UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

SUHAIL NAJIM ABDULLAH AL SHIMARI, *et al.*,	)	
Plaintiffs,	)	
v.	)	No. 1:08-cv-0827 LMB-JFA
CACI PREMIER TECHNOLOGY, INC.,	)	
Defendant,	)	

DEFENDANT CACI PREMIER TECHNOLOGY, INC.'S MEMORANDUM IN SUPPORT OF ITS MOTION TO STRIKE PLAINTIFFS' MOTION TO PRECLUDE THE BORROWED SERVANT DEFENSE

I. INTRODUCTION

You can put lipstick on a pig, but it's still a pig. Plaintiffs can dress their motion up as a motion *in limine*, but the reason Plaintiffs (incorrectly) offer for why CACI should be precluded from presenting evidence on the borrowed servant doctrine is that the defense supposedly fails as a matter of law. Indeed, Plaintiffs themselves characterize their motion as seeking "to preclude" CACI's borrowed servant defense. At the risk of overdoing the barnyard metaphors, if it looks like a duck and quacks like a duck, you've got yourself a duck. By any measure, Plaintiffs' motion is a dispositive motion seeking to resolve an asserted affirmative defense once and for all.

The deadline for pretrial dispositive motions in this case passed more than five years ago. Dkt. #974. The Court ordered that all dispositive motions be filed so that the hearing is at least one week after the deadline for the movant's reply brief. *Id.* Local Rule 56(A) requires that summary judgment motions be filed far enough before trial so that the Court has a reasonable amount of time to decide them. Plaintiffs' motion violates every one of these dictates. If required to do so, CACI will oppose Plaintiffs' motion on the merits, but some motions are too

untimely, and cover ground too well trod, to justify making a party expend resources to confront them in the month before trial. The Court should promptly strike Plaintiffs' new "motion *in limine*" on the borrowed servant doctrine so that CACI can suspend work on its opposition and focus on preparing for trial.

II. BACKGROUND

A. Pretrial

Plaintiffs have been on notice that CACI was asserting a borrowed servant defense since 2009. In CACI's answer to Plaintiffs' amended complaint, CACI listed, "The loaned employee doctrine precludes Plaintiffs' claims" amongst its "Additional Defenses." *See* Dkt. #107 (Answer to Amended Complaint) at 33, ¶12. Nine years later, in 2018, CACI reiterated that defense in its answer to Plaintiffs' third amended complaint. Dkt. #665 (Answer to Third Amended Complaint) at 51, ¶13 ("The loaned employee doctrine precludes Plaintiffs' claims.").

Plaintiffs did not seek to strike or obtain summary judgment with respect to *any* of CACI's defenses. When Plaintiffs opposed CACI's motion for summary judgment, Plaintiffs *wrongly* claimed that CACI "argue[d] for the first time that the "borrowed servant" doctrine bars recovery," *but see* Dkt. #107 and #665, and then urged that the Court should not grant CACI summary judgment on that basis because the defense involves a "highly factual inquiry" and because Plaintiffs have "repeatedly identified" evidence "on the issue of 'command and control.'" Dkt. #1086 at 31 (Dkt. #1090 (sealed version)). Plaintiffs go on to admit that the borrowed servant doctrine "applies when the borrowing employer 'possesses . . . authoritative direction and control over' the 'servant's performance of the particular work in which he is engaged at the time of the accident." *Id.* at 32 (quoting *White v. Bethlehem Steel Corp.*, 222 F.3d 146, 149 (4th Cir. 2000)). Plaintiffs highlighted again the fact-sensitive inquiry and asserted multiple incorrect legal arguments with the bottom line that because supposedly CACI could not

undisputedly prove that it had "relinquished *all* control of its own employees," summary judgment was not appropriate. *Id.* at 32-33 (emphasis in original). At no time when opposing summary judgment did Plaintiffs assert that CACI's borrowed servant defense was in any way precluded as a matter of law or policy; rather, Plaintiffs fought summary judgment based on the defense by offering purported (and often fictional) factual disputes. *Id.* at 33 (citing Statement of Material Facts ¶¶ 37-49).

B. Pretrial Evidentiary Rulings and Trial

In briefing for motions *in limine*, in 2019, Plaintiffs *relied upon* CACI's borrowed servant defense, among other arguments, to demonstrate the relevance of PTX-85 (admitted at trial), PTX-86, PTX-87, PTX-96, PTX-99 (admitted at trial), PTX-102, PTX-103 (admitted at trial), PTX-104 (admitted at trial), PTX-105, PTX-106, PTX-107 (PTX-107A-E admitted at trial), PTX-108, PTX-114, PTX-115 (admitted at trial), PTX-128, PTX-129, PTX-131, PTX-132 (admitted at trial), PTX-135, PTX-136 (admitted at trial), PTX-157, PTX-164, and PTX-171. *See* Dkt. #1273 at 14-15.

