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

SUHAIL NAJIM ABDULLAH AL SHIMARI *et al*.,	)	
Plaintiffs,	)	
v.	)	C.A. No. 08-cv-0827 GBL-JFA
CACI INTERNATIONAL, INC., *et. al*.,	)	
Defendants	)	

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

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INTRODUCTION

Defendants, CACI International Inc. and CACI Premier Technology, Inc. (together, "CACI"), move to dismiss Plaintiffs' Second Amended Complaint ("SAC"), on the grounds that the SAC fails to sufficiently plead, under the standards set forth in *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), facts that plausibly state a claim that CACI participated in the conspiracy to torture and abuse detainees at Abu Ghraib. The motion raises the same arguments that this Court considered and rejected in its March 18, 2009 decision denying CACI's previous motion to dismiss Plaintiffs' First Amended Complaint ("FAC") – and does so without the benefit of any changes in the substantive law governing pleading or conspiracies. More puzzling still, CACI's second motion does not even bother to address the dozens of *additional* allegations in the SAC that serve only to amplify the plausibility of the conspiracy claims this Court already upheld. The motion also ignores the decision of Judge Messitte upholding the plausibility of similar allegations of conspiracy in the parallel case of *Al-Quraishi v. Nakhla*, 728 F.Supp.2d 702, 766 (D. Md. 2010).

The Court's March 2009 decision that found Plaintiffs' allegations sufficient to state a claim for conspiracy liability is the law of the case. Under the law-of-the-case doctrine, the Court should summarily dispose of CACI's duplicative motion to dismiss, rather than re-open questions it has already settled in the same litigation. *See Jones v. Sears Roebuck & Co.*, 301 Fed. Appx. 276, 285 (4th Cir. 2008).

Even if the court were open to reconsidering its prior decision, CACI's arguments are meritless. CACI contends – as it did before – that: (i) CACI employees' participation in the conspiracy is not plausible in light of conceivably lawful explanations for their conduct; (ii) Plaintiffs must allege that CACI employees were themselves the ones who administered

beatings, abuse, and torture of each Plaintiff; and, (iii) there are no allegations supporting liability of the corporate entity for the misconduct of its employees. These arguments carry no more weight today than when they were made in support of CACI's previous unsuccessful motion to dismiss.

First, numerous allegations in the SAC – some similar and many supplemental to those in the FAC – support the claim that CACI employees conspired with military personnel in the torture and abuse at Abu Ghraib. As the SAC alleges, motivated by lucrative contractual payments from the U.S. government to deliver intelligence information, CACI ordered and otherwise cooperated with low-level military personnel to "soften" detainees through torture and abuse in an attempt to increase the amount of intelligence they could provide to their customer. SAC ¶¶ 70-73. Various CACI whistleblowers, military personnel working at Abu Ghraib alongside CACI interrogators, and military investigators have pointed to the involvement of CACI employees in the abuse. SAC ¶¶ 65-67, 69, 74-77, 81-82. They have all consistently described CACI interrogators as instructing or directing military personnel through the use of code words such as giving detainees "special treatment" or "setting the conditions" for subsequent interrogation. SAC ¶¶ 70-73. *See also* Major General Antonio Taguba's Article 15-6 Investigation of the 800th Military Police Brigade (*cited in* SAC ¶ 67) ("Taguba Report") at 48. Such code words were understood by military personnel and civilian contractors alike as instructions to torture the detainees.

Indeed, conspiracy is not only a plausible theory, it is the *only plausible explanation* for the allegations of detainee abuse. If there were no common understanding to tolerate and invite such misconduct, individual military officers and contractor interrogators would have been very reluctant to engage in torture and abuse of detainees in the close quarters of the Abu Ghraib hard

site, knowing that colleagues in proximity, whether military personnel or civilian contractors, would report them. It is only with some assurance that the abuse was expected and would go unreported that it could take place.

Second, CACI is flatly incorrect to suggest that a conspiracy requires Plaintiffs to allege that CACI employees physically abused the Plaintiffs by their own hands; by their very nature, conspiracies require no such thing. The physical acts of abuse are overt acts in furtherance of the conspiracy, but the conspiracy itself is the illicit agreement to abuse the detainees that invites and facilitates those specific acts. Under CACI's novel theory of conspiracy only a mafia hit-man would be liable for a victim's death, but not the mafia boss who ordered the killing. Finally, as this Court has already held, the prior allegations in the FAC (as in the SAC) – including allegations that CACI management failed to adequately train and supervise interrogator employees, ignored reports of abuse, and attempted to cover up the abuse – states a claim for respondeat superior or vicarious liability sufficient to implicate the corporate entities.

The law governing conspiracies and pleadings has not changed since this Court's earlier decision. The SAC adds dozens of supplemental allegations that only strengthen the plausibility of the conspiracy claims this Court previously considered. There can be no grounds to change the Court's earlier ruling. The filing of CACI's motion is a waste of judicial and litigant time. CACI's motion should be summarily denied.

PROCEDURAL BACKGROUND

A. The First Amended Complaint

The Plaintiffs filed the FAC before this Court on September 15, 2008, Dkt. No. 28, alleging a conspiracy to torture at the Abu Ghraib hard site by CACI employees in concert with military personnel. On October 2, 2008, CACI moved to dismiss the FAC, raising various claims of immunity and affirmative defenses; that motion also sought to dismiss Plaintiffs'

conspiracy claims as insufficiently pled. *See* Dkt. No. 35. Then, as now, CACI ignored the Plaintiffs' allegations setting forth a conspiracy to torture and CACI's role in this conspiracy, and focused myopically on a single paragraph of the FAC: "CACI conveyed its intent to join the conspiracy by making a series of verbal statements and by engaging in a series of criminal acts of torture alongside and in conjunction with several co-conspirators." Dkt. No. 35 at 24 (*citing* FAC ¶ 72). Relying on *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007), CACI argued that this allegation was conclusory and that otherwise, Plaintiffs were required to allege "facts indicating direct involvement of CACI PT personnel in causing them injury, or to support co-conspirator liability." *Id*. at 26.

