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

SUHAIL NAJIM ABDULLAH AL SHIMARI *et al.*, Plaintiffs,	)	
v.	)	Case No. 1:08-cv-827 (LMB/JFA)
CACI PREMIER TECHNOLOGY, INC., Defendant.	)	

PLAINTIFFS' OPPOSITION TO CACI'S MOTION IN LIMINE TO EXCLUDE THE EXCERPTS FROM THE TAGUBA AND FAY REPORTS THAT THE COURT PREVIOUSLY ADMITTED

CACI's renewed motion to exclude the reports by Major General Taguba and Major General Fay is simply a rehash of arguments that this Court has already rejected twice. Just as in its prior attempts to exclude the reports, CACI does not address the specific excerpts that the Court ***admitted*** at the April 2024 trial because CACI cannot articulate any persuasive objection to those excerpts. Instead, CACI insists that the reports must be excluded entirely based on the same misplaced hearsay and relevance objections that this Court rejected before, when it found that "there are passages in those reports that are relevant, that are reliable, and that would be admissible under some of the exceptions under the rules of evidence." ECF No. 1460 (Dec. 15, 2023 Hr'g Tr.) 22:12-14.

CACI's repackaged arguments continue to be wrong. It does not matter that Major General Taguba and Major General Fay were not present for the abuse at Abu Ghraib, because Federal Rule of Evidence 803(8)(A)(iii) does not require a governmental report's author to have

"personal knowledge" of the events underlying their factual findings. To the contrary, courts routinely admit reports with factual findings based on interviews, witness statements, and documents, so long as the reports meet certain criteria for trustworthiness. And as the Court previously recognized, the Taguba and Fay reports easily meet those criteria: they were the product of thorough investigations conducted shortly after the events in question by teams of impartial experts. CACI's complaints also ring hollow because CACI has had the opportunity to cross-examine both Generals at their depositions and, in the case of MG Taguba, for a second time at trial. CACI can make any arguments as to the reliability of the generals' findings to the jury, but it cannot, under applicable law, exclude the reports.

Additionally, the Taguba and Fay report excerpts admitted at the April 2024 trial are plainly relevant. They corroborate Plaintiffs' testimony that they were abused at Abu Ghraib before and after interrogations, and they tend to prove that CACI interrogators entered into a conspiracy to abuse detainees and aided and abetted such abuse. Furthermore, admission of passages from the reports does not unfairly prejudice CACI because the reports do not suggest that the jury decide this case on any improper basis. To the contrary, the reports are highly probative as to the facts that the jury should consider.

Plaintiffs respectfully submit that this Court should reject CACI's third attempt to exclude excerpts of the Taguba and Fay reports that the Court has already held to be both "reliable" and "relevant." ECF No. 1460 (Dec. 15, 2023 Hr'g Tr.) 22:12-18. The Court's prior rulings were correct, and CACI offers no good reason why the Court should reverse course at this point in this litigation.

BACKGROUND

The Court needs no introduction to the facts of this case, but, in light of the revisionist history proffered by CACI, some facts need to be reiterated.

I. PLAINTIFFS' CLAIMS AGAINST CACI

Plaintiffs Salah Al-Ejaili, Asa'ad Al-Zuba'e, and Suhail Al Shimari are three Iraqi civilians who suffered horrific abuse before, during, and after interrogations while detained at Tier 1 of the "hard site" of the Abu Ghraib prison in late 2003. ECF No. 1631 (Apr. 15, 2024 Afternoon Trial Tr.) 35:12-51:22; ECF No. 1623 (Apr. 16, 2024 Morning Trial Tr.) 8:15-34:3; ECF No. 1624 (Apr. 17, 2024 Morning Trial Tr. 14:18-25:3). Plaintiffs bring claims against CACI for conspiring with and aiding and abetting U.S. military personnel to torture and abuse detainees at the Abu Ghraib hard site. Each Plaintiff was interrogated, formally or informally, by ***CACI*** personnel. ECF No. 1650-36 ¶¶ 8, 18; ECF No. 1650-37 at 4-5; *see also, e.g.*, ECF No. 1631 (Apr. 15, 2024 Afternoon Trial Tr. (Al-Ejaili)) 48:12-50:17, 72:16-73:2; ECF No. 1650-13 (Apr. 16, 2024 Morning Trial Tr. (Al-Zuba'e)) 22:9-12, 25:8-20; ECF No. 1650-5 (Apr. 17, 2024 Morning Trial Tr. (Al Shimari)) 15:5-9 (Plaintiffs each testifying about interrogations by civilian interrogators).

As the Court instructed the jury at the April 2024 trial, Plaintiffs' conspiracy claims require proof of the following: (1) an agreement to inflict torture or cruel, inhumane, or degrading treatment on detainees at Abu Ghraib; (2) CACI's knowing or intentional entry into that agreement; (3) commission of an overt act in furtherance of the conspiracy by one of its members; and (4) infliction of torture or CIDT upon the Plaintiff in question, resulting from acts in furtherance of the conspiracy. ECF No. 1626 (Apr. 22, 2024 Trial Tr.) 100:13-101:4. According to the Court, Plaintiffs' aiding-and-abetting claims require proof that (1) military

personnel subjected Plaintiffs to torture or CIDT; (2) CACI provided practical assistance to those military personnel that had a substantial effect on the infliction of such torture or CIDT; and (3) when CACI provided that practical assistance to military personnel, it did so with the purpose of facilitating the torture or CIDT. *Id.* 102:11-24.