Immediately prior to first trial, Plaintiffs raised a flurry of issues they had left unaddressed in motions *in limine* and failed to raise as objections regarding during *de bene esse* depositions over which the Court presided. *See generally* Dkt. #1570. Amongst those issues, Plaintiffs asserted "the sweeping position that it is irrelevant who had operational control over CACI interrogators." *Id.* at 3; *see also* Dkt. #1576 at 2-6. In that filing, Plaintiffs raised many of the same issues they raise in the present motion. *Compare* Dkt. #1576 at 2-6 *with* Dkt. 1781-1. The Court rejected Plaintiffs' belated and misplaced attempt to recontour CACI's defenses to their liking: "So I'm just saying that I think this issue as to who was controlling whom or who had to give orders to whom is definitely relevant, ***and it's going to stay in the case***." 4/12/2024 H'ring Tr. at 27:13-15 (emphasis added).

Throughout trial, Plaintiffs offered evidence in an effort to overcome CACI's borrowed servant defense and argued that evidence extensively in closing. *See* Dkt. #1626 at 67:23-71:22. Plaintiffs attempted to convince the jury that CACI's defense was precluded as a matter of law or policy, but were unsuccessful. With respect to jury instructions, the Court specifically found that the borrowed servant instruction was warranted:

> I do think that it is appropriate to put the borrowed servant instruction in that instruction. It makes more sense. Now, there's not going to be a standalone borrowed servant instruction then with a heading; it's right there in explaining to the jury the basic structure of the case. And so all of the red line on page 23 has an explanation of that doctrine. I've looked again at the *Alvarez* case. I think that our instruction absolutely models the Fourth Circuit's discussion of the borrowed servant doctrine . . . .

Dkt. #1626 at 8:1-10. Plaintiffs objected to the instruction, but *not* on the grounds that the borrowed servant defense was precluded as a matter of law or policy. *Id.* at 8:19-9:11. Rather, Plaintiffs unsuccessfully asserted their view that the instruction was incomplete because it did not contain Plaintiffs' preferred language that "a general employer must be shown to completely relinquish control" and that a general employer remains liable "where a borrowed employee also acts in the course and scope of his . . . employment for his general employer at the same time." *Id.*

Plaintiffs continued to raise objections to the borrowed servant instruction based on questions from the jurors, which made clear that the jurors viewed it as a viable defense. *See* Dkt. #1637:3-4:1. The Court expressly and repeatedly found that CACI's borrowed servant defense is appropriate and expressly and repeatedly rejected Plaintiffs' misreading of mandatory authority on the issue.

> THE COURT: Right. You have to read the whole opinion. It goes on to say in terms of determining liability, you have to determine who is actually controlling the work of the employee. I'm adding -- because I think it's clear within the opinion – "the work of the

> employee when the misconduct occurs," because that's the only relevant time period.
>
> . . . I do get it. You've made your argument. But if it were a complete relinquishment, a complete relinquishment, then effectively they wouldn't be an employee in my view.
>
> MR. AZMY: Yeah.
>
> THE COURT: ***I mean, I understand your concern. We may be wrong, but as I read Alvarez, I don't think it goes as far as you indicate.*** It still is a factual determination. The jury has to determine whether or not CACI, in fact, abandoned control over the work that was being performed at Abu Ghraib. That's a factual issue this jury has to decide.

Dkt. #1619 at 5:3-6:4 (emphasis added).

> MR. AZMY: Your Honor, we filed papers last night related to the borrowed servant instruction.
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> THE COURT: First of all, there's no pending question about the borrowed servant, so I'm not going to *sua sponte* assume that that's what's holding them up. There are other issues which could very well be holding them up. Number two, ***even if that were the question, I don't agree with your proposal. I think it goes beyond what the Fourth Circuit deems to be the proper formulation***. So I've read it, but I already told the jury you can wear two hats. I put that – I added that verbally. The first sentence of that instruction clearly says you can be working for two people at the same time. The issue is clearly from the Fourth Circuit's viewpoint, and I think appropriately under my view from my viewpoint as well, is whether or not the conditions of work that the person is performing are who's controlling it. That's the question. And I think that's fairly articulated in the instruction plus the supplement that they have. But ***you've made your record on that issue***.

