (1951), the Supreme Court held that language in the original version of the FTCA's waiver of sovereign immunity—that, subject to limitations, sovereign immunity is waived for "'*any claim* against the United States . . . on account of personal injury'"—is "broad" in scope and includes contribution claims that derive from personal-injury claims. *Id.* at 548 (quoting 28 U.S.C. § 931(a) (1946)) (emphasis added); *see also Lockheed Aircraft Corp. v. United States*, 460 U.S. 190, 198 (1983) (third-party indemnity claims are not categorically barred by the FTCA). Just as the phrase "any claim" in the FTCA's original immunity-waiving provision broadly encompassed third-party claims that derived from personal-injury actions, so too do the FTCA's § 2680 exceptions—all of which begin with "[a]ny

claim"—broadly exclude from the FTCA's waiver third-party claims that derive from excluded activities or conduct that could not itself be actionable under the FTCA.

As explained above, the United States is undoubtedly immune to any money-damages suit that Plaintiffs could have brought against it. And just as the FTCA preserves the United States' immunity to suit by Plaintiffs, so too does it immunize the United States from CACI's third-party claims.

B. The FTCA Does Not Encompass the Extraterritorial Conduct at Issue in This Litigation

Even assuming *arguendo* that the FTCA's foreign-country and combatant-activities exceptions did not apply to this action, CACI's claims must still be dismissed because (i) they concern allegedly-tortious acts or omissions by federal employees in Iraq, but (ii) the FTCA does not encompass such extraterritorial conduct.

"[T]he presumption against extraterritorial application of United States statutes requires that any lingering doubt regarding the reach of the FTCA be resolved against its encompassing torts committed" outside of the United States. *Smith v. United States*, 507 U.S. 197, 203–04 (1993). *Smith* was a wrongful-death action involving "tortious acts or omissions occurring in Antarctica." *Id.* at 198–99. In concluding that the FTCA's waiver of sovereign immunity did not apply to the plaintiff's claims, the Supreme Court recognized that the plaintiff's "argument for governmental liability . . . faces significant obstacles in addition to the foreign-country exception." *Smith*, 507 U.S. at 201. The Court rested its holding on "the language and structure of the [FTCA] itself," *i.e.*, 28 U.S.C. §§ 1346(b), 1402(b), and 2680(k)—as well as "on presumptions as to extraterritorial application of Acts of Congress and as to waivers of sovereign immunity." *Smith*, 507 U.S. at 204. Just as the FTCA does not "encompass[] torts committed in

Antarctica," *id.* at 203–04, neither does it encompass allegedly-tortious conduct committed in Iraq.

This conclusion is borne out by two other features of the FTCA. *First*, the substantive law applied in an FTCA action is "'the whole law (including choice-of-law rules) . . . of the State where the [allegedly tortious federal] act or omission occurred.'" *Sosa*, 542 U.S. at 708 n.5 (quoting *Richards v. United States*, 369 U.S. 1, 3, 11 (1962)) (alterations as in original). Here, any tortious federal acts or omissions occurred in Iraq, so under the requisite analysis, Iraq's choice-of-law rules would apply. But, as the Supreme Court noted, in waiving the United States' sovereign immunity, Congress "was unwilling to subject the United States to liabilities depending upon the laws of a foreign power." *Spelar*, 338 U.S. at 221. And that "legislative will must be respected." *Id.* (*See also* CACI Mem. in Supp. Mot. To Dismiss, Doc. 627, at 40–41 ("The reason that claims involving injuries in foreign countries are excluded from the United States' waiver of sovereign immunity is that Congress did not want the United States' conduct being judged through 'the application of foreign substantive law.'") (quoting *Sosa*, 542 U.S. at 707).)

Second, FTCA claims may be brought "only in the judicial district where the plaintiff resides or wherein the act or omission complained of occurred." 28 U.S.C. § 1402(b). It follows that if the FTCA were to apply to acts or omissions that occurred overseas, venue would exist only if the plaintiff happened to reside in the United States. Thus, if the FTCA applied here, CACI would have a venue in which to sue the United States, but Plaintiffs would not. The Supreme Court deemed this dichotomy "anomalous"—especially considering that Congress "declined to enact earlier versions of [the FTCA] that would have differentiated between foreign and United States residents." *Smith*, 507 U.S. at 202 & n.4. "Congress does not in general

intend to create venue gaps, which take away with one hand what Congress has given by way of jurisdictional grant with the other." *Id.* at 203. Rather, the FTCA should be construed so as to "avoid[] leaving such a [venue] gap." *Id.*

For these reasons, the FTCA does not apply extraterritorially to alleged federal conduct in Iraq.