II. MAJOR GENERAL TAGUBA'S REPORT[1]

In January 2004, the Commander of the Coalition Forces Land Component Command ("CFLCC") in Iraq appointed Major General ("MG") Antonio M. Taguba to investigate allegations of detainee abuse at Abu Ghraib and to "[m]ake specific findings of fact concerning all aspects of the investigation." Decl. of Muhammad Faridi ("Faridi Decl."), Ex. A at 6-7.[2] As demonstrated, the process that MG Taguba followed in issuing his report was exhaustive and thorough.

A. MG Taguba's Investigation

MG Taguba assembled a team of approximately twenty individuals to assist him in his investigation, including the CFLCC Provost Marshal and officers deputized from his office, experts as to military police detention and internment operations and training, legal experts from the CFLCC Staff Judge Advocate's office, and a psychiatrist. *Id.* at 7, 13; ECF No. 1623 (Apr. 16, 2024 Morning Trial Tr.) 81:11-82:21.

---

[1] Plaintiffs have described the reports by Major General Taguba and Major General Fay at length in prior briefing. *See* ECF No. 1013 at 3-7; ECF No. 1080 at 2-3, 5-6. Plaintiffs repeat much of that background here for the Court's benefit because it illustrates that the reports are both reliable and relevant.

[2] Exhibit A attached hereto is the redacted version of MG Taguba's report that the Court admitted at the April 2024 trial, PTX-137. Page numbers throughout this brief refer to the trial exhibit page number at the very bottom of each page.

MG Taguba personally spent approximately three weeks at Abu Ghraib. *Id.* at 83:3-5. He and his team reviewed in detail the results of a prior investigation conducted by the Army's Criminal Investigation Division, including by analyzing approximately fifty witness statements, numerous photos and videos of detainee abuse, and other documents memorializing internal investigations and disciplinary actions at Abu Ghraib. Faridi Decl., Ex. A at 12-13; ECF No. 1623 (Apr. 16, 2024 Morning Trial Tr.) 83:17-85:20. MG Taguba and his team also personally interviewed forty-eight witnesses from Abu Ghraib, including both military police ("MP") and military intelligence ("MI") personnel. ECF No. 1013-2 at 50-52. Those witnesses included CACI interrogator Steve Stefanowicz, whom MG Taguba personally interviewed for at least an hour. ECF No. 1623 (Apr. 16, 2024 Afternoon Trial Tr.) 10:1-14.

B. Factual Findings in MG Taguba's Report

After completing his investigation, MG Taguba issued a report in which he found that "between October and December 2003, at the Abu Ghraib Confinement Facility (BCCF), numerous incidents of sadistic, blatant, and wanton criminal abuses were inflicted on several detainees." Faridi Decl., Ex. A at 16. Specifically, MG Taguba found that the following incidents of abuse occurred:

- "Punching, slapping, and kicking detainees; jumping on their naked feet;"
- "Videotaping and photographing naked male and female detainees;"
- "Forcibly arranging detainees in various sexually explicit positions for photographing;"
- "Forcing detainees to remove their clothing and keeping them naked for several days;"
- "Forcing naked male detainees to wear women's underwear;"
- "Forcing groups of male detainees to masturbate themselves while being photographed and videotaped;"
- "Arranging naked male detainees in a pile and then jumping on them;"

- "Placing a dog chain or strap around a naked detainee's neck and having a female soldier pose for a picture;"
- "Using military working dogs (without muzzles) to intimidate and frighten detainees, and in at least one case [the dog] biting and severely injuring a detainee."

Id. at 16-17. MG Taguba also found credible allegations by detainees that they had cold water poured on them, that they were threatened with rape, and that they were sodomized with a chemical light and perhaps a broom stick. *Id.* at 17-18. Additionally, MG Taguba expressly stated that he found a statement from Plaintiff Asa'ad Al-Zuba'e credible. *Id.* at 18 (identifying detainee #152529, who was Al-Zuba'e). The forms of abuse detailed in the Taguba report are similar to the abuses that Plaintiffs suffered. ECF No. 1631 (Apr. 15, 2024 Afternoon Trial Tr.) 35:12-51:22; ECF No. 1623 (Apr. 16, 2024 Morning Trial Tr.) 8:15-34:3; ECF No. 1624 (Apr. 17, 2024 Morning Trial Tr.) 14:18-25:3.

Further, MG Taguba found that MI interrogators, including CACI interrogators, "actively requested that MP guards set physical and mental conditions for favorable interrogation of witnesses." Faridi Decl., Ex. A at 18. In particular, MG Taguba concluded that Stefanowicz "[a]llowed and/or instructed MPs … to facilitate interrogations by 'setting conditions' which were neither authorized [nor] in accordance with applicable regulations/policy. He clearly knew his instructions equated to physical abuse."[3] *Id.* at 48. MG Taguba also found that Stefanowicz "[m]ade a false statement to [MG Taguba's] investigation team regarding the locations of his interrogations, the activities during his interrogations, and his knowledge of abuses." *Id.*

---

[3] Contrary to CACI's claim in its brief, MG Taguba's report did not refer to these statements about Stefanowicz as "suspicions." ECF No. 1672 at 4. The report refers to these statements as "findings." Faridi Decl., Ex. A at 48; *see also CACI Premier Tech., Inc. v. Rhodes*, 536 F.3d 280, 297 (4th Cir. 2008) ("The Taguba report went beyond suspicion to find that Ste[f]anowicz was responsible for abuse…").