B. The Court's March 2009 Decision

Rejecting CACI's novel and unduly narrow conception of a conspiracy claim, the Court found that "Plaintiffs sufficiently plead facts to support a conspiratorial liability claim under [] *Twombly*." Mem. Order March 18, 2009, Dkt. No. 94 at 65, *reported at* 657 F. Supp. 2d 700 (E.D. Va. 2009). First, the Court found that "Plaintiffs adequately allege specific facts to create the plausible suggestion of a conspiracy," highlighting "at least two suggestive facts that push their claims into the realm of plausibility": (1) the allegation that CACI employees adopted the code phrase "special treatment" – code for the torture of the type endured by Plaintiffs in the hard site, FAC ¶ 70, because, "the use of code words makes a conspiracy plausible because the personnel would have to reach a common understanding of the code in order to effectively respond to it"; and (2) the allegation that Plaintiff Mr. Rashid was "removed from his cell by stretcher and hidden from the International Committee of the Red Cross who visited Abu Ghraib shortly after Mr. Rashid had been brutally and repeatedly beaten," *Id.* ¶ 43 as "[t]he act of hiding abuse from a humanitarian organization's inspection also plausibly suggests a conspiracy, as a

cover-up would require the participation and cooperation of multiple personnel." Dkt. No. 94 at 66-67.

Second, unlike in *Twombly*, the Court could find "no independent motive to act in the alleged manner." *Id*. at 67. Contrasting the Plaintiffs' allegations with those in *Twombly*, where the Supreme Court found that "alternate, independent motives made the plaintiffs' conspiracy allegations less plausible," the Court could think of no "history or independent motive Defendants might have that would move Plaintiffs' conspiracy claims outside of the realm of plausibility," since torture during interrogations has been historically banned. *Id*. at 67. The Court further noted that it is "possible that the personnel at Abu Ghraib acted individually in pursuit of some perverse pleasure, but this possibility is insufficient to make Plaintiffs' conspiracy allegations less than plausible." *Id*. at 68.

In further support of the conspiracy claim, the Court found that the FAC sufficiently alleged the direct involvement of CACI's employees in the conspiracy, as it "identify[ied] [CACI employees] Mr. Dugan, Mr. Stefanowicz and Mr. Johnson, as directing and causing 'some of the most egregious torture and abuse at Abu Ghraib'"; "allege[d] that military co-conspirators have testified that Mr. Stefanowicz and Mr. Johnson were 'among the interrogators who most often directed that detainees be tortured'"; and "allege[d] that Mr. Stefanowicz and Mr. Johnson directed and engaged in conduct in violation of the Geneva Conventions, U.S. Army guidance, as well as United States law." Dkt. 94 at 68-69.

Finally, the Court also resolved the additional issue CACI again presses in its new motion to dismiss: CACI's vicarious liability for the conduct of its employees. In 2009, the Court held that the Plaintiffs "ma[de] a sufficient showing of vicarious liability to withstand the motion to dismiss," based on the following allegations:

- CACI employees Steven Stefanowicz, Daniel Johnson, and Timothy Dugan tortured Plaintiffs and instructed others to do so;
- Defendants employed all three and knowingly ratified their illegal actions;
- CACI took steps to cover up the activities of its employees involved in the Abu Ghraib scandal;
- CACI failed to properly train and supervise its employees and failed to properly report the torture committed; and
- Defendants made millions of dollars as a result of their wrongful behavior.

Dkt. 94 at 64.

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

C. The Second Amended Complaint

Plaintiffs chose to file a second amended complaint following an agreement with Defendants to provide further details regarding Plaintiffs' theory of conspiracy. Plaintiffs were under no obligation to do so, as this Court already ruled on the sufficiency of the allegations in the FAC, and as there has been no change in relevant law. Nevertheless, in an attempt to dissuade Defendants from filing a motion to reconsider this Court's March 2009 ruling on the plausibility of Plaintiffs' claims – which Plaintiffs believed would only waste the parties' time – Plaintiffs filed their Second Amended Complaint on December 26, 2012. The SAC preserves the allegations this Court deemed sufficient in 2009, and adds numerous additional allegations supporting their conspiratorial liability claim. *See* SAC ¶¶ 64-69, 71-77, 80-86, 91-94, 102-103. These allegations reference and summarize specific military investigations that identified the role

of CACI interrogators in the abuse, Court Martial testimony of co-conspirator military personnel identifying CACI employees who directed them to abuse detainees, reports by CACI whistleblowers and military personnel to CACI's management about the role of their employees in the abuse, CACI's failure to investigate or address the role of its employees in the abuse, and CACI's efforts to cover up the conspiracy of torture. On January 14, 2013, CACI filed this motion to dismiss the Plaintiffs' conspiracy claims. Dkt. No. 180.

ARGUMENT

I. Because the Court's March 2009 Decision is the Law of the Case, CACI's Motion Should Be Summarily Denied

CACI bothers this Court to address issues the Court has already decided. Under the doctrine of law of the case, however, "a court should not reopen issues decided in earlier stages of the same litigation." *Jones v. Sears Roebuck & Co.*, 301 Fed. Appx. 276, 285 (4th Cir. 2008) (*quoting Agostini v. Felton*, 521 U.S. 203, 236 (1997)); *Sejman v. Warner-Lambert Co., Inc*., 845 F.2d 66, 69 (4th Cir. 1988) ("Clearly, courts could not perform their duties 'satisfactorily and efficiently . . . if a question once considered and decided . . . were to be litigated anew in the same case…'"). The filing of an amended complaint in no way obviates the binding force of a prior ruling in the same case. In *Jones*, the Fourth Circuit ordered dismissal of claims where the state court had already ruled that the allegations did not state a claim under state law and the amended complaint, brought in federal court, made no "material revisions". 301 Fed. Appx. at 285. In the present case, the only "material revisions" are allegations that supplement those that this Court already found sufficient to state a claim.