Dkt. #1627 at 6:12-7:6 (emphasis added). Ultimately, likely because Plaintiffs kept reasserting their misreading of Fourth Circuit precedent with dogged persistence, the Court made it crystal clear that its application of the borrowed servant doctrine in this case is now law of the case: "We've been through this a couple of times, if the Court was wrong, it was wrong, but ***that's, in my view, the law of the case at this point***." Dkt. #1630 at 12:1-4 (emphasis added).

C. The Present Motion

On September 6, 2024, Plaintiffs' counsel wrote counsel for CACI that "As a heads up, while we haven't made a final decision, we may file one more motion next Friday regarding the borrowed servant defense. We can put it on a two-week schedule (your response due by September 27 and our reply on October 2), and it can be teed up for the October 4 hearing." *See* Ex. 1 (Email from A. Haddad to J. O'Connor (Sept. 6, 2024). Plaintiffs did not file any motion on Friday, September 13, 2024, and filed only its oppositions to CACI's motions *in limine* on Friday, September 20, 2024.

Mid-afternoon on September 27, 2024, Plaintiffs wrote to CACI to inform CACI for the first time they were "planning to file a motion today ***to preclude*** the borrowed servant defense" and also that they had solicited two amici briefs, which they propose will be filed "very early next week," including "one from former members of the military on military law and policy, and one from Prof. Deborah DeMott regarding relevant agency principles." Ex. 2 (Email from A. Mahler-Haug to J. O'Connor (Sept. 27, 2024)) (emphasis added). Of course, Plaintiffs had only previously indicated, in an email exchange addressing motions *in limine*, that they planned to file a motion "regarding the borrowed servant defense," *not* that they planned to file a dispositive motion to preclude an entire defense. *See* Ex. 1.

III. ANALYSIS

A. Plaintiffs Waived Moving to Strike CACI's Borrowed Servant Doctrine Defense

Plaintiffs had multiple opportunities to move to strike CACI's borrowed servant defense if they deemed it legally insufficient, immaterial, or against public policy, but never did. CACI initially asserted the defense in April 2009. Dkt. #107. CACI reasserted the defense in January 2018. Dkt. #665. The Federal Rules of Civil Procedure allowed Plaintiffs 21 days after CACI

filed its answers to move to strike CACI's defense. *See* Fed. R. Civ. P. 12(f) ("Motion to Strike. The court may strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter. The court may act: . . . on motion made by a party either before responding to the pleading or, if a response is not allowed, within 21 days after being served with the pleading."). Plaintiffs did nothing.[1] Any attempt to strike CACI's defense now is untimely in the extreme.

B. Law of the Case Precludes All of the Relief Plaintiffs Seek

The Court has already ruled in no uncertain terms that its application of the borrowed servant doctrine to this case – including how the Court interprets mandatory Fourth Circuit precedent on the doctrine and reflects it in the related jury instruction – is now "law of the case":

> But also, the ***borrowed servant doctrine***. We've been through this a couple of times, if the Court was wrong, it was wrong, but ***that's, in my view, the law of the case at this point***.

Dkt. #1630 at 12:1-4 (emphasis added). Law of the case doctrine dictates that "when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case." *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 816 (1988) (quoting *Arizona v. California*, 460 U.S. 605, 618 (1983)). "This rule of practice promotes the finality and efficiency of the judicial process by 'protecting against the agitation of settled issues.'" *Id.* (quoting 1B J. Moore, J. Lucas, & T. Currier, Moore's Federal Practice ¶ 0.404[1],

[1] Of course, even if Plaintiffs had moved to strike CACI's borrowed servant defense, the motion would have been unsuccessful. To grant a Rule 12(f) motion, the Court must determine that the challenged allegations are "so unrelated to the plaintiff's claims as to be unworthy of any consideration as a defense and that their presence in the pleading throughout the proceeding will be prejudicial to the moving party." 5C Charles Alan Wright & Arthur R. Miller, Federal Practice & Procedure § 1380 (2d ed.1990). The Court has already determined that the borrowed servant defense is appropriate and unquestionably relevant. *See* 4/12/2024 H'ring at 27:13-15 ("So I'm just saying that I think this issue as to who was controlling whom or who had to give orders to whom is ***definitely relevant***, and ***it's going to stay in the case***."). Plaintiffs did not move for reconsideration.

p. 118 (1984)). Plaintiffs' favorite pastime is "the agitation of settled issues" and the present motion is just the latest round in their many belated efforts to shield themselves from a defense that the Court has recognized time and again is relevant and applicable to this case.

