UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

SUHAIL NAJIM ABDULLAH AL SHIMARI, *et al.*, Plaintiffs, v. CACI PREMIER TECHNOLOGY, INC., Defendant,	)	No. 1:08-cv-0827 LMB-JFA
CACI PREMIER TECHNOLOGY, INC., Third-Party Plaintiff, v. UNITED STATES OF AMERICA, and JOHN DOES 1-60, Third-Party Defendants.	)	

DEFENDANT CACI PREMIER TECHNOLOGY, INC.'S OPPOSITION TO PLAINTIFFS' MOTION TO CERTIFY DEFENDANT'S APPEAL AS FRIVOLOUS

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I. INTRODUCTION

CACI PT brought its immunity challenge shortly after the conclusion of discovery concerning Plaintiffs' treatment at Abu Ghraib prison, and two months before the scheduled trial date in this case. CACI PT filed its notice of appeal two business days after the Court rejected CACI PT's assertion of derivative immunity. Under established precedent, CACI PT's notice of appeal divests this Court of jurisdiction and vests jurisdiction in the Fourth Circuit to decide whether CACI PT can be subjected to suit.

Plaintiffs' motion asks that this Court certify CACI PT's appeal as frivolous and to proceed as if there were no appeal. "In order for an interlocutory appeal to be deemed frivolous, it must be both meritless and substantively inappropriate." *Eckert Int'l, Inc. v. Gov't of Sovereign Democratic Republic of Fiji*, 834 F. Supp. 167, 174-75 (E.D. Va. 1993) (citing *United States v. Head*, 697 F.2d 1200, 1204-05 (4th Cir. 1982). That is the high bar Plaintiffs must clear to obtain the extraordinary relief they seek. It is not enough that Plaintiffs want to disregard CACI PT's right to appeal and to instead go to trial, or that the Court expressed the view that CACI PT "should expect if you don't settle this case, it's going to go to trial." 2/27/19 Tr. at 52-53. That standard, instead, is *frivolousness*, and Plaintiffs' motion does not come close to meeting that standard.

There is no doubt that the Court's denial of derivative immunity is an order from which a right of immediate appeal ordinarily applies. The *en banc* Fourth Circuit expressly said so in this case. It is legitimate, credible, and unsurprising for CACI PT to contend that the Court's ruling on CACI PT's derivative sovereign immunity is erroneous. It is equally reasonable and unremarkable to contend that the Court's ruling on the United States' sovereign immunity is suspect – this Court's own words describe its decision as a difficult question of first impression that the Court struggled with and agonized over. Plaintiffs argue that CACI PT is estopped from

asserting derivative immunity – an argument they did not raise in opposing immunity and on which the Court did not base its immunity denial. As a practical matter, Plaintiffs are asking the Court, under the pretense of making a "frivolousness" determination, to modify its immunity ruling to add a ground for decision neither raised by Plaintiffs nor addressed by the Court. The Court lacks jurisdiction to add new grounds to its immunity decision at this point. Moreover, CACI PT has substantial grounds for arguing that it is not estopped from asserting derivative immunity, which is much more than required to meet the frivolousness standard at issue here. Finally, Plaintiffs' lengthy diatribe concerning CACI PT's supposed tactical conduct is factually wrong – CACI PT has repeatedly pressed its position on immunity in this action *for over ten years*. In any event, Plaintiffs' *ad hominem* attacks are of no relevance to the frivolousness inquiry on which Plaintiffs' motion rises or, in this case, falls.

II. ANALYSIS

A. An Non-Frivolous Appeal from an Order Denying a Claim of Immunity Divests the District Court of Jurisdiction to Proceed

"In general, filing of a notice of appeal confers jurisdiction on the court of appeals and divests the district court of control over those aspects of the case involved in the appeal." *Marrese v. Am. Academy of Orthopaedic Surgeons*, 470 U.S. 373, 378-79 (1985); *see also Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 58 (1982) ("Even before 1979, it was generally understood that a federal district court and a federal court of appeals should not attempt to assert jurisdiction over a case simultaneously. The filing of a notice of appeal is an event of jurisdictional significance – it confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal."); *Dixon v. Edwards*, 290 F.3d 699, 709 n.14 (4th Cir. 2002) (explaining that timely filing of notice of appeal confers jurisdiction on the court of appeals and divests the district court of its control over those aspects

of the case involved in the appeal); *United States v. Christy*, 3 F.3d 765, 767 (4th Cir.1993) (same); *United States v. Perate*, 719 F.2d 706, 711 (4th Cir. 1983) (same).