This Court can overturn the law of the case only if the Defendants can show that "controlling authority has since made a contrary decision of law applicable to the issue" or "the prior decision was clearly erroneous and would work manifest injustice." *Id*. *See also RegScan,*

Inc. v. Bureau of Nat'l Affairs, Inc., 1:11cv1129 (JCC/JFA), 2012 U.S. Dist. LEXIS 101273, at *7 (E.D. Va. July 19, 2012) (denying defendant's motion for reconsideration). Remarkably, the Defendants do not even acknowledge their obligation to make either such showing. Nor could they satisfy those exacting requirements.

Since the Court's denial of the Defendants' motion to dismiss in 2009, there has been no relevant change in law. CACI strains to suggest that the standard in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), was "new and developing" at the time of the Court's 2009 order and contends that *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), somehow altered the pleading standard set out in *Twombly*. *See* Def. Br. 3. As hundreds of cases and commentators have repeatedly observed, however, *Iqbal* merely extended *Twombly* outside of the antitrust context; indeed, *Iqbal* relies on *Twombly* exclusively in its application of the "plausibility" analysis to the facts in that case. CACI essentially concedes this basic understanding by using "*Twombly*/*Iqbal*" as interchangeable placeholders for a pleading standard that requires that a complaint allege a plausible claim. *See* Def. Br. 7, 8.

Even if one could find any daylight between *Iqbal* and *Twombly*'s pleading analysis, Judge Messitte's decision in the companion case of *Al Quraishi v. Nakhla*, 728 F.Supp.2d 702 – a decision CACI simply ignores – solidifies this Court's March 2009 decision. Following this Court's 2009 order, *and* the Supreme Court's decision in *Iqbal*, Judge Messitte found that similar allegations, arising from a similar set of facts, were sufficient to plead conspiracy liability on the part of corporate defendant L-3, one of the government contractors whose employees were implicated in the abuses at Abu Ghraib. The Court found the following, analogous allegations sufficient: that L-3 employees committed many of the acts of torture described in the complaint and "repeatedly bragged" about their mistreatment of detainees to L-3 management; L-3 had the

authority to stop the wrongful acts of its employees but, despite knowing what they were doing, gave the employees continued permission to mistreat detainees; and L-3 took various steps to cover-up the alleged abuses, including: not reporting, and discouraging its employees from reporting, the conduct to the appropriate authorities, destroying evidence, hiding prisoners from the Red Cross, and misleading the authorities about what was happening at the military prisons. *Id*. at 766. Judge Messitte distinguished the plaintiffs' allegations from those in *Twombly*, finding that the defendants were alleged "to have interacted with one another on a continuous basis, knowing and approving of their complementary roles in bringing an overall scheme to fruition." *Id*. Furthermore, like this Court, Judge Messitte concluded that "…[b]ecause of the inherent illegality of Defendants' alleged behavior and the lack of independent motivators, it is hardly more likely that 'the defendants' allegedly conspiratorial actions could equally have been prompted by lawful, independent goals which do not constitute a conspiracy.'" *Id*. at 767 (*quoting Twombly*, 550 U.S. at 566).[1]

Absent any change in the law – save for law that actually undermines CACI's position, *see Al Quraishi* – what makes CACI's motion to dismiss the SAC even more mystifying is that the SAC only adds numerous allegations to those this Court and *Al Quraishi* already found sufficient. Apparently failing to review Plaintiffs' new pleading, Defendants repeatedly assert that "Plaintiffs' sole 'factual' allegation concerning the CACI Defendants' supposed entry into a conspiracy is that 'CACI conveyed its intent to join the conspiracy, and directly and indirectly

[1] Like this Court, the *Al Quraishi* court concluded,

> That L-3 employees and other individuals working in military prisons all over Iraq might just happen to have randomly begun committing similar acts of torture against detainees while L-3 independently and simultaneously started covering up the ongoing conduct is theoretically possible. But it certainly does not partake of the immediately apparent implausibility of the parallel conduct asserted in *Twombly*, which had a reasonable and lawful explanation. *Id*. at 767-68.

ratified its employees' participation in the conspiracy, by making a series of verbal statements and by engaging in a series of criminal acts of torture alongside and in conjunction with several co-conspirators." Def. Br. 2, 5, 16, 17 (*citing* SAC ¶ 80). That is the same "sole factual allegation" CACI attacked unsuccessfully in its motion to dismiss the FAC. *See* Dkt. No. 35 at 24 (*citing* FAC ¶ 72). Yet, in so asserting, CACI ignores the dozens of additional facts set forth in the SAC that more than adequately allege CACI's conspiracy liability, including those set forth in paragraphs 64-69, 71-77, 80-86, 91-94, 102-103. *See infra* Section II.

Accordingly, the Court should summarily dismiss CACI's duplicative motion to dismiss Plaintiff's conspiracy claims.

II. The SAC Plainly States Valid Claims Regarding CACI's Conspiracy Liability

When considering a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6), a court "…must take the complaints' factual allegations as true and draw all reasonable inferences in plaintiffs' favor." *Robertson v. Sea Pines Real Estate Cos.*, 679 F.3d 278, 284 (4th Cir. 2012). Courts must read a complaint "as a whole" and consider "documents incorporated into the complaint by reference." *Scharpenberg v. Carrington*, 686 F. Supp. 2d 655, 659 (E.D. Va. 2010) (Lee, J.). At this stage of the proceedings, the Court need only decide whether a "claim has facial plausibility..." *Robertson*, 679 F.3d at 287 (*quoting Iqbal*, 556 U.S.at 678). Accordingly, the plaintiff need only "plead[] factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Robertson*, 670 F.3d at 287 (*quoting Iqbal*, 556 U.S.at 678). This is a "'context-specific task that requires the reviewing court to draw' not only 'on its judicial experience,' but also on 'common sense.'" *Robertson*, 679 F.3d at 287 (*quoting Iqbal*, 556 U.S. at 679).

