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

DEFENDANT CACI PREMIER TECHNOLOGY, INC.'S RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION *IN LIMINE* TO PRECLUDE COMMENTS AND STATEMENTS ABOUT THE UNITED STATES' STATE SECRETS PRIVILEGE

I. INTRODUCTION

Plaintiffs could not convince the jury in this matter's first trial to hold CACI[1] liable for Plaintiffs' alleged mistreatment, even though CACI was forced to defend itself with both hands tied behind its back. Plaintiffs hope the Court will improve their odds of success at the upcoming trial by turbocharging the already-severe prejudice to CACI arising from the United States' state secrets assertions. Plaintiffs want the Court not only to permit this trial to go forward without evidence critical to CACI's defense, but also to prevent CACI from explaining to the jury – thereby leaving the question open to speculation and Plaintiffs' innuendo – *why* it cannot present that evidence. Doing so would make a mockery of due process and magnify the

[1] CACI Premier Technology, Inc., will be referred to as "CACI" for purposes of this opposition.

unfair advantages Plaintiffs have repeatedly received that allowed this case to go to trial in the first place.[2]

Plaintiffs have already obtained a trial in which their credibility cannot be meaningfully questioned[3] and the credibility of witnesses who refute their allegations can neither be evaluated nor substantiated with records that are in the government's possession.[4] Now Plaintiffs want the Court to hide from the jury, preferably without explanation (Dkt. #1693-1 at 2 and 7), the reason why CACI is not allowed to (1) present live the witnesses who directly controvert Plaintiffs' evolving tales of torment, (2) offer into evidence documents demonstrating what actually occurred during Plaintiffs' interrogations, or (3) *identify or provide any background information regarding* ***its own employees*** *who interrogated Plaintiffs*. Plaintiffs prefer that the Court leave to the jury's imagination (and Plaintiffs' suggestion) why CACI is presenting bare-bones testimony from Plaintiffs' interrogators and interpreters via gap-filled, pitch-altered audio recordings, designed to conceal the identities of the witnesses. Plaintiffs would have the jury wonder why CACI did not put into evidence the detailed documentation for Plaintiffs' interrogations that military intelligence required before and after every interrogation. *See, e.g.*, Dkt. #1598-1 at 16 (describing interrogation plans and reports); Dkt. #1600-05 at 8-12 (same). Withholding any explanation for the odd presentation and the evidentiary gaps inflicted on CACI is not just unfair.

---

[2] *See, e.g.*, 12/16/2016 H'ring Tr. at 10:16-11:11 (summarily overturning prior Order (Dkt. #205) requiring Plaintiffs to comply with Local Rule 30 and appear within the district for depositions); Dkt. #1625 at 144:13-19 (Plaintiffs were permitted to proceed on "a shaky theory" of conspiracy); Dkt. #1630 at 11:12-18 (The Court "ruled on some of the evidentiary issues significantly in [Plaintiffs'] favor in letting the Taguba and Fay reports in.").

[3] *See* Dkt. #1459 (excluding evidence demonstrating Plaintiffs' statements that they were "swept up" in military raids were false and evidence demonstrating Plaintiffs' bias and hostility towards U.S. personnel); *see also* Dkt. #1685 (CACI's motion to admit evidence regarding the same in light of Plaintiffs' abuse of the evidentiary gap in the first trial).

[4] *See* Dkt. #1042 at 6 (quoting Sec. Mattis' declaration asserting state secrets privilege).

It would render untenable for the jury a trial that the Court has recognized is already particularly "rough" due to the government's "appalling" use of its privilege. Dkt. #1625 at 148:6-8 ("I've got to tell you, the state secret invocation in this case was appalling. It's just rough really for the jury on that issue.").

Plaintiffs gloss over that the Court, recognizing the problems created by the government's abusive and arbitrary privilege assertions,[5] instructed CACI to retain the government's objections and instructions not to answer questions based on the privilege in the depositions and remove only colloquy following the instruction not to answer. Plaintiffs also either fail to appreciate (or more likely fully understand and, therefore, seek to obscure) how the fact that CACI is still – *twenty years later* – not permitted even to know the identities or background information of any its own employees associated with any specific detainee is, by itself, strong evidence that CACI had no ability whatsoever to control or supervise its employees' actions while they were serving under the military chain of command at Abu Ghraib.

