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-0827 GBL-JFA
CACI INTERNATIONAL, INC., *et. al*.,	)	
Defendants	)	

PLAINTIFFS' CORRECTED OPPOSITION TO DEFENDANT CACI INTERNATIONAL INC'S MOTION TO DISMISS PLAINTIFFS' SECOND AMENDED COMPLAINT

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INTRODUCTION

Defendant CACI International, Inc. moves to dismiss Plaintiffs' Second Amended Complaint ("SAC") against it, on the grounds that the SAC fails to sufficiently plead that CACI Premier Technology, Inc. ("CACI PT") served as an alter ego of CACI International. By exclusively and formalistically focusing on Plaintiff's alter ego theory of liability, however, CACI simply ignores two independent bases of liability Plaintiffs adequately allege to state a claim against CACI International. Because the SAC sufficiently states valid claims against CACI International, its motion should be denied.

First, the Complaint contains numerous allegations, including those incorporated by reference to a book published by CACI's management team, *Our Good Name*, that show that CACI International and CACI PT acted as a single entity, and thus, should be treated as such. Indeed, the Fourth Circuit has treated them as a single juridical entity, in light of their indistinguishable role in Abu Ghraib. *See CACI Premier Tech., Inc. v. Rhodes*, 536 F.3d 280, 284 (4th Cir. 2008) ("[Abu Ghraib] is the place where plaintiffs, CACI Premier Technology, Inc. *and CACI International Inc.* (together, CACI), interrogated Iraqi detainees for the U.S. military." (emphasis added)). Given CACI International's consistent efforts to take credit for its work in Iraq, it cannot now disclaim liability when that work produces grave harm.

Second, CACI attempts to impose a stricter standard for alter ego liability than imposed by the applicable law by erroneously contending that Plaintiffs must prove CACI PT was created with the intent to defraud – an unduly narrow conception of the alter ego doctrine that overlooks the plethora of case law expounding a more inclusive analysis. Plaintiffs need only allege (and eventually prove) that CACI International, at some point, used CACI PT for "fraud or unfairness." *NetJets Aviation, Inc. v. LHC Communs., LLC*, 537 F.3d 168, 177 (2d Cir. 2008)

(applying Delaware law); *Holcomb v. Pilot Freight Carriers, Inc.*, 120 B.R. 35, 43 (M.D.N.C. 1990) (applying federal common law). Plaintiffs' allegations show how CACI International used CACI PT as a vehicle to provide interrogation services at Abu Ghraib and, eventually, to ratify, encourage, and cover up its interrogators' participation in the conspiracy to torture Plaintiffs and other detainees. Under these pleaded facts, the unfairness of shielding CACI International from liability is self-evident.

Third, and conclusively, even if the Court were to determine that Plaintiffs' allegations regarding alter ego liability fall short, the Complaint states an alternative basis for CACI International's liability – CACI PT's status as an agent of CACI International. As this agency theory of liability is independently sufficient to state a claim against CACI International, CACI International's motion should be denied. As alleged, CACI International used CACI PT as a vehicle to provide interrogation services in Iraq and maintained close contact with CACI PT's in-country management in order to direct CACI PT's fulfillment of its contractual duties and oversee the conduct of its interrogators at Abu Ghraib. As CACI PT's participation in the torture conspiracy arose out of the interrogation services it provided on behalf of CACI International, CACI PT was acting within the scope of its authority as an agent, and its conduct can thus be legally attributed to CACI International.

Finally, CACI International ignores allegations that demonstrate that it is independently liable, based on its own role in working to cover up the conspiracy to torture Plaintiffs and other detainees at Abu Ghraib. Therefore, regardless of its relationship with CACI PT, CACI International cannot escape liability for its wrongful conduct at this stage of the proceedings and should remain as a defendant.

PROCEDURAL BACKGROUND

Plaintiffs filed their First Amended Complaint before this Court on September 15, 2008 ("FAC"), Dkt. No. 28, alleging a conspiracy to torture at the Abu Ghraib prison by CACI employees in concert with military personnel. Then, as now, Plaintiffs defined their reference to "CACI" as including both "Defendants CACI International Inc. and its wholly-owned subsidiary CACI Premier Technology," *compare* FAC ¶ 4 *with* SAC ¶ 4, and set forth specific allegations of how CACI International and CACI PT acted as a single entity, *compare* FAC ¶¶ 8-9 (CACI PT is a wholly-owned subsidiary of and has the same address as CACI International) *with* SAC ¶¶ 8-9; FAC ¶ 74 (CACI PT is not fully separately capitalized from CACI International, nor is it governed by executives fully autonomous and independent from CACI International) *with* SAC ¶ 87; FAC ¶ 75 (CACI International wholly owns and controls CACI PT and operates CACI PT, specifically controlling how and whether CACI PT did business in Iraq) *with* SAC ¶ 88. The FAC, like the SAC, also set forth allegations that CACI PT and CACI International, together as one entity, oversaw employees who "participated in the ongoing conspiracy to torture Plaintiffs and other prisoners" and whose conduct constituted the acts of both CACI PT and CACI International, *compare* FAC ¶¶ 65, 72 *with* SAC ¶¶ 64, 80, and shared a motive to ratify and otherwise stay silent about the conspiracy – to earn millions of dollars off its government contract, *compare* FAC ¶ 73 *with* SAC ¶ 86. The FAC incorporated by reference the book, *Our Good Name*, *compare* FAC ¶ 86 *with* SAC ¶¶ 102-105, in which the author, CACI International's Chief Executive Officer at the time, consistently conflates the identities of CACI International and CACI PT. J. Phillip London, *Our Good Name* (2008).