C. CACI's Claims Are Not Actionable under Virginia Law

"[T]o be actionable under [the FTCA], a claim must allege, *inter alia*, that the United States would be liable to the claimant as a private person in accordance with the law of the place where the act or omission occurred." *FDIC v. Meyer*, 510 U.S. 471, 477 (1994). Notwithstanding the FTCA's choice-of-law analysis, CACI contends that Virginia law applies to its third-party claims. (*See* CACI Opp. to Pls. Mot. To Strike, Doc. 683, at 16 n.6 ("Virginia law likely governs CACI PT's claims against the United States . . . .").)

As a threshold matter, to the extent that CACI's second count for "exoneration" sounds in tort under Virginia law, it is, at best, duplicative of its claim for common-law indemnity. "'[E]xoneration' and 'indemnity' are often used interchangeably." *Uptagrafft v. United States*, 315 F.2d 200, 203 (4th Cir. 1963).[3] In fact, CACI's claims for common-law indemnification and exoneration are identically pled. (*Compare* CACI TPC ¶¶ 33–38 (common-law indemnification) *with id.* ¶¶ 40–45 (exoneration).) Accordingly, these claims are properly construed together as one for common-law indemnification.

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[3] Technically, exoneration "refers to the right to be reimbursed by reason of having paid that which another should be compelled to pay," whereas indemnity "means compensation for loss already sustained." *Uptagrafft*, 315 F.2d at 203; *accord* 4B *Michie's Jurisprudence of Va. & W. Va.: Contribution & Exoneration* § 29 n.144 (2017). Given the contingent nature of CACI's third-party action, this is a distinction without a difference. CACI has not yet sustained, let alone paid for, any loss.

As explained below, CACI's claims against the United States all fail as a matter of Virginia law. And because "the United States waive[s] sovereign immunity under the FTCA . . . only to the extent that the claim can advance under state law," CACI's claims must be dismissed for lack of subject-matter jurisdiction. *James v. United States*, 143 F. Supp. 3d 392, 397 (E.D. Va. 2015); *accord Smith*, 507 U.S. at 201; *Sobitan v. Glud*, 589 F.3d 379, 388–89 (7th Cir. 2009); *Chomic v. United States*, 377 F.3d 607, 609 (6th Cir. 2004).

1. Virginia Law Does Not Have Extraterritorial Effect

As CACI explained to the Court in 2013, Virginia law "is presumed not to have extraterritorial effect." (CACI Mem. in Supp. Mot. To Dismiss, Doc. 364, at 21 (citing cases).) Judge Wilkinson put it more pointedly: "It defies belief that, notwithstanding the constitutional entrustment of foreign affairs to the national government, Virginia silently and impliedly wished to extend the application of its tort law to events overseas." *Al Shimari*, 679 F.3d at 231 (Wilkinson, J., dissenting); *see also Estate of Sa'adoon v. Prince*, 660 F. Supp. 2d 723, 725 (E.D. Va. 2009) (Virginia's wrongful-death statute does not apply extraterritorially to death in Iraq). And given the absence of any Virginia authority suggesting that its tort law should apply overseas, this Court should forgo the opportunity to blaze a new trail. Federal courts construing state law should generally "decline[] to expand state common law principles to encompass novel circumstances when the courts of that state have not done so first." *Fontenot v. Taser Int'l, Inc.*, 736 F.3d 318, 331 (4th Cir. 2013).

2. CACI's Claims for Common-Law Indemnification, Exoneration, and Contribution Fail Because the United States Cannot Be Liable To Plaintiffs

The Supreme Court of Virginia has held that "before contribution may be had it is essential that a cause of action by the person injured lie against the alleged wrongdoer from whom contribution is sought." *Va. Elec. & Power Co. v. Wilson*, 277 S.E.2d 149, 150 (Va.

