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

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

PLAINTIFFS' REPLY MEMORANDUM IN SUPPORT OF THEIR MOTION *IN LIMINE* TO PERMIT ADMISSION OF STATEMENTS OF CACI PERSONNEL PURSUANT TO FED. R. EVID. 801(d)(2)(D)

In its opposition, CACI tellingly has abandoned the earlier arguments that it used to successfully exclude Torin Nelson's testimony at the April trial about statements made by CACI's former employees Tim Dugan and Steve Stefanowicz—*i.e.*, that the statements at issue were made by "low-level" employees—because they were without merit. In fact, the admissibility of the statements does not turn on where the CACI employees fell within the corporate hierarchy.

CACI now offers a new theory to attempt to exclude this evidence under Federal Rule of Evidence 801(d)(2)(D). But the Rule is straightforward and does not support CACI's argument. The Rule provides that statements are "not hearsay" when they are "offered against an opposing party" and were "made by the party's agent or employee on a matter within the scope of that relationship and while it existed." Fed. R. Evid. 801(d)(2)(D). The statements that Plaintiffs seek to elicit from Nelson at trial squarely satisfy these requirements. The statements will be

offered against an opposing party (CACI); were made by CACI employees (Dugan and Stefanowicz); were about the precise work that the employees were hired by CACI to perform (interrogations), and the statements were made during the time that the employees were employed by CACI and performing that work. Because the statements describe Dugan's and Stefanowicz's own involvement in the abuse, the statements constitute compelling evidence of CACI's participation in the conspiracy to abuse detainees at Abu Ghraib alleged by Plaintiffs, as well as CACI's aiding and abetting of such abuse. Contrary to CACI's assertion that it did not have notice of Nelson's statements, and thus that it was somehow deprived of the opportunity to address the statements at Stefanowicz's *de bene esse* deposition, CACI has known about the exact statements at issue for many years. Indeed, the statements were made by Nelson under oath nearly 20 years ago in another case against CACI, and in 2013 CACI stipulated to treat Nelson's testimony under oath in that case as if it was given in this case. Moreover, contrary to CACI's implication, there is no requirement in Fed. R. Evid. 801(d)(2)(D) that these statements be corroborated by independent evidence.

CACI provides a list of cases in which statements were excluded where the statements did not satisfy Rule 801(d)(2)(D), either because the statements were totally unrelated to the declarants' job responsibilities or because the declarants were not agents or employees of the opposing party. Because Dugan's and Stefanowicz's statements related to their job function as interrogators, and where Dugan and Stefanowicz were undisputedly CACI employees, those cases are inapposite.

CACI's opposition also offers a host of familiar distractions: resuscitation of arguments that have been repeatedly rejected by this Court about the admissibility of evidence of abuse inflicted upon detainees other than Plaintiffs; tangential questions and commentary about

the statements in question; and implausible contentions of prejudice. The Court should again reject those arguments.

Because the proffered testimony meets the requirements of Rule 801(d)(2)(D), and because the testimony is highly probative of CACI's involvement in the conspiracy to abuse detainees at Abu Ghraib, Plaintiffs respectfully request that their motion *in limine* be granted.

ARGUMENT

I. The Proffered Statements Are Non-Hearsay Opposing Party Statements Under Rule 801(d)(2)(D).

The statements that Plaintiffs seek to elicit fall squarely within the ambit of Rule 801(d)(2)(D). This Rule provides that a statement is not hearsay if it "is offered against an opposing party and … was made by the party's agent or employee on a matter within the scope of that relationship and while it existed." Fed. R. Evid. 801(d)(2)(D). These are the ***only*** requirements that the proponent need satisfy. It is not necessary to demonstrate that the declarant was authorized to make the statement at issue or that the statement was consistent with the employer's wishes or policies. *See United States v. McCabe*, 103 F.4th 259, 276 (4th Cir. 2024) (quoting *United States v. Poulin*, 461 F. App'x 272, 282 (4th Cir. 2012)). Unlike certain other hearsay exclusions and exceptions (e.g., the exception for statements against interest), admission of a statement as a party opponent statement does not require the proponent to offer evidence corroborating the contents of the statement. *McCarty v. Norfolk S. Ry. Co*., No. 2:18cv21, 2019 WL 8888163, at *14 n.13 (E.D. Va. Feb. 7, 2019) (holding that "the statement is admissible as a statement of a party-opponent" and that, contrary to non-proponent's contention, "does not require further factual corroboration"); *compare* Rule 801(d)(2)(D) *with* Rule 804(b)(3) (statement against interest exception, unlike Rule 801(d)(2)(D), requires "support[] by corroborating circumstances