II. BACKGROUND

The Court upheld three assertions of the state secrets privilege by the United States, which denied CACI access to, and the ability to present to the jury, crucial evidence regarding Plaintiffs' interrogators and interrogations.[6] CACI was not permitted to discover or present at trial evidence regarding the identities, backgrounds, training, or experience of the Army ***or CACI***

[5] *See* Dkt. #1625 at 116:22-117:6 (discussing "completely unreasonable invocations of any kind of state secret or privilege" and describing the government's conduct in this respect as "[a]bsolutely ridiculous").

[6] Plaintiffs complain that CACI did not challenge the United States' assertion of the state secrets privilege. Dkt. #1693-1 at 2. CACI has neither the information necessary to evaluate the government's assertion nor to challenge the Court's decision upholding the government's assertion. It's a state secret. Whenever it had sufficient information, CACI did challenge the government's position. *See, e.g.*, 3/1/2024 H'ring Tr. at 26:6-29:18 (seeking the Court's intervention to allow Steve Stefanowicz to testify he was not CACI Interrogator A or G).

interrogators who were assigned to interrogate these Plaintiffs. CACI was not permitted to discover or present at trial evidence substantiating what actually occurred during Plaintiffs' interrogations. *See* Dkt. #1042 at 6 (quoting Sec. Mattis' declaration). Because CACI could not discover this information, CACI also could not use this information to refresh the memories of interrogation personnel assigned to Plaintiffs in an effort to learn more about those events.

As a result, for the only people in a position to refute Plaintiffs' unsubstantiated claims of torture, CACI was forced to present nameless, faceless witnesses via pitch modulated audio recordings and to extract generic statements denying abuse generally, rather than information specific to these Plaintiffs. This, of course, allowed Plaintiffs to enhance and inflate their allegations of abuse during and after interrogations. Because CACI could not question its own interrogators on their training and experience, Plaintiffs also were able to distract the jury with an irrelevant and unfairly prejudicial sideshow attacking the training and experience of CACI interrogators generally as well as specific interrogators who were not associated with Plaintiffs. *See* Dkt. #1678. This action is a tort action, but Plaintiffs have been permitted to turn it into a performance review on CACI's contracts, a performance review in which CACI cannot meaningfully participate because of the state secrets restrictions on its knowledge.[7]

Thus, although both sides were, in a technical sense, affected by the government's invocation of the state secrets privilege, following trial even the Court acknowledged, in a notable understatement, that "I think it may have affected the defendant more than the plaintiff." Dkt. #1626 at 6:15-20. The only relief CACI was allowed to address the gaping holes in its defense case created by the state secrets privilege was the ability to explain to the jury why that

[7] Indeed, the real-time performance reviews CACI received were that the U.S. Army was pleased with the support provided by CACI interrogators.

information is not available. The Court fully endorsed this approach and specifically counseled CACI to include the government's objections and instructions not to answer within the pseudonymous interrogator deposition recordings. *See* 3/1/2024 H'ring Tr. at 29:22-31:2 ("[T]he interjection that it's a state secret and therefore the witness cannot answer the question would be appropriate to keep that in the transcript . . . ."); *see also* Dkt. #1625 at 117:10-20. Plaintiffs did not object. For its part, CACI presented the government's state secrets objections in full only in the first pseudonymous deposition, to give the jury an understanding of the content and magnitude of information the government withheld, and the depositions of CACI Interrogators A and G. To avoid repetition, CACI largely removed the objections from the remaining depositions. Dkt. #1625 at 117:9-21.

III. ANALYSIS

A. Concealing the Government's Invocation of State Secrets Over Evidence Critical to CACI's Defense Would Be Misleading and Unfairly Prejudicial

Plaintiffs' argument to hide the scope of the government's state secrets withholdings is both circular and inapposite. Plaintiffs say, correctly, that statements made by counsel at trial are not *evidence*. Dkt. #1693-1 at 3. Plaintiffs then state, also correctly, that irrelevant *evidence* is not admissible. *Id.* at 4. Thus, Plaintiffs urge, the government's assertion of the state secrets privilege and counsel's mention of the same are not relevant. *Id.* at 4. But, as Plaintiffs point out, statements by counsel *are not evidence* and, thus, are invulnerable to a relevance objection.