On October 2, 2008, Defendants moved to dismiss the FAC on various immunities and affirmative defenses rejected by this Court as well as a failure to state a claim upon which relief

may be granted. *See* Dkt. No. 35. Notably, Defendants did not move to dismiss on the basis that Plaintiffs had insufficiently pleaded a basis for liability of CACI International. *See id.* Defendants then delayed the current proceedings for three and a half years by filing a premature appeal of the Court's denial of their motion to dismiss. *See Al Shimari v. CACI Int'l, Inc.*, 679 F.3d 205 (4th Cir. 2012) (*en banc*) (holding that the Court lacked jurisdiction over CACI's premature appeal).

On December 26, 2012, resulting from an agreement with Defendants' counsel, Plaintiffs filed a Second Amended Complaint with additional allegations supporting their conspiratorial liability claim. *See* Dkt. No. 177. Plaintiffs did not believe they needed to do so, as this Court had previously held that the FAC's allegations were sufficient to plead conspiracy liability, *see* Dkt. No. 94 at 65, but filed the SAC in hopes of obviating the threat that Defendants had made of a motion to reconsider the Court's earlier ruling sustaining the conspiracy allegations in the FAC. Defendants, however, did not indicate that they also intended to move separately with respect to the liability of CACI International, and Plaintiffs did not use the SAC to set forth additional allegations concerning that issue. On January 14, 2013, Defendants moved to dismiss Plaintiffs' conspiracy claims, Dkt. No. 180, and CACI International moved to dismiss the claims against it for failing to "plead[] facts supporting a plausible claim against CACI International," Dkt. No. 183.[1]

[1] As part of Plaintiffs' understanding of the agreement among counsel, Defendants' proposed motion to dismiss would, in fact, be limited to the sufficiency of Plaintiffs' conspiracy allegations under *Twombly*/*Iqbal*, and would be in lieu of a motion to reconsider the Court's denial of Defendants' motion to dismiss on that basis. As this email summary from John O'Connor, counsel for CACI, reveals, Plaintiffs had no reason to expect that a proposed motion to dismiss would also address theories of alter ego or agency liability and thus did not add allegations to supplement their alter ego/agency claims, as Plaintiffs did in anticipation of CACI's motion to dismiss the conspiracy allegations. Mr. O'Connor's November 16, 2013 email to Susan Burke, Esq. reads as follows:

ARGUMENT

To "nudge" a complaint across the plausibility threshold, *Ashcroft v. Iqbal*, 556 U.S. 662, 683 (2009), Plaintiffs need only "plead[] factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Robertson v. Sea Pines Real Estate Cos.*, 679 F.3d 278, 287 (4th Cir. 2012) (*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). The court reads the complaint "as a whole" and considers "documents incorporated into the complaint by reference." *Scharpenberg v. Carrington*, 686 F. Supp. 2d 655, 659 (E.D. Va. 2010) (Lee, J.) (*quoting Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308 (2007)).

> "As we discussed today, CACI planned to file a motion asking *the Court to reconsider the aspect of its motion to dismiss ruling with respect to plaintiffs' conspiracy counts*, with CACI arguing that case law developments show that the Amended Complaint's conspiracy allegations do not satisfy the *Twombly*/*Iqbal* standard. You indicated a potential willingness to file a Second Amended Complaint that would add additional factual allegations.
>
> The parties agree as follows: (1) CACI will hold off on filing its motion for reconsideration regarding the conspiracy claims in the Amended Complaint for the time being; (2) CACI consents to Plaintiffs' filing of a Second Amended Complaint, which Plaintiffs will file by November 28, 2012 (given CACI's consent, Fed. R. Civ. P. 15(a)(2) allows Plaintiffs to file the Second Amended Complaint without leave of court); (3) the Second Amended Complaint will add factual allegations but will not change the parties or add new claims; and (4) CACI will evaluate the *Twombly*/*Iqbal* argument it was going to address in its motion for reconsideration once Plaintiffs have filed their Second Amended Complaint."

(emphasis added). As detailed below, Plaintiffs' Second Amended Complaint states a claim for CACI International's liability under an alter ego theory or an agency theory and through its independent corporate actions. If, however, the Court finds that these allegations fall short, Plaintiffs should be given leave to amend the complaint again. *See Checed Creek, Inc. v. Sec'y, United States HUD*, Civil Action No. 4:06cv110, 2007 U.S. Dist. LEXIS 31215, at *12-13 (E.D. Va. Apr. 27, 2007) (permitting plaintiff to amend its complaint to identify the provision permitting recovery, as there would be no prejudice to the defendant).