Where, as here, a defendant appeals from a denial of an assertion of immunity, it is well established that the district court is divested of jurisdiction over the case in its entirety, with only the possible exception of collateral matters that do not require the defendant to participate in trial or pretrial litigation.[1] In *Eckert*, 834 F. Supp. at 174, Judge Ellis denied the defendant's motion to dismiss the plaintiff's complaint on sovereign immunity grounds. Judge Ellis, however, noted that "Fiji has appealed the Court's sovereign immunity ruling, relying on settled authority allowing interlocutory appeals of immunity denials." *Id.* at 173. With respect to Fiji's motion to stay the case pending resolution of the interlocutory appeal, Judge Ellis explained that "[a]nalysis of these motions properly begins with the recognition that Fiji's § 1291 interlocutory appeal divests this Court of jurisdiction over the remaining matters." *Id.* at 1274. Moreover, the Court observed that "[b]ecause '[t]he trial is inextricably tied to the question of immunity . . . [i]t makes no sense for trial to go forward while the court of appeals cogitates on whether there should be one.'" *Id.* at 174 n.12 (second and third alterations in original) (quoting *Apostol*, 870

[1] *See also Walker v. City of Orem*, 451 F.3d 1139, 1146 (10th Cir. 2006) ("Did, then, the district court retain the power after the appeal was filed to rule in favor of the officers on qualified immunity? We think not. . . . We see no reason to depart from this rule, even where the relief granted favored the appealing party." (internal citation omitted)); *Princz v. Federal Republic of Germany*, 998 F.2d 1 (D.C. Cir 1993) (appeal from denial of motion to dismiss on grounds of sovereign immunity divests district court of jurisdiction over entire case); *Williams v. Brooks*, 996 F.2d 728, 729-30 (5th Cir. 1993); *Chuman v. Wright*, 960 F.2d 104, 105 (9th Cir. 1992) ("In this circuit, where, as here, the interlocutory [appeal from a denial of qualified immunity] is immediately appealable, its filing divests the district court of jurisdiction to proceed with trial."); *Stewart v. Donges*, 915 F.2d 572, 575-76 (10th Cir. 1990); *Apostol v. Gallion*, 870 F.2d 1335, 1338 (7th Cir. 1989) ("The justification for the interlocutory appeal is that the trial destroys rights created by the immunity. It makes no sense for trial to go forward while the court of appeals cogitates on whether there should be one. . . . It follows that a proper [interlocutory] appeal divests the district court of jurisdiction (that is, authority) to require the appealing defendants to appear for trial.").

F.2d at 1338). Based on the notice of appeal's divestiture of district court jurisdiction, Judge Ellis correctly concluded that Fiji's motion to stay the case was moot because the district court had already been divested of jurisdiction upon filing of the notice of appeal. *Id.* at 175; *see also Northrop Grumman Tech. Servs., Inc. v. DynCorp Int'l LLC*, No. 1:16-cv-534, 2016 WL 3346349, at *2 (E.D. Va. June 16, 2016).

Plaintiffs argue that CACI PT's notice of appeal does not divest this Court of jurisdiction because CACI PT's appeal is supposedly "frivolous." While the courts of appeals generally have held that a frivolous appeal does not divest a district court of jurisdiction, "[s]uch a power must be used with restraint, just as the power to dismiss a complaint for lack of jurisdiction because it is frivolous is anomalous and must be used with restraint." *Apostal*, 870 F.2d at 1339. It is not enough that the district court believes that the party appealing an immunity denial will lose on appeal – a district court *always* believes that or there would not have been a denial of immunity from which to appeal.