As *Twombly/Iqbal* make plain, plausibility is not akin to a probability requirement. *See S. Appalachian Mt. Stewards v. Penn Va. Operating Co. LLC*, Case No. 2:12CV00020, 2013

U.S. Dist. LEXIS 457 at *5 (W.D. Va. Jan. 3, 2013) ("As the Court noted in *Twombly*, '[a]sking for plausible grounds to infer' the existence of a claim 'does not impose a probability requirement at the pleading stage.'"). Nor does the Court's decision in *Iqbal* give courts license to choose among competing inferences to assess which is more likely to be true. *Iqbal*, 556 U.S. at 678. Instead, all plaintiffs must do is "give enough details about the subject-matter of the case to present a story that holds together," and the court will ask itself "*could* these things have happened, not *did* they happen." *Estate of Davis v. Wells Fargo Bank*, 633 F.3d 529, 533 (7th Cir. 2011) (emphasis in original) (internal quotations omitted).

A. Plaintiffs' Allegations Support the Elements for A Claim for Conspiracy Liability

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

[2] Even if the Court were to look to international law to determine the elements of conspiracy liability for violations of international law as suggested by *Aziz v. Alcolac, Inc.*, 658 F. 3d 388, 398 (4th Cir. 2011), it would find that the standards are the same: The "analog" to conspiracy as a theory of liability under international law is "joint criminal enterprise" ("JCE"). *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244, 260 (2d Cir. 2009) (*citing Hamdan v. Rumsfeld*, 548 U.S. 557, 611 n.40 (2006)). JCE liability requires: (1) a plurality of persons; (2) the existence of a common objective, which amounts to or involves the commission

1. The SAC Adequately Alleges An Unlawful Agreement

"A conspiracy claim does not require an express agreement; proof of a tacit understanding suffices." *Tysons*, 1994 U.S. App. LEXIS 36692, at *14. Where the complaint "points to complementary and interlocking actions by the defendants which together suggest a conspiratorial scheme," the Fourth Circuit has found that the allegations "support an inference that the conspiracy existed." *Id.* As the Court of Appeals emphasized in *Robertson* (cited by Defendants as support for their novel requirement of direct evidence of an agreement to conspire): "Conspiracies are often tacit or unwritten in an effort to escape detection, thus necessitating resort to circumstantial evidence to suggest that an agreement took place." 679 F.3d 278, 289-90 (4th Cir. 2012)*; see also Twombly*, 550 U.S. at 556 ("Asking for plausible grounds to infer an agreement…simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal agreement.")

The SAC adequately alleges the existence of an unwritten agreement to torture and abuse Plaintiffs. That CACI had at least "a tacit understanding [with its co-conspirators] to carry out the prohibited conduct" is demonstrated by the allegations that CACI's employees personally participated in acts of torture and abuse, SAC ¶¶ 64-77; CACI failed to report the torture and abuse, SAC ¶¶ 81-82; CACI tacitly encouraged the abuse, SAC ¶¶ 81-84; and CACI took steps to cover up the torture and abuse, SAC ¶¶ 76-77, 81-83, 102, 104. *Compare Al Quraishi*, 728 F.

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of a crime; and (3) participation of the defendant in the execution of the common plan. *Prosecutor v. Tadić*, Case No. IT-94-1-A, Appeal Judgement, ¶ 227 (July 15, 1999). *See Yousuf v. Samantar*, 1:04cv1360, 2012 U.S. Dist. LEXIS 122403, at *33-34 (E.D. Va. Aug. 28, 2012) (citing *Tadić* in determining the elements for JCE liability). An overt act in support of the offense is required, *Yousuf*, 2012 U.S. Dist. LEXIS 122403, *33-34, and the defendant must contribute to the criminal enterprise either "with the aim of furthering the criminal activity or criminal purpose of the group," or "made in the knowledge of the intention of the group to commit the crime." *Aziz*, 658 F.3d at 401 n.13. *See also Lizarbe v. Rondon*, 642 F. Supp. 2d 473, 491 (D. Md. 2009) (recognizing causes of action for conspiracy and joint criminal enterprise under the ATS and holding that the defendant's "knowledge of and participation in the human rights violations has been adequately pled").

Supp. 2d at 766 (finding that conspiratorial conduct could be inferred from allegations that L-3 employees committed many of the abuses and "repeatedly bragged" about the abuse, that L-3 had the authority to stop their wrongful acts but, despite knowing what they were doing, permitted them to continue mistreating detainees, and that L-3 took various steps to cover up the alleged abuses) *with Coles v. McNeely*, Civil Action No. 3:11CV130, 2011 U.S. Dist. LEXIS 94283, at *8-9 (E.D. Va. Aug. 23, 2011) (*cited in* Def. Br. 13) (finding conspiracy claim insufficiently pled where plaintiff alleged a series of wide-ranging, disparate conduct with the only commonality being the plaintiff's threadbare legal conclusion that they deprived him of his civil rights).

These allegations are well above the "formulaic recitation of the elements" that the court drew from the complaint in *Keck v. Virginia*, Civil Action No. 3:10cv555, 2011 U.S. Dist. LEXIS 115795, *44 (E.D. Va. Sept. 9, 2011), upon which CACI relies, Def. Br. 12. In *Keck*, the only allegations in support of the complaint were vague and conclusory recitations of the elements of the cause of action.[3] Similarly, in *A Society Without a Name v. Virginia*, 655 F.3d 342, 346-47 (4th Cir. 2011) (*cited in* Def. Br.12), the plaintiffs did not state a claim as they simply alleged a "meeting of the minds that [the defendants] would act in concert" with their co-conspirator, and nothing more. The court found their complaint devoid of any specifics, such as a failure to state with "any specificity the persons who agreed to the alleged conspiracy, the

[3] In *Keck*, the only allegations were: (1) "at some point prior to July 24, 2007, the decision was made by an as yet unknown person(s) to search through [Keck's] computer account, looking for any evidence of misfeasance that could be used as leverage later," and (2) "Defendants engaged in a 'common design ... by mutual agreement,' that their actions were 'prearranged and mutually agreed upon,' and that a 'tacit agreement between two or more parties' existed." *Id*. at 43.

specific communications amongst the conspirators, or the manner in which any such communications were made." *Id*. at 347.

