FILED UNDER SEAL PURSUANT TO LOCAL CIVIL RULE 5

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

SUHAIL NAJIM ABDULLAH AL SHIMARI *et al.*, **Plaintiffs,**	)	
v.	)	C.A. NO. 08-cv-827 GBL-JFA
CACI PREMIER TECHNOLOGY, INC. **Defendant**	)	

PLAINTIFFS' OPPOSITION TO DEFENDANT CACI PREMIER TECHNOLOGY, INC.'S MOTION TO DISMISS PLAINTIFFS' THIRD AMENDED COMPLAINT

George Brent Mickum IV (VA Bar # 24385)
Law Firm of George Brent Mickum IV
5800 Wiltshire Drive
Bethesda, MD 20816
Telephone: (202) 281-8662
gbmickum@gmail.com

Baher Azmy, *Admitted pro hac vice*
Katherine Gallagher, *Admitted pro hac vice*
CENTER FOR CONSTITUTIONAL RIGHTS
666 Broadway, 7th Floor
New York, NY 10012

Robert P. LoBue, *Admitted pro hac vice*
PATTERSON BELKNAP WEBB & TYLER LLP
1133 Avenue of the Americas
New York, NY 10046

Shereef Hadi Akeel, *Admitted pro hac vice*
AKEEL & VALENTINE, P.C.
888 West Big Beaver Road
Troy, MI 48084-4736

Attorneys for Plaintiffs

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES
(CONTINUED)

Page(s)

TABLE OF AUTHORITIES
(CONTINUED)

Page(s)

TABLE OF AUTHORITIES
(CONTINUED)

Page(s)

OTHER AUTHORITIES

INTRODUCTION

On March 19, 2013, the Court *sua sponte* granted Plaintiffs leave to file a Third Amended Complaint "consistent with the Court's Order dated March 8, 2013 (Doc. 215)." The Court's March 8, 2013 Order dismissing Plaintiffs' conspiracy-related claims sought more detail and clarity into the nature and plausibility of the alleged conspiracy between Defendant, CACI Premier Technology, Inc. ("CACI"), and the military personnel carrying out much of the torture and abuse at Abu Ghraib. In accordance with the Court's Order, Plaintiffs' Third Amended Complaint ("TAC") contains detailed factual allegations – including allegations based on several military investigative reports and sworn testimony of military co-conspirators directly implicating CACI – supporting the two primary theories of CACI's liability Plaintiffs have maintained throughout this litigation: (1) CACI is liable for its employees' participation in a conspiracy with U.S. military personnel to torture and abuse detainees, including Plaintiffs, at Abu Ghraib, through the well-accepted theory of *respondeat superior* as the employees were acting within the scope of their employment as interrogators; and (2) CACI is liable for its own contribution to the conspiracy that resulted in grave harms to Plaintiffs. Plaintiffs also allege that CACI employees are liable for aiding and abetting a number of torts by requesting, encouraging, and procuring the abusive conduct of the military guards. The aiding and abetting claims are not challenged by CACI's motion.

Addressing the Court's concerns, the TAC's additional allegations provide further details about the conspiratorial agreement and understanding, including (i) the location and time period in which the unwritten agreement to torture and mistreat detainees was made; (ii) the specific individuals, from CACI and the military, who joined as parties to this unlawful agreement; (iii) the sometimes covert manner in which the terms of the illicit agreement were conveyed

among its participants – namely that CACI interrogators, who maintained *de facto* positions of authority at Abu Ghraib, directed military police ("MP") officers to "soften up" detainees for interrogation, code for torture and other forms of abuse, and to inflict specific methods of abuse endured by Plaintiffs; and (iv) the connection between the conspiracy and harm to the four Plaintiffs.

The TAC also supports CACI's corporate liability for the conspiracy. First, it details how the tortious conduct of CACI interrogators was carried out within the scope of their employment and thus attributable to CACI. As this Court and the Virginia Supreme Court have specifically held, a corporation may be vicariously liable for a conspiracy undertaken by its employees acting within the scope of employment (and without the knowledge of the corporate officers). *See* Mem. Order March 18, 2009, Dkt. No. 94 at 64-69, *reported at* 657 F. Supp. 2d 700 (E.D. Va. 2009); *Stith v. Thorne*, 488 F. Supp. 2d 534 (E.D. Va. 2007); *Commercial Business Sys. v. Bellsouth Servs.*, 453 S.E.2d 261 (Va. 1995). Next, the TAC details how CACI's management contributed to the conspiracy separate from the actions of its interrogators at Abu Ghraib, by failing to adequately hire, train, and supervise its employees and by turning a blind eye to, and giving tacit approval for, its employees' role in detainee mistreatment, in order to protect its financial relationship with its U.S.-government client. TAC ¶¶ 143-157.

PROCEDURAL BACKGROUND

A. The First Amended Complaint and the Court's 2009 Decision

The Plaintiffs filed their First Amended Complaint ("FAC") on September 15, 2008, dkt. No. 28, alleging a conspiracy to torture at the Abu Ghraib Hard Site by CACI employees in concert with military personnel. On October 2, 2008, CACI moved to dismiss the FAC, raising various claims of immunity and affirmative defenses; that motion also sought to dismiss

Plaintiffs' conspiracy claims as insufficiently pled. *See* Dkt. No. 35. CACI argued that Plaintiffs were required to allege "facts indicating direct involvement of CACI PT personnel in causing them injury, or to support co-conspirator liability." *Id*. at 26.

The Court rejected CACI's novel and unduly narrow conception of a conspiracy claim, finding that "Plaintiffs adequately allege specific facts to create the plausible suggestion of a conspiracy" under the standards set forth in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007). Dkt. No. 94 at 66. The Court highlighted "at least two suggestive facts that push their claims into the realm of plausibility": (1) the allegation that CACI employees adopted the code phrase "special treatment" – code for the torture of the type endured by Plaintiffs in the Hard Site, FAC ¶ 70, because "the use of code words makes a conspiracy plausible because the personnel would have to reach a common understanding of the code in order to effectively respond to it"; and (2) the allegation that Plaintiff Rashid was hidden from Red Cross inspectors after he had been "brutally and repeatedly beaten," FAC ¶ 43, as "[t]he act of hiding abuse from a humanitarian organization's inspection also plausibly suggests a conspiracy, as a cover-up would require the participation and cooperation of multiple personnel." Dkt. No. 94 at 66-67.

In addition, contrasting Plaintiffs' allegations with those in *Twombly*, the Court could find "no independent motive to act in the alleged manner," since torture during interrogations has been historically banned. *Id*. at 67. The Court further noted that it is "possible that the personnel at Abu Ghraib acted individually in pursuit of some perverse pleasure, but this possibility is insufficient to make Plaintiffs' conspiracy allegations less than plausible." *Id*. at 68.

In further support of the conspiracy claim, the Court found that the FAC sufficiently alleged the direct involvement of CACI's employees in the conspiracy, as it "identif[ied] [CACI employees] Mr. Dugan, Mr. Stefanowicz and Mr. Johnson, as directing and causing 'some of the

most egregious torture and abuse at Abu Ghraib'"; "allege[d] that military co-conspirators have testified that Mr. Stefanowicz and Mr. Johnson were 'among the interrogators who most often directed that detainees be tortured'"; and "allege[d] that Mr. Stefanowicz and Mr. Johnson directed and engaged in conduct in violation of the Geneva Conventions, U.S. Army guidance, as well as United States law." Dkt. 94 at 68-69.

Finally, the Court held that the Plaintiffs "ma[de] a sufficient showing" of CACI's liability as a corporation "to withstand the motion to dismiss," based on allegations that (1) CACI employees Stefanowicz, Johnson, and Dugan instructed military personnel to commit torture and abuse; (2) CACI employed all three and knowingly ratified their actions; (3) CACI took steps to cover up activities of employees involved in the Abu Ghraib scandal; (4) CACI failed to train or properly supervise employees or properly report torture that was committed; and (5) CACI made millions of dollars as a result of its wrongful behavior. Dkt. 94 at 64.