1981). Put another way, "[a] party . . . that cannot be liable to a first-party plaintiff as a matter of law cannot be held liable to a third-party plaintiff in an action for contribution." *Prior v. Teamsters Local 101*, No. 3:14–cv–527, 2015 WL 500173, at *2 (E.D. Va. Feb. 4, 2015); *accord, e.g.*, *Woodson v. City of Richmond*, 2 F. Supp. 3d 804, 810 (E.D. Va. 2014). This principle, furthermore, "is equally applicable to indemnity." *Wilson*, 277 S.E.2d at 150. "Because no cause of action existed against" the United States "in favor of the injured parties, no right of contribution or indemnity could exist in favor of" CACI. *Id.*; *see Gen. Elec. Co. v. United States*, 813 F.2d 1273, 1275–76 & n.2 (4th Cir. 1987) (per curiam) (affirming dismissal of contribution and indemnity claims against the United States because a similarly-situated private employer would be immune pursuant to Maryland's worker's compensation law), *vacated and remanded on other grounds*, 484 U.S. 1022 (1988), *reinstated in relevant part*, 843 F.2d 168, 169 (4th Cir. 1988) (per curiam); *accord Eubank v. Kan. City Power & Light Co.*, 626 F.3d 424, 427–29 (8th Cir. 2010); *Harmsen v. Smith*, 586 F.2d 156, 157–58 (9th Cir. 1978).

3. CACI's Claims for Common-Law Indemnification, Exoneration, and Contribution Fail Because This Action Does Not Involve Allegations of Negligence

A party may seek contribution or common-law indemnity from a third-party defendant only in cases involving negligence. *See* Va. Code. Ann. § 8.01–34 ("Contribution among wrongdoers may be enforced when the wrong results from negligence and involves no moral turpitude"); *Carr v. Home Ins. Co.*, 463 S.E.2d 457, 458 (Va. 1995) ("Equitable indemnification arises when a party without personal fault, is nevertheless legally liable for damages caused by the negligence of another."). "A party forfeits the right to contribution, however, where the joint liability arises not from negligence but 'out of an act involving moral turpitude or a voluntary tort,'" *i.e.*, an intentional tort. *Prior*, 2015 WL 500173, at *2 (quoting *Hudgins v. Jones*, 138 S.E.2d 16, 21 (Va. 1964)); *accord Woodson*, 2 F. Supp. 3d at 810. Similarly, claims for

common-law indemnity fail where the underlying action is based on "active negligence or an intentional tort." *Level 3 Commcn's, LLC v. Webb, Inc.*, No. 3:12–cv–82–DJN, 2012 WL 2199262, at *3 (E.D. Va. June 14, 2012) (citing cases).

Plaintiffs' surviving claims against CACI are not based on negligence. "[U]nlike traditional tort law," the Court recently explained, the ATS "only recognizes a small number of particularly egregious intentional torts." *Al Shimari*, 2018 WL 1004859, at *22. There is no such thing as, say, negligently engaging in a conspiracy to torture, or negligently aiding and abetting in war crimes. Indeed, the Court explained that in order "[t]o state a claim for conspiracy under the ATS, plaintiffs must allege," *inter alia*, "that two or more persons *agreed* to commit a wrongful act" and that the defendant "joined the conspiracy *knowing* of the goal of committing a wrongful act and *intending* to help accomplish it." *Id.* at *17 (emphases added). Likewise, "[t]o maintain a claim for aiding and abetting under the ATS, plaintiffs must allege facts that support a plausible inference that CACI 'provided substantial assistance with the *purpose* of facilitating the alleged violation' of international law." *Id.* at *19 (quoting *Aziz v. Alcolac, Inc.*, 658 F.3d 388, 401 (4th Cir. 2011)); *see also Aziz*, 658 F.3d at 400 (adopting "the specific intent mens rea standard for accessorial liability" under the ATS).

Last month, the Court held that Plaintiffs had plausibly alleged "an intent from the highest levels of [CACI] to enter into the conspiracies that had developed among CACI's employees and military personnel." *Al Shimari*, 2018 WL 1004859, at *18. And with respect to Plaintiffs' aiding-and-abetting claims, the Court found that Plaintiffs' allegations "render plausible the ultimate inference that CACI and its employees purposefully aided the violations of international law in order to facilitate the interrogations of plaintiffs." *Id.* at *19; *see Al Shimari v. CACI Premier Tech., Inc.*, 840 F.3d 147, 156 (4th Cir. 2016) ("the present case involves

allegations of intentional acts"); *see also, e.g.*, *Marlowe v. Nat'l Mausoleum Corp.*, 332 F. Supp. 876, 878 (E.D. Va. 1971) ("The corporations were not technical or secondary wrongdoers—They were co-conspirators—primary wrongdoers.").