Additionally, MG Taguba found that, "[i]n general … US Civilian contract personnel," including CACI, were not "properly supervised within the detention facility at Abu Ghraib" and "wandered about with too much unsupervised free access in the detainee area." *Id.* at 26. And MG Taguba found that there was "no clear delineation of responsibility between [MI and MP] commands, little coordination at the command level, and no integration of the two functions," creating an "ambiguous command relationship." *Id.* at 38. This allowed "[c]oordination [to] occur[] at the lowest possible levels with little oversight by commanders," which was a contributing factor in enabling detainee abuse. *Id.*

Importantly, once complete, MG Taguba's report was reviewed by a Deputy Staff Judge Advocate, who found the report to be "legally sufficient" and to "conform[] with the appointment memorandum." ECF No. 1078-3 at AS-USA-00739. The Judge Advocate found that the investigation "compl[ied] with legal requirements," provided "[s]ufficient evidence [to] support[] the findings of the investigating officer," and provided "recommendations . . . consistent with the findings." *Id.*

In his April 2024 trial testimony, MG Taguba reaffirmed his findings. ECF No. 1623 (Apr. 16, 2024 Morning Trial Tr.) 86:16-19; 94:10-95:12; 95:13-96:8; ECF No. 1632 (Apr. 16, 2024 Afternoon Trial Tr.) 7:19-8:25; 12:2-13:6. CACI had the opportunity to cross-examine MG Taguba about his investigation and report. *Id.* at 18:1-31:18.

III. MAJOR GENERAL FAY'S REPORT

In March 2004, Lieutenant General Ricardo S. Sanchez appointed MG George R. Fay "to investigate allegations that members of the 205th Military Intelligence Brigade [in which CACI interrogators were employed] were involved in detainee abuse at the Abu Ghraib Detention

Facility." Faridi Decl., Ex. B at 2.[4] MG Fay, too, followed an exhaustive and thorough process in reaching his conclusions.

A. MG Fay's Investigation

MG Fay's investigative team consisted of 26 individuals, including investigators, analysts, subject matter experts, and legal advisors. ECF No. 1591, Ex. B (MG Fay Dep. Tr.) 25:12-21. Building off MG Taguba's work, MG Fay's team reviewed more than 9,000 documents and interviewed 173 personnel, including CACI interrogators Steve Stefanowicz, Timothy Dugan, and Daniel Johnson. *Id.* 25:2-15, 26:24-27:11; Faridi Decl., Ex. C at 1-4.

B. Factual Findings in MG Fay's Report

After concluding his investigation, MG Fay issued a report finding that "abuses occurred at the prison at Abu Ghraib," with abuse "defined as treatment of detainees that violated U.S. criminal law or international law or treatment that was inhumane or coercive without lawful justification." Faridi Decl., Ex. B at 3-4. According to MG Fay, among the "primary causes" of the abuse was "misconduct (ranging from inhumane to sadistic) by a small group of morally corrupt soldiers ***and civilians***." *Id.* at 3 (emphasis added). These civilians included CACI, as MG Fay confirmed in his *de bene esse* deposition. ECF No. 1591, Ex. B (MG Fay Dep. Tr.) 19:22-20:02. MG Fay also found in his report that 27 MI personnel "requested, encouraged, condoned or solicited [military police personnel] to abuse detainees and/or participated in detainee abuse and/or violated established interrogation procedures and applicable laws and regulations during interrogation operations at Abu Ghraib," and that "[m]ost … of the violent or sexual abuse occurred separately from scheduled interrogations." Faridi Decl., Ex. B at 4. In

[4] Exhibit C (PTX-023) attached hereto is the redacted version of MG Fay's report that the Court admitted into evidence at the April trial.

MG Fay's words, "MI solicitation of MP abuse included the use of isolation with sensory deprivation, removal of clothing and humiliation, the use of dogs as an interrogation tool to induce fear, and physical abuse." *Id.* at 41. MG Fay detailed various other incidents of abuse in his report.[5] *Id.* at 102-05, 108-09, 111-13, 116, 118, 120-121, 123, 125. Furthermore, MG Fay found that the MI and MP leaders "failed to execute their assigned responsibilities," "failed to supervise subordinates or provide direct oversight," "failed to properly discipline their Soldiers," and "failed to provide continued mission-specific training." *Id.* at 4-5.

MG Fay made a number of findings with regard to CACI specifically. He found that "[i]ntegration of some contractors [i.e., CACI] without training, qualifications, and certification created ineffective interrogation teams and the potential for non-compliance with doctrine and applicable laws." *Id.* at 24. MG Fay also concluded that, "under the CACI contract [with the Army], no one was monitoring [CACI]'s decisions" as to what prior training on the Geneva Conventions was sufficient for CACI interrogators. *Id.* at 85.

Ultimately, MG Fay concluded that CACI interrogators Steve Stefanowicz, Tim Dugan, and Daniel Johnson were among the individuals who "have some degree of responsibility or complicity in the abuses that occurred at Abu Ghraib. " *Id.* at 41-42; *see also id.* at 164-66, 168 (factual findings regarding these three individuals). In MG Fay's words, a "preponderance of evidence supports that" these CACI employees committed abusive acts against detainees. *Id.* at 164-66, 168. Specifically, MG Fay found that Stefanowicz used a dog during an interrogation and lied to investigators about doing so, kicked a detainee into a cell, bragged to several people

[5] As with MG Taguba's report, the types of abuse described by MG Fay are consistent with the abuses that were inflicted on Plaintiffs. ECF No. 1631 (Apr. 15, 2024 Afternoon Trial Tr.) 35:12-51:22; ECF No. 1623 (Apr. 16, 2024 Morning Trial Tr.) 8:15-34:3; ECF No. 1624 (Apr. 17, 2024 Morning Trial Tr.) 14:20-25:3.

that he had shaved the hair and beard of a detainee and put him in red women's underwear, and failed to report a detainee's allegation that an interpreter assaulted him. *Id.* at 168. MG Fay further found that Johnson encouraged Sergeant Ivan Frederick to physically abuse detainees, that Johnson threatened a detainee with a dog, that Johnson placed a detainee in an unauthorized stress position, and that Dugan threw a handcuffed detainee off a vehicle and dragged him into an interrogation booth. *Id.* at 164-166.

