

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA
Alexandria Division

SUHAIL NAJIM ABDULLAH AL SHIMARI, Et al.,)	
)	
Plaintiffs,)	Civil No. 08-cv-827
)	
VS.)	March 8, 2013
)	
CACI INTERNATIONAL, INC., et al.,)	
)	
Defendants.)	

MOTIONS HEARING

BEFORE: THE HONORABLE GERALD BRUCE LEE
UNITED STATES DISTRICT JUDGE

APPEARANCES:

FOR THE PLAINTIFF: CENTER FOR CONSTITUTIONAL RIGHTS
 BY: BAHER AZMY, ESQ.
 KELLER & HECKMAN LLP
 BY: GEORGE BRENT MICKUM, IV, ESQ.
 AKEEL & VALENTINE, PLC
 BY: SHEREEF HADI AKEEL, ESQ.
 PATTERSON BELKNAP WEBB & TYLER, LLP
 BY: ROBERT PAUL LOBUE, ESQ.

FOR THE DEFENDANT: STEPTOE & JOHNSON
 BY: JOSEPH W. KOEGEL, JR., ESQ.
 JOHN O'CONNOR, ESQ.

 OFFICIAL COURT REPORTER: RENECIA A. SMITH-WILSON, RMR, CRR
 U.S. District Court
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 Alexandria, VA 22314
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1 (Thereupon, the following was heard in open
2 court at 11:37 a.m.)

3 THE CLERK: 1:08 civil 827, Suhail Najim
4 Abdullah Al Shimari, et al versus CACI International
5 Incorporated, et al.

6 MR. AZMY: Good morning, Your Honor. Baher
7 Azmy for the plaintiffs, with Virginia counsel, Brent
8 Mickum and pro hac counsel, Bob LoBue and Shareef Akeel.

9 THE COURT: All right.

10 MR. KOEGEL: Good morning, Your Honor. Bill
11 Koegel and John O'Connor for the defendants.

12 MR. O'CONNOR: Good morning, Your Honor.

13 THE COURT: Mr. Koegel, I'm ready.

14 MR. KOEGEL: Thank you, Your Honor. We have
15 one housekeeping matter that we'd like to take up with
16 the Court.

17 When we were here on February 14th, Your
18 Honor entered an order directing the plaintiffs to appear
19 within 30 days for their depositions. At that point in
20 time, one of the plaintiffs had a visa. That plaintiff
21 has appeared for a deposition in this country.

22 Last week, the other three plaintiffs
23 received their visas. It appears that the Court's order
24 had a helpful cathartic effect on the State Department.

25 We have an agreement with plaintiff's counsel

1 for the other three plaintiffs to appear during the week
2 beginning March 18th. That would be beyond the 30 days
3 provided for in the Court's order.

4 And, as a result, we ask whether the Court
5 would like a formal motion to extend that 30-day deadline
6 for the plaintiffs to appear or whether the Court will
7 consider this as an oral motion to amend that order to
8 permit the depositions to occur during the week of March
9 18th.

10 THE COURT: Oral motion has been made and
11 granted with consent.

12 MR. KOEGEL: Thank you, Your Honor.

13 Your Honor, with the Court's permission, I'd
14 like to proceed with the alter ego motion initially,
15 because I believe that's fairly brief.

16 THE COURT: All right.

17 MR. KOEGEL: We have an easel for which we'd
18 like to put a poster board for the Court's reference.

19 THE COURT: Okay. Put it so everybody can
20 see it.

21 Can you see it, Mr. Azmy?

22 MR. AZMY: I might be --

23 MR. KOEGEL: Paragraphs 87 and 88 of the
24 second amended complaint.

25 MR. O'CONNOR: Can Your Honor see it?

1 THE COURT: Yes, and I have the complaint
2 here in front of me as well.

3 MR. KOEGEL: Your Honor, there are three
4 factors for the Court to consider on this motion.

5 THE COURT: Tell me the issue, Mr. Koegel.
6 What's the issue?

7 MR. KOEGEL: The question is whether the
8 plaintiffs have alleged sufficient facts to permit the
9 alter ego theory of liability to go forward with respect
10 to defendant CACI International, Inc.

11 The only allegations in the complaint
12 relating to alter ego liability are set forth in
13 paragraphs 87 and 88 of the second amended complaint.

14 THE COURT: So, to be clear, CACI Premiere
15 Technology is the entity that had the contract with the
16 government; is that right?

17 MR. KOEGEL: That's correct, Your Honor.

18 THE COURT: Not CACI International.

19 MR. KOEGEL: That's correct.

20 THE COURT: Okay.

21 MR. KOEGEL: The three factors we believe are
22 dispositive here are the following: First, that Delaware
23 law applies to the alter ego allegations in this action
24 as both corporations, as affirmatively alleged in the
25 second amended complaint, are incorporated in the State

1 of Delaware. That Delaware law applies to this issue is
2 not disputed.

3 Second, Delaware law requires pleading facts
4 reflecting two things: A, a misuse of the corporate
5 forum; and B, the misuse of the corporate forum to
6 perpetrate a fraud. That requirement of Delaware law is
7 not disputed.

8 And third and finally, the only allegations
9 in the second amended complaint don't alleged either of
10 those elements. There are no facts alleged in the second
11 amended complaint that satisfy the requirements of
12 Delaware law.

13 As I mentioned the only facts, and they're
14 not even facts, they're legal conclusions, set forth in
15 the second amended complaint are in paragraphs 87 and 88
16 on the poster board.

17 There are no facts alleging misuse of the
18 corporate forum. There are no factual allegations
19 reflecting or even alleging that the corporate forum was
20 misused to perpetrate a fraud.

21 Absent those allegations, there's no
22 cognizable claim for alter ego liability in this case.

23 THE COURT: *Ashcroft versus Iqbal* or *Bell*
24 *Atlantic versus Twombly*.

25 MR. KOEGEL: That's correct, Your Honor.

1 THE COURT: And *Ashcroft versus Iqbal* had not
2 been decided when I heard the case back in 2009 or 2008;
3 is that right?