These proceedings were subsequently delayed for three and a half years until May 2012 as a result of CACI's appeal – which it pursued without any basis for appellate jurisdiction, as the Fourth Circuit *en banc* held – of the Court's denial of CACI's motion to dismiss Plaintiffs' state law claims based on certain affirmative defenses. *See Al Shimari v. CACI Int'l, Inc.*, 679 F.3d 205 (4th Cir. 2012) (*en banc*).

B. The Second Amended Complaint and the Court's March 2013 Decision

Plaintiffs filed a Second Amended Complaint ("SAC") on December 26, 2012.[1] The SAC preserved the allegations this Court deemed sufficient in 2009, and maintained the same theories for CACI's conspiracy liability, but added numerous additional allegations supporting

[1] Though under no obligation to do so in light of the Court's March 2008 ruling, Plaintiffs filed a Second Amended Complaint following discussions with CACI regarding the sufficiency of Plaintiffs' conspiracy allegations and in an attempt to obviate the filing of a motion to reconsider the Court's 2008 ruling.

their conspiratorial liability claim. *See* SAC ¶¶ 64-69, 71-77, 80-86, 91-94, 102-103. The SAC alleged that CACI's employees participated in the conspiracy to torture and mistreat Plaintiffs by "[giving] orders to and supervis[ing] military personnel (and military personnel follow[ing] their orders)," *see* Dkt. 189 at 14 (*quoting* SAC ¶ 68), "'with the hope of creating "conditions" in which they could extract more information from detainees to please their U.S. government client,'" *id*. at 18 (*quoting* SAC ¶ 85); and, CACI was liable for their participation in a conspiracy through *respondeat superior* liability, *id*. at 20-22, its willful ignorance of reports of CACI employees' participation in the conspiracy, failure to discipline its employees who participated in the conspiracy, and its cover-up of the conspiracy "'in order to continue to earn millions of dollars from its contract with the United States government,'" *id*. at 18 (*quoting* SAC ¶ 86).

On March 8, 2013, on CACI's motion, the Court dismissed without prejudice the Plaintiffs' claims of a conspiracy between CACI and the military. Dkt. 215. In doing so, this Court affirmed that *respondeat superior* can serve as a basis to hold the corporation liable for the acts of its employees, but ultimately found the factual allegations supporting this otherwise viable theory of liability to be insufficient or implausible. *See* March 8, 2013 Hr'g Tr. 32:5-8, 34:17-24.

C. The Court's *Sua Sponte* Grant of Leave to File a Third Amended Complaint

On March 19, 2013, the Court *sua sponte* granted Plaintiffs leave to file a Third Amended Complaint, "consistent with the Court's Order dated March 8, 2013," permitting only "amendments related to conspiracy allegations between CACI Premier Technology, Inc. and the United States Military." Dkt 227. On March 28, 2013, Plaintiffs filed their Third Amended Complaint ("TAC") with detailed factual allegations supporting the theories of CACI's liability

for a conspiracy that Plaintiffs had asserted throughout this litigation: First, CACI's *respondeat superior* liability for its employees' participation in a conspiracy to torture and mistreat detainees, including Plaintiffs, at the Abu Ghraib Hard Site, supported by allegations that:

(i) Findings from no less than two independent military investigations directly implicated CACI employees in the widespread torture and abuse at Abu Ghraib, *see* TAC ¶¶ 81-84, 87-88;

(ii) Testimony and statements from numerous military co-conspirators, including Ivan Frederick and Charles Graner (who were each court martialed for the very acts at issue in this case), that CACI employees had ordered military personnel to abuse detainees, in order to "soften up" detainees prior to CACI-conducted interrogations, *see* TAC ¶¶ 85, 98-101, 109-123, 126-127;

(iii) The CACI personnel implicated in the wrongdoing were anything but "low-level" employees; rather, they occupied positions of actual or perceived authority at the Hard Site, sufficient to regularly order and specifically instruct military police to abuse detainees, *see* TAC ¶¶ 96-115, 138;

(iv) CACI employees covered up their identities, *see* TAC ¶¶ 91-95, and CACI employees and military co-conspirators used signals and code words such as "soften up," "special treatment," and "doggie dance" to describe well-understood types of abuse, including forced nudity, sexual humiliation, stress positions, exposure to extreme temperatures and use of dogs, and hid Plaintiff Rashid from the Red Cross to evade detection of their abuse, *see* TAC ¶¶ 117-123, 129; and

(v) CACI employees undertook these acts within the scope of their employment as interrogators, *see* TAC ¶¶ 16-18, 78, 102, 118, 156.

Second, CACI's direct liability for its own contributions to the conspiracy, by:

(i) willfully ignoring reports of abuse and its employees' role in the abuse, *see* TAC ¶¶ 148-152;

(ii) failing to discipline and instead promoting its employees involved in the conspiracy, *see* TAC ¶¶ 146-155; and

(iii) contributing to the cover-up of the conspiracy by concealing the central role played by its employees in the conspiracy, *see* TAC ¶¶ 171-183.

The TAC also sets forth details about how Plaintiffs were harmed by the conspiracy, including allegations connecting the specific contributions made by CACI employees to the conspiracy with the harms suffered by Plaintiffs:

(i) Each of the Plaintiffs endured torture and abuse of the kind specifically ordered by CACI employees and undertaken by the military co-conspirators, including diet and environmental manipulation, nudity, stress positions, sleep deprivation, "physical training," humiliation, and use of dogs, *see* TAC ¶¶ 23, 110, 116, 119-123, 125;

(ii) Plaintiff Rashid was subject to serious mistreatment by co-conspirator Graner, who used techniques regularly ordered by CACI employees, and sexually assaulted by a co-conspirator [redacted], *see* TAC ¶135-137;

(iii) Plaintiff Al Zuba'e was subject to serious mistreatment by co-conspirator Graner and subject to cruel techniques regularly ordered by CACI employees, *see* TAC ¶ 134;

(iv) Plaintiff Al-Ejaili was subject to serious mistreatment by co-conspirators Frederick and Graner, [redacted], heard CACI interrogator Johnson and MP Frederick talking about "what to do with" him, and identified CACI employee Johnson as someone who regularly stood outside prison cells giving instructions to military personnel, *see* TAC ¶¶ 124, 131, 138-142; and

(v) Plaintiff Al Shimari was subject to techniques of serious mistreatment regularly ordered by CACI employees, recognized Frederick and Graner as men who often abused detainees, and [redacted], *see* TAC ¶¶ 132-133.

ARGUMENT

When considering a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6), a court "must take the complaints' factual allegations as true and draw all reasonable inferences in plaintiffs' favor." *Robertson v. Sea Pines Real Estate Cos.*, 679 F.3d 278, 284 (4th Cir. 2012). Courts must read a complaint "as a whole," *Scharpenberg v. Carrington*, 686 F. Supp. 2d 655, 659 (E.D. Va. 2010) (Lee, J.), to decide only whether a "claim has facial plausibility." *Robertson*, 670 F.3d at 287 (*quoting Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). Accordingly, a plaintiff need only

"plead[] factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Robertson*, 670 F.3d at 287 (*quoting Iqbal*, 556 U.S. at 678). This is a "'context-specific task that requires the reviewing court to draw' not only 'on its judicial experience,' but also on 'common sense.'" *Id.* (*quoting Iqbal*, 556 U.S. at 679).