As recognized by the Court, Plaintiffs' allegations patently concern alleged moral turpitude and intentional conduct. Accordingly, CACI cannot assert claims for common-law indemnity, exoneration, or contribution against the United States as a matter of Virginia law.[4]

4. CACI's Claims for Common-Law Indemnification and Exoneration Fail Because the United States Is Liable Only on a Vicarious Basis

The United States is liable for the negligent or wrongful acts of its employees under the doctrine of *respondeat superior*. *See Uptagrafft*, 315 F.2d at 202–03; *accord, e.g.*, *Gutierrez de Martinez v. Lamagno*, 515 U.S. 417, 419–20 (1995); *Laird v. Nelms*, 406 U.S. 797, 801 (1972); *United States v. Campbell*, 172 F.2d 500, 503 (5th Cir. 1949). Accordingly, to the extent that the United States can be held liable in this action under the FTCA, its liability is vicarious in nature.

But "where two parties are liable, if at all, only vicariously, there is no common law right of indemnification between them." *Abercrombie & Kent Int'l, Inc. v. Carlson Mktg. Grp., Inc.*, No. 88–cv–7889, 1989 WL 46222, at *2 (E.D. Pa. Apr. 25, 1989); *accord, e.g.*, *Phila. Elec. Co. v. Hercules, Inc.*, 762 F.2d 303, 318 (3d Cir. 1985); *Syberg v. Marion Cnty. Sheriff's Dep't*, No. 1:05–cv–1706, 2007 WL 2316467, at *4 (S.D. Ind. Aug. 7, 2007). This is because "the right to be indemnified is based on the difference between direct and vicarious liability." *Collins v. United States*, 564 F.3d 833, 837 (7th Cir. 2009) (Posner, J.). Accordingly, "an entity that is vicariously liable for the actions of an agent or employee generally may not seek indemnity from

[4] It follows that if Plaintiffs do not carry their burden at trial of proving the necessary intent, and can only demonstrate negligence on the part of CACI, their remaining claims will all fail, and CACI will have no need to seek indemnification, exoneration, or contribution.

the United States on the ground that the United States is also vicariously liable for the acts of the employee, since indemnity is not permitted where both tortfeasors are only passively negligent, or are otherwise negligent in an equal degree." 1 *Handling Federal Tort Claims* § 5.10. Simply put, "the United States [is] merely a vicariously liable passive tortfeasor; its conduct as an employer of [tortious] agents [is] no more blameworthy than that of" CACI. *Rudelson v. United States*, 602 F.2d 1326, 1333 (9th Cir. 1979) (affirming denial of indemnification claims against the United States). For this additional reason, CACI's claims for common-law indemnity and exoneration must be dismissed.

5. CACI's Breach-of-Contract Claim Fails Because It Is Premised on a Breach of a Supposedly-Implied Duty of Good Faith and Fair Dealing, Which Does Not Constitute a Tort in Virginia

CACI's breach-of-contract claim is premised on a breach of a supposedly-implied "duty of good faith and fair dealing." (CACI TPC ¶¶ 53–58.) But in Virginia, a "[b]reach of the duty of good faith and fair dealing is not an independent tort." *Phillips v. Wells Fargo Bank, N.A.*, No. 3:17–cv–00519–JAG, 2018 WL 659199, at *3 (E.D. Va. Feb. 1, 2018); *accord Jackson v. Ocwen Loan Servicing, LLC*, No. 3:15–cv–238, 2016 WL 1337263, at *12 (E.D. Va. Mar. 31, 2016); *Goodrich Corp. v. Baysys Techs., LLC*, 873 F. Supp. 2d 736, 742 (E.D. Va. 2012); *Carr v. Fed. Nat'l Mortg. Assoc.*, 92 Va. Cir. 472, at *4 (Va. Cir. Ct. 2013). It can only be asserted as a contract claim. *Phillips*, 2018 WL 659199, at * 3. Accordingly, to the extent that it is subject to the FTCA, CACI's breach-of-contract claim must be dismissed.

D. The FTCA Bars CACI's Breach-of-Contract Claim for Additional Reasons

The FTCA also bars CACI's breach-of-contract claim because: (i) it is based on a Contract Disputes Act contract that cannot be litigated under the FTCA; (ii) it is subject to the FTCA's contractual-interference, discretionary-function, and misrepresentation exceptions; and

(iii) to the extent that it is not a true derivative claim, CACI has not satisfied the FTCA's administrative-exhaustion requirement.