The germane inquiry is whether the Court should exercise its discretion to prevent CACI from explaining to the jury the presentation difficulties and evidentiary gaps created by the government's invocation of the state secrets privilege. Generally, courts impose limits on counsel's argument to "ensure that argument does not . . . impede the fair and orderly conduct of the trial." *See United States v. Crockett*, 813 F.2d 1310, 1317 (4th Cir. 1987) (quoting *Herring v.*

New York, 422 U.S. 853, 862 (1975)) (discussing limitations on closing arguments). In this case, the Court already recognized that informing the jury that a question implicated "a state secret and therefore the witness cannot answer the question" is "appropriate." *See* 3/1/2024 H'ring Tr. at 29:22-31:2. The Court further determined that there is sufficient risk that a jury will misinterpret or draw adverse inferences from the parties' inability to offer evidence concealed by the government's invocation and, therefore, instructed the jury on this subject at the start and close of trial. Dkt. #1622 at 133:14-134:4; Dkt. #1626 at 85:4-19. There is no sincere argument that fairness requires the Court to ban mention of the evidence made unavailable by the state secrets privilege. Quite the contrary: it would be fundamentally unfair to allow the jury to speculate why CACI would not present live testimony from or even identify its own interrogators who interrogated Plaintiffs, question its interrogators who interrogated Plaintiffs regarding their training and experience, or offer into evidence significant government records regarding Plaintiffs' interrogations.

To bolster their request, Plaintiffs rely on a smattering of unpublished, largely out-of-district cases regarding the irrelevance of pretrial confidentiality designations made by the parties. Dkt. #1693-1 at 4-6. Those cases address counsel's commentary on confidentiality labels on *produced* documents that were *admitted at trial*. They bear no resemblance to what occurred in this case: the U.S. government concealed critical evidence to CACI's defense *from discovery* and *trial* purportedly to protect national security. *See, e.g.*, Dkt. #992-1 (Decl. of Sec. James N. Mattis). In any event, the cases do not stand for the proposition Plaintiffs advocate. For example, Plaintiffs selectively quote *In re Zetia (Ezetimibe) Antitrust Litig.*, No. 2:18-md-2836, 2023 WL 4155408, at *2 (E.D. Va. Mar. 31, 2023) ("*Zetia*"), that "[n]o party shall refer to or comment upon confidentiality designations applied under the terms of the Protective Order

governing discovery in this case." Dkt. #1693-1 at 4. The full quote also states: "Confidentiality markings which predate this litigation *may be relevant and their admissibility shall be addressed, if necessary, by contemporaneous objection or instructions at trial*." *Zetia* at *2 (emphasis added). Of course, that is exactly what happened here. Forced to use depositions for the pseudonymous witnesses as their trial testimony, CACI – at the direction of the Court – included within that trial testimony the government's contemporaneous objections and instructions.

Plaintiffs are not wrong that commentary about confidentiality designations *could* raise concerns that a jury will infer the designating party has something to hide. But that did not happen here. To start, CACI made no comments about the protective order designations of any exhibits at trial. CACI, under the Court's direction and approval, simply allowed the jury to understand what evidence was obscured or removed from the case entirely by the government's state secrets invocation. CACI did not argue or insinuate that Plaintiffs caused or should be penalized for the government's assertion of privilege. Rather, CACI took justifiable steps to try to minimize the prejudice to its defense inflicted by the government's withholding of crucial information and overbearing refusal to allow CACI to ask even basic, background questions of its own employees.

Regardless, as Plaintiffs point out, the Court specifically instructed the jury that "*both* parties were affected by the Government's invocation of state secrets," a contention CACI views as dubious, and that "*neither* side bore any responsibility for the Government's decision to do so." Dkt. #1693-1 at 6 (emphases in original). Thus, the Court more than adequately addressed any possibility that the jury would be confused or hold the government's invocation against Plaintiffs.

