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 FOR SUMMARY JUDGMENT

INTRODUCTION

In 2003, Third-Party Plaintiff CACI Premier Technology, Inc. ("CACI") agreed to provide the United States with interrogation services in Iraq pursuant to two contractual task orders. CACI reaped millions of dollars from the arrangement and, after the termination of the task orders at issue, CACI claimed that the government owed it even more money for services performed under these and other task orders. Ultimately, in 2007—as CACI was defending itself against a putative class action filed by Abu Ghraib detainees in federal district court—CACI and the federal government agreed to settle "all claims and disputes . . . arising out of or related to" eleven task orders, including the two task orders at issue in this case.

In 2018—eleven years after this settlement agreement was executed—CACI impleaded the United States in this then-decade-old action, arguing that the United States must compensate CACI for any judgment it might sustain in the first-party action by Plaintiffs. A sophisticated government contractor and the subsidiary of a publicly-traded, multi-billion-dollar enterprise, CACI has not pointed to any express provision in its contracts with the United States that would obligate the United States to indemnify CACI in this action. Instead, CACI asks this Court to: (i) disregard two centuries of unbroken Supreme Court precedent (and CACI's own long-standing litigation position) demonstrating that the United States is immune to CACI's claims; (ii) twist Virginia tort law[1] into affording CACI the indemnification that it desires, but for which it did not contract (CACI Third Party Compl., Doc. 665, at 61–63 ¶¶ 32–51); and (iii) adopt the tenuous theory that

[1] *See* CACI Opp., Doc. 713, at 21–26 (arguing that CACI's claims "are actionable under Virginia law"). CACI has also conceded that its third-party claims are not based on the present-day law of nations. *See* Ex. 1, CACI Resps. To the United States' First Set of Interrogatories, Interrogatory Resp. No. 7. All exhibits to this memorandum are attached to the contemporaneously-filed Declaration of Elliott M. Davis.

CACI's contracts with the United States *impliedly* obligated the government to supply CACI with certain classified information (*id.* at 64 ¶¶ 53–57).[2]

To be clear, this Court should not decide CACI's third-party claims on their merits (or lack thereof) because, as the United States explains in its pending motion to dismiss, the United States is immune to these claims. (United States' Mem. in Supp. Mot. To Dismiss, Doc. 697, at 3–30; United States' Reply Mem. in Supp. Mot. To Dismiss, Doc. 744, at 2–20.) "[S]overeign immunity deprives federal courts of jurisdiction to hear claims, and a court finding that a party is entitled to sovereign immunity must dismiss the action for lack of subject-matter jurisdiction." *Cunningham v. Gen. Dynamics Info. Tech., Inc.*, 888 F.3d 640, 649 (4th Cir. 2018) (internal quotation marks omitted). And "[b]ecause jurisdictional limits define the very foundation of judicial authority, subject matter jurisdiction must, when questioned, be decided before any other matter." *United States v. Wilson*, 699 F.3d 789, 793 (4th Cir. 2012) (citing *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94 (1998)).

But even assuming *arguendo* that the Court has subject-matter jurisdiction over CACI's third-party claims against the United States, the United States is nevertheless entitled to judgment as a matter of law because: (i) in 2007, CACI and the federal government settled "all claims and disputes . . . arising out of or related to," among other things, the two task orders pursuant to which CACI sent civilian interrogators to Iraq (Ex. 2, Settlement Agreement ¶ 3); and (ii) CACI admits that Plaintiffs' claims, and hence, CACI's derivative third-party claims, "aris[e] out of CACI['s] performance of its contract" (CACI Third Party Compl., Doc. 665, at 64 ¶ 57). Accordingly, to the extent that the Court has subject-matter jurisdiction over CACI's third-party claims against the

[2] Believing incorrectly that the Court can assert subject-matter jurisdiction over its breach-of-contract claim pursuant to the Little Tucker Act, 28 U.S.C. § 1346(a)(2), CACI has expressly limited its breach-of-contract claim to $10,000. (CACI Opp., Doc. 713, at 29.)

United States (and it does not), those claims were settled long ago and should be dismissed as a matter of law.

SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate where the record demonstrates that "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A genuine issue of material fact exists only "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251–52 (1986). "Although the court must draw all justifiable inferences in favor of the nonmoving party, the nonmoving party must rely on more than conclusory allegations, mere speculation, the building of one inference upon another, or the mere existence of a scintilla of evidence." *Dash v. Mayweather*, 731 F.3d 303, 311 (4th Cir. 2013).