To the extent Plaintiffs would characterize their pending motion as a motion for reconsideration, it is completely improper. "A district court may grant a motion for reconsideration under Rule 54(b): (1) to accommodate an intervening change in controlling law; (2) to account for new evidence not available earlier; or (3) to correct a clear error of law or prevent manifest injustice." *Integrated Direct Mktg., LLC v. May*, No. 114-CV-1183-LMB-IDD, 2016 WL 7334278, at *1 (E.D. Va. Aug. 12, 2016) (quoting *LaFleur v. Dollar Tree Stores, Inc.*, No. 2:12–CV–00363,2014 WL 2121563, at *1 (E.D. Va. May 20,2014) (citing *Hutchinson v. Staton*, 994 F.2d 1076,1081 (4th Cir. 1993))). None of those circumstances is even arguably present here. "[W]hen a request for reconsideration 'raises no new arguments, but merely requests the district court to reconsider a legal issue or to 'change its mind,' relief is not authorized.'" *Id.* (quoting *Pritchard v. Wal Mart Stores, Inc.*, 3 Fed. Appx. 52, 53 (4th Cir. 2001)).

C. The Timing of Plaintiffs' Motion Violates Local Rule 56(A)

Plaintiffs have known for weeks, if not months, that they intended to file this motion but waited until *less than three weeks* prior to the scheduled hearing on motions *in limine* to file this motion and noticed their new motion for the motion *in limine* hearing date. As described above, Plaintiffs waived moving to strike CACI's borrowed servant defense and have no proper basis for asking the Court to reconsider its determination that the borrowed servant defense is applicable and its rejection of Plaintiffs' incorrect formulation of Fourth Circuit law governing the defense. Plaintiffs' purported "motion *in limine*" is, therefore, best characterized as an untimely motion for summary judgment to dispose of CACI's borrowed servant defense.

For motions for summary judgment, local rules required Plaintiffs to file this motion "within a reasonable time before the date of trial." Local R. 56(A).[2] This case has already been to trial once. Regardless, timing a motion to dispose of an entire defense, for which Plaintiffs have been on notice *since 2009*, such that briefing concludes merely *two weeks before trial* and a hearing on the motion is noticed *for the same day briefing concludes* is far from "reasonable." Even if Plaintiffs had not waived this motion, it must be rejected as untimely.

D. Plaintiffs' Notice of Hearing Violates Local Rule 7(F)(1) and this Court's Most Recent Order Regarding Briefing for Dispositive Motions

Local Rule 7(F)(1) provides, "Unless otherwise directed by the Court, the opposing party shall file a response brief and such supporting documents as are appropriate, within fourteen (14) calendar days after service and the moving party may file a reply brief within six (6) calendar days after the service of the opposing party's response brief." Under the Rule, because Plaintiffs waited until September 27, 2024, to file this dispositive motion, CACI's opposition brief would be due on October 11, 2024, and Plaintiffs reply brief would be due on October 17, 2024, *the same day Plaintiffs noticed the motion for oral argument and less than two weeks before trial*.

At the final pretrial conference in October 2018, the Court advised the parties, with respect to dispositive motions and motions *in limine* that "both sides need to think those issues through carefully, and I expect, you know, *one set of motions* so that we can get them resolved at one time, all right?" 10/25/2018 Final Pretrial Conf. at 19:10-16. The Court then asked

[2] Local Rule 56(A) provides:

> The time provisions of Fed. R. Civ. P. 56(b) shall not apply in this District. No motion for summary judgment shall be considered unless it is filed and set for hearing or submitted on briefs within a reasonable time before the date of trial, thus permitting a reasonable time for the Court to hear arguments and consider the merits after completion of the briefing schedule specified in Local Civil Rule 7(F)(1).

Plaintiffs if they intended to file any dispositive motions and Plaintiffs represented, "No, we – as presently advised, we have no intention of filing a dispositive." *Id.* at 19:18-22. At that time, the Court ordered that the parties provide the Court at least one week of time after the reply brief for dispositive motions:

> ORDER: For the reasons stated in open court, it is hereby . . .
>
> ORDERED that any dispositive motions be filed such that the reply brief is received by the Court at least one week before oral argument,
>
> . . . . Signed by District Judge Leonie M. Brinkema on 10/25/18. (yguy) (Entered: 10/25/2018)

Dkt. #974. Plaintiffs could not possibly file their reply brief seven days prior to oral argument on October 17, 2024, because CACI's opposition brief would not be due until *six* days prior to argument. As such, Plaintiffs' notice of hearing must be struck as it violates both this Court's rules and order.

IV. CONCLUSION

For the foregoing reasons, the Court should strike Plaintiffs' purported "motion *in limine*" to dispose of a defense for which they have been on notice since 2009 and should strike Plaintiffs' notice of hearing for October 17, 2024.

Respectfully submitted,

/s/ John F. O'Connor

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CERTIFICATE OF SERVICE

I hereby certify that on the 30th 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 below-listed counsel.

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