… if [statement] is offered in a criminal case" and exposes declarant to criminal liability). The crux of the inquiry simply concerns whether the declarant's "job function has something to do with the issue at hand." *Tucker v. Norfolk & W. Ry. Co*., 849 F. Supp. 1096, 1099 (E.D. Va. 1994) (quoting *McCallum v. CSX Transp., Inc.*, 149 F.R.D. 104, 111 (M.D.N.C. 1993)).

Here, the requirements for admissibility under Rule 801(d)(2)(D) are easily met. Nelson will testify about Dugan's statements, while the two were CACI employees, roommates, and fellow interrogators at Abu Ghraib, that during an interrogation Dugan cuffed a detainee to the eyebolt of the cell floor and then kicked a table next to the head of the immobile detainee with such force that the table hit the ceiling of the cell and broke apart. Nelson will also testify about Stefanowicz's statements, while the two were working for CACI as interrogators at Abu Ghraib, that in the course of an interrogation Stefanowicz got a detainee to admit to being Osama bin Laden in disguise. There is no dispute that Plaintiffs seek to offer these statements against an opposing party—namely, CACI. Dugan and Stefanowicz were employees of CACI—they were hired by CACI, promoted by CACI, and paid by CACI to perform interrogations and to provide other interrogation-related services at Abu Ghraib—when they made the statements about which Nelson will testify. *See, e.g.*, Ex. 1 (PTX 107B) (Stefanowicz writing to CACI that "I will stop performing the numerous duties here if that is what's desired, *I am not going to do the massive amount of interrogation/s and operational issues, plus the additional ones for free*" and requesting a raise from CACI in connection with those duties) (emphasis added); Ex. 2 (PTX 103) (CACI email chain describing Dugan's hiring and promotion by CACI to an interrogator). Their "job function" plainly "has something to do with" the subject matter of the proffered statements, which concerns their treatment of detainees during interrogations, so that the statements fall within their scope of employment. That is all that is required.

Notably, CACI implicitly concedes that its objections to the proffered testimony at the April trial were misplaced: CACI argued then that the statements were not admissible under Rule 801(d)(2)(D) because Dugan and Stefanowicz were only "low-level employees" who were not "in a position of authority" to speak for the company. *See* ECF No. 1686-1 at 3. CACI has properly abandoned those arguments, which are contrary to law as set forth in Plaintiffs' opening brief. *See id.* at 4-6.

Instead, CACI now focuses primarily on disputing that the statements in question fall within "the scope of [Dugan's and Stefanowicz's] relationship" with CACI. Fed. R. Evid. 801(d)(2)(D); *see* ECF No. 1697 at 9-13. But even CACI recognizes that this requirement is met where the employees are "authorized to engage" in the duties at issue, ECF No. 1697 at 11, and Dugan and Stefanowicz were plainly "authorized" by CACI to conduct interrogations. Indeed, as this Court has previously explained, "[t]he entire purpose of their employment was to direct the interrogation of detainees." *Al Shimari v. CACI Premier Tech., Inc.*, 324 F. Supp. 3d 668, 696 (E.D. Va. 2018). Statements that Dugan and Stefanowicz made about their interrogation work, while they were at Abu Ghraib performing that work, are thus "undeniably related to and within the scope of their employment." *Id.*

CACI cites cases in which courts rejected admission of statements pursuant to Rule 801(d)(2)(D) on the ground that the statements in question were not within the scope of the declarant's employment. *See* ECF No. 1697 at 10-13. But these cases do not move the ball in CACI's favor. For starters, almost all of these cases are employment discrimination and retaliation cases where the statements clearly fell outside the scope of the declarant's employment. *See id.* (citing *Hassman v. Caldera*, No. 00-1104, 2000 WL 1186984 (4th Cir. 2000); *Parker v. Danzig*, 181 F. Supp. 2d 584 (E.D. Va. 2001); *Barner v. Pilkington N. Am., Inc.*, 399 F.3d 745 (6th Cir.