A. The TAC States Valid Claims of CACI's Conspiracy Liability

At common law, the elements of a conspiracy include: "a combination of two or more persons, by some concerted action, to accomplish some criminal or unlawful purpose, or to accomplish some purpose, not in itself criminal or unlawful, by criminal or unlawful means." *Tysons Toyota v. Globe Life Ins. Co.*, Nos. 93-1359, 93-1443, 93-1444, 1994 U.S. App. LEXIS 36692, at *14 (E.D. Va. Dec. 29, 1994). The Eleventh Circuit articulated similar elements of conspiracy liability under the Alien Tort Statute: (1) two or more persons agreed to commit a wrongful act; (2) the defendant joined the conspiracy knowing of at least one of the goals of the conspiracy and intending to help accomplish it; and (3) one or more of the violations were committed by someone who was a member of the conspiracy and acted in furtherance of the conspiracy. *Cabello v. Fernandez-Larios*, 402 F.3d 1148, 1158 (11th Cir. 2005).

1. The TAC Adequately Alleges an Unlawful Agreement between CACI Employees and the Military

"A conspiracy claim does not require an express agreement; proof of a tacit understanding suffices." *Tysons*, 1994 U.S. App. LEXIS 36692, at *14. Where the complaint "points to complementary and interlocking actions by the defendants which together suggest a conspiratorial scheme," the Fourth Circuit has found that the allegations "support an inference that the conspiracy existed." *Id.* As the Court of Appeals emphasized in *Robertson*, "Conspiracies are often tacit or unwritten in an effort to escape detection, thus necessitating

resort to circumstantial evidence to suggest that an agreement took place." 679 F.3d 278, 289-90 (4th Cir. 2012).

The TAC adequately alleges the existence of an unwritten agreement to torture and abuse Plaintiffs. In the small and confined universe of Tier 1A of the Hard Site at Abu Ghraib, TAC ¶ 12, members of the 372nd Military Police Company charged with guarding detainees took instructions from civilian interrogators employed by CACI to "'soften up' detainees for interrogation" by creating "extreme and abusive" and "torturous conditions . . . to which Plaintiffs were subject," TAC ¶ 18. *See also* TAC ¶¶ 85, 98-101, 109-123, 126-127. "[redacted]personnel," including two CACI personnel, Stefanowicz and Johnson, "had actually ordered" co-conspirator and non-commissioned officer in charge of the Hard Site Ivan Frederick "to set the conditions for abusing detainees." TAC ¶ 85. Military investigative reports confirmed that CACI employees ordered or worked alongside court martialed military personnel to abuse detainees. TAC ¶¶ 81-84, 87-88. CACI interrogators also ordered other lower-level soldiers to torture and abuse detainees. *See* TAC ¶¶ 100, 111. CACI interrogators "used code words or terms such as 'special treatment,' 'soften up,' 'doggie dance,' and related code-words to signal to their military co-conspirators to employ torture and other abusive techniques of the kind Plaintiffs suffered at the Hard Site." TAC ¶ 117. The CACI interrogators and soldiers alike "understood, that 'softening up' and 'special treatment' for interrogations equated to serious physical abuse and mental harm in an attempt to make detainees more responsive to questioning." TAC ¶ 118.

The TAC specifically names those who joined this unwritten agreement: CACI employees Steven Stefanowicz, Daniel Johnson, and Timothy Dugan; soldiers Ivan Frederick, Charles Graner, Megan Ambuhl, Javal Davis, Lynndie England, Roman Krol, Michael Smith,

and Sabrina Harman; and civilian translators, Adel Nakhla and Etaf Mheisen.[2] TAC ¶ 78. The TAC also identifies when the agreement was made: "no later than October 2003, when the named conspirators were stationed at the Hard Site and when acts of 'sadistic, blatant, and wanton criminal' abuse, as described in Major General Antonio Taguba's Article 15-6 Investigation of the 800th Military Police Brigade ("Taguba Investigation" or "Taguba Report"), were found to have occurred," TAC ¶ 78, and when the employees' participation ended: "in approximately February 2004, following Sergeant Joseph Darby's disclosure to military authorities of photographs and information that documented the abusive conduct, and the commencement of investigations by the Criminal Investigation Division of the Department of Defense, although several conspirators attempted during and after those investigations to conceal the conspiracy and their role in it," TAC ¶ 79.

The TAC sums up the unlawful agreement as follows:

> Because the abuse of Plaintiffs by guards at the Hard Site was unquestionably perpetrated by members of the 372nd Military Police Company under the charge and control of Frederick, and because Frederick testified that he took direct orders to engage in such behavior (and to order or tolerate his subordinates in doing so) towards those detainees at the Hard Site from the CACI PT interrogators, those CACI PT employees filled a necessary role in the accomplishment of the cruel and inhuman conduct that occurred at Abu Ghraib and specifically the serious harms visited on Plaintiffs.

TAC ¶ 22. The above alleges an unlawful agreement by stating who joined in the agreement, when the agreement was made and when it ended, and how the agreement was conveyed (*i.e.*, via instructions from CACI interrogators to military police officers). This stands in sharp contrast

[2] The TAC also alleges there were potentially other civilian contractors and military personnel not presently known to Plaintiffs. TAC ¶ 78. *See, e.g., Hampton v. United States*, 3:07CV497-02-MU,3:04CR118-MU, 2008 U.S. Dist. LEXIS 121214, at *12 (W.D.N.C. Mar. 7, 2008) ("the law is clear that there simply is no requirement that a conspiracy indictment against a single defendant name or other-wise precisely identify the defendant's co-conspirators" *citing United States v. American Waste Fibers Co.*, 809 F.2d 1044, 1046 (4th Cir. 1987) (upholding charge alleging defendant conspired with persons known and unknown)).

to the vague and conclusory allegations set forth by the plaintiffs in a series of cases upon which CACI relies. *See* Def. Br. 21, citing *Keck v. Virginia*, No. 3:10cv555, 2011 U.S. Dist. LEXIS 115795, *43-44 (E.D. Va. Sept. 9, 2011); *A Society Without a Name v. Virginia*, 655 F.3d 342, 346-47 (4th Cir. 2011); *Wills v. Rosenberg*, No. 1:11cv1317 (LMB/JFA), 2012 U.S. Dist. LEXIS 4320, at *3-4, 9-10 (E.D. Va. Jan. 13, 2012); *Coles v. McNeely*, Civil Action No. 3:11CV130, 2011 U.S. Dist. LEXIS 94283, at *8-9 (E.D. Va. Aug. 23, 2011).

2. The TAC Alleges Sufficient Facts to Show the Plausibility of the Unlawful Agreement between CACI Employees and the Military

As *Twombly/Iqbal* make plain, plausibility is not akin to a probability requirement. *See S. Appalachian Mt. Stewards v. Penn Va. Operating Co. LLC*, No. 2:12CV00020, 2013 U.S. Dist. LEXIS 457 at *5 (W.D. Va. Jan. 3, 2013) ("As the Court noted in *Twombly*, '[a]sking for plausible grounds to infer' the existence of a claim 'does not impose a probability requirement at the pleading stage.'"). Nor does the Court's decision in *Iqbal* give courts license to choose among competing inferences to assess which is more likely to be true. *Iqbal*, 556 U.S. at 678. Instead, all plaintiffs must do is "give enough details about the subject-matter of the case to present a story that holds together," and the court will ask itself "*could* these things have happened, not *did* they happen." *Estate of Davis v. Wells Fargo Bank*, 633 F.3d 529, 533 (7th Cir. 2011) (emphasis in original) (internal quotations omitted).

a. Plaintiffs' Conspiracy Theory Is Plausible

Before the world learned in April 2004 of the atrocities committed by U.S. personnel at Abu Ghraib, many would have thought the very notion that these events could occur at all was implausible in the extreme. The real world turned out to be more complex. It is, sadly, not in the least implausible that a small group of ill-trained and largely unsupervised individuals in a closed

prison environment could collectively decide that what was wanted of them was to extract intelligence by whatever means necessary.