1. The Contract at Issue Is Subject To the Contract Disputes Act So Any Breach of That Contract Cannot Be Litigated under the FTCA

CACI's breach-of-contract claim arises out of a contract subject to the Contract Disputes Act of 1978 ("CDA"), 41 U.S.C. §§ 7101 *et seq.* (formerly §§ 601 *et seq*.), and thus cannot be brought under the FTCA. The CDA applies "to any express or implied contract . . . made by an executive agency for [*inter alia*], the procurement of services." 41 U.S.C. § 7102; *United Fed. Leasing, Inc. v. United States*, 33 F. App'x 672, 674 (4th Cir. 2002) ("The CDA provides for legal recourse against the government for disputes arising from the procurement of property and services by the federal government."); *Bank of Am. Nat'l Tr. & Sav. Ass'n v. United States*, 23 F.3d 380, 387 (Fed. Cir. 1994) ("Because the contract was one for the procurement of services by the government, it was necessarily controlled by the provisions of the" CDA). Here, CACI alleges that "the United States issued task orders to CACI PT whereby CACI PT provided civilian interrogators to the United States military." (CACI TPC ¶ 14.) Such task orders, issued by an executive agency for the procurement of services from CACI, are contracts subject to the CDA. *See, e.g., Kingdomware Techs., Inc. v. United States*, 136 S. Ct. 1969, 1978 (2016) (explaining that task orders issued through the Federal Supply Schedule are contracts).

The CDA includes statutory review procedures, 41 U.S.C. §§ 7103–7107, and those review procedures "are exclusive of jurisdiction in any other forum." *United States v. J & E Salvage Co.*, 55 F.3d 985, 987 (4th Cir. 1995). Plaintiffs cannot circumvent the CDA's review procedures by attempting to characterize their breach-of-CDA-contract claims as torts: "Effective enforcement of the jurisdictional limits of the CDA mandates that courts recognize contract actions that are dressed in tort clothing." *Id.* at 988. "Plaintiff[s] cannot invoke the

jurisdiction of [the district court] by framing a claim as other than contractual, when, in fact, the genesis of any wrongdoing by the United States was breach of contract." *United Fed. Leasing*, 33 F. App'x at 675 (affirming dismissal of putative FTCA claim). "It is well-established therefore that disguised contract actions may not escape the CDA." *J & E Salvage Co.*, 55 F.3d at 988; *see Walsh Constr. Co. v. United States*, 132 Fed. Cl. 282, 290–91 (2017) (claim for breach of implied duty of good faith and fair dealing in CDA contract must first be presented to contracting officer).

Here, CACI does not even attempt to disguise its fourth count as a tort claim. Rather, it expressly styles its Count IV as one for "breach of contract." (CACI TPC ¶¶ 52–58 & heading.) Accordingly, CACI's breach-of-contract claim cannot proceed under the FTCA. *United Fed. Leasing*, 33 F. App'x at 675.

2. CACI's Breach-of-Contract Claim Is Subject To Three Additional FTCA Exceptions

Even assuming that CACI's breach-of-contract claim could somehow escape the CDA, it still is barred by no fewer than three additional exceptions in 28 U.S.C. § 2680.

First, CACI's breach-of-contract claim is barred because it "aris[es] out of . . . interference with contract rights." 28 U.S.C. § 2680(h). CACI asserts that its contracts with the United States "contain an implied duty of good faith and fair dealing," yet the government has supposedly "hinder[ed]" CACI's ability "to obtain the fruits of [its] bargain" and "in bad faith, le[ft] CACI PT 'hung out to dry.'" (CACI TPC ¶¶ 53–57.) But "claims for breach of an implied covenant of good faith and fair dealing . . . to the extent that they are construed as tort claims . . . fall under the statutory exemption for interference of contract rights." *Coulibaly v. Kerry*, 213 F. Supp. 3d 93, 127 (D.D.C. 2016); *accord Champagne v. United States*, 15

F. Supp. 3d 210, 221, 225 (N.D.N.Y. 2014); *Setterlund v. Potter*, No. 05–cv–40194, 2006 WL 3716039, at *2–3 & n.2 (D. Mass. Dec. 15, 2006).