STATEMENT OF MATERIAL AND UNDISPUTED FACTS

1. CACI provided interrogators to the U.S. Army under Task Order 35 and Task Order 71. Task Orders are sometimes also referred to as "Delivery Orders." (CACI Statement of Material Undisputed Facts, Doc. 1035 at 8 ¶ 23; Stip. of Uncontested Facts, Doc. 968, ¶¶ 25, 27; CACI Third Party Compl., Doc. 665, at 55 ¶ 14.)

2. Task Order 35 and Task Order 71 were issued and administered by the United States Department of the Interior pursuant to a Blanket Purchase Agreement,[3] and signed by a federal contracting/ordering officer in the name of the United States of America. (*See, e.g.*, Stip. of Uncontested Facts, Doc. 968, ¶¶ 23–26; Order for Supplies or Services, Doc. 1044–1 at ECF p. 536 (Task Order 35); Order for Supplies or Services, *id.* at ECF p. 586 (Task Order 71).)

[3] A blanket purchase agreement "is a simplified method of filling anticipated repetitive needs for supplies or services by establishing 'charge accounts' with qualified sources of supply." 48 C.F.R. § 13.303–1(a).

3. The Statement of Work for Task Order 35 provided in part that "[t]he contractor will provide Interrogation Support Cells, as directed by military authority, throughout" the Combined Joint Task Force-Seven ("CJTF-7") Area of Responsibility in Iraq "to assist, supervise, coordinate, and monitor all aspects of interrogation activities, in order to provide timely and actionable intelligence to the commander." (Doc. 1044–1 at ECF pp. 536 & 541 ¶ 3.)

4. The Statement of Work for Task Order 71 provided that the mission was to "[a]ssist CJTF-7 subordinate divisions, their subordinate Brigade Combat Teams, separate maneuver brigades and organic [military intelligence] units in performance of HUMINT and Counterintelligence missions at secure and fixed locations, in order to free military Tactical HUMINT Teams to focus on support to ongoing operations and collection activities." (Doc. 1044–1 at ECF pp. 586 & 589 ¶ 1 (acronyms omitted).)

5. Some of the interrogators provided by CACI pursuant to these task orders were deployed to Abu Ghraib prison. (CACI Third Party Compl., Doc. 665, at 55 ¶ 15.)

6. On or about May 2004, CACI recognized that the events that took place at Abu Ghraib prison "were highly likely to result in litigation." (Ex. 3, CACI Resps. To Plaintiffs' First Set of Interrogatories, Interrogatory Resp. No. 9.)

7. On or about May 2004, CACI engaged outside counsel in connection with the events that took place at Abu Ghraib prison. CACI's outside counsel conducted interviews and gathered information in contemplation of litigation. (*Id.*)

8. On June 9, 2004, several plaintiffs who alleged that they were detained at Abu Ghraib prison and elsewhere filed a putative class action complaint against various corporate and individual defendants, including CACI's parent company and two of that company's other subsidiaries. The plaintiffs alleged, among other things, that the defendants "contracted with the

United States to provide interrogation and other related intelligence services" and that "they conspired with each other and with certain United States government officials to direct and conduct a scheme to torture, rape, and, in some instances, summarily execute Plaintiffs." (Ex. 4, Compl. ¶ 1 in *Al Rawi, et al. v. Titan Corp., et al.*, No. 3:04–cv–01143–R–NLS, Doc. 1 (S.D. Cal. filed June 9, 2004).) This action was ultimately transferred to the U.S. District Court for the District of Columbia, and amended in 2006 to name CACI as a defendant. (Ex. 5, 3d Am. Compl. in *Saleh, et al. v. Titan Corp., et al.*, No. 1:05–cv–01165–JR, Doc. 34 (D.D.C. filed Mar. 22, 2006).) That amendment defined one subclass as "persons other than U.S. citizens who (a) were imprisoned in prisons or facilities in and around Iraq under the control of the United States forces; (b) were tortured and otherwise mistreated by defendants and their co-conspirators in a manner that violates United States and international law; and (c) suffered injuries to their persons as a result." (*Id.* ¶ 38.)