The TAC alleges that the unlawful agreement between CACI and the military was made possible through the "command vacuum" that existed at the prison during the time period of the conspiracy, when "[t]here was virtually no supervision of the MPs at the Hard Site by superiors in the military chain of command." TAC ¶ 18. In an environment like the detention center at Abu Ghraib, it is entirely foreseeable that the absence of adequate supervision is likely to cause those charged with guarding and otherwise interacting with detainees to engage in abusive and inhumane treatment toward detainees. TAC ¶¶ 19-20 (*citing* Expert Reports of Dr. Philip Zimbardo and Professor Geoffrey S. Corn, in Exhibits A and B, respectively, attached to the Declaration of Baher Azmy, Esq., dated May 3, 2013 ("Azmy Decl.")). CACI interrogators exploited this environment and "filled the vacuum by assuming *de facto* positions of authority" from which they instructed military police officers to abuse detainees. TAC ¶ 18. *See also* TAC ¶¶ 96-108 (allegations demonstrating positions of authority CACI interrogators commanded over MPs at the Hard Site).

CACI interrogators did so in an effort to "soften up" detainees for interrogation, or in other words, with the expectation that following such torture and mistreatment, detainees would provide answers – however credible – to the interrogators' questions, allowing CACI to regularly deliver intelligence to its United States government customer. *See* TAC ¶¶ 118, 156. CACI interrogators engaged in such behavior because they lacked, like their military co-conspirators, proper training and oversight and received tacit encouragement of their abusive behavior from their bosses. TAC ¶ 146.

CACI asserts that because participation in such a conspiracy is unlawful and in violation of its contract with the U.S. government, it could have "no incentive whatsoever" to do so. Def. Br. 18. CACI thus appears to believe that criminals or tortfeasors have no incentive to commit crimes or torts simply because they are unlawful and, were they to be caught, they would suffer consequences adverse to their own interests. But, in fact, CACI (through and along with its employee interrogators) did have an incentive to participate in such a conspiracy, as set forth in the TAC: to "extract more information from detainees to please their client" so that CACI could "secure more profitable contracts" from its "single most important customer," the United States government. TAC ¶ 156. *See also* TAC ¶¶ 10, 157, 183, 186. Profit motive is as plausible an explanation for corporate behavior as any on record. *See Iqbal*, 556 U.S. at 678 (courts may not choose among competing inferences to assess which is more likely to be true). But even if CACI had no *corporate* motive to engage in improprieties in carrying out its contract, that would not affect Plaintiffs' well-pleaded allegations that CACI is liable under *respondeat superior* for the actions of its employees.

Contrary to the direct holding of *Twombly/Iqbal*, CACI demands that Plaintiffs disprove alternative theories. CACI argues that Plaintiffs' allegations fail to "exclude the possibility that the alleged co-conspirators acted independently." Def. Br. 26. At the motion to dismiss stage, however, Plaintiffs need not disprove every conceivable alternative; they need allege only enough facts to suggest the plausibility of an unlawful agreement. *See Starr v. Sony BMG Music Entm't*, 592 F.3d 314, 325 (2d Cir. 2010) ("to survive a motion to dismiss, plaintiffs need only 'enough factual matter (taken as true) to suggest that an agreement was made'" (*citing Twombly*,

at 554, 556; 2 Areeda & Hovenkamp § 307d1 (3d ed. 2007))).[3] Plaintiffs amply meet that standard, given that the conduct alleged is egregious and unlawful in itself; was carried out in a manner that requires multiple participants; and took place in a small, closed universe. Indeed, the *only* plausible explanation for abuse in this closed environment is the one offered by Plaintiffs: such conduct "could only plausibly occur if there was at least a tacit understanding among" all those present at the site "that the abusive behavior was encouraged and condoned." TAC ¶ 21. Were CACI's hypothesis true – *i.e.*, that the alleged abuses were merely independent acts – CACI interrogators and U.S. army personnel alike would have taken on the unreasonable risk "that his or her conduct would be reported to higher authority and punished." *Id*. The Court essentially concluded this in denying CACI's initial motion for dismissal, finding that the possibility that the wrongdoers were acting independently was itself not very plausible. *See* Dkt. 94 at 68.

Finally, CACI asserts that "low-ranking Army personnel" serving as CACI's co-conspirators had "no incentive to enrich CACI PT through the mistreatment of detainees." Def. Br. 18. However, as the TAC specifically alleges, military co-conspirators such as Frederick and Graner viewed CACI interrogators Stefanowicz and Johnson as serious authority figures, TAC ¶¶ 96-108. Two senior military officials, "Sergeant Theresa Adams, a military intelligence section leader at Abu Ghraib, and Captain Carolyn Wood, the Officer in Charge with the [Joint Interrogation Debriefing Center], both provided testimony . . . that CACI PT interrogators had actually supervised military personnel," TAC ¶ 97, "in direct violation of CACI PT's [Statement

[3] The facts at hand are unlike those found in *Twombly*/the antitrust context, where parallel behavior among independent actors would be expected. In *Loren Data Corp.*, cited by CACI, the court found that the allegations did not "tend to exclude the possibility that the alleged co-conspirators acted independently," but there, the complaint affirmatively relied on a letter from the defendant that itself set forth a more plausible explanation for defendant's rejection of plaintiff's contract than participation in a conspiracy to boycott plaintiff's business. *Loren Data Corp. v. GXS, Inc.*, No. 11-2062, 2012 U.S. App. LEXIS 26471, at *13-15 (Dec. 26, 2012). Everything in Plaintiffs' complaint, including independent assessments by military investigators, points directly to coordinated action between CACI personnel and MPs.

of Work] as well as the controlling military regulations," TAC ¶ 96. Further, the TAC alleges that "[m]ilitary personnel at the Abu Ghraib Hard Site were frequently confused as to whether interrogators were associated with civilian contractors or military intelligence personnel" since "it was common practice for personnel at Abu Ghraib to cover their name tags and not disclose their identities to detainees." TAC ¶¶ 90-91.

Thus, because (1) there was widespread confusion among military police officers as to who was military intelligence and who was a private contractor; (2) "military personnel perceived CACI PT employees as authority figures," TAC ¶ 96; *see also* TAC ¶¶ 97-108; and (3) military police officers were not subject to rigorous oversight and training, greatly increasing the risk that they would engage in cruel and abusive behavior towards the detainees under their charge, TAC ¶¶ 19-20 (citing Expert Reports of Dr. Zimbardo, Azmy Decl. Ex. A, and Professor Corn, Azmy Decl. Ex. B), it is more than plausible that CACI's military co-conspirators followed the instructions of CACI interrogators to inflict torture and other inhumane treatment on detainees.

b. CACI's Challenge to the Veracity of Plaintiff's Allegations is Impermissible

At this motion to dismiss stage, CACI improperly takes issue with the truth of Plaintiffs' factual allegations. For example, it asserts that "[t]he idea that the military abdicated authority over the MPs" and allowed CACI personnel to "position[] themselves at the top of the power structure" is "simply fabricated." Def. Br. 23-24. CACI misapprehends the difference between pleading obligations and burdens of proof. *Iqbal* did nothing to change the fundamental principle that, at the motion to dismiss stage, the court must accept all of a plaintiff's allegations as true. *See Clear Sky Car Wash, LLC v. City of Chesapeak*e, No. 2:12cv194, 2012 U.S. Dist. LEXIS 178966, at *16 (E.D. Va. Dec. 18, 2012) ("Rule 12(b)(6) does not countenance . . .

dismissals based on a judge's disbelief of a complaint's factual allegations." (*quoting Twombly*, 550 U.S. at 556)); *Witherspoon v. Jenkins*, No. 1:11cv963 (TSE/TCB), 2011 U.S. Dist. LEXIS 149646, at *3 (E.D. Va. Dec. 30, 2011) ("When determining whether a motion to dismiss should be granted, the alleged facts are presumed true.").