4 MR. KOEGEL: That is correct, Your Honor.
5 *Iqbal* was decided subsequent to the Court's decision in
6 March, 2009.

7 THE COURT: I think I understand your
8 position.

9 MR. KOEGEL: Thank you.

10 MR. AZMY: Good morning, Your Honor. There
11 are two motions before the Court, and Mr. Koegel started
12 with the motion seeking to dismiss the parent entity,
13 CACI International, and there's a separate motion seeking
14 to dismiss both entities.

15 With respect to CACI International, Your
16 Honor, there are three theories of liability that we have
17 advanced that would support keeping CACI International in
18 the case. One is an alter ego theory, two is an agency
19 theory, and the third is direct liability of the parent
20 corporation.

21 And, you know, we can skip past the alter ego
22 theory and go straight to the agency theory because that
23 standard is slightly lower and clearly sufficient, we
24 believe, to keep CACI International in the case.

25 To demonstrate agency, we have to show

1 control or domination by the parent over the sub and that
2 the sub acted within the scope of its agency authority
3 with respect to the misconduct.

4 Now, by -- in our allegations in our
5 complaint that reflect agency -- continuing paragraphs 89
6 through 95, we allege that the sub, CACI PT, was an
7 instrument of CACI International.

8 In their opposition --

9 THE COURT: What do you mean by that? What
10 do you mean by -- let me finish my thought, if you would,
11 then you can hear my question.

12 There are many cases where there's a parent
13 corporation and subsidiaries. Is your theory that if a
14 subsidiary carries out an act, it automatically becomes
15 the act of the parent corporation through agency?

16 MR. AZMY: No, Your Honor, no.

17 THE COURT: What is your argument here?

18 MR. AZMY: Our argument is when the sub is
19 used for purposes to advance the business interests of
20 the parent and where the parent company itself holds
21 itself out to the public and to the government as
22 indistinguishable from the sub.

23 Case law suggests that states a claim for
24 agency, particularly under the ATS. The *Bowoto* case in
25 the Northern District of California and the *South African*

1 *Apartheid* case in the District of New York. And so in
2 their opposition brief -- and this is why discovery is
3 important on this question -- counsel -- the parent
4 suggest that PT, the sub, entered into the contract with
5 the United States independently. But, we've just this
6 week received discovery which suggests that PT was
7 created specifically to allow the parent to enter
8 interrogatory services in Iraq.

9 There had been an entity that existed before
10 that held this contract with the United States
11 government. CACI PT was not in existence until
12 International created it as an acquisition sub
13 specifically to buy PTG, assume the government contract,
14 and thereafter, International took credit for
15 interrogation services conducted by PT throughout.

16 And --

17 THE COURT: Wait a minute. Wait a minute. A
18 corporation is set up as a body in order to limit
19 liability; is that right?

20 MR. AZMY: Yes, Your Honor.

21 THE COURT: So under your theory of agency
22 then any time a parent creates additional entities, the
23 parent is always liable because the parent ultimately
24 owns the subsidiary; is that right?

25 MR. AZMY: That's not enough, Your Honor. We

1 would agree that that is not enough. But where --

2 THE COURT: What do you have here? The
3 contract which you all -- somebody gave me the contract
4 which I've finally seen for the first time in the
5 four years this case has been pending -- let me see. I
6 had it right here a moment ago.

7 It has CACI PT as the person that got the
8 statement of work in the invoices. It's right here.
9 Wait a minute. Hold on.

10 It's Mr. O'Connor's submission. It's
11 Exhibit 1. It says CACI PTI.

12 MR. AZMY: Your Honor, I think the
13 circumstances surrounding acquisition and the creation of
14 the contract are not fully clear yet because we haven't
15 completed discovery.

16 THE COURT: How is it relevant? How is it
17 relevant? All I'm focused on is the contract. Why is it
18 relevant that the parent created another entity? That
19 can happen all the time.

20 What I'm concerned with here is why is CACI
21 International, the parent, liable for the actions of the
22 subsidiary here under agency theory? Help me with that.

23 MR. AZMY: So, that was just a first step in
24 the analysis, Your Honor, because thereafter, CACI
25 International exercises control and management over PT in

1 a way that holds itself out to have an agency
2 relationship. And the case law suggests, particularly
3 ATS context when a parent is intermingled with the sub,
4 particularly in response to a crisis that occurs, then
5 the parent is held out to the government as an agent.

6 THE COURT: Where are those allegations in
7 your second amended complaint?

8 MR. KOEGEL: The allegations are from 87 to
9 88 which relate to alter ego and 89 to 94.

10 And, CACI International criticizes the
11 plaintiffs for in these allegations not distinguishing
12 between CACI International and CACI PT.

13 The difficulty plaintiff had in
14 distinguishing those two entities is that CACI
15 International rarely ever did.

16 As we cite --

17 THE COURT: No, no. You can't do group
18 pleading any more. And there has to be some designation
19 of what entity you're referring to when both have the
20 same acronym as the first part of their name.

21 So you agree that these allegations you just
22 referred to don't separate out. They just say CACI. And
23 so I'm supposed to infer two entities where you refer to
24 the acronym CACI; is that right?

25 MR. AZMY: They're referring to them

1 collectively to represent the -- that we're not clear
2 which of the two entities or that both entities are
3 responsible for each of these allegations, which is
4 frankly how CACI International described their
5 relationship with interrogation services in Iraq.

6 We cite to reference -- incorporate by
7 reference the CEO of CACI International's book which --

8 THE COURT: Wait a minute. You think I'm
9 going to accept your incorporation of an 800-page book in
10 a pleading? It's not going to happen. Let me just
11 disabuse you of that notion. There is no way you can
12 incorporate a book into a pleading. Okay.

13 The Fourth Circuit would have to tell me to
14 do that. I'm not going to do that.

15 MR. AZMY: Okay.

16 THE COURT: How in the world could the
17 defendant even be able to respond to a book written or --
18 it's not going to do that.

19 MR. AZMY: Well, just to make clear, we were
20 referring to particular passages which we cite in our
21 brief and which was written by the defendant and which is
22 in part the basis on which these public statements form
23 the allegations in the complaint.