Second, CACI's breach-of-contract claim is also barred by the FTCA's discretionary-function exception, which "preserves sovereign immunity and insulates the government from liability for 'the exercise or performance [of] a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.'" *Seaside Farm, Inc. v. United States*, 842 F.3d 853, 857 (4th Cir. 2016) (quoting 28 U.S.C. § 2680(a)). By grounding its claim that federal employees were obligated to provide it with "information regarding the persons with whom Plaintiffs interacted" at Abu Ghraib (CACI TPC ¶ 56), in an amorphous duty supposedly implied in contract, CACI effectively acknowledges that no federal statute, regulation, or policy specifically mandates the United States to provide it with the information that it seeks.[5] And where, as here, federal employees are afforded discretion, "it must be presumed that decisions are grounded in policy when exercising that discretion." *Seaside Farm*, 842 F.3d at 858. CACI cannot overcome this presumption. Information regarding the identities of individuals who had contact with Plaintiffs is, at the very least, sensitive—if not classified. Accordingly, the decision to withhold such information necessarily implicates discretionary policy judgment that is protected by the discretionary-function exception. *See Canadian Transp. Co. v. United States*, 663 F.2d 1081, 1087 (D.C. Cir. 1980) ("the decision to keep the details, and even the existence, of the SIV program classified is immunized by the discretionary function exemption"); *cf. Patton Elec. Co. v. United States*, 64 F. Supp. 2d 580, 584 (E.D. Va. 1999) (Brinkema, J.) ("This course of

[5] *Cf., e.g.*, 10 U.S.C. § 130b; Dep't of Def., Directive No. 3115.09, Encl. 4 § 13(a); Dep't of Def. Manual 5400.07 § 5.2.c.(2).(a).

conduct necessarily balanced economic and social welfare concerns. . . . The typical FTCA case is a car crash with a government vehicle in which the government driver was negligent. Unlike the car crash case, the instant case actually involved governmental decisions.").

Finally, the FTCA also explicitly preserves the United States' sovereign immunity with respect to "claim[s] arising out of . . . misrepresentation." 28 U.S.C. § 2680(h). "'[A] misrepresentation may result from the failure to provide information.'" *Esrey v. United States*, 707 F. App'x 749, 749 (2d Cir. 2018) (quoting *Ingham v. E. Air Lines, Inc.*, 373 F.2d 227, 239 (2d Cir. 1967)) (emphasis omitted); *accord, e.g.*, *Zelaya v. United States*, 781 F.3d 1315, 1334–35 (11th Cir. 2015); *Muniz-Rivera v. United States*, 326 F.3d 8, 13 (1st Cir. 2003); *Lawrence v. United States*, 340 F.3d 952, 958 (9th Cir. 2003). CACI's breach-of-contract claim is premised on the notion that the United States owes CACI a duty to "provide[] information regarding the persons with whom Plaintiffs interacted," but the United States "den[ied] CACI PT access to [such] information." (CACI TPC ¶¶ 56–57.) In other words, CACI's breach-of-contract claim reduces to one for failure to provide information, which is barred by the misrepresentation exception. *See, e.g.*, *Esrey*, 707 F. App'x at 750 (claim that IRS breached its fiduciary duties by "wrongfully with[holding] information" from plaintiffs was barred by the misrepresentation exception).

3. To the Extent That CACI's Breach-of-Contract Claim Is Not Derivative in Nature, It Must Be Dismissed for Failure To Exhaust Administrative Remedies under the FTCA

To the extent that CACI argues that its breach-of-contract claim is not, in fact, derivative in nature,[6] it must be dismissed for lack of subject-matter jurisdiction because CACI "does not

[6] *See, e.g.*, *PTM Dev. Co. v. Leland*, No. 07–cv–539, 2007 WL 4268773, at *3 (N.D. Okla. Nov. 30, 2007) ("Defendant's [third-party] breach of contract claim is clearly not derivative of plaintiff's claims, because it involves two promissory notes executed between himself and [the *(cont'd)*