9. CACI's motion to dismiss in *Saleh* was denied in part on June 29, 2006, *see Saleh v. Titan Corp.*, 436 F. Supp. 2d 55 (D.D.C. 2006), and its summary judgment motions were denied on November 6, 2007. (Ex. 6, Mem. Order in *Saleh, et al. v. Titan Corp., et al.*, No. 1:05–cv–01165–JR, Doc. 137 (D.D.C. Nov. 6, 2007).) Ultimately, CACI prevailed on its interlocutory appeal, *see Saleh v. Titan Corp.*, 580 F.3d 1 (D.C. Cir. 2009), and the Supreme Court denied the plaintiffs' petition for certiorari in 2011, *see Saleh v. Titan Corp.*, 564 U.S. 1037 (2011).

10. In December 2006, as Abu Ghraib-related putative class litigation proceeded against CACI in federal district court, CACI noticed an appeal in a dispute over eleven task orders (the "terminated Task Orders"), including Task Order 35 and Task Order 71. CACI's appeal was

docketed as CBCA No. 546 in the Civilian Board of Contract Appeals.[4] (Ex. 2, Settlement Agreement at Recital; Ex. 7, Order in CBCA No. 546, dated Mar. 7, 2007.)

11. In February 2007, CACI agreed to "a full and final settlement of all claims and disputes arising out of the 11 terminated Task Orders." (Ex. 2, Settlement Agreement at Recital.)

12. Specifically, CACI agreed that the government's payment of $200,000 "shall constitute full and final payment, settlement, and accord and satisfaction of all claims and disputes by DOI [the United States Department of the Interior] and CACI arising out of or related to the terminated Task Orders, including those in CBCA No. 546." (*Id.* ¶¶ 1, 3.)

13. The parties further agreed that "[u]pon payment of the Settlement Amount, CACI and DOI shall withdraw the appeal, CBCA No. 546." (*Id.* ¶ 4.)

14. The government issued the settlement payment and on March 5, 2007, the parties jointly moved to dismiss the CBCA No. 546 appeal with prejudice. The Civilian Board of Contract Appeals granted the parties' motion and dismissed the appeal with prejudice. (Ex. 7, Order in CBCA No. 546, dated Mar. 7, 2007.)

15. CACI has not identified any express provisions in its contracts with the United States that would support its breach-of-contract claim. (Ex. 8, CACI Resps. To the United States' 2d Set of Interrogatories, Interrogatory Resp. No. 1.)

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[4] The Civilian Board of Contract Appeals is a creature of the Contract Disputes Act of 1978, 41 U.S.C. §§ 7101–09. *See* 41 U.S.C. § 7105(b)(1) ("There is established in the General Services Administration the Civilian Board of Contract Appeals."). It is not surprising that CACI litigated these task orders in a Contract Disputes Act forum. As the United States explains in its pending motion to dismiss, the task orders at issue are governed by the Contract Disputes Act. (*See* United States Mem., Doc. 697, at 22–23.) Despite litigating these task orders in a Contract Disputes Act forum, CACI has argued to this Court that the Contract Disputes Act does not apply to its breach-of-contract claim. (*See* CACI Opp., Doc. 713, at 27–29.)

ARGUMENT

Assuming *arguendo* that the Court has subject-matter jurisdiction over CACI's third-party claims against the United States, all of these claims should be dismissed as a matter of law as CACI and the federal government settled "all claims and disputes" arising out of the contracts at issue over a decade ago. CACI's breach-of-contract claim also should be dismissed because CACI has not identified any express contractual obligation that would support that claim.

I. CACI'S THIRD-PARTY CLAIMS AGAINST THE UNITED STATES WERE SETTLED LONG AGO

In 2007, CACI agreed to accept $200,000 from the government as "full and final payment, settlement, and accord and satisfaction of all claims and disputes by DOI [the United States Department of the Interior] and CACI arising out of or related to the terminated Task Orders." (Ex. 2, Settlement Agreement ¶¶ 1, 3.) These "terminated Task Orders" included Task Order 35 and Task Order 71— the two task orders pursuant to which CACI provided the contract interrogation services at issue in this action. (*Id.* at Recital.) There can be no serious dispute that CACI's third-party claims against the United States in this action "aris[e] out of" and are "related to" Task Order 35 and Task Order 71. Indeed, CACI has acknowledged that Plaintiffs' claims against CACI "aris[e] out of CACI['s] performance of its contract" (CACI Third Party Compl., Doc. 665, at 64 ¶ 57), and CACI's third-party claims necessarily "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) (internal quotation marks omitted). As CACI long ago "full[y] and final[ly]" settled "all claims and disputes" "arising out of or related to" the two task orders at issue in this case, CACI's third-party claims against the United States should, as a matter of law, be dismissed.