24 THE COURT: The book comes after all this Abu
25 Ghraib disaster took place.

1 MR. AZMY: Yes.

2 THE COURT: Which you've alleged is a
3 conspiracy to engage in torture by a corporation through
4 low level employees.

5 MR. AZMY: Not low level employees, Your
6 Honor, but through CACI employees, that's right.

7 THE COURT: Which you say those employees can
8 bind the corporation by their acts.

9 MR. AZMY: Well, there's no doubt that the
10 corporation can bind CACI PT.

11 THE COURT: My question is very precise. Are
12 you saying that three low level interrogators can bind
13 the corporation?

14 MR. AZMY: Your Honor, forgive me if I don't
15 understand the question. There are two corporate
16 entities and one CACI PT --

17 THE COURT: The CACI PT three employees that
18 you mentioned in the second amended complaint, you're
19 saying that they bind the corporation with their
20 statements and acts. So they could enter an agreement to
21 bind the company to plan to agree to torture detainees in
22 the prison?

23 MR. AZMY: Your Honor, they can -- they can
24 through vicarious liability. There is no doubt and this
25 Court has already held, bind CACI PT. And there is no

1 dispute that CACI PT held the contract and that CACI PT's
2 employees through vicarious liability, Your Honor has
3 already held, can bind CACI PT.

4 This motion goes to whether or not CACI
5 International as the parent can be held liable for the
6 sub's vicarious -- also for the sub's liability through
7 vicarious liability.

8 THE COURT: What you're trying to say is that
9 CACI International is going to be held liable for the
10 acts of employees of CACI PT carrying out a contract that
11 they may have violated, and you're holding the parent
12 liable under --

13 MR. AZMY: Yes.

14 THE COURT: -- under agency theory?

15 MR. AZMY: Excuse me, Your Honor.

16 THE COURT: Under agency theory.

17 MR. AZMY: That's right.

18 THE COURT: Look like you've abandoned the
19 alter ego argument. You're just with agency now?

20 MR. AZMY: We think agency is a stronger
21 theory based on what we've alleged, Your Honor.

22 THE COURT: You're abandoning alter ego?

23 MR. AZMY: Yes, Your Honor.

24 THE COURT: All right.

25 MR. AZMY: So that's right. We think the

1 CACI PT as the sub is clearly liable under principles of
2 vicarious liability for the acts of the interrogators in
3 Abu Ghraib which is what this Court held in March 2009
4 because they were acting within the scope of CACI PT --
5 of their employment with CACI PT.

6 And, this Court already held that we have
7 alleged a plausible theory of conspiracy between these
8 interrogators, CACI employees and military personnel in
9 the prison which Judge Messitti also held considering
10 similar allegations in the Al Karachi case.

11 So I just want to be clear that the
12 conspiracy allegations relating to CACI PT have already
13 been decided before this Court.

14 THE COURT: Well, actually they haven't been
15 decided in connection with this second amended complaint.
16 That's the second part of the motion we're going to take
17 up today.

18 MR. AZMY: That's right, Your Honor. Would
19 you like me to address those issues?

20 THE COURT: Well, you said three theories.
21 You said alter ego you've abandoned. You said agency and
22 then you said direct liability. But you didn't say
23 anything more about direct liability and I don't recall
24 reading that in your brief. Maybe it's in there.

25 MR. AZMY: It is, Your Honor, in the briefs

1 Your Honor through two -- two categories of fact. Direct
2 liability because the parent corporation knew of but
3 turned a blind eye towards abuses reported to the parent
4 corporation under again, ATS law like *Bowoto* and *South*
5 *African Apartheid* that can create liability for the
6 parent, particularly when the parent is monitoring what's
7 going on during this crisis which the parent did.

8 And so, those case law -- those cases say on
9 a motion to dismiss, that would support liability for a
10 parent corporation. Where they turn up, where they --

11 THE COURT: When you say direct liability are
12 you talking about direct liability for the assaults or
13 are you saying direct liability under conspiracy?

14 MR. AZMY: Direct liability for the acts of
15 the employees in Abu Ghraib -- for the conspiracy of the
16 employees in Abu Ghraib. So there are --

17 THE COURT: Well, say we're talking about
18 conspiracy. Let me -- what are the elements for
19 conspiracy?

20 MR. AZMY: There needs to be an agreement to
21 undertake unlawful action and then overt acts that are in
22 furtherance of the conspiracy. And --

23 THE COURT: Well, what is -- the agreement
24 here is between whom to do what and where have you set it
25 forth in your complaint?

1 MR. AZMY: Your Honor, we set it forth as
2 you've held in your March 2009 order. We set it forth in
3 delay that there's a conspiracy between CACI

4 interrogators and military personnel. And those --

5 THE COURT: I want to focus on that for a
6 second.

7 MR. AZMY: Okay.

8 THE COURT: So you think in your complaint
9 you've set forth agreement entered into by a military
10 person and CACI personnel?

11 MR. AZMY: Yes, Your Honor.

12 THE COURT: All right. Where do you see
13 that? I see paragraph 80 --

14 MR. AZMY: Your Honor --

15 THE COURT: -- you made a judgment -- I'm
16 looking at the second amended complaint. I think that's
17 where we're focused on now.

18 MR. AZMY: The conspiracy --

19 THE COURT: Let me finish. I'm going to give
20 you a chance to respond.

21 I see a general allegation of conspiracy
22 beginning paragraph 64, after you laid out all the harms
23 that the plaintiffs have suffered, really horrible harms
24 if they are true.

25 And then 65, these and other CACI employees

1 conspired with military personnel to harm plaintiffs in
2 the various methods above.

3 Well, where is the allegation of an entry of
4 agreement between a CACI employee and a military person?

5 MR. AZMY: Your Honor, 65, there's an
6 allegation of an agreement. And in 67, we referenced --

7 THE COURT: Between whom?

8 MR. AZMY: Huh?

9 THE COURT: Between whom?

10 MR. AZMY: Between CACI personnel referenced
11 in paragraph 64, employees Steven Stefanowicz, Daniel
12 Johnson and Timothy Dugan and military personnel.

13 THE COURT: So I want to make sure I'm clear
14 then. So you're saying that the government which is the
15 contractor and the person carrying out the contract, they
16 conspired?