plead [administrative] exhaustion of [its] claims"—"a necessary prerequisite to pursuing an FTCA claim in federal court." *Ameur v. Gates*, 950 F. Supp. 2d 905, 919 n.6 (E.D. Va. 2013), *aff'd on other grounds* 759 F.3d 317 (4th Cir. 2014); *accord Johnson v. Runyon*, No. 95–3083, 1996 WL 405218, at *2 (4th Cir. July 19, 1996). To be sure, the FTCA provides that its administrative-exhaustion requirement "shall not apply to such claims as may be asserted under the Federal Rules of Civil Procedure by third party complaint." 28 U.S.C. § 2675(a). But "[t]his exception has been narrowly construed" and "only applies to third-party actions under Fed. R. Civ. P. 14 seeking indemnity or contribution from the government." 3 *Handling Federal Tort Claims* § 17.01. "[I]t does not apply to . . . third-party claims which are not 'true' Rule 14 impleader actions." *Id.* (citing cases); *see Northridge Bank v. Cmty. Eye Care Ctr., Inc.*, 655 F.2d 832, 835–36 (7th Cir. 1981) ("Since Community's conspiracy claim is not a compulsory counterclaim or a proper third-party claim, Community cannot be excused for its failure to comply with" the FTCA's administrative-exhaustion requirement); *In re Ingram Barge Co.*, No. 05–cv–4419, 2007 WL 550060, at *2–3 (E.D. La. Feb. 15, 2007) (finding that a third-party FTCA claim was not a "true" third-party claim, and refusing to reconsider its dismissal of that claim for failure to exhaust administrative remedies).

IV. THE LITTLE TUCKER ACT DOES NOT WAIVE THE UNITED STATES' IMMUNITY TO CACI'S BREACH-OF-CONTRACT CLAIM

CACI does not assert that the Court has subject-matter jurisdiction pursuant to the Little Tucker Act, 28 U.S.C. § 1346(a)(2). (*See* CACI TPC ¶ 6.) But even if it did, the Little Tucker Act does not waive the United States' immunity to CACI's breach-of-contract claim.

(cont'd from previous page)
third-party defendant]. The existence of promissory notes between defendant and a third-party has no bearing on plaintiff's claims against defendant.").

Because, as explained above in Part III.D.1, CACI's breach-of-contract claim is founded on a contract subject to the Contract Disputes Act, jurisdiction in the district courts is expressly precluded pursuant to the Little Tucker Act. 28 U.S.C. § 1346(a)(2). Moreover, because CACI has failed to meet the jurisdictional prerequisites for exclusive jurisdiction to arise in the United States Court of Federal Claims, transfer to that court is not appropriate. Instead, this Court should dismiss CACI's breach-of-contract claim for lack of subject-matter jurisdiction.

A. Jurisdiction Under the Contract Disputes Act Is Exclusive in the Court of Federal Claims

The United States, as sovereign, is "immune from suit save as it consents to be sued." *United States v. Sherwood*, 312 U.S. 584, 586 (1941). Although 28 U.S.C. § 1346(a)(2), known as the "Little Tucker Act," waives sovereign immunity for a civil suit in this Court seeking no more than $10,000 if founded on, among other things, an express or implied contract with the United States, it contains an express exception to this waiver for contracts subject to the CDA. 28 U.S.C. § 1346(a)(2) ("except that the district courts shall not have jurisdiction of any civil action or claim against the United States founded upon any express or implied contract with the United States . . . which are subject to sections 7104(b)(1) and 7107(a)(1) of title 41 [the CDA]."). In cases in which the CDA applies, "'it provides the exclusive mechanism for dispute resolution.'" *Lockheed Martin Corp. v. Def. Contract Audit Agency*, 397 F. Supp. 2d 659, 664 (D. Md. 2005) (quoting *Dalton v. Sherwood Van Lines, Inc.*, 50 F.3d 1014, 1017 (Fed. Cir. 1995)). "'The purpose for centralizing the resolution of government contract disputes in [these fora], rather than in district court, is to ensure national uniformity in government contract law.'" *Lockheed Martin Corp.*, 397 F. Supp. 2d at 664–65 (quoting *Tex. Health Choice, L.C. v. OPM*, 400 F.3d 895, 899 (Fed. Cir. 2005)). This Court does not possess jurisdiction to entertain

CACI's breach-of-contract claim because the contract that CACI alleges the government has breached is subject to the CDA.

And even if CACI had filed its complaint with the Court of Federal Claims, that court would not currently possess jurisdiction to adjudicate it. Pursuant to the CDA, any claim by a Government contractor must first be submitted to the contracting officer for a decision. 41 U.S.C. § 7103. "A 'claim' under the Contract Disputes Act, 41 U.S.C. §§ [7101–09], must be '(1) a written demand, (2) seeking, as a matter of right, (3) the payment of money in a sum certain.'" *Daewoo Eng'g & Constr. Co. v. United States*, 557 F.3d 1332, 1336 (Fed. Cir. 2009) (quoting *Reflectone, Inc. v. Dalton*, 60 F.3d 1572, 1575 (Fed. Cir. 1995) (en banc)).