Doubling down on its curious claim that Plaintiffs simply made up their allegations from whole cloth, CACI grossly mischaracterizes the conclusions of numerous government investigations into the torture and abuses at Abu Ghraib. First, two of the reports cited by CACI, Def. Br. 24 n.12, and relied upon by Plaintiffs in the TAC, clearly and unequivocally concluded that a vacuum of military leadership existed at the Hard Site. The Taguba Report consistently characterized the military leadership at Abu Ghraib as absent and ineffectual. Taguba Report at 40, 29, 30.[4] The Taguba Report further concluded that contractor personnel, including CACI employees, had "wandered about [Abu Ghraib] with too much unsupervised free access in the detainee area." *Id*. at 26. S*ee also* TAC ¶ 89. In fact, as alleged in the TAC,

> The Taguba Investigation recommended official reprimand and termination of Stefanowicz for his role in the conspiracy, including for giving instructions to military personnel that Stefanowicz knew were both physically abusive and prohibited.

TAC ¶ 87 (*citing* Taguba Report at 48).

Similarly, the report of the AR15-6 Investigations of the Abu Ghraib Prison and 205th Military Intelligence Brigade by Lieutenant General Anthony R. Jones and Major General George R. Fay ("Jones/Fay Report") concluded that "[t]he primary causes [of the abuses at Abu Ghraib] are misconduct (ranging from inhumane to sadistic) *by a small group of morally corrupt*

[4] *See also id*. at 43 ("I find that individual Soldiers within the 800th MP Brigade and the 320th Battalion stationed throughout Iraq had very little contact during their tour of duty with either LTC (P) Phillabaum or BG Karpinski."); 45-48 (recommending that eight other Colonels, Lieutenant Colonels, Captains, Lieutenants, and Sergeants be reprimanded for "[f]ailing to properly supervise his soldiers working and 'visiting' Tier 1 of the Hard-Site at Abu Ghraib"); 48-49 (explaining that Taguba's assistant Colonel Nelson determined that the abuses at Abu Ghraib took place "in an unsupervised and dangerous setting").

soldiers and civilians, a lack of discipline on the part of the leaders and Soldiers of the 205th MI BDE *and a failure or lack of leadership by multiple echelons within CJTF-7*," and that "[t]he leaders from units located at Abu Ghraib or with supervision over Soldiers and units at Abu Ghraib, failed to supervise subordinates or provide direct oversight of this important mission." Jones/Fay Report at 2 (emphasis added)). The Jones/Fay Report further concluded "that a civilian interrogator known to be [CACI interrogator Daniel] Johnson had encouraged Frederick to abuse detainees." TAC ¶ 88 (*citing* Jones/Fay Report at 132).[5]

The other reports cited by Defendant, Def. Br. 24 n. 12, are outside the pleadings and may not be considered on a motion to dismiss. *See Clear Sky Car Wash*, 2012 U.S. Dist. LEXIS 178966, at *17. The reports in fact do nothing to contradict the consensus view that there was a vacuum of leadership in Abu Ghraib and, even if they somehow contradicted the reports upon which Plaintiffs rely, such contradictions would only go to the ultimate weight afforded to the Plaintiffs' evidence, *see, e.g., J.P. v. County Sch. Bd.*, 447 F. Supp. 2d 553, 578 (E.D. Va. 2006) (finding that contradiction between witness testimony and documentary evidence "adversely affect[ed] the *weight*" of the evidence (emphasis added)); they could not be used to assess the plausibility of Plaintiffs' allegations, *Iqbal*, 556 U.S.at 677 ("A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.").

Similarly, CACI attempts to lighten the heavy weight of co-conspirator Frederick's testimony directly implicating CACI – an effort also foreclosed at this stage. Specifically, CACI

[5] Defendant also plucks one statement found in the Jones/Fay report in an attempt to show a conspiracy might not in fact have existed. Def. Br. 18 (*citing* Jones/Fay Report at 4). In fact, General Fay concluded that CACI employees, along with military intelligence personnel, military police, and medical soldiers, had "*responsibility* or complicity in the abuses that occurred at Abu Ghraib." TAC ¶ 81 (*quoting* Jones/Fay Report at 7-8 (emphasis added)). The investigation further concluded that "[w]hat started as nakedness and humiliation, stress and physical training (exercise), carried over into sexual and physical assaults by *a small group* of morally corrupt and unsupervised Soldiers *and civilians*." TAC ¶ 82 (*quoting* Jones/Fay Report at 9-10, para. (c)(1) (emphasis added)).

parses Frederick's testimony to suggest a conflict between his testimony and the TAC's reliance on it and then further suggests that "the actual contents" of the testimony must "control." Def. Br. 24. The cases CACI cites in support of this novel assertion are inapposite. In *Space Tech. Dev. Corp. v. Boeing Co.*, 209 F. App'x 236 (4th Cir. 2006), and *Fayetteville Investors v. Commercial Builders, Inc.*, 936 F. 2d 1462 (4th Cir. 1991), the complaints attached contracts as exhibits in purported support for breach of contract claims, but the plain language of the contracts themselves foreclosed plaintiffs' claims.[6] Thus, the courts in those cases looked to the terms of the contract only to determine what was required to show defendant's liability; the cases do not permit an assessment of whether a plaintiff's allegations are in fact true. Regardless, Plaintiffs' allegations accurately reflect Frederick's testimony that he took orders from CACI interrogators to abuse detainees at the Hard Site. *Compare*, *e.g.*, TAC ¶¶ 18, 23, 85, 98, 111, 116, 120, 122 *with* Azmy Decl. Ex. C at 84:6-85:8, 126:20-129:9, 146:6-12, 164:19-165:4, 166:2-9. And with respect to CACI's assertion that Frederick "confirmed that to his knowledge, no CACI PT interrogator ever gave instructions regarding the treatment of a detainee who was not assigned to him or her," Def. Br. 25, Plaintiffs specifically allege in the TAC that [redacted], TAC ¶ 124.

3. The TAC Adequately Alleges That Plaintiffs' Injuries Resulted From the Conspiracy

A defendant may be held liable for the substantive offenses that his *co-conspirators* committed in furtherance of the conspiracy. *See United States v. Oliver*, No. 12-4047, No. 12-4052, 2013 U.S. App. LEXIS 4741, at *9 (4th Cir. Mar. 8, 2013) ("'The [*Pinkerton v. United States*, 328 U.S. 640 (1946)] doctrine makes a person liable for substantive offenses committed

[6] While the third case, *Witherspoon v. Jenkins*, recalls the basic proposition that "where a conflict exists between 'the bare allegations of the complaint and any attached exhibit, the exhibit prevails,'" there was no such issue identified in the case. No. 1:11cv963 (TSE/TCB), 2011 U.S. Dist. LEXIS 149646 (E.D. Va. Dec. 30, 2011).

by a co-conspirator when their commission is reasonably foreseeable and in furtherance of the conspiracy.'" (*quoting United States v. Ashley*, 606 F.3d 135, 142-43 (4th Cir. 2010))); *Brown v. Gilner*, No. 1:10-cv-00980 (AJT/IDD), 2012 U.S. Dist. LEXIS 138662, *24 (E.D. Va. Sept. 25, 2012) (applying Virginia law) ("As a participant in the conspiracy, those damages are assessable against Gilner, whether caused directly by Bochinski's statements and conduct or his own."). Plaintiffs need only sufficiently allege CACI's participation in a conspiracy with knowledge of the conspiracy's unlawful objective for CACI to be liable for any conspirator's "overt act that caused injury, so long as the purpose of the act was to advance the overall object of the conspiracy." *Halberstam v. Welch*, 705 F.2d 472, 487 (D.C. Cir. 1983).