17 MR. AZMY: Military personnel conspired, yes.
18 Charles Graner, Chip Fredrick and other military
19 personnel and we detail in our complaint that they've
20 testified in their court marshal that they were ordered
21 by CACI employees to soften up the detainees, give
22 detainees special treatment and therefore enter into this
23 conspiracy which is what Taguba, Fay, Jones and Nelson
24 also found which we also detailed in the complaint.

25 THE COURT: Well, the difficulty I'm having

1 is the agreement preceding the actual carrying out of the
2 acts and who entered the agreement. So what you're
3 telling me now is these three employees from CACI and
4 undescribed military personnel who work for the United
5 States Army, who is a party to the contract?

6 MR. AZMY: Not undescribed. We identify the
7 military conspirators, Charles Graner, Chip Frederick and
8 potentially others who testified that they were ordered
9 to abuse detainees, as this Court already found in its
10 March 2009 decision, by CACI employees. And --

11 THE COURT: But there's no allegation here
12 that any of these individuals were actually touched by
13 any CACI employee, is there?

14 MR. AZMY: No, Your Honor, because we don't
15 specifically allege that in the complaint. We didn't
16 have information, but that's not necessary for a
17 conspiracy.

18 If someone is ordering somebody else to
19 undertake an overt act in furtherance of the conspiracy,
20 the victim of the conspiracy does not have to identify
21 the person ordering the abuse.

22 And that's -- that's fairly clear in the case
23 law governing conspiracies. So, if there's an agreement
24 between conspirators, the conspirators are liable for all
25 the foreseeable overt acts that occur consistent with

1 that conspiracy.

2 THE COURT: I understand that theory. I
3 understand that theory. But the concern I have is
4 twofold. First, you're saying that the -- these
5 employees who work for CACI, who are working pursuant to
6 a government contract, entered into a conspiracy with an
7 entity that extended the contract. And you're making
8 them two separate entities for purposes of
9 inter-corporate immunity. And I'm focused on whether the
10 persons carrying out a contract that's been given by the
11 military could conspire with each other.

12 Could you answer that question?

13 MR. AZMY: If I understand your question and
14 focusing on CACI PT and not the agency principle for now,
15 Your Honor --

16 THE COURT: Yes.

17 MR. AZMY: The -- the law is, I believe,
18 clear and Judge Messitti sketched this out specifically
19 that employees of a corporation can conspire with third
20 parties who are not employees of the corporation. And
21 then that conspiracy through vicarious liability can hold
22 the corporate entity, in this case, PT liable through a
23 theory of respondeat superior which is precisely the
24 theory Your Honor recognized in the March, 2009 decision,
25 that there was a conspiracy among the military and CACI

1 employees. And because CACI employees were acting within
2 the scope of their employments through CACI PT, CACI PT
3 is vicariously liable which is standard corporate tort
4 law.

5 And then we allege in addition that the
6 parent should also be liable. But just to break those
7 two pieces out, that's the theory Your Honor already
8 upheld and we don't believe can or should be revisited
9 because the law really hasn't changed.

10 *Iqbal* basically extended *Twombly* outside of
11 the agent trust context.

12 THE COURT: It did, but in a former life, if
13 you just set forth the formulaic recitation of the
14 elements under Rule 8 that was sufficient, but now you
15 need to have facts.

16 MR. AZMY: Your Honor --

17 THE COURT: Let me finish.

18 MR. AZMY: Excuse me.

19 THE COURT: And the question about facts is
20 whether you set forth facts that show that this
21 government contractor that had a substantial contract
22 plausibly would enter into a conspiracy to breach the
23 contract with the government contractor and enter some
24 conspiracy to harm these individual detainees in a
25 prison.

1 What would be their incentive to do such a
2 thing? What facts have you set forth that said they did
3 that?

4 MR. AZMY: Your Honor, that's the theory of
5 liability that CACI is focused on in trying to knock
6 down. But we have another theory of liability this Court
7 has already upheld under *Twombly* which is we believe, you
8 know, functions identical to *Iqbal* which is the vicarious
9 liability theory.

10 In other words, one could -- we don't have to
11 prove that CACI PT or CACI International chose to enter
12 into a conspiracy to abuse detainees. We do specifically
13 allege which is supported by references to court marshal
14 testimony and military reports that CACI employees
15 entered a conspiracy with the military to abuse
16 detainees. And that conspiracy, this Court has already
17 upheld as plausible under *Twombly* because there were code
18 words that were used between them that suggested a tacit
19 agreement and because they -- in that closed confinement
20 of Abu Ghraib, one would only undertake that kind of
21 abuse if one were confident that no one would report the
22 abuse.

23 So there was an agreement at that level. And
24 then as this Court held, that misconduct by the employees
25 is charged to the corporation under respondeat superior

1 theory.

2 THE COURT: All right.

3 MR. AZMY: And so we don't have to prove that
4 CACI chose to entered the conspiracy.

5 THE COURT: You don't have to prove anything
6 on a 12(b)(6) motion. You just have to allege it.

7 MR. AZMY: That's right.

8 THE COURT: I've asked you the questions that
9 I have.

10 MR. AZMY: Thank you.

11 THE COURT: Thank you.

12 MR. KOEGEL: Your Honor, I'd like to begin
13 with rebuttal in connection with our alter ego motion.

14 THE COURT: I'm listening.

15 MR. KOEGEL: Mr. Azmy has abandoned the alter
16 ego theory, so I think our motion can now be -- can be
17 granted.

18 He points to other paragraphs in the second
19 amended complaint and he says, well, there's really an
20 agency theory here. There's no agency theory of
21 liability asserted in this complaint. There are
22 certainly no facts alleging agency liability.

23 As Your Honor correctly observed, the
24 paragraphs that Mr. Azmy points to simply lumps the two
25 corporate defendants together, which is not a permissible

1 approach -- approach under the law.

2 So, we don't think that the plaintiffs can
3 effectively orally amend their complaint to say that
4 well, what we really mean is agency liability, not alter
5 ego.

6 The only theory that's alleged in the second
7 amended complaint is right there on the board and that's
8 alter ego liability.