Only if such a claim is denied or deemed denied does exclusive jurisdiction arise in the United States Court of Federal Claims to entertain the claim. 41 U.S.C. § 7103. A contractor must await a final decision denying the claim[7] before filing an appeal in the appropriate board of contract appeals or the Court of Federal Claims. *England v. The Swanson Grp., Inc*., 353 F.3d 1375, 1379 (Fed. Cir. 2004). The claim submission requirements under the CDA are "jurisdictional prerequisites," without which the Court of Federal Claims does not possess jurisdiction to entertain a CDA contract claim. *Id*. Because CACI has not alleged that it has satisfied these prerequisites, the Court of Federal Claims would also lack jurisdiction over Count IV of its complaint and transfer is inappropriate, as it would be futile.

[7] Alternatively, the passage of 60 days without a final decision from the contracting officer or a notification of the time within which a decision will be issued will allow the contractor to deem the claim denied and to file an appeal. *Case, Inc. v. United States*, 88 F.3d 1004, 1009 (Fed. Cir. 1996); *see also Lockheed Martin Corp*., 397 F. Supp. 2d at 664.

B. Even If CACI's Contract Were Not Subject To the CDA, the Court Would Still Lack Jurisdiction

As discussed above, the Little Tucker Act expressly precludes jurisdiction in this Court for contract claims subject to the CDA. Even if CACI's contract claim were not precluded by the CDA, however, jurisdiction would still be lacking under the Little Tucker Act, because CACI does not seek presently due monetary damages, nor has it expressly waived any damages award over $10,000.

1. The Court Does Not Possess Jurisdiction To Grant Equitable Or Injunctive Relief under the Little Tucker Act

It is unclear what particular damages CACI seeks as a result of Count IV of its complaint, but CACI does not allege that any sum certain is presently due. The Little Tucker Act, however, "'has long been construed as waiving the federal government's sovereign immunity only with respect to claims that seek monetary relief in the form of 'actual, presently due money damages.'" *Johnson v. DeVos*, No. GJH–15–1820, 2017 WL 3475668, at *4 (D. Md. Aug. 11, 2017) (quoting *Dawson v. Great Lakes Educ. Loan Servs., Inc.*, No. 15–CV–475–BBC, 2016 WL 426610, at *3 (W.D. Wis. Feb. 3, 2016); *Bowen v. Massachusetts*, 487 U.S. 879, 914–15 (1988)). "Claims for any type of equitable or nonmonetary relief, such as injunctive or declaratory relief, do not fall within the Little Tucker Act's ambit." *Johnson*, 2017 WL 3475668, at *4. To the extent that CACI seeks damages conditional upon a judgment entered against it in a parallel action, in the amount of any such damages, such a claim is not yet ripe, and should be dismissed. *Texas v. United States*, 523 U.S. 296, 300 (1998) ("A claim is not ripe for adjudication if it rests upon 'contingent future events that may not occur as anticipated, or indeed may not occur at all.'").

2. CACI Has Failed To Expressly Limit Its Damages To $10,000

CACI's contract claim asserts that CACI's breach-of-contract damages will "equal[] the amount of any theoretical judgment against CACI PT in this action." (CACI TPC ¶ 58.) The Little Tucker Act, however, provides the district courts with jurisdiction concurrent with that of the Court of Federal Claims only for claims not exceeding $10,000. 28 U.S.C. § 1346(a)(2). Although a plaintiff can bring a Little Tucker Act contract claim worth more than $10,000 in the district court if it waives its right to recover more than $10,000, such a waiver "must be clearly and adequately expressed." *Goins v. Speer*, No. 4:16–CV–48–D, 2017 WL 3493607, at *5 (E.D.N.C. Aug. 14, 2017) (quoting *Waters v. Rumsfeld*, 320 F.3d 265, 271 (D.C. Cir. 2003)). Here, CACI has given no indication in its complaint that it intends to cap any damages it might be awarded at $10,000. As a result, this Court should decline to exercise jurisdiction even if this case were not expressly carved out from its Little Tucker Act jurisdiction under the CDA.

CONCLUSION

For all of the foregoing reasons, CACI cannot carry its burden of demonstrating an express and unequivocal waiver of sovereign immunity that would allow its claims against the United States to proceed. Accordingly, those claims must be dismissed for lack of subject-matter jurisdiction.

Dated: March 14, 2018

Respectfully submitted,

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I certify that on March 14, 2018, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which sent a notification of such filing (NEF) to the following counsel of record:

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