Plaintiffs are not required to plead any specific legal theories to state a valid claim for relief, but are only required to plead sufficient facts from which they could claim a right of recovery, regardless of the particular legal theory. *See, e.g., Exec. Risk Indem., Inc. v. Charleston Area Med. Ctr., Inc.*, 681 F. Supp. 2d 694, 723 (S.D. W. Va. 2009) (expressly noting that "[t]his principle remains true after *Twombly*") (collecting cases). It is the court's duty, when considering a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6), to "take the complaints' factual allegations as true and draw all reasonable inferences in plaintiffs' favor," *Robertson*, 679 F.3d at 284.

I. The SAC Sufficiently Alleges That CACI PT Is Merely An Alter Ego of CACI International

While federal courts sitting in diversity must apply the choice-of-law rules of the forum state, *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496 (1941), the Court has yet to determine whether the choice-of-law rules of Ohio or Virginia properly apply to the state law claims in the instant proceedings, *see* Dkt. No. 175. Nevertheless, Plaintiffs will assume for purposes of this motion that, as Defendants contend, Delaware law governs the alter ego claim,[2] so this issue need not be resolved at this time.

[2] Federal courts sitting in Ohio have applied the laws of the state where the defendant is incorporated to determine alter ego claims. *See Plaskon Electronic Materials, Inc. v. Allied-Signal, Inc.*, 904 F. Supp. 644, 656 (N.D. Ohio 1995); *Days Inn Worldwide, Inc. v. Sai Baba, Inc.*, 300 F. Supp. 2d 583, 591 n. 3, (N.D. Ohio 2004) ("Because Sai Baba, Inc. is an Ohio corporation, I will look to Ohio law to determine the merits of defendants' 'alter ego' claim."). *See also Cabell Fin. Corp. v. Gurr*, Case No. 1:12 CV 473, 2012 U.S. Dist. LEXIS 178082, at *7-10 (N.D. Ohio Nov. 27, 2012) (explaining that in discerning which alter ego analysis to employ, if application of either the choice of law rule of the forum state or that of the state of incorporation does not change the outcome, no choice of law analysis is required, and finding that Ohio law, which requires a showing that "the shareholders used their control over the corporation to commit fraud, an illegal act, or a similarly unlawful act" to pierce a corporate veil, was the same as Delaware law).

The standard to determine alter ego liability under Delaware law is "'whether [the two entities] operated as a single economic entity such that it would be inequitable for this Court to uphold a legal distinction between them.'" *HOB Entm't, Inc. v. SilkHOB, LLC*, Civil Action No.: 4:08-cv-02783-TLW-SVH, 2011 U.S. Dist. LEXIS 9252, at *28 (D.S.C. Jan. 28, 2011) (*quoting Harper v. Del. Valley Broadcasters, Inc.*, 743 F. Supp. 1076, 1085 (D. Del. 1990)). Plaintiffs must allege that (1) "'those in control of a corporation' did not 'treat[] the corporation as a distinct entity'"; and that (2) "the corporation was used to engage in conduct that was 'inequitable,' or 'prohibited,' or an 'unfair trade practice,' or 'illegal.'" *NetJets Aviation*, 537 F.3d at 177 (applying Delaware law) (*citing, inter alia, Mobil Oil Corp. v. Linear Films, Inc.*, 718 F. Supp. 260, 269 (D. Del. 1989)).

In its analysis of Plaintiffs' claims brought under the Alien Tort Statute, 28 U.S.C. § 1350 ("ATS"), the Court is guided by principles found in federal common law. *See Holcomb*, 120 B.R. at 43 ("The alter ego doctrine has an independent basis in federal law."); *Mobil Oil*, 718 F. Supp. at 267-68 (observing that courts deciding the question of alter ego in federal question cases have often applied federal common law). While under federal common law "there is no one test that governs when one corporation will be found to be the alter ego of another," *Pace Indus. Union-Mgmt. Pension Fund v. Dannex Mfg. Co.*, 394 Fed. Appx. 188, 198 (6th Cir. 2010), courts have found that, similar to Delaware law, "fraud is not needed to establish alter ego liability" under federal common law. *Holcomb*, 120 B.R. at 43 (*citing DeWitt Truck Brokers, Inc. v. W. Ray Flemming Fruit Co.*, 540 F.2d 681 (4th Cir. 1976)). *See also, e.g.*, *Doe v. Unocal Corp.*, 248 F.3d 915, 926 (9th Cir. 2001) (not requiring fraud in incorporation in determining alter ego liability in ATS case); *Pearson v. Component Tech. Corp.*, 247 F.3d 471, 485 (3d Cir. 2001)

(observing that federal courts are more likely to pierce the corporate veil where necessary to effectuate a federal statute that would otherwise be frustrated by the state's corporate laws).