9 You won't find the word "agent" or "agency"
10 in the second amended complaint.

11 His alternative approach is to say well, we
12 want CACI International to have direct liability for the
13 actions of the employees of CACI PT.

14 He doesn't explain how he gets from the
15 actions of employees of CACI PT to impose liability on
16 the parent of CACI PT.

17 And there are certainly no facts alleged in
18 the second amended complaint that would serve as a bridge
19 for that extension.

20 So we think on this matter, the Court's path
21 is pretty clear. The alter ego allegations in the
22 complaint can't survive, and there is no alternative
23 theory set forth in the second amended complaint.

24 Had there been we would have addressed it in
25 moving to dismiss CACI International from the case. But

1 there's not, and it's too late in the day to try to
2 substitute a new theory through the arguments of counsel
3 in the case.

4 THE COURT: All right.

5 MR. KOEGEL: I'll now move to conspiracy.
6 This poster board sets forth paragraph 80 from the second
7 amended complaint. And our argument here, Your Honor, is
8 that under *Iqbal* and *Twombly* and the other case law we've
9 cited the conspiracy claims in this case fail to meet
10 every standard that a complaint must pass to satisfy --
11 to state a cognizable claim for conspiracy.

12 As Mr. Azmy correctly notes, a conspiracy
13 requires an agreement.

14 There has to be an agreement by the
15 corporations because it is in fact, the CACI corporate
16 defendants that are accused of entering into a conspiracy
17 in paragraph eight.

18 If there's no agreement on behalf of the
19 corporations, there can be no conspiracy.

20 There are -- and the Fourth Circuit's most
21 recent exposition on the matter on *Society Without a Name*
22 makes it crystal clear that a complaint must set forth
23 specific facts reflecting the corporate agreement to
24 enter into the conspiracy.

25 It has to identify specific persons who

1 agreed on behalf of the corporate defendant to enter into
2 a conspiracy.

3 Specific communications between the
4 co-conspirators with respect to an agreement are required
5 to state a cognizable claim.

6 The second amended complaint fails that test.
7 There are no facts in the second amended complaint
8 reflecting an agreement on behalf of the corporate
9 defendants to enter into a conspiracy with military
10 personnel in performing the contract which CACI PT had
11 with the United States government.

12 These are legal conclusions. There are no
13 specific facts you can find in the second amended
14 complaint that identified the who, what, where, when, and
15 how that's necessary at a minimum to state a cognizable
16 conspiracy claim.

17 Second and equally fatal defect in this
18 complaint is its failure to allege facts that exclude the
19 possibility that the co-conspirators acted independently.
20 We've cited the rather substantial law that parallel
21 conduct is not sufficient to satisfy that burden.

22 And a complaint must also allege facts that
23 would allow the Court to conclude in connection with the
24 motion to dismiss that the conspiracy made practical
25 economic sense.

1 Again, we're faced with the absence of any
2 facts suggesting a plausible conspiracy here.

3 Indeed --

4 THE COURT: Well, the plaintiff says in their
5 brief not in their pleading that if they engaged in
6 torture techniques to gather intelligence, that would
7 somehow curry favor with the government contractors. But
8 they already have the contract.

9 MR. KOEGEL: CACI already had the contract
10 and it defies common sense to believe that military
11 personnel would engage in a conspiracy for that purpose.
12 They have no conceivable benefit from that kind of
13 conduct.

14 Quite frankly the theory defies common sense.
15 Even if somehow CACI personnel could generate some
16 benefit for the corporation by engaging in that form of
17 misconduct and I think that requires a complete
18 suspension of disbelief, but even if it were possible to
19 get to that position, the military personnel have
20 absolutely nothing to gain and the plaintiffs don't
21 allege any plausible motivation, incentive or reason for
22 military personnel to engage in this conspiracy. It
23 makes no sense.

24 The only facts that appear in the second
25 amended complaint contradict the notion of a conspiracy,

1 and particularly the Fay Report which the plaintiffs cite
2 at some considerable length in the second amended
3 complaint. They don't cite the Fay Report as concluding
4 or finding or setting forth any information reflecting a
5 conspiracy. And, in fact, as we pointed out, the --

6 THE COURT: Well, I'm not so sure I need to
7 focus on the Fay Report to determine the issue of
8 conspiracy here in evaluating this complaint under
9 12(b)(6).

10 The book and the Fay Report, it seems to me,
11 are not evidence. They're allegations that I certainly
12 can accept as true. But I don't see the point. I need
13 to have facts about what happened here as it relates to
14 these plaintiffs.

15 Help me with the issue of if the plaintiffs
16 here do not say that they were injured by a CACI
17 employee, they don't identify CACI employee who did
18 anything to them --

19 MR. KOEGEL: That's correct.

20 THE COURT: -- can they state a claim for
21 conspiracy here if they were injured as a result of the
22 conspiracy?

23 MR. KOEGEL: Not under a -- not under their
24 current theory, Your Honor.

25 Mr. Azmy says well, CACI PT would be liable

1 for the actions of its employees under a respondeat
2 superior theory. And in certain circumstances, that
3 would be correct.

4 However, we pointed to the case law in the
5 brief that says even under that approach, CACI PT is not
6 liable for any actions by non-CACI employees, any other
7 purported co-conspirators. CACI PT would only have
8 potential liability for the actions of its own employees.

9 And the facts in this case where there is no
10 connection alleged between the plaintiffs and their
11 alleged injuries and anyone affiliated with either of the
12 CACI corporations, we think, prevents that conspiracy
13 theory from going forward.

14 THE COURT: Well, I've asked you the
15 questions that I have, and you all have briefed the
16 matter quite extensively.

17 Mr. Azmy was given a chance a moment ago to
18 address some of the conspiracy allegations but I see him
19 over there taking copious notes. I think he has a few
20 things he want to say and then I'm prepared to conclude
21 the proceedings.