Rather, "[i]n order for an interlocutory appeal to be deemed frivolous, it must be both meritless and substantively inappropriate." *Eckert*, 834 F. Supp. 167, 174-75 (E.D. Va. 1993) (citing *Head*, 697 F.2d at 1204-05 (holding that the frivolousness standard for an interlocutory appeal based on double jeopardy "must embrace both a perception that a claim that is manifestly 'double jeopardy' in substantive content is wholly lacking in in merit, and a perception that a claim advanced as one of 'double jeopardy' is manifestly not that in substantive content")). Plaintiffs cannot meet either of these requirements for the extraordinary relief they seek.

B. CACI PT's Appeal Has Substantial Merit

The Court denied CACI PT's derivative immunity on one ground and one ground only – that the Court's legal conclusion that "the United States does not enjoy sovereign immunity for these kinds of claims" precludes derivative immunity for CACI PT as a matter of law. Dkt.

#1083 at 52. While the Court undoubtedly believes that its ruling is correct, it cannot reasonably conclude that it would be *frivolous* to contend otherwise. The United States filed its sovereign immunity motion on March 14, 2018. The Court considered the United States' motion for a full year, noting at various times during that year that the Court was looking at the issues very carefully.[2]

As recently as February 27, 2019, the Court stated that it was "agonizing" over and "struggling" with the United States' immunity assertion and that the Court "still ha[dn't] decided how I want to resolve it." 2/27/19 Tr. at 31-32. The Court's March 22, 2019, opinion denying sovereign immunity to the United States for violations of *jus cogens* norms takes 42 pages to reach this conclusion, Dkt. #1083 at 5-47, places substantial reliance on law review articles, cites no binding precedent, and states that "[t]his question appears to be one of first impression, not just in this district or circuit but nationally." Dkt. #1083 at 8. The Court's ruling, whether ultimately vindicated or not, is unquestionably unprecedented, novel, and groundbreaking. There is no reasoned basis for concluding that the Court's ruling on an issue of first impression is so firmly entrenched and obvious that any argument to the contrary is frivolous and that any appellate court's conclusion to the contrary would be unimaginable.

[2] 7/6/18 Tr. at 23 ("Now, there is still a motion pending, which we're looking at very carefully, and obviously, were I to deny the motion to dismiss, I believe that would give the government the right to take an immediate appeal."); 10/25/18 Tr. at 3 ("I recognize that we have not yet ruled on the pending motion to dismiss. It's in the works, and it shouldn't be too much longer before we get that out."); *id.* at 11 ("I recognize that CACI in their status report – and I appreciate the report – has indicated that some of the motions will be dependent upon what the Court does with the motion to dismiss. As I said, that's in the works, and it shouldn't be too much longer until that gets out. That will perhaps gel certain things for you-all."); 12/10/18 Tr. at 26 ("I know that I still have that motion to dismiss that's pending. We're working on it, and we'll try to get that out to you certainly before the end of the year if at all possible, all right?").

C. CACI PT's Appeal Is Substantively Appropriate

CACI PT's appeal is substantively appropriate because the Court's denial of derivative immunity to CACI PT rests on a conclusion of law that the United States does not enjoy immunity from claims alleging violations of *jus cogens* norms. Moreover, Plaintiffs' argument that CACI PT is estopped from asserting derivative immunity, an argument Plaintiffs did not raise in opposing derivative immunity and on which the Court did not base its decision, is wholly without merit.

1. Orders Denying Immunity Based on Questions of Law Are Immediately Appealable

An order denying derivative immunity to a government contractor is immediately appealable. The Fourth Circuit said as much *in this very case*. After this Court denied CACI PT's Rule 12(b)(1) motion asserting derivative immunity from suit in 2009, CACI PT noticed an interlocutory appeal, and a Fourth Circuit panel concluded that it had appellate jurisdiction. *Al Shimari v. CACI Int'l Inc*, 658 F.3d 413, 420 (4th Cir. 2011) ("*Al Shimari I*"). On rehearing *en banc*, the Fourth Circuit held that it did not have appellate jurisdiction, but only because the district court's Rule 12(b)(1) denial of derivative immunity had been "tentative." *Al Shimari v. CACI Int'l Inc*, 679 F.3d 205, 221-22 (4th Cir. 2012) ("*Al Shimari II*"). Importantly, though, the *en banc* Fourth Circuit expressly held that it would have appellate jurisdiction if the district court's immunity ruling had rested on undisputed material facts or presented an abstract question of law. As the Fourth Circuit explained:

> More generally, ***we would have jurisdiction over an appeal like the ones attempted here "if it challenge[d] the materiality of factual issues.***" . . . .
>
> In *Iqbal*, the Supreme Court framed the genuineness-materiality distinction as one between "fact-based" or "abstract" issues of law, with only the latter supplying a proper foundation for immediate appeal. . . .

> ***Hence, insofar as an interlocutory appeal of a denial of immunity requires resolution of a purely legal question*** (such as whether an alleged constitutional violation was of clearly established law), or an ostensibly fact-bound issue that may be resolved as a matter of law (such as whether facts that are undisputed or viewed in a particular light are material to the immunity calculus), ***we may consider and rule upon it.***

Id. (emphasis added) (internal citations omitted). The Fourth Circuit has already undertaken the "first principles" assessment of collateral order jurisdiction that Plaintiffs urge here, and has ruled that CACI PT has a right of interlocutory appeal from a denial of immunity if the ruling from which it appeals is grounded in undisputed facts or an abstract question of law.

Here, the Court's ruling denying derivative immunity to CACI PT is based solely on the Court's resolution of a pure question of law – whether the United States would have sovereign immunity if Plaintiffs had brought their claims against the United States. Dkt. #1183 at 51 ("Because this Court has ruled that sovereign immunity does not protect the United States from claims for violations of *jus cogens* norms, the first prong of the derivative sovereign immunity test is not met, and CACI's Motion to Dismiss on a theory of derivative immunity will be denied."); *id.* at 52 ("Regardless, CACI's Motion to Dismiss fails because the United States does not enjoy sovereign immunity for these kinds of claims."). Indeed, the Court's derivative immunity decision cites no facts from the record – it only references Plaintiffs' allegations of violations of *jus cogens* norms and the Court's legal conclusion that sovereign immunity is unavailable with respect to such allegations. Dkt. #1183 at 51-52. Thus, the Court's derivative immunity ruling is premised on an "abstract issue of law" that the Fourth Circuit can "analy[ze] by resort merely to the plaintiffs' pleadings," the type of immunity denial for which the Fourth Circuit *has already held* CACI PT has a right of immediate appeal. *Al Shimari II*, 679 F.3d at 221-22.

2. CACI PT Is Not So Obviously Estopped from Challenging the Court's Immunity Ruling That Its Appeal Is Frivolous

Plaintiffs argue that CACI PT is estopped from challenging the United States' sovereign immunity. According to Plaintiffs, CACI PT's estoppel arises from its having asserted a third-party complaint against the United States and opposing dismissal of the United States while CACI PT remained in the case. There is no reasonable basis for finding that CACI PT is estopped on appeal, but that is not even the standard. The standard is whether it is so clear and obvious that CACI PT would be estopped on appeal that any contention otherwise is frivolous. *United States v. Head*, 697 F.2d 1200, 1204-05 (4th Cir. 1982); *see also Apostal*, 870 F.2d at 1339; *Eckert*, 834 F. Supp. 167, 174-75 (E.D. Va. 1993). There are myriad procedural and substantive flaws in Plaintiffs' argument.

Plaintiffs' opposition to CACI PT's derivative immunity motion made three arguments against immunity:

- That "unlawful conduct is not subject to derivative sovereign immunity," Dkt. #1172 at 5;
- That "CACI was not directed by the Government or its contract to torture and abuse detainees," *id.* at 6; and
- That "equating CACI with the Sovereign raises significant policy concerns, *id.* at 10.