A. Plaintiffs Plead That CACI International and CACI PT Operated As A Single Entity

In determining whether the first "single entity" prong is satisfied, courts consider the following factors, none of which are dominant: (1) whether the company was adequately capitalized for the undertaking; (2) whether the company was solvent; (3) whether corporate formalities were observed; (4) whether the controlling shareholder siphoned company funds; and (5) whether, in general, the company simply functioned as a facade for the controlling shareholder. *HOB Entm't*, 2011 U.S. Dist. LEXIS 9252, at *27 (*citing Harco Nat'l Ins. Co. v. Green Farms, Inc.*, Civil Action No. 1131, 1989 Del. Ch. LEXIS 114, at *4 (Del. Ch. Sept. 19, 1989). *See also Blair v. Infineon Techs. AG*, 720 F. Supp. 2d 462, 470-71 (D. Del. 2010).

First, the SAC alleges that CACI PT is not fully capitalized, *see* SAC ¶ 87, and is wholly owned by CACI International, SAC ¶ 88. *See Mobil Oil*, 718 F. Supp. at 266-67 (finding support for plaintiff's alter ego theory in the allegation that the parent corporation, "throughout its existence, held all of the stock of the [subsidiary]").

Second, it alleges that CACI PT and CACI International did not observe many corporate formalities: CACI International and CACI PT shared the same business address, *see* SAC ¶¶ 8-9, and CACI PT's executives were not independent and fully autonomous from CACI International, *see* SAC ¶ 87. *See In re Moll Indus., Inc.*, 454 B.R. 574, 589 (Bankr. D. Del. 2011) (finding failure to maintain certain corporate formalities based on assertion that the subsidiary did not hold annual director and shareholder meetings or maintain separate offices, officers, and directors from its holding company and HCMLP). CACI International treated CACI PT as one of its own corporate divisions. *See* SAC ¶ 88. *See also Our Good Name*, at 159 (referring to

CACI PT's interrogation work in Iraq as CACI's "new line of business"); 160, 597 (referring to CACI PT's "Vice President of the Operational Support Division of CACI Premier Technology, Inc." as "CACI's Division Vice President for the interrogation services in Iraq"); 169-70 (explaining that a "business unit at CACI had absorbed PTG[3]").[4] By doing so, CACI International's executives were able to "control[] how and whether CACI Premier Technology did business in Iraq." SAC ¶ 88. *See Shandler v. DLJ Merch. Banking, Inc.*, C.A. No. 4797-VCS, 2010 Del. Ch. LEXIS 154, at *58 (Del. Ch. July 26, 2010) (finding facts sufficient to plead alter ego, where "[f]airly read, the complaint alleges that DLJ, Inc….controlled Insilco and directed its business strategy").

Third, CACI International, whose primary function is to provide intelligence services to the U.S. government and which sought to expand into the field of interrogation to become a full-service intelligence contractor, brought its institutional expertise to bear for CACI PT's operations in Iraq. *See, e.g.*, *Our Good Name* at 38, 42 (describing CACI International's "expertise" and "niche" in intelligence and homeland security); 150 (describing how "the interrogation requirement coming from Iraq was a logical extension" of CACI International's work). *Compare In re Moll. Indus.*, 454 B.R. at 589 (finding insufficient allegation of corporate fraud where the subsidiary operated in a "completely different" field than the parent as opposed to a discrete portion of the same field); *Medi-Tec of Egypt Corp. v. Bausch & Lomb Surgical*, Consolidated C.A. No. 19760-NC, 2004 Del. Ch. LEXIS 21, at *13 (Del. Ch. March 4, 2004)

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[3] "PTG" refers to "Premier Technology Group," the company CACI International acquired in May 2003 to form CACI PT. *See Our Good Name* at 155.

[4] *Our Good Name* is referenced in paragraphs 102, 104, and 105 of the SAC. *See, e.g.*, *Witthohn v. Fed. Ins. Co.*, 164 Fed. Appx. 395, 396-397 (4th Cir. 2006) ("[A] court may consider… documents sufficiently referred to in the complaint so long as the authenticity of these documents is not disputed.").

(finding insufficient facts to allege alter ego where plaintiff "does not allege that BLS France and BLS Inc. shared resources or 'operated in relevant part as one'").

That CACI International viewed CACI PT as simply an extension of its work is reflected in its repeated conflation of its own identity with CACI PT's. *See, e.g.*, *Our Good Name* at 143-44 (discussing "*CACI*'s contract" and "Statement of Work for the interrogation support services contract between CACI and the army in Iraq") (emphasis added); 155 (explaining that employees deployed in Iraq to provide interrogation services "were employed and being *paid by CACI*" and that "*CACI hired* a total of three dozen interrogators…to serve at various U.S. Army sites throughout Iraq," including at Abu Ghraib) (emphasis added); 159, 161 (discussing "CACI" personnel in Iraq); 168-71 (discussing the history of "CACI's" contract with the U.S. government for intelligence services). *See Mobil Oil*, 718 F. Supp. at 266-67 (finding support for the first prong of the alter ego test in plaintiff's allegations "that following the formation of the Delaware corporation and the name change of the Oklahoma corporation from Linear Films, Inc. to Linear Films of Oklahoma, Inc., the Oklahoma corporation continued to advertise, issue invoices, use letterhead, and enter contracts under its previous name -- Linear Films, Inc.").