22 MR. KOEGEL: Thank you, Your Honor.

23 THE COURT: Thank you.

24 MR. AZMY: Sorry if my note taking was
25 distracting.

1 THE COURT: No, I expect lawyers to take
2 notes, but I've actually read all your briefs.

3 MR. AZMY: Thank you, Your Honor. I just
4 want to emphasize that in this presentation, Mr. Koegel
5 has ignored the alternate theory of liability that we
6 pled with the first amended complaint that Your Honor
7 already upheld which is holding the corporation
8 vicariously liable.

9 And so, we don't need to show, although we
10 believe we have allegations to show that the corporation
11 PT covered up and ratified the conspiracy.

12 What we have pled in great detail --

13 THE COURT: I want you to focus on that. So
14 you're saying that when the company learns of the things
15 done by their employees in concert with the military,
16 they joined the conspiracy when they did not report to
17 the media what had taken place?

18 MR. AZMY: They -- yes, you can extend the
19 conspiracy -- a corporation can be held liable for
20 extending a conspiracy if they're put on notice as we
21 allege they were told by military personnel and CACI
22 whistle blowers that there was abuse going on and they,
23 we allege, turned a blind eye to that abuse.

24 THE COURT: I have a question that's very
25 precise, and that question was could the corporation

1 after learning its employees had done really bad horrible
2 things to these detainees at Abu Ghraib, after learning
3 of that, could they then join a pre-existing conspiracy
4 by failing to tell the media the truth?

5 MR. AZMY: They wouldn't technically join the
6 conspiracy. They would be liable under vicarious theory
7 of extending --

8 THE COURT: No, I don't think so. And I've
9 asked you the question twice now, and each time you've
10 not answered it.

11 My question was: You say there was a
12 conspiracy between CACI employees and the military to
13 torture these poor detainees in Abu Ghraib. And you say
14 the corporation learned of that after it had already
15 occurred, which means the agreement was already made
16 between the employees and the military.

17 And you're saying that once they learned of
18 it and they did not go to the media and disclose what
19 they knew about it, that they somehow joined the
20 conspiracy to torture. Is that your theory?

21 MR. AZMY: That is one of our theories, Your
22 Honor, but not our primary theory. Our primary theory is
23 vicarious --

24 THE COURT: I'm having trouble with that
25 theory because the agreement was already made. The acts

1 were already done. Is there an obligation to go out and
2 tell the public well, all these bad things happened and
3 our guys did it to -- and that makes them a part of the
4 conspiracy. I'm not buying that.

5 MR. AZMY: No, Your Honor -- pardon me. So,
6 vicarious liability is a theory. It's respondeat
7 superior.

8 THE COURT: I understand vicarious liability.
9 I understand that. But I'm focused on the conspiracy
10 itself.

11 MR. AZMY: Okay.

12 THE COURT: And as I understood you say a
13 conspiracy involves two or more people in an agreement to
14 do something unlawful or to do something lawful -- lawful
15 through lawfully means. And I don't think overt acts are
16 required to form a conspiracy action in a civil case.

17 And so it seems to me that the conspiracy was
18 already underway in Iraq before the corporation even knew
19 about it. And when they learned of it, they didn't
20 retroactively joint acts that had already taken place.
21 And I'm not sure they had an obligation to go out and
22 have some press conference to describe what they figured
23 out, that that made them join the conspiracy. And you're
24 saying that made them join the conspiracy.

25 MR. AZMY: Your Honor, this is a very

1 important point. They are liable for the acts of their
2 employees.

3 THE COURT: I understand that. I'm asking
4 you, do they become liable for conspiracy? They become a
5 part of the conspiracy?

6 MR. AZMY: Under our alternate theory, we
7 believe so. But under our primary theory which is
8 respondeat superior that corporations are liable for the
9 acts -- the illegal acts of their employees and that's a
10 very old tort doctrine that --

11 THE COURT: I don't have any problem with
12 that part of it. You've answered my question.

13 MR. AZMY: Thank you, Your Honor.

14 THE COURT: Thank you. Let the record
15 reflect this matter is before the Court on defendant's
16 CACI's motion to dismiss the conspiracy complaint and
17 there's also CACI International's motion to dismiss.

18 Let me first take up the issue of conspiracy
19 and that is whether the plaintiffs have set forth
20 sufficient facts to state a claim for conspiracy between
21 CACI PT and its employees CAPT and CACI International or
22 CACI PT and the United States military when the
23 plaintiffs alleged that CACI, CACI PT and three of its
24 employees contractors conspired together to torture
25 detainees at Abu Ghraib; that CACI International joined

1 the conspiracy which CACI PT allegedly entered into with
2 its employees and CACI PT and the United States military
3 entered into an agreement with CACI PT to use torture as
4 a method of interrogation in furtherance of the
5 contractual relationship between the parties.

6 The standard that I have to evaluate the
7 complaint by is very well known and that has to do with
8 whether the plaintiff has set forth sufficient facts to
9 state a plausible claim under *Bell Atlantic versus*
10 *Twombly* and *Ashcroft versus Iqbal*.

11 I'm required to accepted the allegations as
12 true. And the Court is to isolate out factual
13 allegations from legal conclusions and just to evaluate
14 the facts pled to determine if there's a plausible claim
15 stated which is sufficient to withstand a motion to
16 dismiss.

17 I'm going to grant the motion to dismiss CACI
18 PT's motion to dismiss the conspiracy claim because
19 plaintiffs have failed to set forth facts to support a
20 claim between -- of conspiracy between CACI and the
21 military as there are no facts which plausibly establish
22 that plaintiffs were directly injured by a CACI
23 contractor or any member of the alleged conspiracy to
24 which CACI PT allegedly joined.

25 And I'm focusing now on CACI PT.

1 My prior rulings in this case do not bar me
2 from considering this matter fresh, particularly in light
3 of the changes that have taken place. And this is the
4 third time this plaintiff has pled this complaint. And
5 the 2009 decision was well before *Ashcroft versus Iqbal*
6 decided by the Supreme Court. And again, this is not the
7 first time the plaintiffs pled the complaint. This is
8 actually the third time.

9 And so it seems to me that I have the
10 obligation to assess the complaint that's been brought
11 before me. And the law of the case doctrine does not
12 preclude an evaluation of the sufficiency of this
13 complaint which is a second amended complaint.