Directly contradicting the exact opposite position it has taken in this litigation, CACI argues in this motion that Plaintiffs' "allegations that CACI PT employees ordered the MPs to implement harsh conditions upon detainees generally" are insufficient. Def. Br. 19. Under the law, that is all Plaintiffs are required to allege. So long as harm to Plaintiffs was a reasonably foreseeable consequence of the conspiracy, CACI is liable. *See, e.g.*, *Oliver*, 2013 U.S. App. LEXIS 4741, at *9; *United States v. Vazquez-Botet*, 532 F.3d 37, 62-63 (1st Cir. 2008); *Daily v. Gusto Records, Inc.*, 14 F. App'x 579, 587 (6th Cir. 2001); *Jones v. Chicago*, 856 F.2d 985, 992 (7th Cir. 1998). As the object of the conspiracy was to torture and mistreat detainees at the Abu Ghraib Hard Site to "soften" them up for interrogation, harm to Plaintiffs, as part of that defined group, was reasonably foreseeable. *See In re Chiquita Brands Int'l, Inc. Alien Tort Statute & S'holder Derivative Litig.*, 792 F. Supp. 2d 1301, 1344-45 (S.D. Fla. 2011) (holding that the plaintiffs only needed to "allege that Chiquita intended for the AUC to torture and kill civilians in Colombia's banana growing regions, which is the conduct that allegedly harmed or killed Plaintiffs' relatives"); *Ungar v. Islamic Republic of Iran*, 211 F. Supp. 2d 91, 100 (D.D.C. 2002)

(the *mens rea* for civil conspiracy is reflected in the defendant's knowledge of the conspiracy's unlawful objective, even where the defendant is unaware of the identity of all co-conspirators or details of the conspiracy).

Indeed, after arguing that allegations of specific harm to Plaintiffs was required in its motion to dismiss the SAC, CACI changed course and took the exact opposite position in its motion to stay discovery on the conspiracy claims, where it asserted,

> [a] fundamental feature of conspiracy claims is that a party to a conspiracy can be held liable for actions of co-conspirators in furtherance of the conspiracy, *even if the defendant had no involvement with the actions that injured the plaintiff*.

Dkt. 222 at 11 (*citing Tire Eng'g & Distribution, LLC v. Shandong Linglong Rubber Co.*, 682 F.3d 292, 313 n.10 (4th Cir. 2012)) (emphasis added).

Nevertheless, the TAC directly connects CACI interrogators to the harms suffered by Plaintiffs as a result of the conspiracy. First, the TAC alleges that CACI interrogators instructed their military co-conspirators, namely Frederick and Graner, to soften up detainees for interrogation and alleges the specific torturous and abusive techniques CACI interrogators directed them to employ. *See* TAC ¶¶ 85, 116, 119-120, 122-123, 126. Plaintiffs alleged that Frederick and/or Graner were persons who participated in their abuse, and that they suffered from the same type of abuse that CACI interrogators directed Frederick and Graner to use, during the same time period in which CACI interrogators took on this commanding role in the prison. *See* TAC ¶¶ 119, 120-122, 125, 131-135. Furthermore, the TAC alleges that CACI interrogators were involved in their abuse and/or interrogation. [redacted], TAC ¶ 124, and CACI interrogator Johnson saw Al Ejaili naked in his cell and appeared to direct the military police in their abusive treatment towards Al-Ejaili, TAC ¶¶ 141- 142. Similarly, [redacted]

[redacted]. TAC ¶ 133.

The plausibility standard to particular cases is "context-specific," *Iqbal*, 556 U.S. at 679, and requires assessing "the allegations of the complaint as a whole," *Matrixx Initiatives, Inc. v. Siracusano*, 131 S. Ct. 1309, 1323 (2011). Thus, at the pleading stage, allegations of circumstantial evidence supporting elements of a plaintiff's claims "are sufficient under *Twombly* and *Iqbal* to plausibly state a claim for relief." *Palmetto Pharms. LLC v. AstraZeneca Pharms. LP*, No. 2:11-cv-00807-SB-JDA, 2012 U.S. Dist. LEXIS 18019, at *29-30 (D.S.C. Jan. 4, 2012). *See also Allstate Ins. Co. v. Warns*, No. CCB-11-1846, 2012 U.S. Dist. LEXIS 26174, at *23 (D. Md. Feb. 29, 2012).

B. The TAC Adequately Alleges CACI's Corporate Liability

1. The TAC Adequately Pleads CACI's *Respondeat Superior* Liability for Acts Taken by Employees Within the Scope of Their Employment

As the Court explained in its 2009 decision, "Under the theory of respondeat superior, an employer may be held liable in tort for an employee's tortious acts committed while doing his employer's business and acting within the scope of the employment when the tortious acts were committed." Dkt. 94 at 63 (*citing Plummer v. Ctr. Psychiatrists, Ltd.*, 476 S.E.2d 172, 174 (Va. 1996)).[7] Further, "[a]n employer may be liable in tort even for an employee's unauthorized use of force if 'such use was foreseeable in view of the employee's duties.'" *Id.* (*quoting Martin v. Cavalier Hotel Corp.*, 48 F.3d 1343, 1351 (4th Cir. 1995)). The Court found that the FAC set forth sufficient facts to infer vicarious liability, and ultimately concluded that, "it was foreseeable

[7] *See also* Restatement (Second) of Agency sections 219, 228 (an act is within the course and scope of an agent's employment, and thus subjects the employer to liability based on *respondeat superior*, when (1) the conduct occurred substantially within the time and space limits authorized by the employment; (2) the employee was motivated, at least in part, by a purpose to serve the employer; and (3) the act was of a kind that the employee was hired to perform).

that Defendants' employees might engage in wrongful tortious behavior while conducting the interrogations because interrogations are naturally adversarial activities." *Id*. at 64-65. Thus, when CACI employees entered into the conspiracy to abuse detainees, their culpable conduct is legally attributable to their employer. That finding is the law of the case, and was affirmed by the Court when it dismissed without prejudice Plaintiffs' conspiracy claims as between CACI PT and the military. *See* March 8, 2013 Hr'g Tr. 32:5-8, 34:17-24 (affirming that *respondeat superior* liability can serve as a basis to hold the corporation liable for the acts of its employees, but ultimately finding the factual allegations in the SAC supporting this otherwise viable theory of liability to be insufficient).

In any event, the TAC – just as earlier versions of the complaint – satisfies the standards for *respondeat superior* liability.[8] Plaintiffs have alleged an employer-employee relationship between CACI and its employees named as participating in the conspiracy. *See* TAC ¶ 78. Once an "employer-employee relationship has been established, 'the burden is on the [employer] to prove that the [employee] was *not* acting within the scope of his employment when he committed the act complained of, and . . . if the evidence leaves the question in doubt it becomes an issue to be determined by the jury.'" *Plummer*, 476 S.E.2d at 174.

In addition to alleging an employer-employee relationship, Plaintiffs have also alleged how the individual CACI employees' participation in the conspiracy fell within the scope of their employment even if their conduct was in violation of CACI's formal policies. *See Martin v. Cavalier Hotel Corp.*, 48 F.3d 1343, 1351-1352 (4th Cir. Va. 1995) (employer could be liable for its employee's sexual assaults, because employee was acting within the scope of his employment

[8] CACI seeks to characterize Plaintiffs' long-standing theory of *respondeat superior* liability as "new," Def Br. 15, in order to suggest the TAC is somehow a radical departure from the prior pleadings or what was contemplated by the Court's order. Rather, this has been Plaintiffs' primary argument for CACI's corporate liability since 2008. *See* Procedural History, *supra*.

at the time); *Stith v. Thorne*, 488 F. Supp. 2d 534 (E.D. Va. 2007); *Heckenlaible v. Va. Peninsula Reg'l Jail Auth.*, 491 F. Supp. 2d 544, 549 (E.D. Va. 2007). As alleged, CACI interrogators Stefanowicz, Dugan, and Johnson could not have reached an agreement with their military co-conspirators and committed acts in furtherance of the conspiracy, "were it not for [their] employment" with CACI, *Heckenlaible*, 491 F. Supp. 2d at 552, which had a contract with the U.S. government to provide interrogators at Abu Ghraib, TAC ¶ 15.