An argument that CACI PT was estopped from asserting derivative immunity is notably absent from Plaintiffs' opposition. Plaintiffs' failure to argue estoppel in opposing CACI PT's immunity motion speaks volumes about the merits of that argument. Moreover, under established precedent, the Fourth Circuit will not even consider Plaintiffs' estoppel argument on appeal.[3]

[3] "[I]f a party wishes to preserve an argument for appeal, the party must press and not merely intimate the argument during the proceedings before the district court." *In re Under Seal*,

Even more important, this Court did not rule that CACI PT was estopped from asserting its derivative immunity defense. Rather, the Court proceeded directly to the merits and decided CACI PT's immunity challenge based on a pure question of law. Dkt. #1083 at 51-52. Plaintiffs functionally are asking the Court, in the guise of making a "frivolousness" determination, to modify its immunity ruling to add a ground for decision neither raised by Plaintiffs nor addressed by the Court. This the Court cannot do. The Court lacks jurisdiction to amend or modify its decision once CACI PT has appealed. As the Fourth Circuit has held, "jurisdiction over a particular subject or issue is exercised by only one court at a time, and '***a district court may not interfere with [an appellate court's] jurisdiction by amending a decision that is under appellate review.***'" *United States v. Gideon*, 514 F. App'x 341, 342 (4th Cir. 2013) (emphasis added) (alteration in original) (quoting *United States v. McHugh*, 528 F.3d 538, 540 (7th Cir. 2008)).

Even if Plaintiffs had raised an estoppel argument in connection with CACI PT's derivative immunity challenge, the Court could not have found estoppel, as the Court well understood CACI PT's position and the contingent nature of third-party practice in which CACI PT's arguments arose. Federal Rule of Civil Procedure 14(a) provides that "[a] defending party may, as third-party plaintiff, serve a summons and complaint on a nonparty *who is or may be liable to it* for all or part of the claim against it. Fed. R. Civ. P. 14(a) (emphasis added). By its nature, a third-party claim is contingent because it applies only if the third-party plaintiff's defenses against the plaintiff have failed. *E.I. DuPont de Nemours and Co. v. Kolon Indus.*, 688 F. Supp. 2d 443, 462 (E.D. Va. 2009) (third-party complaint appropriate "where a proposed third

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749 F.3d 276, 287 (4th Cir. 2014) (alteration in original) (quoting *Dallas Gas Partners, L.P. v. Prospect Energy Corp.*, 733 F.3d 148, 157 (5th Cir. 2013)). The Fourth Circuit "take[s] this narrow course because an appellate court is not a freestanding open forum for the discussion of esoteric hypothetical questions. Rather, [it] adjudicate[s] the legal arguments actually raised." *Id.* at 293 (internal citations and quotations omitted).

party plaintiff says, in effect, 'If I am liable to plaintiff, then my liability is only technical or secondary or partial, and the third party defendant is derivatively liable and must reimburse me for all or part . . . of anything I must pay plaintiff'") (quoting *Watergate Landmark Condominium Unit Owners' Assoc. v. Wiss, Janey, Elstner Assoc., Inc.*, 117 F.R.D. 576, 578 (E.D. Va. 1987)).

Accordingly, third-party complaints commonly make allegations that are inconsistent with those asserted in defending against the plaintiff's claims. Inconsistent pleading is permissible under the Federal Rules. As one prominent commentator has observed:

> However, the third-party defendant may not object to alternative pleading by the third-party plaintiff even if there is an inconsistency between the claims pleaded by that party against the original plaintiff and the claims against the third-party defendant; Rule 8[(d)] expressly permits this type of pleading.

6 Wright & Miller, *Federal Practice & Procedure* § 1455 (3d ed. 2004); *see also Aholelei v. Dep't of Pub. Safety*, 488 F.3d 1144, 1148-49 (9th Cir. 2007).