Settlement agreements with the federal government are governed by federal common law. *E.g.*, *Moore v. U.S. Dep't of State*, No. 17–cv–1531 (DLF), -- F. Supp. 3d --, 2019 WL 162093, at *6 (D.D.C. Jan. 9, 2019) ("A settlement agreement between one private party and a federal agency . . . —like any contract with the federal government—is governed by federal common law.") (internal quotation marks omitted); *see also United States ex rel. Ubl v. IIF Data Solutions*, 650 F.3d 445, 451 (4th Cir. 2011) (False Claims Act settlements are governed by federal common law). "Precedents from the Court of Federal Claims" and its reviewing court, the Federal Circuit, are "a rich source of . . . federal common law." *Trout v. Comm'r*, 131 T.C. 239, 251 (2008).

"It is axiomatic that a settlement agreement is a contract." *Greco v. Dep't of the Army*, 852 F.2d 558, 560 (Fed. Cir. 1988). "Equally settled is the principle that interpretation of the terms of a contract is a question of law." *Id.* Where, as here, the provisions of a settlement agreement "are clear and unambiguous, they must be given their plain and ordinary meaning, and the court may not resort to extrinsic evidence to interpret them." *McAbee Constr., Inc. v. United States*, 97 F.3d 1431, 1435 (Fed. Cir. 1996) (internal citations and quotation marks omitted); *see Slattery v. Dep't of Justice*, 590 F.3d 1345, 1347 (Fed. Cir. 2010) ("[W]hen a contract's words and meaning are unambiguous, its terms are not subject to variation."); *Barron Bancshares, Inc. v. United States*, 366 F.3d 1360, 1375 (Fed. Cir. 2004) ("If the terms of a contract are clear and unambiguous, they must be given their plain meaning—extrinsic evidence is inadmissible to interpret them."). "To permit otherwise would cast a long shadow of uncertainty over all transactions and contracts." *McAbee Constr., Inc.*, 97 F.3d at 1435 (internal quotation marks omitted).

In construing a release in an agreement between the government and a government contractor, the Supreme Court long ago held that the broadly-worded release evinced "an intent to make an ending of every matter arising under or by virtue of the contract" and that "[s]tipulations

of this kind are not to be shorn of their efficiency by any narrow, technical, and close construction." *United States v. William Cramp & Sons Ship & Engine Bldg. Co.*, 206 U.S. 118, 128 (1907). In *William Cramp & Sons*, the Supreme Court rejected the contractor's argument that, despite the broadly-worded agreement, the contractor was nevertheless entitled to recover damages occasioned by the United States' delay: "That which was to be released was 'all claims of any kind or description under or by virtue of said contract.' Manifestly, included within this was every claim arising not merely from a change in the specifications, but also growing out of delay caused by the government." *Id.* at 126–27.

The terms of the 2007 settlement agreement are simple, broad, and unambiguous—and nearly mirror the terms at issue in *William Cramp & Sons*. CACI agreed that the government's $200,000 settlement payment "constitute[d] *full and final* payment, settlement, and accord and satisfaction of *all claims and disputes* by DOI and CACI *arising out of or related to*," among other things, the two task orders pursuant to which CACI provided the contract interrogation services at issue in this action. (Ex. 2, Settlement Agreement ¶¶ 1, 3 (emphases added); *see* CACI Third Party Compl., Doc. 665, at 55 ¶ 14.) Indeed, it is difficult to think of broader language that the parties could have employed. *See Am. Contractors Indem. Co. v. Carolina Realty & Dev. Co.*, 529 F. App'x 346, 350 (4th Cir. 2013) ("We find the Settlement Agreement to be clear. Using broad and unequivocal language, American Contractors decided to 'fully and forever settle . . . any and all past and present claims . . . between the Parties relating to or arising out of the [Florida] Project.'"); *W&F Bldg. Maint. Co. v. United States*, 56 Fed. Cl. 62, 68 (2003) ("The modification provided that the parties intended it to be the '*full and final* release and accord and satisfaction of any and all claims under this contract . . . .' Given this attestation of completeness, plaintiff carries a heavy burden when arguing to the contrary.") (emphasis in original, footnote omitted).