By contrast, here, Plaintiffs allege that CACI "conspired with military personnel" at the Abu Ghraib hard site, SAC ¶¶ 64-65, by "[giving] orders to and supervis[ing] military personnel (and military personnel follow[ing] their orders)," SAC ¶ 68. *See also* SAC ¶¶ 71, 73-77. Plaintiffs further allege the specific communications: "CACI employees used the term 'special treatment' and related code words to signal to their military co-conspirators to employ torture and other abusive techniques," SAC ¶ 70, and instructed military personnel to "set the conditions" for interrogations, which CACI co-conspirators knew "equated to serious physical abuse in an attempt to make detainees more responsive to CACI interrogators," SAC ¶ 72. *See also* SAC ¶¶ 71, 73; Taguba Report at 48 (finding that CACI employee Steven Stefanowicz "[a]llowed and/or instructed [military police], who were not trained in interrogation techniques, to facilitate interrogations by 'setting conditions' which were neither authorized and in accordance with applicable regulations/policy [and which] [h]e clearly knew…equated to physical abuse"). Those are plainly sufficient. *See* Dkt. No. 94 at 66.[4]

[4] CACI simply misreads the Court's finding in *In re Xe Services Alien Tort Litig.*, 665 F. Supp. 2d 569 (E.D. Va. 2009) and *Aziz v. Alcolac, Inc.*, 658 F.3d 388 (4th Cir. 2011). Def. Br. 13-14. The allegations in *In re Xe Services* that the CACI recites, Def. Br. 13, were only the conclusory allegations by which the plaintiffs "merely recite[d] the elements, as plaintiffs understood them, for claims of war crimes under the ATS." *Id*. at 590. The Court reviewed the remainder of the allegations and assumed they were "sufficiently non-conclusory under *Iqbal* and *Twombly*," but nonetheless found them wanting simply because they failed to "give rise to a plausible inference that defendant Prince intentionally killed or severely harmed innocent Iraqi civilians" a necessary element for the plaintiffs' claim of Defendant Prince's *direct liability* for war crimes. *Id*. at 591. Similarly, in *Aziz*, the court found only that the allegations did not meet the "purpose" *mens rea* the court adopted for aiding and abetting liability. The only conduct alleged was the placing "into the stream of international commerce" chemicals, which the court noted had "many lawful commercial applications." *Aziz*, 658 F.3d at 401, 390. Without more, the court could not infer that the defendant had acted with the *purpose* of facilitating genocide. *Id.* at 401.

If further support for the plausibility of the conspiracy allegations were needed, it would be found in Annex 1 to the report of Maj. Gen. Antonia Taguba, one of several to investigate the abuses at Abu Ghraib. Annex 1 is a psychological assessment provided to General Taguba by Col. (Dr.) Henry Nelson, who accompanied and assisted General Taguba in conducting the investigation. After reviewing much of the same evidence pleaded in the SAC and that Plaintiffs expect to produce at trial, Colonel Nelson concluded that the "ringleaders" of the abuse "collaborated with other MP soldiers and several unknown MI personnel, to include soldiers as well as their civilian contract interrogators and interpreters."[5] That is the conspiracy alleged in the SAC: a collaboration between soldiers and the civilian contract employees to commit illegal acts.

2. CACI Is Liable For the Unlawful Acts Committed By Co-conspirators In Furtherance of the Conspiracy

Defendants attempt to impose a novel element to decades-old conspiracy doctrine, insofar as they criticize Plaintiffs' failure to "allege any contact whatsoever with CACI PT personnel" as somehow undermining their claim. Def. Br. 12. Such allegations are not required to plead or prove a conspiracy claim. Under both federal common law and Virginia law, a defendant may be held liable for the substantive offenses that his *co-conspirators* committed in furtherance of the conspiracy. *See Brzonkala v. Virginia Polytechnic & State Univ.*, 169 F.3d 820, 910-11 (4th Cir. 1999) (Motz J., dissenting) (*citing Pinkerton v. United States*, 328 U.S. 640, 647-48 (1946)); *Brown v. Gilner*, Case No. 1:10-cv-00980 (AJT/IDD), 2012 U.S. Dist. LEXIS 138662, *24 (E.D.

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[5] Taguba Report, Annex 1 at 2 *available at* http://www.dod.mil/pubs/foi/operation_and_plans/Detainee/taguba/ *and* http://www.aclu.org/torturefoia/released/101904.html. The Taguba Report including its annexes are cognizable on this motion both as materials referred to and incorporated in the SAC (*see* SAC¶¶ 67, 76), *see supra* p. 10, and as judicially-noticeable public records, *see*, *e.g.*, *Witthohn v. Fed. Ins. Co.*, 164 Fed. Appx. 395, 396-397 (4th Cir. 2006).

Va. Sept. 25, 2012) (applying Virginia law) ("As a participant in the conspiracy, those damages are assessable against Gilner, whether caused directly by Bochinski's statements and conduct or his own.").[6]

CACI's novel interpretation of conspiracy law would certainly be welcome by criminal enterprises: under CACI's proposed standard, a mafia boss who ordered the beating and torture of a victim would not be liable for his instructions as long as the victim did not have "any contact whatsoever with" the mafia boss. This is not the law. So long as Plaintiffs sufficiently alleged Defendants' participation in a conspiracy with knowledge of the conspiracy's unlawful objective, they are liable for any conspirator's "…overt act that caused injury, so long as the purpose of the act was to advance the overall object of the conspiracy." *Halberstam v. Welch*, 705 F.2d 472, 487 (D.C. 1983).