MG Fay testified about his findings before the United States Senate Armed Services Committee in September 2004.[6] MG Fay then reaffirmed his findings in his March 2024 *de bene esse deposition*. ECF No. 1591, Ex. B (MG Fay Dep. Tr.) 62:2-64:12; 81:19-83:10; 87:7-88:9; 94:3-19; 108:6-109:4; 123:3-9; 130:5-132:18. CACI also had the opportunity to cross-examine him. *Id.* at 147:11-148:11.

IV. THE COURT'S ADMISSION OF EXCERPTS FROM THE TAGUBA AND FAY REPORTS AT THE APRIL 2024 TRIAL

In November 2018, CACI moved to exclude the Taguba and Fay reports in their entirety, making the same hearsay and relevance objections that they assert now. ECF No. 995. The Court denied this motion. *See* ECF No. 1026. At the motion hearing, the Court noted that "some of the statements [in the reports] clearly would be relevant" and stated that the Court would likely admit report excerpts "where there would not be an inappropriate hearsay problem" and "where there's sufficient indicia of reliability." ECF No. 1092 (Dec. 10, 2018 Hr'g Tr.) 15:25-16:4.

[6] *Prisoner Abuse Investigations,* C-SPAN (Sept. 9, 2024), https://www.c-span.org/video/?183428-1/prisoner-abuse-investigations.

Per the Court's directive, Plaintiffs then submitted the specific excerpts that they sought to have admitted. ECF No. 1078 *et seq*. CACI opposed this motion in its entirety, repeating the same hearsay and relevance objections and insisting that no excerpts from the reports should be admitted whatsoever. ECF No. 1105. At the hearing on Plaintiffs' motion, the Court stated, "I've already ruled that portions of those reports are appropriate, and I am going to let them in," and that "the blanket opposition to anything from those reports coming in is overruled." ECF No. 1460 (Dec. 15, 2023 Hr'g Tr.) 21:19-20, 22:6-7. The Court further stated:

> [t]here clearly are passages in those reports that are relevant, that are reliable, and that would be admissible under some of the exceptions under the rules of evidence. It's an official government report. There certainly are indicia of reliability, and so I'm not going to hear a lot of argument about that. I just need to tell you which ones I'm going to allow in.

Id. at 22:12-18. The Court then admitted some of the excerpts that Plaintiffs submitted—only excluding excerpts that the Court deemed were "cumulative," *id.* at 21:22—and those excerpts were introduced at trial through the testimony of MG Taguba and MG Fay. ECF No. 1591, Ex. B (MG Fay Dep. Tr.) 20:3-23:21; ECF No. 1623 (Apr. 16, 2024 Morning Trial Tr.) 77:1-78:3; *see* Faridi Decl., Exs. A, B (the excerpts admitted by the Court).

ARGUMENT

CACI rehashes the same misplaced hearsay and relevance objections that the Court has carefully considered and rejected twice. Plaintiffs respectfully submit that the Court should reject these retread objections again.

I. THE TAGUBA AND FAY REPORT EXCERPTS OFFERED BY PLAINTIFFS ARE ADMISSIBLE UNDER RULE 803(8)(A)(III)

Under Federal Rule of Evidence 803(8)(A)(iii), the Taguba and Fay reports, as factual findings from investigations authorized and conducted by the Executive Branch, are

presumptively admissible unless the opposing party can show sufficient indicia of untrustworthiness. *Kennedy v. Joy Techs., Inc.*, 269 Fed. App'x 302, 310 (4th Cir. 2008) (emphasizing the "presumption of admissibility" created by Rule 803(8) and reversing a district court that failed to apply that presumption); *see also Ellis v. Int'l Playtex, Inc.*, 745 F.2d 292, 305 (4th Cir. 1984) (reversing a district court that had excluded reports that were admissible under Rule 803(8)). Under the Federal Rules of Evidence and this Circuit's long-standing precedent, the party opposing admission bears the burden of proving that the reports "indicate a lack of trustworthiness." Fed. R. Evid. 803(8)(B); *see Kennedy*, 269 Fed. App'x at 310 ("[T]he party opposing the admission of such a report bears the burden of establishing its unreliability.") CACI does not come close to meeting its burden because its two arguments about Rule 803(8)(A)(iii) lack any support in the law.

A. Rule 803(8) Does Not Require the Report Author to Have Personal Knowledge of the Events Underlying Their Factual Findings

CACI's first argument is that only statements within a government report that are based on the report author's personal knowledge of the underlying events are admissible under Rule 803(8). ECF No. 1672 at 6-9. CACI is dead wrong. By black-letter law, the report author's personal knowledge of the underlying events is *not* required for admission under Rule 803(8)(A)(iii). 5 Weinstein's Federal Evidence ("Weinstein") § 803.10(4)(a) ("Even if the official does not have firsthand knowledge and the information does not satisfy some other hearsay exception, admission of the report and its conclusions may still be warranted . . . ."). As a result, courts routinely admit reports that are based solely on witness interviews, documents, pictures, and/or videos. *E.g.*, *Chavez v. Carranza*, 559 F.3d 486, 496 (6th Cir. 2009) (in action brought by torture victims and their families against a Salvadoran military officer, court admitted

U.N. Commissions' report on its investigation in El Salvador despite the report being based solely on interviews with witnesses, victims, and relatives and a review of complaints of acts of violence); *Combs v. Wilkinson*, 315 F.3d 548, 554-55 (6th Cir. 2002) (investigative report based on interviews and documents—and no personal knowledge—regarding a prison disturbance is presumptively admissible); *United States v. AT&T*, 498 F. Supp. 353, 364 (D.D.C. 1980) (author of report need not have firsthand knowledge of facts upon which findings are based because "multiple hearsay issue is reducible to one of the trustworthiness of the factual findings").