Finally, in *CACI Premier Tech., Inc. v. Rhodes*, 536 F.3d 280 (4th Cir. 2008), a defamation suit brought on behalf of *both* CACI International and CACI PT, CACI's own complaint lumped CACI International and CACI PT together, alleging that defendants' statements blaming CACI in part for the Abu Ghraib abuses were untrue as to "CACI," referring to both entities. Judge Michael's decision reflects CACI's singular identity in the same way that CACI itself consistently does: "[Abu Ghraib] is the place where plaintiffs, CACI Premier Technology, Inc. *and CACI International Inc.* (together, CACI), interrogated Iraqi detainees for the U.S. military." *Id.*, at 284 (emphasis added).

Even government agencies view CACI International and CACI PT as one and the same. A U.S. government agency, assigned to audit CACI's contract with the U.S. government to provide interrogation services in Iraq, describes the contract as between the Interior Department's contracting office on behalf of the Department of Defense and "CACI *International*, Inc." *See* "Interagency Contracting Problems with DoD's and Interior's Orders to Support Military Operations," Government Accountability Office, GAO 05-201, at 2, April 2005 *available at* http://www.gao.gov/new.items/d05201.pdf (*cited in Our Good Name*, at 504) (emphasis added). Similarly, the General Services Administration sent a letter to the office of CACI International's CEO to inform the company that it was considering barring it from government contracts due to "misuse" of the contract retaining CACI's services in Iraq. *See Our Good Name*, at 241-42.

B. Treating CACI International As A Separate Entity From CACI PT Would Be Unjust Or Unfair

While some Delaware cases have observed the importance of "an element of fraud to justify piercing the corporate veil," *Case Fin., Inc. v. Alden*, Civil Action No. 1184-VCP, 2009 Del. Ch. LEXIS 153, at *14 (Del. Ch. Aug. 21, 2009), all that is required is "an overall element of injustice or unfairness," *Microstrategy Inc. v. Acacia Research Corp.*, Civil Action No. 5735-VCP, 2010 Del. Ch. LEXIS 254, at *46 (Del. Ch. Dec. 30, 2010); *Mobil Oil*, 718 F. Supp. at 268 ("Fraud is frequently cited as a basis on which to pierce the corporate veil, but it is not the only one.").[5] Moreover, while "the fraud or injustice must consist of something more than the alleged wrong in the complaint and relate to a misuse of the corporate structure," *Medi-Tec*, 2004 Del.

[5] While Defendant contends that Virginia law "appear[s] to be identical in all respects to Delaware law," one of the cases it cited expressly observes that "Virginia, *unlike some jurisdictions*, mandates proof of fraud or a legal 'wrong' to recover from corporate owners or agents." *Lower Neuse Preservation Group, LLC v. Boats, Etc., Inc.*, Civil Action No. 4:11cv77, 2011 U.S. Dist. LEXIS 112192, *8 (E.D. Va. Sept. 28, 2011).

Ch. LEXIS 21, at *30, Plaintiffs "need not prove that the corporation was created with fraud or unfairness in mind"; [i]t is sufficient to prove that it was so used." *NetJets Aviation*, 537 F.3d at 177 (internal citations omitted). *See also SRI Int'l, Inc. v. Internet Sec. Sys., Inc.*, Civ. No. 04-1199-SLR, 2005 U.S. Dist. LEXIS 6797 (D. Del. Apr. 13, 2005) (holding that under Delaware law, alter ego liability may be found where "the parent/subsidiary relationship would work a fraud, injustice or inequity"). The conclusion of a majority of courts that the alter ego doctrine can be invoked when a corporation is "used," and not only when it is "created," to work an injustice is a sensible one. Were the law otherwise, persons or companies could with impunity conduct illegal activities through a previously-created corporation. CACI offers no logic for such a perverse result.

Plaintiffs plead sufficient facts to allege that CACI International "benefit[ed] from the misuse of the corporate form" of CACI PT. *In re Moll Indus., Inc.*, 454 B.R. at 588. In control of CACI PT's operations, SAC ¶ 88, CACI International received reports of the conduct and performance of CACI interrogators, SAC ¶ 92, and had the ability to prevent employees from torturing, or participating in a conspiracy, to torture Plaintiffs, SAC ¶¶ 90, 94, by disciplining and reporting those conspirators who engaged in detainee abuse, SAC ¶¶ 86, 82. But "[d]espite having knowledge of abuses, and the authority and duty to prevent them, CACI willfully ignored reports of CACI employees' participation in the conspiracy, failed to discipline those conspirators who engaged in detainee abuse, and otherwise kept quiet about CACI's role in the conspiracy in order to continue to earn millions of dollars from its contract with the United States government." SAC ¶ 86. In other words, CACI International ratified, encouraged, and covered up the conspiracy to torture Plaintiffs and other detainees at Abu Ghraib to protect its own profits. CACI International is now using a "corporate façade" in an attempt to create legal