To the extent that CACI sought to preserve the right to assert future third-party claims against the government, it was incumbent on CACI to make such a reservation clear in the 2007 settlement agreement. "If parties intend to leave some things open and unsettled," against the backdrop of a broad settlement agreement, "their intent so to do should be made manifest." *William Crump & Sons*, 206 U.S. at 128. And "[i]f a contractor wishes to preserve a right to assert a claim under [a] contract later, it bears the burden to modify the release, before signing it." *Dairyland Power Coop. v. United States*, 27 Fed. Cl. 805, 811 (1993), *aff'd*, 16 F.3d 1197 (Fed. Cir. 1994); *see also Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1394 (Fed. Cir. 1987) ("Exceptions to releases are strictly construed against the contractor.").

Despite the fact that: (i) CACI recognized by May 2004 that the events that took place at Abu Ghraib prison were highly likely to result in litigation; (ii) CACI engaged outside counsel in or around May 2004 in connection with the events that took place at Abu Ghraib prison; (iii) CACI-related entities were sued in June 2004 in a class complaint, which alleged in part that those entities conspired with federal employees to torture Abu Ghraib detainees; and (iv) CACI was named as a defendant to that lawsuit in 2006, CACI did not insert any reservation of rights in the 2007 settlement agreement that would preserve its ability to file third-party claims against the United States arising out of the two task orders pursuant to which CACI provided the contract interrogation services at issue in this litigation.

Although the 2007 settlement agreement was signed in the name of the United States Department of the Interior and not the United States, this does not limit the breadth of the settlement. "As a general rule, the execution of an unrestricted release, pursuant to a government contract, bars the later assertion of claims against the government with respect to that contract." *Dairyland Power Coop.*, 27 Fed. Cl. at 811. Though the United States Department of the Interior

issued and administered Task Order 35 and Task Order 71, these task orders are fundamentally—and expressly—contracts between CACI and the United States. Indeed, Task Order 35 and Task Order 71 were both signed by a federal contracting/ordering officer in the name of the United States of America. (*See, e.g.*, Order for Supplies or Services, Doc. 1044–1 at ECF p. 536 (Task Order 35); Order for Supplies or Services, *id.* at ECF p. 586 (Task Order 71).) This is not surprising, as contracting officers "sign contracts on behalf of the United States." 48 C.F.R. § 4.101. A long-time government contractor, CACI knows this full well. In fact, CACI describes itself in its Third Party Complaint as having "provided civilian interrogators under contract *with the United States*." (CACI Third Party Compl., Doc. 665, at 53 ¶ 7 (emphasis added).) Simply put, the 2007 settlement agreement resolved all claims relating to the two task orders at issue that CACI ever had, or might ever have, against the United States.

CACI also cannot argue that the 2007 settlement agreement was intended only to resolve the specific appeal pending before the Civilian Board of Contract Appeals. A contractual interpretation that "'gives a reasonable meaning to all parts will be preferred to one which leaves a portion of it useless, inexplicable, inoperative, void, insignificant, meaningless, superfluous, or achieves a weird and whimsical result.'" *Julius Goldman's Egg City v. United States*, 697 F.2d 1051, 1058 (Fed. Cir. 1983) (quoting *Arizona v. United States*, 575 F.2d 855, 863 (Ct. Cl. 1978)). The 2007 settlement agreement provided that the settlement payment "shall constitute full and final payment, settlement, and accord and satisfaction of *all claims and disputes* by DOI and CACI arising out of or related to the terminated Task Orders, *including those in CBCA No. 546*." (Ex. 2, Settlement Agreement ¶ 3 (emphasis added).) The 2007 settlement agreement cannot be construed to have settled only those claims and disputes pending before the Civilian Board of Contract Appeals in CBCA No. 546. Although CACI's claims in CBCA No. 546 were expressly

"includ[ed]" in the 2007 settlement agreement, the agreement broadly encompassed "all claims and disputes . . . arising out of or related to the terminated Task Orders," and was not limited to the claims in CBCA No. 546. Any more-limiting interpretation would render the "including those in CBCA No. 546" clause "'useless, inexplicable, inoperative, void, insignificant, meaningless [and] superfluous.'" *Julius Goldman's Egg City*, 697 F.2d at 1058. The settlement agreement necessarily contemplated the resolution of more than just CBCA No. 546.