If CACI were right that only findings based on an investigator's personal knowledge of the underlying events are admissible, then it would be difficult to conceive of any investigative report conducted after the events in question that would be admissible under Rule 803(8). But the opposite is true: courts routinely find that investigative reports of this nature are admissible. In this very case, the Fourth Circuit has observed (referring explicitly to the Taguba and Fay reports) that "[g]enerally, investigative government reports of this nature are admissible as an exception to the rule against hearsay under Federal Rule of Evidence 803(8)(A)(iii)." *Al Shimari v. CACI Premier Tech., Inc.*, 840 F.3d 147, 156 n.4 (4th Cir. 2016); *see also Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 156 (1988) (report from Navy officer's investigation); *Kennedy*, 269 Fed. App'x at 310 (Mine Safety and Health Administration report investigating a mining accident); *Bridgeway Corp. v. Citibank*, 201 F.3d 134, 143 (2d Cir. 2000) (State Department report); *Diaz v. United States*, 655 F. Supp. 411, 415–17 (E.D. Va. 1987) (Navy officer's investigative report consisting of summaries of interviews with witnesses and parties admissible); *cf. Chavez*, 559 F.3d at 496 (U.N. Commission public report of investigation in El Salvador).

Contrary to CACI's argument, it does not matter that the MG Taguba and MG Fay teams were not "present at Abu Ghraib when abuse occurred." ECF No. 1672 at 6. Rule 803(8)(a)(iii) does not require that. Nor would such a requirement make sense, as "legally authorized investigations" typically occur after the events in question took place.

The cases that CACI cites do not hold to the contrary; in fact, they support Plaintiffs' position. In *Jordan v. Binns*, 712 F.3d 1123 (7th Cir. 2013), the Seventh Circuit expressly rejected CACI's argument by noting that a police report would "not be excluded merely because its author does not have firsthand knowledge of the reported matters." *Id.* at 1133. In fact, CACI mischaracterizes *Jordan*. The *Jordan* court did not exclude the factual findings in a police report that were "based on statements made to investigators," as CACI represents in its brief. ECF No. 1672 at 6. Rather, the court excluded "third-party statements contained in a police report," 712 F.3d at 1133, which are analogous to the witness statements that MG Taguba and MG Fay reviewed. Plaintiffs do not seek admission of those witness statements. Plaintiffs only seek admission of the Generals' factual findings and conclusions that the Court admitted at the first trial, which are equivalent to the police report findings that the Seventh Circuit deemed admissible in *Binn*.

Similarly, in *Miller v. Field*, the Sixth Circuit acknowledged that "factual findings" in a police report are admissible, including findings based on witness interviews (i.e., where the report author did not personally witness the events in question). 35 F.3d 1088, 1091 (6th Cir. 1994). The court held that police reports that were merely "a recitation of statements of other individuals" were inadmissible hearsay. *Id.* at 1092. Again, that ruling comports with this Court's admission of the Taguba and Fay reports' factual findings, and the Court's exclusion of the witness statements referred to in those reports. The same is true of *Sanders v. Sky Transp.*

LLC, 569 F. Supp. 3d 455, 458-59 (E.D. Tex. 2021). When that decision refers to the "reporting officer's personal knowledge," it means that the officer's statements must be "based on their investigations and experience," not that the officer was required to personally witness the events that they investigated. *Id.* And the statements in *Gilbert v. Gulf Oil Corp.*, 175 F.2d 705, 710 (4th Cir. 1949) about an investigator's opinions and conclusions have been overruled by *Beech Aircraft Corp.*, the seminal case holding that Rule 803(8)(A)(iii) "extends to conclusions and opinions contained in [investigative] reports," 488 U.S. at 156. Moreover, *Gilbert* is inapposite because the document at issue was a letter, not a report made pursuant to legal authorization. *See* 175 F.2d at 710. The remaining cases that CACI lists in a string cite do not support CACI's invented, categorical "personal knowledge" requirement either. *See* ECF No. 1672 at 8. These cases either repeat the uncontested principle that third-party statements contained in government reports are hearsay, or they engage in a fact-specific analysis of a report's trustworthiness based on the quality of the underlying investigation.

B. The Taguba and Fay Reports Are Sufficiently Trustworthy to Be Presented to a Jury

CACI's other, half-hearted argument about Rule 803(8) is that the Taguba and Fay reports are untrustworthy because their factual findings are based in part on witness statements. *Id.* at 9-10. Again, CACI is wrong, as this Court recognized when it found the reports had "indicia of reliability." ECF No. 1460 (Dec. 15, 2023 Hr'g Tr.) 22:16.

"When the trustworthiness of … an investigative report has been challenged, a court should assess and weigh factors such as: (1) the timeliness of the investigation; (2) the special skill or experience of the investigators; and (3) any possible motivation problems." *Kennedy*, 269 Fed. App'x at 309 (citing *Ellis*, 745 F.2d at 300-01). Other factors indicating

untrustworthiness are "unreliability, inadequate investigation, inadequate foundation for conclusions, [and] invasion of the jury's province." *Id.* (quoting *Distaff, Inc. v. Springfield Contracting Corp.*, 984 F.2d 108, 111 (4th Cir. 1993). Considering these factors, the Taguba and Fay reports are plainly trustworthy, as the Court previously held.