distance between itself and the conspiracy. *Compare Medi-Tec*, 2004 Del. Ch. LEXIS 21, at *16 ("Allegations of breach of contract by a subsidiary do not suffice to supply the necessary fraud or injustice to hold the subsidiary to be the alter ego of the parent, especially where there is no evidence of wrong-doing by the parent."); *SEC v. Woolf*, 835 F. Supp. 2d 111, 124 (E.D. Va. 2011) (Lee, J.) (in a securities fraud case, finding insufficient allegations of alter ego liability where the complaint did not "allege that [the defendants] controlled and used the corporate entities in order to perpetuate securities fraud").

In sum, CACI International cannot have it both ways. It cannot hold itself out in its dealings with the government, the courts, and the public as integral to interrogations operations in Iraq and then disavow any prospect of liability when those operations result in grave harm. Given the manifest injustice that would result should CACI International be insulated from facing any liability for the torture inflicted upon the Plaintiffs, the Court should at least allow the Plaintiffs to obtain discovery on this issue. *See, e.g.*, *Medi-Tec*, 2004 Del. Ch. LEXIS 21, at *13 (dismissing Medi-Tec's alter ego claim for failing to "come forward with specific facts to support its assertion of alter ego jurisdiction" following discovery on the jurisdictional issues).

II. The SAC's Allegations That CACI PT Acted As An Agent of CACI International Are Sufficient to Independently State a Claim for CACI International's Liability

Plaintiffs plead an alternative basis for CACI International's liability in this case, independent of the alter ego theory that Defendants exclusively focus upon. Without even reaching the question of alter ego liability, CACI International can be held vicariously liable for the acts of CACI PT, its subsidiary, on an agency theory of liability. *See Bowoto v. ChevronTexaco Corp.*, 312 F. Supp. 2d 1229, 1238 (N.D. Cal. 2004). *See also Ntsebeza v. Daimler AG (In re S. African Apartheid Litig.)*, 617 F. Supp. 2d 228, 299 (S.D.N.Y. 2009)

("'[J]ust as one corporation can hire another to act as its agent, a parent can commission its subsidiary to do the same.'").

CACI will surely stress that while the SAC (like the FAC) uses the term "alter ego," it does not deploy the specific term "agency" in the Complaint. Of course, under modern pleading standards, that is of no moment. "Although it is common to draft complaints with counts that advance a specific legal rule or theory, nothing in rule 8(a) requires it"; "[t]o the contrary, the rules discourage it." *Davis v. Adelphia Communs. Corp.*, Case No. 2:06CV00003, 2006 U.S. Dist. LEXIS 3247, at *2 (W.D. Va. Jan. 22, 2006).[6] The Court, taking all inferences in the favor of the Plaintiffs, need only identify allegations sufficient to infer liability on an agency theory. By this well-accepted standard, the SAC plainly sets forth sufficient allegations to infer that CACI PT acted as an agent of CACI International. *See Hospitalists of Del., LLC v. Lutz,* C.A. No. 6221-VCP, 2012 Del. Ch. LEXIS 207, at *63 n. 103 (Del. Ch. Aug. 28, 2012) (observing that "the mere presence of the words 'corporate veil' is not fatal to Plaintiffs' claim" and permitting an agency theory of liability).[7]

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[6] *See also Munoz v. Balt. County*, Civil Action No.: RDB-11-02693, 2012 U.S. Dist. Lexis 103597, *24-26 (D. Md. July 25, 2012) (finding that the complaint was "better understood as asserting a claim for retaliation under the ADA," even though it did not assert this claim explicitly, and noting that courts agree that "a failure to cite the correct legal theory, or the citation of the incorrect legal theory, is not fatal to a claim"); *Morales-Vallellanes v. Potter*, 339 F.3d 9, 14-15 (1st Cir. 2003) ("A complaint sufficiently raises a claim even if it points to the wrong legal theory as a basis for that claim."); *Bartholet v. Reishauer A.G.*, 953 F.2d 1073, 1077-78 (7th Cir. 1992) (finding that where plaintiff pled his claim under state law but pled facts sufficient to raise claims under ERISA, dismissal for failure to amend the complaint simply to "invoke ERISA" was improper).

[7] If, however, the Court finds that the complaint must expressly plead an agency theory of liability, Plaintiffs should be given leave to amend the complaint again. *See Checed Creek, Inc. v. Sec'y, United States HUD*, Civil Action No. 4:06cv110, 2007 U.S. Dist. LEXIS 31215, at *12-13 (E.D. Va. Apr. 27, 2007) (permitting plaintiff to amend its complaint to identify the provision permitting recovery, as there would be no prejudice to the defendant).