Nor, for several independent reasons, can CACI seriously argue that the 2007 settlement agreement did not release its third-party claims against the United States on the grounds that this action was not commenced until 2008:

First, the 2007 settlement agreement does not speak in terms of "past and present claims." The agreement settled "*all* claims," and the phrase "all claims" includes future claims. *See, e.g.*, *W&F Bldg. Maint. Co.*, 56 Fed. Cl. at 70 (holding that the phrase "*all* claims relating to the contract" in a settlement agreement "leads to the conclusion that the settlement agreement and modification settled *all past, pending, and prospective* causes of actions") (emphases in original).

Second, the 2007 settlement agreement settled all claims "arising out of or related to," among other things, the two task orders at issue in this litigation. (Ex. 2, Settlement Agreement ¶ 3.) CACI's derivative third-party claims against the United States undeniably arise out of and relate to these task orders: in the absence of these task orders, CACI would not have provided interrogators to the U.S. Army, and would not now be defending itself against Plaintiffs' claims in this action. *See Augustine Med. Inc. v. Progressive Dynamics, Inc.*, 194 F.3d 1367, 1371 (Fed. Cir. 1999) ("Augustine's [post-settlement] claims for patent infringement . . . are undeniably *related to* Progressive's production and marketing of the goods at issue on or before the date of the Settlement Agreement.") (emphasis in original). (*See* CACI Third Party Compl., Doc. 665, at

55 ¶ 14 ("the United States issued task orders to CACI PT whereby CACI PT provided civilian interrogators to the United States military"); *id.* at 64 ¶ 57 (admitting that Plaintiffs' claims "aris[e] out of CACI['s] performance of its contract").)

Finally, courts applying federal common law have consistently held that broad settlement language, such as that in the 2007 settlement agreement, "constitute[s] a waiver of all claims and causes of action arising under or by virtue of the contract, and of all claims based upon events occurring prior to the date of the release." *Augustine Med. Inc.*, 194 F.3d at 1372 (internal quotation marks and citations omitted). Indeed, "[i]t is well settled that a contractor who executes a general release is thereafter barred from maintaining a suit for damages or for additional compensation under the contract based upon events that occurred prior to the execution of the release." *B.D. Click Co. v. United States*, 614 F.2d 748, 756 (Ct. Cl. 1980).

The alleged conduct in this lawsuit and in the earlier, related *Saleh* litigation is all alleged to have taken place in 2003 and the beginning of 2004. As early as May 2004, CACI correctly anticipated that the events that took place at Abu Ghraib prison "were highly likely to result in litigation." (Ex. 3, CACI Resps. To Plaintiffs' First Set of Interrogatories, Interrogatory Resp. No. 9.) And Plaintiffs here were putative class members in the *Saleh* litigation, which remained pending at the time the 2007 settlement agreement was signed. Especially against this backdrop, as CACI "fail[ed] to exercise its right to reserve" future third-party claims against the United States in the 2007 settlement agreement, "it is neither improper nor unfair . . . to preclude" CACI "from maintaining a suit based on events which occurred prior to the execution" of that agreement. *Kenbridge Constr. Co. v. United States*, 28 Fed. Cl. 762, 765 (1993) (internal quotation marks omitted).

Simply put, CACI long ago settled all of its claims arising out of or relating to the two task orders at issue in this litigation. To the extent that the Court has subject-matter jurisdiction to hear CACI's third-party claims against the United States (and it does not), those claims should be dismissed as a matter of law.

II. CACI'S BREACH-OF-CONTRACT CLAIM FAILS BECAUSE CACI HAS NOT IDENTIFIED ANY EXPRESS CONTRACTUAL OBLIGATION THAT WOULD SUPPORT THAT CLAIM

CACI's breach-of-contract claim fails for an additional, independent reason. Under federal common law,[5] "[t]he implied duty of good faith and fair dealing cannot expand a party's contractual duties beyond those in the express contract or create duties inconsistent with the contract's provisions." *Precision Pine & Timber, Inc. v. United States*, 596 F.3d 817, 831 (Fed. Cir. 2010). Although parties to a contract have a "duty not to interfere with the other party's performance and not to act so as to destroy the reasonable expectations of the other party regarding the fruits of the contract," *Centex Corp. v. United States*, 395 F.3d 1283, 1304 (Fed. Cir. 2005), the "implied covenants of good faith and fair dealing are limited to assuring compliance with the express terms of the contract," *Bradley v. Chiron Corp.*, 136 F.3d 1317, 1326 (Fed. Cir. 1998) (citing *Racine & Laramie, Ltd. v. Cal. Dep't of Parks & Recreation*, 11 Cal. App. 4th 1026 (1992)), and "any breach of that duty has to be connected, though it is not limited, to the bargain struck in the contract," *Metcalf Constr. Co. v. United States*, 742 F.3d 984, 994 (Fed. Cir. 2014). As the Federal Circuit recently stated, "a specific promise must be undermined for the implied duty to be