2005); *Williams v. Pharmacia, Inc*., 137 F.3d 944 (7th Cir. 1998); *Breneman v. Kennecott Corp*., 799 F.2d 470 (9th Cir. 1986); *Hill v. Spiegel, Inc*., 708 F.2d 233 (6th Cir. 1983)). The courts' rulings in these cases turn on the reasons that the particular employment actions were taken, and in that context "[Rule] 801(d)(2)(D) requires the statement's proponent to demonstrate that the scope of the declarant's authority included matters related to the employment action at issue." *Parker*, 181 F. Supp. 2d at 592. In other words, these cases simply reflect that the statements of employees, offered to prove the reasons for the challenged employment actions, are not admissible under Rule 801(d)(2)(D) where the employees had no responsibility for—or involvement in—such actions.[1] The Court has already noted that cases "limited to the employment discrimination context" are "[not] helpful" to CACI. *Al Shimari*, 324 F. Supp. 3d at 695. Outside of the employment discrimination context, "the only requirement" for a statement to fall within the scope of the declarant's employment "is that the subject matter of the admission match the subject matter of the employee's job description," as is the case here. *Aliotta v. Amtrak,* 315 F.3d 756, 762 (7th Cir. 2003) (distinguishing unique application of Rule 801(d)(2)(D) in employment cases)).

The few cases cited by CACI that are outside of the employment discrimination or retaliation context are no more helpful to CACI. In those cases, the proponents of the statements in question failed to meet their burden of establishing the requisite connection between the statements and the declarant's job duties. In *Wilkinson v. Carnival Cruise Lines*, for example,

[1] *See, e.g*., *Pharmacia, Inc*., 137 F.3d at 950-51 (statements inadmissible because "[n]one of the [declarants] were agents of Pharmacia for the purpose of making managerial decisions affecting the terms and conditions of their own employment" and "the decisionmaking process itself—which is the relevant issue in proving a pattern or practice of discrimination—was outside the scope of [their] employment"); *Breneman*, 799 F.2d at 473 (statements inadmissible because "Breneman provided no evidence that either [declarant] w[as] involved in Kennecott's discharge of Breneman").

plaintiff sought admission of testimony from a cruise cabin steward that there had been "problems" with a sliding door that ran over the plaintiff's foot. 920 F.2d 1560, 1562-63 (11th Cir. 1991). However, the defendant employer submitted an affidavit that the cabin steward's responsibilities were only to clean rooms and that they were not even permitted to be in the passenger area of the cruise ship where the door in question was located. *Id.* at 1563. The affidavit established, and plaintiff did not rebut, that the cabin steward's job functions were wholly separate from the content of his proffered statement, which is why the statement was not admissible against his employer. *Id.* at 1566.

Similarly, in *Precision Piping and Instruments, Inc. v. E.I. d Pont de Nemours and Company*, an antitrust action that concerned the reasons that the defendants ceased doing business with the plaintiff ("PPI"), the district court precluded testimony from PPI executives about what certain employees of defendants allegedly told the executives regarding the cessation of business relations. Similar to the cases involving employment discrimination, the "relevant question" was whether the declarants "had the authority to hire and fire PPI." 951 F.2d 613, 619-20 (4th Cir. 1991). The district court determined that they did not, *id.* at 619, and the Fourth Circuit—noting that if the statements had been admitted, it "would be hard put to fault that exercise of discretion"—found that there was no abuse of discretion in that determination. *Id.* at 620. But in this case—where the relevant question for the Rule 801(d)(2)(D) analysis is whether Dugan and Stefanowicz had authority to interrogate detainees—Plaintiffs have, of course, conclusively demonstrated that authority, which was lacking in *Wilkinson* and *Precision Piping.*