Also, according to the terms of their contract, CACI provided interrogators and other intelligence support personnel "to assist, supervise, coordinate, and monitor all aspects of interrogation activities, in order to provide timely and actionable intelligence to the commander." TAC ¶ 15; *see also* TAC ¶ 156. Thus, in directing the abuse of detainees to "set conditions" for interrogation, they "arguably used the authority of [their] office to accomplish the wrongful act." *Heckenlaible*, 491 F. Supp. 2d at 552. *See also Rasul v. Myers*, 512 F.3d 644, 658-59 (D.C. Cir. 2008), *vacated and remanded* 555 U.S. 1083 (2008) (torture, threats and abuse by interrogators was incidental to the legitimate employment duties of the defendant military officers as "the plaintiffs do not allege that the defendants acted as rogue officials or employees who implemented a policy of torture for reasons unrelated to the gathering of intelligence").

Finally, CACI need not have "impliedly or expressly direct[ed] the wrongful act." *Heckenlaible*, 491 F. Supp. 2d at 549. So long as its employees' conduct was foreseeable in view of their duties as interrogators, CACI may be held liable for their actions. *See* dkt. No. 94 at 63. *See also Commercial Business Sys. v. Bellsouth Servs.*, 453 S.E.2d 261, 265-66 (Va. 1995) (detailing several cases in which the Virginia Supreme Court found that an employee was acting within the scope of his employment, e.g., when a railroad gateman shot a motorist over a dispute about raising the gate and when a bus driver punched another motorist after a near-accident). As

alleged in the complaint based on expert testimony in this litigation, "'[i]ndividuals involved in detention and interrogation operations in high-stress environments without actual mission-specific training or fully operational oversight are likely to escalate abuse of prisoners and even torture them without regard for human rights regulations governing such situations.'" TAC ¶ 145 (*citing* Expert Report of Dr. Zimbardo, Azmy Decl. Ex. A). Further, with respect to interrogators in particular, "'who will be under intense pressure to produce actionable intelligence to facilitate tactical and operational success of friendly forces,'" there is a "high risk 'that the pressure to deliver actionable information will inevitably push even the very best trained interrogators to fall into the trap of acting on the belief' that the ends justifies the means." TAC ¶ 144 (*citing* Expert Report of Professor Corn, Azmy Decl. Ex. B). In sum, "[c]ircumstances related to [their] employment facilitated" the torture and abuse. *Heckenlaible*, 491 F. Supp. 2d at 552. As such, the TAC plainly states a claim for CACI's *respondeat superior* liability.

CACI consistently characterizes its interrogators alleged to have participated in the conspiracy as "low-level", Def. Br. 1, 3, 6, 7, 9, 15, 24, 26 – a self-serving characterization not found in the TAC, and one that CACI is not permitted to simply assert at this stage. In any event, the claim ignores the consistent findings of military investigators – cited in the TAC – that the interrogators, many of whom were CACI, were directing the conduct of the military personnel who often carried out the abuse, *see* TAC ¶¶ 87-88 (*citing* Taguba Report at 48, Jones/Fay Report at 51-52); testimony by military personnel at the prison that CACI interrogators supervised military personnel, *see* TAC ¶¶ 97-101; and testimony by a CACI employee that CACI interrogator/co-conspirator Stefanowicz asserted a "position of authority" over CACI personnel, *see* TAC ¶ 105.

CACI also misapplies the case law it cites in support of its assertion of the novel requirement that in order to plead CACI's *respondeat superior* liability for the participation of its interrogators in the conspiracy, Plaintiffs must allege "what person(s) with the authority to bind CACI PT supposedly made a corporate decision to enter into a conspiracy to engage in corporate conduct the object of which was to harm the Plaintiffs." Def. Br. 16. First, given the age-old understanding of *respondeat superior*, Plaintiffs do not have to show, as CACI seems to imply, that a corporation's board of directors or senior executives voted on and ratified a conspiracy. *See infra* Section B.2. The corporation is liable for the acts of employees taken within the scope of employment.

Iqbal, cited by CACI, is of no import here. As the decision makes abundantly clear, *Iqbal*'s limitation on supervisory liability applies only to *Bivens* claims for constitutional violations brought against individual *government* defendants, who enjoy the benefits of qualified immunity; that limitation parallels the prohibition on *respondeat superior* liability against city and state governments that has been in effect at least since the Supreme Court's decision in *Monell v. New York City Dept. of Social Services*, 436 U.S. 658, 659 (1978). *See Iqbal*, 556 U.S. at 675-77. Unlike such sovereign bodies, CACI is a for-profit business corporation that, like any other, is generally liable for the torts of its employees committed in the course of their employment. *Iqbal* did nothing to upset nearly centuries of law governing the vicarious liability of private entities, nor could it have without producing a revolution in basic tort doctrine.[9]

While *Hill v. Lockheed Martin Logistics Mgmt.*, also cited by CACI, discusses restrictions on the ability of employees to bind a corporation, the discussion is limited to actions

[9] Even if a court were, for the first time, to import *Iqbal*'s "personal involvement" requirement into the corporate context, Plaintiffs would still survive CACI's motion to dismiss as Plaintiffs' allegations of knowledge and acquiescence or deliberate indifference to a known risk, meet the "personal involvement" standard. *See, e.g.*, *Dodds v. Richardson*, 614 F.3d 1185, 1195 (10th Cir. 2010); *Sanchez v. Pereira-Castillo*, 590 F.3d 31, 49 (1st Cir. 2009).

brought under certain anti-discrimination statutes, for which "Congress 'evinced an intent to place some limits on the acts of employees for which employers . . . are to be held responsible.'" 354 F.3d 277, 287 (4th Cir. 2004). Regardless, the court found that actions taken by a supervisor to be sufficient. *Id*. at 287-288. The complaint alleges that CACI's Site Lead Manager at Abu Ghraib and other CACI supervisory personnel who were based in Iraq or frequently visited Iraq were made aware of the mistreatment of detainees and the role of CACI personnel in the torture and abuse, *see* TAC ¶¶ 150-151, 163-166, 176, but instead of reporting or disciplining those employees, promoted those individuals and/or ignored the reports of abuse, *see* TAC ¶¶ 146, 148-155. Those allegations adequately allege that persons with supervisory authority and apparent authority, if not actual authority, acted in a manner to bind the corporation.

2. Corporations May Be Held Liable for Their Employees' Participation in a Conspiracy

As Plaintiffs have long argued in this case, and has been affirmed by this Court, corporate defendants may be held liable for their employees' participation in a conspiracy. *See Commercial Business Sys.*, 453 S.E.2d 261 (recognizing *respondeat superior* liability for employee's participation in a conspiracy); *accord Stith v. Thorne*, 488 F. Supp. 2d 534 (E.D. Va. 2007). *See also United States v. Stevens*, 909 F.2d 431, 433 (11th Cir. 1990) ("[L]iability for a conspiracy may be imputed to the corporation itself on a respondeat superior theory.").