[5] "In the context of contracts between the federal government and its citizens, the courts have opted for a uniform federal common law of contracts as the federal rule of decision, to avoid the uncertainty of conflicting state laws." *Price v. United States*, 46 Fed. Cl. 640, 647 (2000), *aff'd*, 10 F. App'x 801 (Fed. Cir. 2001) (citing *Clearfield Trust Co. v. United States*, 318 U.S. 363, 366–67 (1943); *Montana v. United States*, 124 F.3d 1269, 1274 (Fed. Cir. 1997); *Al-Kurdi v. United States*, 25 Cl. Ct. 599, 601 (1992)).

violated." *Dobyns v. United States*, No. 2015–5020, -- F.3d --, 2019 WL 453486, at *8 (Fed. Cir. Feb. 6, 2019); *see also Alaska v. United States,* 35 Fed. Cl. 685, 704 (1996), *aff'd,* 119 F.3d 16 (Fed. Cir. 1997) (holding that a plaintiff must "attach" a claim based on the implied duty of good faith and fair dealing to a "specific substantive obligation, mutually assented to by the parties").

In this case, CACI has disavowed reliance upon any specific promise contained in its contracts with the United States as the basis for its claim of breach of the implied duty of good faith and fair dealing. Through discovery, the United States specifically asked CACI what provisions of the contracts between CACI and the United States it relied upon to support its breach of contract claim, and CACI did not identify any terms, duties, or obligations arising under the contracts. (Ex. 8, CACI Resps. To the United States' 2d Set of Interrogatories, Interrogatory Resp. No. 1.)

In its Third Party Complaint, CACI premised its argument that the United States has acted in bad faith on the United States' decision to "deny[] CACI PT access to information that would allow CACI PT to defend itself for claims arising out of CACI PT's performance of its contract." (CACI Third Party Compl., Doc. 665, at 64 ¶ 57.) But CACI has not produced any evidence that the contracts included a promise that the United States would give CACI access to such information, nor has it explained how any provision of the contract would imply that the United States would give CACI access to that information.

The result of allowing CACI's contract claim without any reference to the specific obligations in the contract would be absurd: CACI seeks to impose on all contracts among all parties nationwide, a duty to assist in third-party litigation that goes beyond the existing laws for discovery requirements if that litigation arises during the performance of a contract and would require unfettered access to, and use of, classified information. No such duty exists, and courts

have held that they will not "allow the implied duty of good faith and fair dealing to mandate specific actions that were not required by law." *CanPro Invs. Ltd. v. United States*, 131 Fed. Cl. 528, 531 (2017) (analyzing *Alaska*, 35 Fed. Cl. 685 (1996)).

While CACI's claim fails irrespective of the nature of the information at issue, it is particularly untenable under the current circumstances of this case. The information CACI seeks—the classified identities of the interrogators who interrogated the Plaintiffs—was the subject of former Secretary of Defense James N. Mattis' first state secrets assertion, which the Court upheld, (Docs. 791 & 850), and the effect of the affirmed state secrets privilege assertion is to remove the information from the case. *See El-Masri v. United States,* 479 F.3d 296, 305 (4th Cir. 2007). It would defy logic to hold that the United States has an implied duty to share the same classified, state secrets information that the Court has previously ordered excluded from the case.

Because CACI has no basis upon which to claim a breach of contract or breach of an implied duty of good faith and fair dealing by the United States, the United States is entitled to judgment as a matter of law for this additional reason as well.

CONCLUSION

This Court does not have subject-matter jurisdiction over CACI's third-party claims against the United States and, accordingly, this Court should not decide the merits of those claims. But even assuming that the Court had subject-matter jurisdiction, for the reasons above, all of CACI's third-party claims against the United States should be dismissed as a matter of law.

Dated: February 15, 2019

Respectfully submitted,

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