The entire premise of CACI PT's third-party complaint is that the United States is liable to CACI PT ***if CACI PT is liable to Plaintiffs, which would mean that CACI PT had been found not entitled to derivative sovereign immunity***. Thus, in opposing the United States' sovereign immunity motion, CACI PT was very clear that it was making a classic alternative claim: If CACI PT is not immune from suit for Plaintiffs' claims, then the United States is not immune from CACI PT's third-party claims.[4] This Court fully understood CACI PT's position at the hearing on the United States' motion to dismiss:

[4] *See* Dkt. #713 at 2 ("If CACI PT can be held in this case to answer for torture and war crimes committed by soldiers or Executive Branch officials, even where neither CACI PT nor any of its employees knew particular mistreatment was occurring, the same result must apply to the United States."); *id.* at 14 ("[T]he immunity of CACI PT and the United States is coextensive with respect to the claims at issue in this case. If the United States is immune from suit by CACI PT for claims arising out of injuries inflicted by soldiers and resulting from United States

> Well, we'll take it under advisement, and depending upon what our decision is, to the extent that the – that CACI has argued that if the Court does find that the government is immune, that they should have the benefit of the same immunity, the plaintiffs have not had an opportunity to respond to that, and so we would have to have a second round of briefing on that particular issue.
>
> ***I will note that a significant portion of the defendant's opposition to the motion to dismiss focused on that issue***, and that's why I did sort of expect I would see counsel here from plaintiffs.

4/12/18 Tr. at 12 (emphasis added). As a third-party Plaintiff, CACI PT merely identified the implication of Plaintiffs' allegations of violations of *jus cogens* norms as an issue the Court would need to address, and was very transparent in its position that the ultimate resolution of this issue, by whatever court finally resolves it, would apply to CACI PT's derivative immunity defense as well.

If Plaintiffs desire to argue that CACI PT is estopped from challenging the Court's immunity ruling, it may do so in the Fourth Circuit, and the Fourth Circuit can decide whether to entertain an argument Plaintiffs did not assert in opposing on CACI PT's motion and on which this Court did not base its decision. That is the Fourth Circuit's decision, and there is no reason that this Court should usurp the Fourth Circuit's role as the arbiter of the merits of CACI PT's appeal. This is particularly true where, as here, it is not even remotely frivolous for CACI PT to contend that it is not estopped from challenging the Court's immunity decision.

D. CACI PT Has Proceeded Promptly and Appropriately in Connection With Its Derivative Immunity Defense

Plaintiffs accuse CACI PT of being "dilatory," of making a "sham" immunity assertion, and characterize CACI PT's appeal as "little more than a tactical attempt to dislodge the

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detention policies, CACI PT is equally immune from suit by Plaintiffs seeking to tag CACI PT with such liability."); *id.* at 19 ("If the United States can clear that hurdle [that sovereign immunity applies to *jus cogens* violations], CACI PT and the United States should share the same fate – dismissal or continued participation in this case.").

imminently scheduled trial date." *See, e.g.*, Pl. Mem. at 1, 5-6. Plaintiffs' motion depends on whether CACI PT's appeal is both procedurally and substantively meritless, not on the merits of Plaintiffs' attacks on CACI PT's bona fides. In any event, vitriol is no substitute for facts, no matter how shrilly argued. CACI PT has been as diligent as reasonably possible in pursuing its derivative immunity defense and in bringing its appeal.

As Plaintiffs' acknowledge, CACI PT asserted a derivative immunity defense in 2008 when it moved to dismiss Plaintiffs' complaint. CACI PT appealed this Court's 2009 denial of CACI PT's motion to dismiss, and a Fourth Circuit panel ruled for CACI PT on preemption grounds, with one judge also concluding that Plaintiffs' claims were barred by derivative immunity and the political question doctrine. *Al Shimari I*, 658 F.3d at 420 (lead opinion and opinion of Niemeyer, J., concurring). On *en banc* rehearing, the Fourth Circuit held that it lacked appellate jurisdiction because CACI PT's defense required further factual development in discovery. *Al Shimari II*, 679 F.3d at 221-22. In moving to dismiss Plaintiffs' Third Amended Complaint in July 2017, CACI PT reiterated its view that it is immune from suit and advised that, consistent with the Fourth Circuit's instructions in *Al Shimari II*, would brief its immunity defense once discovery had been completed. Dkt. #627 at 45. The very first defense stated in CACI PT's January 2018 Answer to Plaintiffs' Third Amended Complaint is that it is immune from suit. Dkt. #665 at 50. In responding to the United States' motion to dismiss CACI PT's third-party complaint in March 2018, CACI PT stated its position that its derivative immunity is coextensive with the United States; sovereign immunity. Dkt. #713 at 11.