Nor does the law require that the allegations "permit the inference that CACI PT employees conspired to injure plaintiffs" specifically. *See* Def. Br. 14. It is sufficient that the complaint alleges that CACI employees conspired with others to torture or abuse detainees at the Abu Ghraib hard site, as that is the conduct that Plaintiffs allege caused their injuries. *See In re Chiquita Brands Int'l, Inc. Alien Tort Statute & S'holder Derivative Litig.*, 792 F. Supp. 2d 1301, 1344-45 (S.D. Fla. 2011) (holding that the plaintiffs only needed to "allege that Chiquita

[6] *See also Daily v. Gusto Records, Inc.*, 14 Fed. Appx. 579, 587 (6th Cir. 2001) ("[I]it is not essential that each conspirator have knowledge of the details of the conspiracy."); *Jones v. Chicago*, 856 F.2d 985, 992 (7th Cir. 1998) ("[Y]ou need not have agreed on the details of the conspiratorial scheme or even know who the other conspirators are. It is enough if you understand the general objectives of the scheme, accept them, and agree, either explicitly or implicitly, to do your part to further them."); *Ungar v. Islamic Republic of Iran*, 211 F. Supp. 2d 91, 100 (D.D.C. 2002) ("[A] conspiracy does require proof of a 'common and unlawful plan whose goals are known to all members,' even if all parties are not privy to each individual act taken in furtherance of the common objective.")

intended for the AUC to torture and kill civilians in Colombia's banana growing regions, which is the conduct that allegedly harmed or killed Plaintiffs' relatives").

B. The SAC, like the FAC, Plausibly Alleges Conspiracy Liability

In its 2009 denial of Defendants' motion to dismiss the FAC, the Court found that "the Defendants here have no independent motive to act in the alleged manner," Dkt. No. 94 at 67, and thus found this case distinguishable from *Twombly*. The Court observed that in *Twombly*, "[t]he Court found the allegations of parallel conduct insufficient without more because the defendant carriers had independent incentives to act in the manner that they did." *Id*. at 65-66. In this case, by contrast, this Court found no incentives behind CACI's conduct other than participation in a conspiracy. The Court reasoned, first, that "the historical explanation present in *Twombly* is absent here," as "torture during interrogations is historically banned." *Id*. at 67-68. Second, the Court could "think of no plausible motive Defendants might have to act independently in the egregious manner alleged by Plaintiffs." *Id.* at 68. *Compare Wills v. Rosenberg*, 1:11cv1317 (LMB/JFA), 2012 U.S. Dist. LEXIS 4320, at *3-4, 9-10 (E.D. Va. Jan. 13, 2012) (finding sufficient allegations that the defendants "present[ed] false statements and fabricat[ed] evidence during the empaneling of plaintiff's grand jury and the course of his trial" to plead a conspiracy).

This Court's conclusion comports with "common sense." *See Iqbal*, 556 U.S. at 679. Indeed, the most plausible explanation for CACI's alleged conduct is the existence of a conspiracy. Given the historical ban on torture and abuse, and criminal penalties for its commission, those who engaged in torture and abuse in close proximity with others in Abu Ghraib (including CACI employees), must have had a common understanding to undertake and tolerate such illegal conduct; absent such a common understanding, the risk of discovery and censure would have been too great. *See Robertson*, 679 F. 3d at 289 ("Conspiracies are often

tacit or unwritten in an effort to escape detection."). It is Defendants' hypothesis that the alleged conspirators were somehow engaged in rational, independent, parallel abuse of detainees in the confines of Abu Ghraib that is extremely implausible.

In addition to the plausible basis for the claims this Court already endorsed, Plaintiffs offered an additional "rational motive for the CACI Defendants to conspire with low-level soldiers to engage in conduct antithetical to the desires of the United States government." Def. Br. 18. Plaintiffs allege that "CACI interrogators' encouragement, facilitation, direction, and conspiracy to engage in torture and abuse the detainees at Abu Ghraib was undertaken with the hope of creating 'conditions' in which they could extract more information from detainees to please their U.S. government client." SAC ¶ 85. Plaintiffs have also alleged that their co-conspirators' participation in this conspiracy followed from CACI instructions, encouragement, and orders. The motivation for doing so is also expressly alleged: CACI employees' "unsupervised access to the detainee areas of Abu Ghraib" lead to "confusion among military police personnel, particularly those convicted of abuse at the prison, as to whether CACI employees were military intelligence personnel or civilian contractors," and, as a result, followed the orders given by CACI interrogators. SAC ¶ 68. Finally, Plaintiffs separately allege the motive behind CACI's role in the conspiracy, as a corporate entity, independent of the acts of its employees: "CACI willfully ignored reports of CACI employees' participation in the conspiracy, failed to discipline those conspirators who engaged in detainee abuse, and otherwise kept quiet about CACI's role in the conspiracy in order to continue to earn millions of dollars from its contract with the United States government." SAC ¶ 86. Profit motive is as plausible an explanation for corporate behavior as any on record.

Misapprehending the difference between pleading obligations and burdens of proof,

CACI plucks one statement from the report of the AR15-6 Investigations of the Abu Ghraib Prison and 205th Military Intelligence Brigade by Lieutenant General Anthony R. Jones and Major General George R. Fay ("Jones/Fay Report") in an attempt to show a conspiracy might not in fact have existed. Def. Br. 6, 15 (*citing* Jones/Fay Report, at 4). This isolated finding states that certain abuses were the result of "individual criminal misconduct, clearly in violation of law, policy, and doctrine and contrary to Army values." Yet, the statement, viewed in its context, is meant to underscore the military investigators' conclusion that no soldier or contractor could have reasonably believed that their abuses "were permitted by any policy or guidance." Jones/Fay Report, at 4, para. (c)(4); 15-16, para. 8(c)(1). In fact, as noted in the SAC, General Fay concluded that "Fifty-four (54) MI, MP, and Medical Soldiers, *and civilian contractors* were found to have some degree of responsibility or complicity in the abuses that occurred at Abu Ghraib," SAC ¶ 65 (*citing* Jones/Fay Report at 7-8 (emphasis added)). Moreover, the investigation found that "[p]hysical and sexual abuses of detainees at Abu Ghraib were…perpetrated or witnessed by individuals or *small groups*," and that "[w]hat started as nakedness and humiliation, stress and physical training (exercise), carried over into sexual and physical assaults by *a small group* of morally corrupt and unsupervised Soldiers *and civilians*." SAC ¶ 66 (*citing* Jones/Fay Report at 9-10, para. (c)(1) (emphasis added)).[7]