The test to establish an agency relationship[8] is lower than that for alter ego liability, as the Court need not disregard the corporate form. *In re S. African Apartheid Litig.*, 617 F. Supp. 2d at 299; *Bowoto*, 312 F. Supp. at 1238. *See also First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 629 (1983) (distinguishing an alter ego claim from a vicarious liability claim). Rather, to plead CACI International's liability based on agency, Plaintiffs need only allege "a close relationship or domination" between CACI International and CACI PT, and that "the injury allegedly inflicted by" CACI PT "was within the scope of the [its] authority as an agent." *Bowoto*, 312 F. Supp. 2d at 1239. To determine the scope of CACI PT's authority as an agent, the court "looks to the facts specific to this case for indicia of whether defendants authorized [the subsidiary] to act as their agent; whether during that agency relationship defendants retained control over [the subsidiary]; and whether the conduct that plaintiffs' allege as the subject of their complaint was within the scope of that agency relationship." *Bowoto*, 312 F. Supp. 2d at 1241. *See also In re S. African Apartheid Litig.*, 617 F. Supp. 2d at 298-99 ("the parent has manifested its desire for the subsidiary to act upon the parent's behalf, the subsidiary has consented so to act, the parent has the right to exercise control over the subsidiary with respect to matters entrusted to the subsidiary" (*citing* Restatement (Second) of Agency § 1 (1958)); *Aventis Pharma Deutschland GMBH v. Lupin Ltd.*, 403 F. Supp. 2d 484, 493 (E.D. Va. 2005) (relying on Restatement (Second) of Agency § 1 to determine that plaintiff sufficiently alleged that subsidiary acted as an agent of its parent corporation).

A "close" or "dominating" relationship between CACI International and CACI PT "may

[8] This argument applies both Delaware law, assuming that the applicable choice-of-law rules for the state law claims point to Delaware, and federal common law, *see, e.g., Doe v. Exxon Mobil Corp.*, 654 F.3d 11, 51 (D.C. Cir. 2011) ("[T]he technical accoutrements to the ATS cause of action, such as corporate liability and agency law, are to be drawn from federal common law.") There is little need to distinguish between the two as the general principles of agency law "do not vary significantly from jurisdiction to jurisdiction." *Japan Petroleum Co. (Nigeria), Ltd. v. Ashland Oil Co.*, 456 F. Supp. 831, 840-841 n. 17 (D. Del. 1978).

be inferred from, among other things, the principal's day-to-day control over the agent's business." *Hospitalists*, 2012 Del. Ch. LEXIS 207, at *61. *See also EBG Holdings LLC v. Vredezicht's Gravenhage 109 B.V.*, Civil Action No. 3184-VCP, 2008 Del. Ch. LEXIS 127, at *44 (Del. Ch. Sept. 2, 2008) ("[I]n the parent-subsidiary context, the critical question is 'whether the parent corporation dominates the activities of the subsidiary.'"); *accord Japan Petroleum Co. (Nigeria), Ltd. v. Ashland Oil Co.*, 456 F. Supp. 831, 841 (D. Del. 1978).

The numerous allegations detailed above, *see supra* Section I.A., which show that CACI International and CACI PT operated as a single entity for the purposes of alter ego liability, equally demonstrate agency liability. *See Hospitalists*, 2012 Del. Ch. LEXIS 207, at *61 (finding that the allegations of overlap of "management, officers, and employees"; sharing of "address and physical office space" and resources; and shared payrolls were sufficient "at least at the pleading stage, to support a reasonable inference that Integra exercised control over Cubit's day-to-day affairs consistent with a principal-agent relationship"); *Bowoto*, 312 F. Supp. at 1245 (where "a parent holds out to the public that a subsidiary is a department of its own business," there is a greater "likelihood that the parent will be held liable for the subsidiary's acts"); *Japan Petroleum*, 456 F. Supp. at 838 ("It is well settled that where a holding company directly intervenes in the management of its subsidiaries so as to treat them as mere departments of its own enterprise, it is responsible for the obligations of those subsidiaries incurred or arising during its management." (*quoting Consolidated Rock Co. v. DuBois*, 312 U.S. 510, 524 (1941))).

CACI International's own description of the history behind the interrogation services provided at Abu Ghraib demonstrate that the relevant activities of CACI PT were within the scope of the authority conferred by CACI International. CACI International explains in its book, *Our Good Name*, that the interrogation services CACI International chose to provide at Abu

Ghraib were "a logical extension" of the services it "had long provided…to the U.S. military," even in Iraq, and thus when the request came from the U.S. government to provide such services, "there was no hesitation" on the part of "the CACI team," particularly "because of its long-standing commitment to its U.S. Army clients." *Id*. at 150-52, 158. In the view of CACI International's CEO "and that of his team," a "refusal to support the army could [have] impact[ed] the bond of loyalty and commitment between the company and the army." *Id*. at 162. Thus, CACI's statements, incorporated by reference in the SAC, plausibly suggest that CACI PT performed functions that CACI International "would otherwise have to perform," demonstrating that CACI PT "functions as 'merely the incorporated department of its parent.'" *Doe v. Unocal Corp.*, 248 F.3d at 928 (*quoting Gallagher v. Mazda Motor of America, Inc.*, 781 F. Supp. 1079, 1084-85 (E.D. Pa. 1992)).