The Taguba and Fay investigations were timely: the Taguba investigation was conducted less than a month after the Army discovered detainee abuse at Abu Ghraib, and the Fay investigation was conducted shortly thereafter. *See, e.g.*, *Beech Aircraft*, 488 U.S. at 157 (report admitted when investigation commenced six weeks after airplane crash); *Ellis*, 745 F.2d at 303 (report admitted when investigation began "several months" after outbreak of toxic shock syndrome). MG Taguba and MG Fay were each assisted by large teams of subject-matter experts. *Compare Ellis*, 745 F.2d at 299-300 (admitting report from investigation done by team of experts), and *Kennedy*, 269 Fed. App'x at 305 (same), *with Diaz*, 655 F. Supp. at 416 (excluding report by individual without any relevant investigative skills). The Generals' investigations followed standard military procedure[7] and were conducted with impartiality and thoroughness. MG Taguba and MG Fay are not affiliated with either party in this case, and were appointed in part so they could act as outside observers as they had not been stationed in Iraq.[8]

---

[7] Army Regulation 15-6: Procedures for Administrative Investigations and Boards of Officers lists the primary duties of an investigating officer in an AR 15-6 investigation as: (1) to ascertain and consider the evidence on all sides of an issue; (2) to be thorough and impartial; (3) to make findings and recommendations warranted by the evidence; and (4) to report the findings and recommendations to the approval authority. ECF No. 1013-7 at 45.

[8] AR 15-6 specifies that the appointing authority should pick an investigating officer believed to be "best qualified for the duty by reason of their education, training, experience, length of service, demonstrated sound judgment and temperament" and that the investigating officer "must be impartial, unbiased, objective, and have the ability to complete the investigation in a timely manner." ECF No. 1013-7 at 13.

Compare Diaz, 655 F. Supp. at 416–17 (admitting report because it was a routinely prepared "candid recitation of the facts"), *with Jenkins v. McCoy*, No. 93-cv-6919, 1994 U.S. App. LEXIS 25531, at *3-7 (4th Cir. 1994) (excluding report prepared by codefendant because of lack of impartiality). Both reports contain detailed, extensive factual findings, and MG Fay's team reviewed more than 9,000 documents and interviewed 173 individuals, while MG Taguba's team interviewed forty-eight individuals and reviewed hundreds of documents and approximately fifty witness statements. *See supra* Background II-III. For all of these reasons, the Fourth Circuit deemed the Taguba and Fay reports to be "reliable sources" in CACI's failed defamation suit against a radio host who made public statements based in part on the reports. *CACI Premier Tech. Inc. v. Rhodes*, 536 F.3d 280, 297 (4th Cir. 2008); *see also id.* at 300 ("There is no evidence to suggest that [the Taguba report] provided unreliable information…"). The United States Senate Armed Services Committee also frequently cited the Taguba and Fay reports in its report on its inquiry into the treatment of detainees in U.S. custody. *Inquiry into the Treatment of Detainees in U.S. Custody*, United States Senate Committee on Armed Services (Nov. 20, 2008), https://www.armed-services.senate.gov/imo/media/doc/Detainee-Report-Final_April-22-2009.pdf.

And the Taguba and Fay reports will not invade the jury's province because they do not opine on the merits of Plaintiffs' claims specifically and because the jury's role is safeguarded by CACI's ability to introduce contradictory evidence and by the Court's ability to give curative jury instructions (such as not to treat a report's conclusions as dispositive). *See Zeus Enters. v. Alphin Aircraft, Inc.*, 190 F.3d 238, 243 (4th Cir. 1999) (upholding admission of ALJ decision because the opposing party was able to introduce evidence to contradict the ALJ's findings and the jury had been instructed that the ALJ's decision was not dispositive).

None of the reports at issue in the cases cited by CACI are like the Taguba and Fay reports. In *Gross v. King David Bistro Inc.*, the district court excluded conclusions in a state health department report about who contaminated tuna salad that were heavily qualified and based almost entirely on biased accounts from party hosts who claimed they did not touch the food in question. 84 F. Supp. 2d 675, 678 (D. Md. 2000). The report authors hedged their conclusion by saying that "the source of contamination cannot be clearly determined" and that "we have to go on the honestly [sic] of the people that report this information." *Id.* (citations omitted). That is a far cry from the Taguba and Fay reports, which had no such equivocations and considered accounts from numerous and varied witnesses, along with extensive documentary evidence. *Miller v. Caterpillar Tractor Co.* is distinguishable because, in that case, the report author "was not facially qualified to render opinions and conclusions relating to mechanical operations and/or failures." 697 F.2d 141, 144 (6th Cir. 1983). CACI does not even bother arguing that MG Taguba, MG Fay, and their investigative teams were unqualified. And finally, CACI cites a portion of Wright & Miller's treatise stating that reports may be excluded when they "merely relate hearsay statements made to the investigator by others." ECF No. 1672 at 10. But the Taguba and Fay report excerpts admitted by this Court do not do that: they contain MG Taguba and MG Fay's factual findings, which are supported by extensive interviews, witness statements, and documentary and photographic evidence.

II. THE TAGUBA AND FAY REPORT EXCERPTS ARE HIGHLY RELEVANT AND DO NOT UNFAIRLY PREJUDICE CACI

CACI's Rule 401 and 403 arguments fare no better. As the Court previously recognized, the Taguba and Fay reports are "clearly … relevant" because they corroborate Plaintiffs' conspiracy and aiding-and-abetting claims. ECF No. 1460 (Dec. 15, 2023 Hr'g Tr.) 22:12-16.

And the excerpts are not unfairly prejudicial to CACI because they do not suggest that the jury decide this case on any improper basis.