[7] Revealing the weakness of its position, CACI relies on cases that impose a heightened pleading requirement, but fails to acknowledge that such specificity in pleading is required only for claims brought under Virginia's *business* conspiracy *statute*. *See* Def. Br. 19-20 (*citing Scharpenberg*, 686 F. Supp. 2d at 661 ("In addition to *Iqbal*'s plausibility requirement, allegations of 'business conspiracy, like fraud, must be pleaded with particularity.'"); *Weiler v. Arrowpoint Corp.*, No. 1:10cv157, 2010 U.S. Dist. LEXIS 46163, at *24 n.5 (E.D. Va. May 11, 2010) (same). Even in those cases, the plaintiffs had not mentioned "any reason why" the defendants may have entered into a conspiracy. *Scharpenberg*, 686 F. Supp. 2d at 662. Here, Plaintiffs proffer just such a reason – CACI's economic interest in delivering intelligence (good or bad) to its government-client.

III. The SAC Adequately Alleges Liability Of The Corporate Entities

Defendants assert that Plaintiffs' "sole allegation" supporting their "corporate entry" into the conspiracy is Plaintiffs' allegation that Defendants made a "series of verbal statements" and engaged "in a series of criminal acts of torture alongside and in conjunction with several co-conspirators." Def. Br. 16 (*citing* SAC ¶ 80). In addition to disregarding the Court's prior decision on this question, CACI ignores the litany of allegations establishing: (1) Defendants' respondeat superior liability,[8] and (2) CACI's own corporate contributions to the conspiracy.

A. The SAC Adequately Alleges CACI's Vicarious Liability For The Acts Of Its Employees

As the Court explained in its 2009 decision, "Under the theory of respondeat superior, an employer may be held liable in tort for an employee's tortious acts committed while doing his employer's business and acting within the scope of the employment when the tortious acts were committed." Dkt. No. 94 at 63 (*citing Plummer v. Ctr. Psychiatrists, Ltd.*, 476 S.E.2d 172, 174 (Va. 1996)). Further, "[a]n employer may be liable in tort even for an employee's unauthorized use of force if 'such use was foreseeable in view of the employee's duties.'" *Id*. (*quoting Martin v. Cavalier Hotel Corp.*, 48 F.3d 1343, 1351 (4th Cir. 1995)). Based on the allegations, the Court already found that the FAC set forth sufficient facts to infer vicarious liability, and ultimately concluded that, "it was foreseeable that Defendants' employees might engage in wrongful tortious behavior while conducting the interrogations because interrogations are naturally adversarial activities." *Id*. at 64-65. Thus, when CACI employees entered into the conspiracy to abuse detainees, their culpable conduct is legally attributed to their employer. That

[8] Plaintiffs assert that both CACI International Inc. and CACI Premier Technology, Inc. are vicariously liable for their employees' participation in the conspiracy to torture, and otherwise abuse, the Plaintiffs. *See* SAC ¶¶ 1, 64, 88-90, 92, 94.

finding is also law of the case, and requires summary rejection of CACI's attempts to re-litigate the corporate entities' responsibility.

In any event, the Second Amended Complaint – just as the FAC – satisfies the standards for respondeat superior liability. Plaintiffs have alleged an employer-employee relationship between CACI and its employees named as participating in the conspiracy. *See* SAC ¶ 64. Once an "employer-employee relationship has been established, 'the burden is on the [employer] to prove that the [employee] was *not* acting within the scope of his employment when he committed the act complained of, and . . . if the evidence leaves the question in doubt it becomes an issue to be determined by the jury.'" *Plummer*, 476 S.E.2d at 174. In addition to alleging an employer-employee relationship, Plaintiffs have also alleged how the individual CACI employees' participation in the conspiracy fell within the scope of their employment even if their conduct was in violation of CACI's formal policies. *See Heckenlaible v. Va. Peninsula Reg'l Jail Auth.*, 491 F. Supp. 2d 544, 549 (E.D. Va. 2007) ("[A] jury issue may exist as to whether an employee's wrongful act occurred within the scope of employment notwithstanding the fact that the employee's act violated an employer's rules or directives."). As alleged, CACI interrogators Stefanowicz, Dugan, and Johnson, among potentially others, along with their co-conspirators, could not have reached an agreement with their co-conspirators and committed acts in furtherance of the conspiracy, "were it not for [their] employment" with CACI. *Id*. at 552. Also, in directing the abuse of detainees to "set conditions" for interrogation, they "arguably used the authority of [their] office to accomplish the wrongful act." *Id*. In sum, "[c]ircumstances related to [their] employment facilitated" the torture and abuse. *Id*. As such, the SAC, just like the FAC, plainly states a claim for CACI's vicarious liability. *See, e.g.*, *id*. at 549 ("[A]n employer need not impliedly or expressly direct the wrongful act.").