Additional allegations raised against CACI PT in the SAC demonstrating that its work was within the scope of its agency relationship with CACI International include (1) CACI PT's reporting of "the conduct and performance of CACI interrogators" to CACI International's management during the time the conspiracy is alleged to have been carried out, SAC ¶ 92; (2) CACI International's setting of ethics and business conduct policies for interrogators at Abu Ghraib, *see Our Good Name*, at 59 n. 66, 272; and (3) CACI International's reliance on CACI PT for "the overall success" of its operations, *see Our Good Name*, at 113, 244 (while "interrogation was but a small part of the company's portfolio," CACI relied on the U.S. government's satisfaction with its interrogation services in Iraq to maintain and obtain more contract work from the U.S. government – CACI International's "single most important customer"). Finally, CACI interrogators were only able to participate in the conspiracy to torture Plaintiffs because of the authority conferred upon CACI PT to provide interrogation services at

Abu Ghraib, *see* SAC ¶¶ 68-77 (describing how CACI interrogators directed their military co-conspirators to torture detainees "in an attempt to make detainees more responsive to CACI interrogators").[9]

The existence of an agency relationship is only buttressed by CACI International's efforts to clear its own name – not just that of its subsidiary CACI PT – following public revelations of the involvement of CACI interrogators in the atrocities at Abu Ghraib. CACI International's senior management developed an entire public relations strategy and devoted a significant amount of time to responding to the press stories about CACI's services at the prison. *See Our Good Name*, at 79 (outlining CACI International's public relations strategy), 162 (describing CACI International's CEO "thank[ing] his senior people for shepherding the company through the shadow of Abu Ghraib"). *See also generally Our Good Name* (subtitled, "A Company's Fight to Defend Its Honor and Get the Truth Told About Abu Ghraib"). *See Bowoto*, 312 F. Supp. at 1245 (finding an agency relationship where "[t]here [was] significant evidence that defendants viewed unrest in Nigeria as directly affecting CNL's oil production, and consequently defendants' revenues").

Together, these allegations lead to the plausible inference that CACI PT acted as an agent of CACI International and that, therefore, CACI International is vicariously liable.

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[9] *See Bowoto*, 312 F. Supp. at 1243 ("Factors to which the Court has given particular consideration in its analysis include: (1) the degree and content of communications between CNL and defendants, particularly including the communications during the incidents at issue; (2) the degree to which defendants set or participated in setting policy, particularly security policy, for CNL; (3) the officers and directors which defendants and CNL had in common; (4) the reliance on CNL for revenue production and acknowledgment of the importance of CNL and other international operations to the overall success of defendants' operations; and (5) the extent to which CNL, if acting as defendants' agent, was acting within the scope of its authority during the events at issue.")

III. The SAC Alleges CACI International's Independent Liability As a Co-Conspirator

Regardless of whether CACI PT served as an alter ego or agent of CACI International, CACI International is independently liable for its own role in participating in and covering up the conspiracy. Despite CACI International's knowledge of the conduct of CACI interrogators at Abu Ghraib, *see* SAC ¶¶ 91-93, CACI International published statements denying all implications of CACI personnel in the atrocities. CACI International embarked upon a campaign to suppress media investigations of their role in the conspiracy, SAC ¶ 98; made knowingly false public statements that none of its employees was involved in torturing detainees, when in fact, co-conspirators, some under oath, had specifically identified CACI employees involved in the abuse, SAC ¶ 101; and falsely claimed that the publicly-released photographs of torture at Abu Ghraib do not show any CACI employees, when there is a photograph of CACI employee Daniel Johnson interrogating a detainee in a dangerous and harmful stress position not authorized by the relevant military regulations governing interrogation nor by any military personnel, SAC ¶104.

CACI International's current motion does not even address, much less challenge the sufficiency, of these allegations of its own participation in the alleged conspiracy, independent of CACI PT. Acts to cover up the illegal conduct of co-conspirators are in furtherance of the conspiracy and create an independent basis for liability. *See Riddell v. Riddell Washington Corp.*, 866 F.2d 1480, 1493 (D.C. Cir. 1989) (recognizing concealment as an act in furtherance of a conspiracy). Because CACI International should therefore remain as a defendant in this case, its motion to dismiss it due to supposedly insufficient allegations merely of its *derivative* liability fall short.

CONCLUSION

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

Date: January 29, 2013

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CERTIFICATE OF SERVICE

I hereby certify that on January 29, 2013, I electronically filed the Plaintiffs' CORRECTED OPPOSITION TO DEFENDANT CACI INTERNATIONAL INC'S MOTION TO DISMISS PLAINTIFFS' SECOND AMENDED COMPLAINT through the CM/ECF system, which sends notification to counsel for Defendants.

/s/ George Brent Mickum
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