A. The Taguba and Fay Reports Are Relevant to Plaintiffs' Conspiracy and Aiding-and-Abetting Claims

The Taguba and Fay reports easily meet the threshold for relevance. MG Taguba and MG Fay found the existence of a command vacuum at Abu Ghraib and illustrated how that command vacuum contributed to MI personnel, including CACI, conspiring with and aiding and abetting MPs to "set conditions" for interrogations. For example, MG Taguba found that there was no clear chain of command and that "US civilian contract personnel . . . d[id] not appear to be properly supervised within the detention facility," which contributed to the command vacuum. Faridi Decl., Ex. A at 26. The Taguba report also found that "interrogators actively requested that MP guards set physical and mental conditions for favorable interrogation of witnesses." *Id.* at 18. And MG Taguba further found that Steve Stefanowicz "instructed MPs . . . to facilitate interrogations by 'setting conditions' which were neither authorized [nor] in accordance with applicable regulations/policy," and that "[h]e clearly knew his instructions equated to physical abuse." *Id.* at 48.

For its part, the Fay report also found that a lack of supervision and of clear delineations of command led to a command vacuum problem, which in turn led to interrogators requesting and condoning MPs setting conditions for interrogations through abuse. Regarding Stefanowicz, MG Fay found that he "[i]nappropriate[ly] use[d] dogs," engaged in "[d]etainee abuse," [m]a[de] false statements," "[f]ailed to report detainee abuse," and engaged in "[d]etainee humiliation" including shaving detainees facial hair and putting male detainees in female underwear. Faridi Decl., Ex. B at 168. Thus, both reports evidence CACI's substantial involvement in abuse at

Abu Ghraib and describe the conditions at Abu Ghraib that led to the abuse and conspiracy among MI and MPs.

CACI's counterarguments are misplaced. They first contend that MG Taguba's report merely states his "unsubstantiated suspicion" that Stefanowicz enabled MPs to set conditions for detainees. ECF No. 1672 at 11. That is false: MG Taguba's report is clear that MG Taguba made specific and unequivocal "findings" about Stefanowicz. The report recommends:

> That Mr. Steven Ste[f]anowicz . . . be given an Official Reprimand to be placed in his employment file, termination of employment, and generation of a derogatory report to revoke his security clearance for the following acts which have been previously referred to in the aforementioned *findings*:
>
> • Made a false statement to the investigation team regarding the locations of his interrogations, the activities during his interrogations, and his knowledge of abuses.
>
> • Allowed and/or instructed MPs, who were not trained in interrogation techniques, to facilitate interrogations by "setting conditions" which were neither authorized and in accordance with applicable regulations/policy. He clearly knew his instructions equated to physical abuse.

Faridi Decl., Ex. A at 48. MG Taguba reaffirmed this conclusion at his deposition, ECF No. 1013, Ex. C at 149:5-150:4; *see also id.* at 130:21–132:17, and again in his trial testimony, ECF No. 1632 (Apr. 16, 2024 Afternoon Trial Tr.) 11:9-16:20. Nowhere in the report or his trial testimony does MG Taguba say these were mere "suspicions." CACI conflates this conclusion with MG Taguba's *second* recommendation regarding Stefanowicz, which was that a separate investigation (like the one that MG Fay eventually undertook) was warranted to look into whether Stefanowicz and three others "were either directly or indirectly responsible for the abuses at Abu Ghraib." Faridi Decl., Ex. A at 48. This recommendation is separate from the detailed findings about Stefanowicz quoted above, which were part of a section listing detailed

findings about several specific individuals. *Id.* at 45-48. Indeed, the Fourth Circuit recognized this in CACI's failed defamation suit, stating that "[t]he Taguba report went beyond suspicion to *find* that Ste[f]anowicz was responsible for abuse…." *CACI Premier Technology*, 536 F.3d at 297 (emphasis in original). In any event, even if it were true that the Taguba report contained only MG Taguba's "suspicions" related to CACI personnel (which it is not), the Supreme Court has held that reports containing hypotheses of "possible set of events" are admissible. *Beech Aircraft Corp.*, 488 U.S. at 156-58.

CACI next argues that findings in the Taguba and Fay reports regarding abuse against other detainees and Stefanowicz's role in that abuse are irrelevant to Plaintiffs' claims. ECF No. 1672 at 12-13. The Court has rejected this argument time and time again. *See* ECF No. 94 at 65-68; ECF No. 679 at 38-40; *see also* ECF No. 1143 (denying CACI's summary judgment motion that made this argument). As the Court instructed the jury at the April trial, Plaintiffs' conspiracy claims require proof that CACI entered into an agreement to inflict torture or CIDT on detainees at Abu Ghraib—not against Plaintiffs specifically. ECF No. 1626 (Apr. 22, 2024 Trial Tr.) 100:13-101:4. Proof that CACI employees played a role in the abuse of other detainees is therefore highly relevant. The antitrust cases that CACI cites are inapposite: they state only that parallel (and otherwise lawful) behavior between different actors does not prove an illegal agreement. ECF No. 1672 at 13 (citing, *inter alia*, *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556-57 (2007)). In contrast, the Taguba and Fay reports show direct coordination between CACI employees and other actors to engage in unquestionably illegal behavior, i.e., abusing detainees at the Abu Ghraib hard site in ways similar to how Plaintiffs were abused. *See* ECF No. 1649 at 10 n.6 (explaining in greater detail why CACI's parallel conduct argument is misplaced).