CACI's only effort to argue otherwise is to suggest that Dugan and Stefanowicz were engaged in conduct that ran afoul of what CACI or the military approved. *See, e.g.*, ECF No. 1697 at 12 (suggesting that Dugan's interrogation may have involved "a detainee never assigned

to" him); *id*. at 13 (arguing that "Stefanowicz's authorized job duties did not involve procuring absurd, and facially false, confessions"). But, as Plaintiffs previously have explained, *see* ECF No. 1686-1 at 5, "[t]he concern of Rule 801(d)(2)(D) is not whether the employee was carrying out the employer's wishes." *McCabe*, 103 F.4th at 276. Whether Dugan and Stefanowicz conducted interrogations in a manner that violated CACI's or the Army's official policies—or indeed federal or international law—is irrelevant to the Rule 801(d)(2)(D) inquiry. ECF No. 1686-1 at 5; *United States v. Riley*, 621 F.3d 312, 338 (3d Cir. 2010), *as amended* (Oct. 21, 2010) ("[A] statement of illegal activity can still be within the scope of employment and … admissible under [Rule] 801(d)(2)(D)" (citing *Cline v. Roadway Express, Inc*., 689 F.2d 481, 488 (4th Cir. 1982)).

Perhaps recognizing the limitations of its scope of employment argument, CACI tosses a Hail Mary: CACI attempts to take its borrowed servant argument beyond a defense to liability and also use it as an evidentiary shield. *See* ECF No. 1697 at 9 (arguing that statements fall within Rule 801(d)(2)(D) only where "the employer had the power to exercise control and supervision over the employee's activities"). This argument turns the evidentiary Rule on its head: under CACI's interpretation, Plaintiffs cannot offer any statement by a CACI employee about their work in connection with interrogations at Abu Ghraib—a task that CACI was charged with performing under its contract with the Army—against CACI. Unsurprisingly, the two out-of-jurisdiction cases on which CACI relies for this sweeping proposition do not support it, but instead merely present inapposite circumstances in which the proponents could not establish the requisite employment or agency relationship. *See Gilmore v. Palestinian Interim Self-Government Auth.*, 843 F.3d 958, 970 (D.C. Cir. 2016) (statement that a Palestinian prisoner made, relating the statements of a deceased former soldier in the Palestinian Authority security apparatus, did not fall under Rule 801(d)(2)(D) where the prisoner was serving six life sentences and plaintiffs offered

little indicia of any present agency relationship with the Palestinian Authority); *Lippay v. Christos*, 996 F.2d 1490, 1498-99 (3d Cir. 1993) (holding that a drug informant's statements were not admissions as against the undercover agent with whom the informant worked, both because the agent was at best the "co-employee" of the informer and because of informers' "tenuous relationship" with law enforcement). Here, by contrast, the status of Dugan and Stefanowicz as employees of CACI is undisputed.

II. CACI's Retread of Repeatedly Rejected Arguments Should Be Rejected Again

Finally, CACI uses its opposition as another opportunity to raise meritless arguments that the Court has rejected time after time. These arguments can be dispensed with quickly. First, CACI maintains that evidence of abuse by or at the direction of CACI is irrelevant if the abuse did not concern the treatment of Plaintiffs. But evidence of abuse of other detainees constitutes (at a minimum) direct evidence of the conspiracy to abuse detainees and CACI's agreement to and participation in that conspiracy, as Plaintiffs allege. By CACI's argument, evidence related to the completion of the objectives of the conspiracy is inadmissible. That is not, and it cannot be, the law, and this Court has repeatedly acknowledged the relevance of evidence regarding such abuse. *See, e.g.*, ECF No. 1145 (Feb. 27, 2019 Hr'g Tr.) at 15:20-17:1 (reciting evidence of abuses inflicted against other detainees and emphasizing "broad concepts of both conspiracy liability and aiding and abetting liability" in denying CACI's summary judgment motion); *see also* ECF No. 1396 at 27, 31 (emphasizing that evidence regarding CACI's "aware[ness] of detainee abuse" generally is "directly relevant to plaintiffs' claims"); ECF No. 678 at 39-40 (similar).