As the case proceeded, with the Court not having ruled on the United States' sovereign immunity motion, CACI PT twice advised the Court that it was awaiting the Court's ruling on that motion because it would inform CACI PT's planned derivative sovereign immunity

challenge. Dkt. #966 at 2; Dkt. #1057 at 3; *see also* 10/25/18 Tr. at 11 (THE COURT: "I recognize that CACI in their status report – and I appreciate the report – has indicated that some of the motions will be dependent upon what the Court does with the motion to dismiss. As I said, that's in the works, and it shouldn't be too much longer until that gets out. That will perhaps gel certain things for you-all."). Indeed, as the case proceeded, the Court on multiple occasions throughout 2018 advised that its ruling on the United States' motion to dismiss would be forthcoming soon. *See* note 2.

While CACI PT awaited the Court's ruling on the United States' sovereign immunity challenge, the need to complete fact discovery also prevented CACI PT from asserting a derivative immunity challenge. In particular, the Court upheld the United States' assertion of the state secrets privilege and ruled that CACI PT could depose Plaintiff's interrogators (even interrogators who had been CACI PT employees) only pseudonymously by telephone. As a result of this process, CACI PT was not able to take the pseudonymous, telephonic deposition of CACI Interrogator G – one of only two CACI PT interrogators assigned to interrogate any of the Plaintiffs – until February 12, 2019. *See* Dkt. #1126 (report regarding CACI Interrogator G deposition).

CACI PT filed its derivative immunity challenge on February 28, 2019, shortly after completing discovery and nearly two months before the scheduled trial date. CACI PT filed its challenge on that date because one day earlier the Court had suggested in a motions hearing that it might forgo ruling on the United States' sovereign immunity challenge in favor of granting the United States' summary judgment motion. 2/27/19 Tr. at 32 ("So I'm waiting to see your response on [the United States' summary judgment motion], and that may avoid having to address the [United States'] motion to dismiss entirely."). At that point, waiting for a sovereign

immunity decision that might never come seemed inadvisable, so CACI PT filed its derivative immunity challenge the next day. Once the Court issued its ruling denying sovereign immunity to the United States and derivative immunity to CACI PT, CACI PT filed its notice of appeal a mere two business days later. Thus, CACI PT was not lying in the weeds on a derivative immunity challenge to be launched on the eve of trial. CACI PT's timing in filing its motion reflected the Fourth Circuit's admonition to develop the factual record regarding immunity, this Court's adoption over CACI PT's objection of an unwieldy and time-consuming pseudonymous interrogator program for depositions, and the Court's timing in issuing its long-promised ruling on the United States' March 2018 sovereign immunity motion.

Plaintiffs' description of the interplay between CACI PT's mandamus petition and its notice of appeal is also highly misleading. CACI PT filed its mandamus petition on March 4, 2019, and asked the Fourth Circuit to direct this Court to make an evidence-based justiciability determination. Three weeks later, when the Court had denied CACI PT's derivative immunity motion and CACI PT had appealed, the relief sought in CACI PT's mandamus petition was no longer available to CACI PT because this Court had been divested of jurisdiction. As a result, CACI PT did what any responsible litigant would do, it advised the Fourth Circuit of its notice of appeal and noted that the relief it sought via a writ of mandamus was no longer available on account of the shift in jurisdiction to the Fourth Circuit. One day after having been so advised by CACI PT, the Fourth Circuit unsurprisingly dismissed CACI PT's petition. Thus, even if CACI PT's bona fides were relevant to the frivolousness inquiry, CACI PT has acted transparently and promptly throughout.

III. CONCLUSION

For the foregoing reasons, the Court should deny Plaintiffs' motion.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 2nd day of April, 2018, I will electronically file the foregoing with the Clerk of Court using the CM/ECF system, which will then send a notification of such filing (NEF) to the following counsel:

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