In *Commercial Business Sys.*, plaintiff CBS had a contract with defendant BellSouth to perform repair work. 453 S.E.2d 261. When the contract was up for renewal, BellSouth's employee, Waldrop, awarded the contract to CBS's competitor, who was paying Waldrop kickbacks. CBS sued BellSouth, asserting claims for common law conspiracy to injure business reputation and tort liability under doctrine of *respondeat superior*. The Virginia Supreme Court reversed the grant of summary judgment as to CBS's common law conspiracy claim, which was

premised exclusively on the conduct of BellSouth's employee and CBS's competitor, *i.e.* under a theory of *respondeat superior*. *Id.* at 268. The Court explained,

> Under the modern view, the willfulness or wrongful motive which moves an employee to commit an act which causes injury to a third person does not of itself excuse the employer's liability therefor. The test of liability is not the motive of the employee in committing the act complained of, but whether that act was within the scope of the duties of employment and in the execution of the service for which he was engaged.

Id. at 266 (*quoting Tri-State Coach Corp. v. Walsh*, 49 S.E.2d 363, 366 (Va. 1948)). *See also Stith v. Thorne*, 488 F. Supp. 2d at 552-53 (denying mortgage company summary judgment on conspiracy claim because, "though [the employees'] conduct was likely violative of the [company's] internal rules, and undoubtedly motivated by a desire to further their own self-interests rather than that of their employer, a reasonable juror could conclude that the acts were nonetheless committed while performing their roles as mortgage brokers.")

The only cases relied on by CACI in support of the claim that there is an exception to vicarious liability for conspiracy claims – *Oki Semiconductor Co. v. Wells Fargo Bank, N.A.*, 298 F.3d 768 (9th Cir. 2002), and *Day v. DB Capital Group, LLC*, No. DKC 10-1658, 2011 U.S. Dist. LEXIS 25303 (D. Md. Mar. 11, 2011), *see* Def. Br. 27-28 – actually affirm the ability of a corporation to be held liable for its employee's participation in a conspiracy on a theory of *respondeat superior* liability. In fact, *Oki Semiconductor* described the important role that *respondeat superior* plays in holding corporations accountable for torts, including conspiracy:

> This possibility of respondeat superior liability for an employee's RICO violations encourages employers to monitor closely the activities of their employees to ensure that those employees are not engaged in racketeering. It also serves to compensate the victims of racketeering activity. Vicarious liability based on the doctrine of respondeat superior thereby fosters RICO's deterrent and compensatory goals.

298 F.3d at 776. The reason the corporations in *Oki Semiconductor* and *Day* were not held liable under an available *respondeat superior* theory of liability is that they involved self-dealing employees who entered their respective conspiracies outside the scope of their employment and not to benefit their employers. By contrast, Plaintiffs here expressly allege the CACI employees entered into the conspiracy in their role as interrogators, a "naturally adversarial activit[y]," *see* Dkt. 94 at 65, in order to serve their employer by attempting to extract more intelligence during their interrogations, *see* TAC ¶ 102,118, 156.

3. The TAC Also Adequately Alleges CACI's Liability for Its Own Participation in the Conspiracy

In addition to a legally sufficient *respondeat superior* theory of corporate liability, the TAC further alleges the role of CACI's management in the conspiracy distinct from the contributions to the conspiracy made by its employee interrogators, based on a failure to adequately hire, train, and supervise its employees, as well as based on the corporation's knowledge and acquiescence in abuse by employees.

First, despite "the high risk that its employees would participate in the torture or abuse of detainees," given the "frequently adversarial, domineering dynamic between interrogator and detainee," CACI "failed to take due care to hire and deploy to Abu Ghraib employees who had sufficient experience, training, or certification to conduct interrogations of detainees." TAC ¶¶ 143-147. Compounding this risk, CACI "insufficiently supervised the conduct of its employees; ignored reports of abuse; and promoted and/or praised employees implicated in detainee abuse, providing incentives for behavior that lead to the torture and abuse of detainees." TAC ¶ 146. *See also* TAC ¶¶ 148-152. Despite reports to CACI's management by its own employees and military personnel about detainee abuse and the role of CACI interrogators in

such abuses, "CACI PT management failed to report this abuse to the military or take additional steps to ensure its own employees discontinued detainee abuse." TAC ¶¶ 150-153, 176.

Second, CACI turned a blind eye to reports of abuse. CACI had managers based at Abu Ghraib and elsewhere in Iraq who "had access to and reviewed interrogation reports, some of which . . . raised concerns of potential abuse by other CACI PT personnel." TAC ¶ 163. A CACI manager was present at Abu Ghraib during the entire period of the conspiracy and other CACI managers frequently visited the prison during that time. TAC ¶¶ 164-166. All of those managers communicated regularly with "military personnel regarding the conduct of CACI PT employees, including interrogators at Abu Ghraib." *Id*. Thus, they "had access to full information about the conduct and performance of CACI PT employees, including CACI PT interrogators," and shared that information up the corporate chain of command. TAC ¶¶ 163-167.

Finally, CACI management took active efforts to cover up the conspiracy, and the role of its employees in particular. Plaintiffs' allegations of CACI's conduct that constituted cover-up of the conspiracy include:

- destroying or failing to preserve evidence;
- preventing the reporting of and failing to report the torture and abuse to non-conspiring authorities, the International Committee of the Red Cross, and the media, and misleading non-conspiring military and government officials about the state of affairs at the prison; and
- knowingly making false statements to the effect that none of its employees was involved in torturing detainees, while testimonial and documentary evidence either presented to or of which CACI management was otherwise aware revealed that CACI interrogators were involved in the torture.

TAC ¶¶ 171-182. CACI contributed to the conspiracy by engaging in efforts to cover up the role of its employees "in the abuse of detainees at Abu Ghraib, in order to continue earning millions of dollars from United States government contracts and keep the CACI corporate family's stock

price high." TAC ¶ 183. This sufficiently pleads liability of the corporation. *See In re American Honda Motor Co.*, 958 F. Supp. 1045, 1052-54 (D. Md. 1997) (explaining that contribution to a conspiracy may be made in the form of efforts to "conceal that which has already occurred" and finding that where parent corporation may not have been vicariously liable for its subsidiary's participation in a kickback scheme, it could have been separately liable for the conspiracy by "encouraging, concealing and obstructing investigations of the scheme").

CONCLUSION

For the reasons stated above, the Court should deny Defendant CACI Premier Technology, Inc.'s Motion To Dismiss Plaintiffs' Third Amended Complaint.

Date: May 3, 2013

/s/ George Brent Mickum
George Brent Mickum IV (VA Bar # 24385)
Law Firm of George Brent Mickum IV
5800 Wiltshire Drive
Bethesda, MD 20816
Telephone: (202) 281-8662
gbmickum@gmail.com

Baher Azmy, *Admitted pro hac vice*
Katherine Gallagher, *Admitted pro hac vice*
CENTER FOR CONSTITUTIONAL RIGHTS
666 Broadway, 7th Floor
New York, NY 10012

Robert P. LoBue, *Admitted pro hac vice*
PATTERSON BELKNAP WEBB & TYLER LLP
1133 Avenue of the Americas
New York, New York 10036

Shereef Hadi Akeel, *Admitted pro hac vice*
AKEEL & VALENTINE, P.C.
888 West Big Beaver Road
Troy, MI 48084-4736
Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on May 3, 2013, I caused the Plaintiffs' OPPOSITION TO DEFENDANT CACI PREMIER TECHNOLOGY, INC.'S MOTION TO DISMISS PLAINTIFFS' THIRD AMENDED COMPLAINT and accompanying DECLARATION OF BAHER AZMY, ESQ. to be sent to the following counsel for Defendant via email:

J. William Koegel, Jr.
Virginia Bar No. 38243
John F. O'Connor
STEPTOE & JOHNSON LLP
1330 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 429-3000 – telephone
(202) 429-3902 – facsimile
wkoegel@steptoe.com
joconnor@steptoe.com

/s/ George Brent Mickum
George Brent Mickum IV (VA Bar # 24385)
LAW FIRM OF GEORGE B. MICKUM IV
5800 Wiltshire Drive
Bethesda, MD 20816
Telephone: (202) 281-8662
gbmickum@gmail.com