Second, CACI maintains that evidence of CACI's involvement in the abuse of detainees other than Plaintiffs is improper character evidence that runs afoul of Federal Rule of

Evidence 404(b)(1). ECF No. 1697 at 7. That is wrong for the same reason that CACI's relevance argument so widely misses the mark: Plaintiffs do not offer the statements in question to show Dugan's and Stefanowicz's propensity to commit bad acts, but to show CACI's participation in the conspiracy at issue. Such evidence is not governed by Rule 404(b). *See, e.g.*, *United States v. Jackson*, No. 2:16-cr-00054-DCN-1, 2022 WL 17094667, at *11 (D.S.C. Nov. 21, 2022) (rejecting argument that testimony of sex trafficking victim was impermissible under Rule 404(b) where defendant was not charged with trafficking that victim, because defendant was "charged with conspiracy to commit sex trafficking" and the testimony in question "goes to the existence of [the] conspiracy"); *United States v. Aladekoba*, No. 94-5236, 1997 WL 712894, at *5 (4th Cir. Nov. 17, 1997) (evidence of prior drug conviction, involving possession of drugs during time period of charged conspiracy, "was direct evidence in support of the charged crime and, thus, was not an attempt to attack his character"); *United States v. Anderson*, No. 1:06cr20–8, 2006 WL 8435902, at *3 (N.D. W. Va. Dec. 20, 2006) (testimony regarding acts in furtherance of conspiracy is "relevant evidence offered to prove the conspiracy count and [is] not subject to … Rule of Evidence 404(b)").

Third, CACI attacks the proffered testimony on a variety of *ad hoc* and irrelevant grounds, including that Plaintiffs have supposedly not shown that the conduct that Dugan and Stefanowicz describe was "unapproved" or "resulted in injury," ECF No. 1697 at 7; that Plaintiffs have not offered external corroboration, *see id.* at 4; and that, as to Stefanowicz's statement, Plaintiffs "deprived Mr. Stefanowicz (and CACI) of any opportunity to either deny or explain the alleged statement" at his *de bene esse* deposition. *Id.* at 3. CACI does not explain why any of these grounds bears on the relevance or admissibility of the statements, and none do. As to whether the conduct was approved or not, both this Court and the Fourth Circuit have already made clear

that approval by the military (or anyone else) of abuse of detainees would not make that abuse any less illegal and would provide no escape hatch from liability. *See Al Shimari v. CACI Premier Tech., Inc*., 840 F.3d 147, 157 (4th Cir. 2016) (holding that the military cannot confer authority to CACI to subject detainees to treatment that has been proscribed by Congress and international law); ECF No. 1183 at 47, 51-52 (holding that derivative sovereign immunity is not available for a contractor who violates the law). Whether or not the conduct Dugan and Stefanowicz described actually caused injury, meanwhile, does not change the conduct's relevance to demonstrating CACI's participation in a conspiracy to abuse detainees.

Finally, the last ground CACI raises, regarding the alleged "deprivation" of the opportunity to address the Stefanowicz statement, is not only irrelevant—there is no requirement that such an opportunity be afforded—but is also just plain wrong. CACI has known about Nelson's recollection of Stefanowicz's statement for nearly two decades. In 2005, Nelson gave a statement under oath in a separate litigation against CACI, during which he described both the Dugan and Stefanowicz statements at issue. *See* Ex. 3 (Nelson Statement Excerpts) at 41:21-43:21; 53:14-19.[2] CACI thus has had *every* opportunity to explore the statement with Stefanowicz, either at the *de bene esse* deposition of Stefanowicz that CACI noticed, or during the numerous communications that CACI has had with Stefanowicz without the knowledge or presence of Plaintiffs. The accusation that Plaintiffs deprived CACI of anything in this regard is disingenuous at best.

[2] In 2013, CACI stipulated that Nelson's statement would "be treated for all purposes as if it were a duly-noticed deposition taken in this case." Ex. 4 (Stipulation).

CONCLUSION

For the foregoing reasons, and the reasons set forth in Plaintiffs' opening brief, Plaintiffs respectfully request that this Court grant their motion *in limine* to permit admission of statements of CACI personnel pursuant to Fed. R. Evid. 801(d)(2)(D).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on September 30, 2024, I electronically filed the foregoing, which sends notification to counsel for Defendants.

/s/ Charles B. Molster, III
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