In this case, the government (*i.e.*, the *only* employer of convicted conspirators in detainee abuse at Abu Ghraib) is conspicuously absent as a party while excessively interfering with the presentation of witnesses and evidence. At the first trial, Plaintiffs sought to ignore that elephant in the room to no avail. At the second trial, Plaintiffs want the Court to actively hide the elephant from the jury, leaving the jury to speculate as to the source of the large, gray shadow that is blocking their access to evidence in the case. Maybe the pseudonymous interrogators are in jail. Maybe they're international fugitives. Maybe CACI is not presenting evidence about the training and experience of CACI Interrogators A and G – the only CACI interrogators ever assigned to any of these Plaintiffs – because they were ditch-diggers in civilian life and were completely without relevant training and experience. All of this would leave CACI without any explanation for obvious deficiencies in its defense. Doing so would severely prejudice CACI, while granting Plaintiffs an undeserved advantage. More importantly, it would work a deception on the jury and create more obfuscation in a case in which a full record is both vital and unattainable.

B. The Fact that CACI *Still* Cannot Learn Any Details About Its Interrogators' Assignments at Abu Ghraib Demonstrates CACI's Total Lack of Knowledge and Control Over Its Interrogators' Performance of the Intelligence Mission

Plaintiffs insist that the government's invocation of state secrets over vital information that relates to their interrogations as well as CACI interrogators' roles in the same is "an issue for the Court, not the jury." Dkt. #1693-1 at 7. But the fact that, *twenty years later*, the government *still* will not allow CACI to know the details about its interrogators' assignments at Abu Ghraib, or the interrogation approaches sought by CACI interrogators and approved by military officials, is powerful evidence that CACI had no significant insight into or supervision over its interrogators' interactions with detainees.

Indeed, the *only* valid point Plaintiffs raise in their motion to exclude is that CACI counsel's statements related to the state secrets privilege are, by themselves, insufficient to allow the jury to consider this nearly dispositive point. Accordingly, CACI will address that concern and shortly file a request asking that the Court take judicial notice and instruct the jury regarding certain facts contained in Secretary Mattis' declarations in support of the government's state secrets privilege invocation. In particular, CACI will present to the jury exactly what information the U.S. government concealed through its privilege assertion and Secretary Mattis' representation that none of the records related to Plaintiffs' interrogations discussed or described the use of enhanced interrogation techniques or techniques not authorized by Army Field Manual 34-52. *See, e.g.*, Dkt. #992-1 at 3-4.

To this day, the shroud the U.S. military placed around interrogation operations at Abu Ghraib prevents CACI management from learning any significant information about its own employees' interrogation work. The jury has a right to understand fully how the government's exclusion of CACI management from all detainee- or interrogation-related information destroyed any possibility that CACI management could supervise or control its employees at Abu Ghraib.

IV. CONCLUSION

For the foregoing reasons, Plaintiffs' Motion *in Limine* should be denied.

Respectfully submitted,

/s/ John F. O'Connor

John F. O'Connor
Virginia Bar No. 93004
Linda C. Bailey (admitted *pro hac vice*)
Joseph McClure (admitted *pro hac vice*)
STEPTOE LLP
1330 Connecticut Avenue, N.W.
Washington, DC 20036
(202) 429-3000 – telephone
(202) 429-3902 – facsimile
joconnor@steptoe.com
lbailey@steptoe.com
jmcclure@steptoe.com

Nina J. Ginsberg
Virginia Bar No. 19472
DiMuroGinsberg, PC
1001 N. Fairfax Street, Suite 510
Alexandria, VA 22314-2956
703-684-4333 – telephone
703-548-3181 – facsimile
nginsberg@dimuro.com

Counsel for Defendant CACI Premier Technology, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on the 20th day of September, 2024, 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:

Cary Citronberg, Esq.
Johnson/Citronberg, PLLC
421 King Street, Suite 505
Alexandria, Virginia 22314
cary@jc-attorney.com

Charles B. Molster, III
Law Offices of Charles B. Molster, III PLLC
2141 Wisconsin Avenue, N.W., Suite M
Washington, D.C. 20007
cmolster@molsterlaw.com

/s/ John F. O'Connor
John F. O'Connor
Virginia Bar No. 93004
Attorney for Defendant CACI Premier Technology, Inc.
STEPTOE LLP
1330 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 429-3000 – telephone
(202) 429-3902 – facsimile
joconnor@steptoe.com