Finally, CACI contends that the Fay report is an "explicit rejection" of Plaintiffs' claims because the report states that the abuses at Abu Ghraib were "carried out by a small group of morally corrupt and unsupervised Soldiers *and civilians*." ECF No. 1672 at 13-14 (emphasis added). But this finding does not reject Plaintiffs' claims. Rather, it supports them: CACI interrogators were among the "small group of morally corrupt … civilians." Contrary to CACI's suggestion, Plaintiffs need not prove "a systematic US approach to torture or approved treatment of detainees" to succeed on their claims against CACI. ECF No. 1672 at 13-14.

B. The Taguba and Fay Reports Do Not Unfairly Prejudice CACI Because They Do Not Suggest That the Jury Decide This Case on an Improper Basis

CACI's final argument is that the Court should exclude the Taguba and Fay reports under Federal Rule of Evidence 403. Rule 403 permits the exclusion of relevant evidence "if its probative value is *substantially* outweighed by a danger of . . . *unfair* prejudice." Fed. R. Evid. 403 (emphasis added). Unfair prejudice means an "undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one." Federal Rule of Evidence 403, Advisory Committee Note.

CACI fails to identify any "improper basis" upon which the reports suggest the jury base its decision. CACI contends that evidence of wrongful conduct toward other detainees that is detailed in the Taguba and Fay reports somehow unfairly prejudices CACI by allowing the jury to infer that similar wrongful conduct occurred to Plaintiffs. ECF No. 1672 at 14-15. There is nothing unfair about that: the Taguba and Fay reports corroborate Plaintiffs' testimony that they suffered abuse. CACI further complains that Plaintiffs suggest that CACI employees played a role in the abuses described in the reports—but that is exactly what the reports conclude, and such evidence is highly relevant evidence as to Plaintiff's conspiracy and aiding-and-abetting

claims. There is nothing unfairly prejudicial about Plaintiffs accurately characterizing relevant evidence.

Additionally, CACI repeats its frequent complaint that the government's state-secrets assertions impair CACI's ability to present evidence contradicting the reports. But, as the Court has recognized, the state-secrets assertions affected both parties. ECF No. 1626 (Apr. 22, 2024 Trial Tr.) 6:13-22, 85:4-11. Plaintiffs were denied the opportunity to ask certain questions of the pseudonymous witnesses, just as CACI was. Taken together, the Taguba and Fay reports and the government's state-secrets assertions do not suggest that the jury should decide the case on an improper basis.

In passing, CACI complains that Plaintiffs said in their closing argument that the Taguba and Fay reports found "violat[ions] of U.S. criminal or international law." ECF No. 1672 at 14-15. CACI analogizes the violations detailed in the Taguba and Fay reports to proof of other unrelated crimes, which are generally inadmissible in criminal cases. *Id.* That analogy is off base. The instances of abuse described by the Taguba and Fay reports are at the core of this case: they are proof that CACI participated in a conspiracy to abuse detainees and aided and abetted that abuse, and they corroborate Plaintiffs' testimony that they were abused as a result of that very conspiracy and CACI's aiding-and-abetting of abuse.[9]

Finally, CACI urges that the Taguba and Fay reports should be "accompanied by admission of other government reports reaching contrary conclusions," like Vice Admiral Church's report. *See* ECF No. 1672 at 15 (citing ECF No. 1672-5 at 17.) Vice Admiral

[9] Additionally, CACI did not object to MG Fay's trial testimony that, to determine what constituted abuse, he considered whether an activity violated U.S. criminal or international law. ECF No. 1591, Ex. B (MG Fay Dep. Tr.) at 29:24-30:06. CACI thereby waived any objection to such testimony, as well as any objection to Plaintiffs referring to this testimony in their closing.

Church's report does not focus on Abu Ghraib and, therefore, its relevance is dubious. And more importantly, it did not reach a "contrary conclusion": it actually acknowledges the "involvement of some contractors [i.e., CACI] in abuse at Abu Ghraib." *See* ECF No. 1672-5 at 17. That Vice Admiral Church found few *other* instances of abuse involving contractors elsewhere in Iraq and Afghanistan does not contradict MG Taguba and MG Fay's findings about the events at Abu Ghraib. Moreover, Vice Admiral Church's finding that civilian contract interrogators "made a significant contribution to U.S. intelligence efforts" does not rebut MG Taguba and MG Fay's findings about the detainee abuse that undisputedly occurred at Abu Ghraib. ECF No. 1672 at 15. That finding is also irrelevant in this case because the jury is not being asked to decide the extent to which civilian interrogators contributed to U.S. intelligence efforts and because obtaining intelligence does not justify torturing detainees. In any event, if CACI truly felt that Vice Admiral Church's report contradicted MG Taguba and MG Fay's findings, CACI was free to seek admission of that report under Rule 803(8), but CACI has never done so. That gives CACI's game away: CACI knows that the Church report is irrelevant and CACI only mentions that report now to manufacture an issue about the need for "collateral litigation over which investigation reports are better." ECF No. 1672 at 15.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court deny CACI's motion *in limine* to exclude the passages from the Taguba and Fay reports that the Court admitted at the April 2024 trial.

Dated: September 20, 2024

Respectfully submitted,

<u>/s/ Charles B. Molster, III</u>

Charles B. Molster, III, Va. Bar No. 23613
Law Offices of Charles B. Molster, III PLLC
2141 Wisconsin Avenue, N.W., Suite M
Washington, D.C. 20007
(703) 346-1505
cmolster@molsterlaw.com

Muhammad U. Faridi, *Admitted pro hac vice*
PATTERSON BELKNAP WEBB & TYLER LLP
1133 Avenue of the Americas
New York, NY 10036

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

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

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on September 20, 2024, I electronically filed the foregoing, which sends notification to counsel for Defendants.

/s/ Charles B. Molster, III
Charles B. Molster, III