14 The plaintiffs have failed to set forth facts
15 supporting a conspiracy claim. We've discussed what the
16 elements are under Virginia law and they are "an
17 agreement between two or more persons to accomplish an
18 unlawful purpose or to accomplish a lawful purpose by
19 unlawful means which results in damage to plaintiff".
20 That's *Glass versus Glass*.

21 And importantly, the Supreme Court of
22 Virginia has held that in Virginia a common law claim of
23 civil conspiracy which requires proof that the underlying
24 tort was committed under the *Almy*, that's *A-L-M-Y versus*
25 *Richmond* case.

1 The Supreme Court says, "this is so because
2 the gist of the civil action for conspiracy is a damage
3 caused by the acts committed in the pursuance of a form
4 of conspiracy and not the mere combination of two or more
5 persons to accomplish an unlawful purpose or use unlawful
6 means". And that's the *Almy* decision at page 190.

7 "Thus where there's no actionable claim for
8 underlying alleged wrong, there can be no civil action
9 for conspiracy of that wrong". That's *Citizens of*
10 *Fauquier County* case, Virginia Circuit Court.

11 Further, in looking at the inter-corporate
12 immunity doctrine acts of inter-corporate conspiracy
13 doctrine, acts of the corporate agent are the acts of the
14 corporation itself. And corporate employees cannot
15 conspiracy with each other or with the corporation under
16 the ePlus -- that's *ePlus Tech versus Aboud*, A-B-O-U-D
17 from the Fourth Circuit, 2002.

18 And furthermore, a single entity cannot
19 conspire against itself. "Because corporations and their
20 agents lack the requisite multiplicity of actors, they
21 fail to satisfy the standard for a civil conspiracy
22 claim". And that's the *U.S. Coast Guard* case from the
23 Fourth Circuit 2012 which talks about two or more
24 persons.

25 The Fourth Circuit has consistently found

1 inter-corporate conspiracy doctrine can be broadly
2 applied to conspiracy cases under the *Walters* case from
3 the District of Maryland, 2011.

4 And in this case, plaintiffs have not set
5 forth facts sufficient to support a claim of conspiracy
6 between CACI PT and CACI International or CACI and its
7 employees.

8 Further, the allegation is insufficient to
9 establish a claim of conspiracy between for CACI PT and
10 the United States military.

11 Let me address first the conspiracy
12 allegation between CACI PT and CACI International.

13 Plaintiffs cannot plead facts of suspicion to
14 support a claim of conspiracy between CACI PT and CACI
15 International because a wholly-owned subsidiary and its
16 parent corporation cannot conspire with one other under
17 the *Cohen* case, and under *Salida versus Exxon*, a
18 corporation cannot conspire with its wholly-own
19 subsidiary.

20 To plead civil conspiracy in Virginia law
21 plaintiff must allege facts to support a claim that two
22 or more persons combined to accomplish by some concerted
23 action some criminal or unlawful purpose or some lawful
24 purpose by criminal means or unlawful means under the
25 Coast Guard case I just referred to.

1 Plaintiffs fail to allege facts that suggest
2 that CACI PT and CACI International, two separate
3 entities, are capable of forming a conspiracy with one
4 another.

5 Moreover, there are no allegations that
6 identify an individual of CACI PT who entered into an
7 agreement with CACI International to engage in any
8 conspiracy. There's no detail set forth of when this
9 conspiracy was formed, what was the object of the
10 conspiracy, who is the third party involved in the
11 conspiracy? Is it just the three people named in the
12 complaint who are low-level CACI employees or is it the
13 three individuals who are mentioned in the military who
14 are subject matter of the military court marshals? Who
15 are the parties?

16 Additionally, it's fairly clear and I think
17 that plaintiff concedes this that the allegation that
18 CACI PT is an alter ego of CACI International just will
19 not stand up, and plaintiff has already conceded that
20 argument. So I'm going to grant the motion to dismiss as
21 it relates to CACI International because they don't set
22 forth sufficient facts to support such a claim of alter
23 ego under Delaware law, nor do they set forth that the
24 corporate forum was misused in order to cause a fraud on
25 the plaintiffs.

1 And, these are separate corporations. And
2 even if it was a mere corporate division, these facts are
3 insufficient to state a claim of conspiracy between CACI
4 PT and CACI International.

5 And there's been a great deal of group
6 pleading going on on this pleading of just naming CACI
7 without any distinction between the two entities. And
8 it's clear that they are two different entities because
9 they're named as separate defendants.

10 As it relates to the conspiracy between CACI
11 PT and its employees, plaintiffs cannot set forth facts
12 and have not set forth facts and cannot in my view
13 suggest a conspiracy between CACI PT and its employees
14 under the inter-corporate immunity doctrine because
15 co-employees cannot conspire with each other or with the
16 corporation and I've already cited the cases on that.

17 The exception to the inter-corporate immunity
18 doctrine do not apply in this case. That is to say the
19 personal stake exception which is under the *Walters* case
20 and the *Greenville Publishing Company versus Daily*
21 *Refractive* case from the Fourth Circuit.

22 There are exceptions to the corporate
23 immunity doctrine. One is where the corporate officers
24 have independent personal stake in achieving illegal
25 objectives of the corporation.

1 Well that's not met here because the
2 plaintiff contends that CACI PT and its co-conspirators
3 had a professional rather than a personal stake in
4 carrying out these objectives in that they were hoped to
5 create conditions in which they could extract more
6 information from the detainees to please their client.

7 Well, the object of the contract was to carry
8 out interrogation, so that's not independent personal
9 stake. And the -- they do not claim that the employees
10 stood to benefit from anything other than pleasing their
11 client and receiving remuneration for their work, and
12 under the *ePlus* case that is just not sufficient to state
13 a claim.

14 As it relates to a conspiracy between CACI PT
15 employees and the United States military, again, I have
16 to separate out all of the legal conclusions and there
17 are many legal conclusions here set forth in paragraph
18 80, paragraphs 64, 81 to 86. There are a lot of legal
19 conclusions set forth, conspiratorial campaign, paragraph
20 97.

21 These are insufficient to state a claim for
22 conspiracy under *Iqbal* and Twombly standards. First,
23 plaintiff seeks to impose liability under defendant for
24 conduct alleged to co-conspirators. "The Court must be
25 able to infer a conspiratorial agreement from the facts

1 alleged, otherwise the conspiracy claims must be
2 dismissed" under the *Wiggins versus Kew Gardens* case from
3 the Fourth Circuit, August 2012.

4 "The facts must demonstrate the conspirators
5 positively or tacitly came to a mutual understanding to
6 try to accomplish a common unlawful claim" under the
7 *Ruttengberg*, that's R-U-T-T-E-N-G-B-E-R-G *versus Jones*
8 case from the Fourth Circuit, June 2008.

9 These conclusory allegations, coupled with
10 allegations of parallel conduct, is insufficient to state
11 a claim under *Bell Atlantic versus Twombly*.

12 I note that the allegations here may suggest
13 parallel conduct. But again, these are insufficient to
14 state a claim for cognizable conspiracy under the *Loren*
15 *Data*, that's L-O-R-E-N *Data Corp* case from the Fourth
16 Circuit, December 26, 2012.

17 The Court states, "specifically when
18 concerted conduct is a matter of inference, the plaintiff
19 must include evidence that place the parallel conduct in
20 a context that raises suggestion of a preceding agreement
21 as distinct from identical independent action".

22 There is reference here to the Fay Report.
23 And I guess both sides are trying to use the book and the
24 report as some evidence of some agreement. But it seems
25 to me that the Fourth Circuit in *Loren* says that the

1 evidence must tend to excluded the possibility that the
2 alleged co-conspirators acted independently and the
3 alleged conspiracy must make economic and practical
4 sense.

5 What I have here is the facts that plaintiff
6 alleged that unnamed CACI PT contractors use code words
7 to signal the military to apply special treatment to
8 detainees. That's the second amended complaint,
9 paragraph seven.

10 However plaintiffs fail to connect the use of
11 the code word to any individual plaintiff particularly.
12 And plaintiff generally allege that CACI PT conspired
13 with the military to torture or mistreat detainees. Yet,
14 there is no allegation here that ties the activities of
15 CACI PT to torture the individual plaintiffs -- named
16 plaintiffs at all.

17 As the Court note in *Twombly*, "includes the
18 allegation of an agreement at some unidentified point
19 does not supply facts adequate to show illegality". And
20 that's the *Twombly* case at page 557.

21 It follows that plaintiffs fail to supply
22 facts adequate to show the alleged agreement between CACI
23 PT and the military was directed toward these plaintiffs,
24 not just any detainee but these plaintiffs. And,
25 allegations before the Court suggesting parallel conduct

1 is just insufficient to state a claim under the *Loren*
2 case. And without specific allegations that plaintiffs
3 had any direct contact with specific CACI PT contractors
4 or any member of the alleged conspiracy, the claim must
5 fail because the allegations merely demonstrate parallel
6 conduct of detainee torture, not conduct directed at
7 them.

8 So I will grant the motion to dismiss the
9 conspiracy claims as it relates to CACI PT as an
10 allegation insufficient to establish plausible claim to
11 torture and do plaintiff personal injury.

12 As I stated a moment ago, I'm granting the
13 CACI International's motion to dismiss the complaint
14 because the facts set forth do not support an alter ego
15 liability theory against CACI International. The
16 plaintiff has conceded that and now they have a new
17 theory of agency that's not set forth in their complaint.

18 And applying the law of the state of the
19 corporation which is Delaware, the elements are set forth
20 in the briefs. Everybody's read them in the
21 *MicroStrategy* case, and I don't have any allegations here
22 of misuse of the corporate entity that the alter ego --
23 that was intended to cause some fraud. And the complaint
24 is insufficient to plead alter ego because there are no
25 facts supporting the claim that CACI International used

1 corporate forum to perpetrate a fraud, and so I'm
2 granting the motion to dismiss the claim against CACI
3 International.

4 The allegations in paragraph 86 do not, in my
5 view, support a claim of misuse of the corporate forum or
6 fraud would be sufficient to withstand the element of
7 injustice in the *MicroStrategy* case.

8 So, to be clear, what I'm doing is I'm
9 granting defendant's CACI PT's motion to dismiss
10 conspiracy claims because plaintiff failed to set forth
11 sufficient facts to support a claim of conspiracy between
12 CACI PT and its employees, between CACI PT and CACI
13 International, because the allegations alleged
14 co-conspirators in both were agents of a single
15 corporation and therefore could not, as a matter of law,
16 conspire among themselves under the doctrine of
17 inter-corporate immunity. So those claims will be
18 dismissed with prejudice.

19 As it relates to CACI's motion to dismiss as
20 to plaintiff's conspiracy claims related to CACI PT and
21 the United States military, I'm granting that motion to
22 dismiss, because plaintiff has not set forth sufficient
23 facts to state a plausible claim that CACI PT and the
24 United States military conspired to torture them. That
25 would be dismissed without prejudice.

1 So, to be clear, I'm granting the motion to
2 dismiss for CACI International with prejudice, because
3 there's been a failure to show alter ego and I'm not
4 accepting some new claim that's not pled. And all the
5 other claims are -- the other claim is dismissed as I
6 said a moment ago with respect to the alleged conspiracy
7 between the military and CACI without prejudice.

8 Thank you.

9 (Proceeding concluded at 12:32 p.m.)

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CERTIFICATE OF REPORTER

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2
3 I, Renecia Wilson, an official court
4 reporter for the United State District Court of Virginia,
5 Alexandria Division, do hereby certify that I reported by
6 machine shorthand, in my official capacity, the
7 proceedings had upon the motions in the case of Al
8 Shimari, et al vs. CACI International.

9 I further certify that I was authorized and
10 did report by stenotype the proceedings and evidence in
11 said motions, and that the foregoing pages, numbered 1 to
12 45, inclusive, constitute the official transcript of said
13 proceedings as taken from my shorthand notes.

14 IN WITNESS WHEREOF, I have hereto subscribed
15 my name this 26th day of March, 2013.

16
17 /s/
18 _____
19 Renecia Wilson, RMR, CRR
20 Official Court Reporter
21
22
23
24
25