Defendants egregiously misrepresent the Court's respondeat superior liability analysis in *Iqbal*. Def. Br. 10, 16; *see also* Def. Br. 12-13 (relying on analysis of *Iqbal* in 42 U.S.C. § 1983 case, *Robinson v. Stewart*, Civil Action No. 3:11CV63, 2012 U.S. Dist. LEXIS 108556 (E.D. Va. Aug. 2, 2012)). As the decision makes abundantly clear, *Iqbal*'s limitation on supervisory liability applies only to *Bivens* claims for constitutional violations brought against individual *government* defendants, who enjoy the benefits of qualified immunity; that limitation parallels the prohibition on respondeat superior liability against city and state governments that has been in effect at least since the Court's decision in *Monell v. New York City Dept. of Social Services*, 436 U.S. 658, 659 (1978). *See Iqbal*, 556 U.S. at 675-77. Unlike such sovereign bodies, CACI is a for-profit business corporation that, like any other, is generally liable for the torts of its employees committed in the course of their employment. *Iqbal* did nothing to upset nearly centuries of law governing the vicarious liability of private entities, nor could it have without producing a revolution in basic tort doctrine. Vicarious liability rules for private entities are the same as when this Court ruled in 2009.[9]

[9] Even if a court were, for the first time, to import *Iqbal*'s "personal involvement" requirement into the corporate context, Plaintiffs would still survive CACI's motion to dismiss as Plaintiffs' allegations of knowledge and acquiescence or deliberate indifference to a known risk, meet the "personal involvement" standard. *See, e.g., Dodds v. Richardson*, 614 F.3d 1185, 1195 (10th Cir. 2010) (explaining, post-*Iqbal*, a supervisor's "personal involvement is not limited solely to situations where a defendant violates a plaintiff's rights by physically placing his hands on him"); *Parrish v.Ball*, 594 F.3d 993, 1001 (8th Cir. 2009) ("[S]upervising officer can be liable for an inferior officer's constitutional violation only if he directly participated in the constitutional violation or if his failure to train or supervise the offending actor caused the deprivation.") (internal quotation omitted); *Sanchez v. Pereira-Castillo*, 590 F.3d 31, 49 (1st Cir. 2009) (supervisory liability where official "supervises, trains or hires a subordinate with deliberate indifference toward the possibility that deficient performance of the task eventually may contribute to a civil rights deprivation") (internal quotation omitted); *Sandra v. Grindle*, 599 F.3d 583, 590 (7th Cir. 2010).

B. The SAC Also Adequately Alleges CACI's Liability For Its Own Participation In The Conspiracy

As this Court has already held, Plaintiffs' allegations regarding CACI's vicarious liability are sufficient to state a claim for its liability. Nevertheless, the SAC further alleges the role of CACI's management in the conspiracy to torture, and otherwise abuse, the Plaintiffs. While CACI employees and military personnel reported abuse at Abu Ghraib, and CACI employees' role in that abuse, "CACI Management failed to report this abuse to the military or to take additional steps to ensure its own employees discontinued detainee abuse." SAC ¶¶ 81-82. Plaintiffs specifically allege the role of CACI's Site Lead Manager, who "had full access to information about the conduct and performance of CACI interrogators, including CACI co-conspirators." SAC ¶ 92. Plaintiffs further allege that "CACI repeatedly made knowingly false statements to the effect that none of its employees was involved in torturing detainees," even though "co-conspirators have admitted, some of whom admitted under oath, that CACI corporate employees were involved in the torture," in an effort to cover up the conspiracy. SAC ¶ 101. Plaintiffs specifically point to a book written by CACI's Chief Executive Officer falsely stating that "none of its employees" participated in the abuse, when military investigations, whistleblowers, and at least one photograph have revealed the involvement of CACI employees. SAC ¶¶ 102-104.

Defendants consistently characterize CACI interrogators alleged to have participated in the conspiracy as "low-level" – a self-serving characterization not found in the SAC that Defendants are not permitted to make on a motion to dismiss. In any event, the claim ignores the consistent findings of military investigators – cited in the SAC – that the interrogators, many of whom were CACI, were directing the conduct of the military personnel who often carried out the abuse. *See* SAC ¶¶ 64, 68-77. *See also* Taguba Report at 48; Jones/Fay Report at 51-52.

Finally, CACI cites no authority to support its assertion that Plaintiffs must allege who exactly "with the authority to bind the CACI Defendants supposedly made a corporate decision to enter into a conspiracy to engage in corporate conduct that was not authorized by the United States and which is by definition criminal in nature." Def. Br. 17. Neither *In re Xe Services*, 665 F. Supp. 2d 569, nor *Wiggins v. 11 Kew Garden Court*, No. 12-1424, 2012 U.S. App. LEXIS 18345 (4th Cir. Aug. 28, 2012), imposes this requirement. In *In re Xe Services*, the court found the complaints insufficient to show the employers' direct liability – as opposed to secondary liability (such as vicarious liability, conspiracy liability, or aiding and abetting liability) – for war crimes. 665 F. Supp. at 591 ("[T]he complaints…support a plausible inference of recklessness or negligence by defendants, but not of intentional killing or infliction of serious bodily harm."). Here, as this Court has already found, Plaintiffs have sufficiently alleged CACI's participation in a conspiracy as well as its vicarious liability. Dkt. No. 94 at 64, 65; *see also supra* at Sections II, III.B (conspiracy liability); Section III.A (vicarious liability). In *Wiggins*, the Fourth Circuit concluded that, while the plaintiff claimed that the private defendants and members of the judiciary conspired together, "he fail[ed] to make any factual contentions concerning any actual conduct by any of the judiciary Defendants aside from entering orders and making legal decisions" – conduct that is both lawful and in the normal course of the judiciary's function. *Id*. at *4. Here, Plaintiffs have alleged CACI's wrongful conduct, including a failure to report abuse when it had the duty to do so, its tacit approval of the abuse by failing to discipline employees reported to have abused detainees, and its role in the cover-up of the conspiracy.[10]

[10] While *Hill v. Lockheed Martin Logistics Mgmt.*, Def. Br. 18, discusses the ability of employees to bind a corporation, the discussion is limited to actions brought under certain anti-discrimination statutes, for which "Congress 'evinced an intent to place some limits on the acts of employees for which employers . . . are to be held responsible.'" 354 F.3d 277, 287 (4th Cir. 2004). Regardless, the court found that actions taken by a supervisor to be sufficient. *Id*. at 287-

CONCLUSION

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

Date: January 28, 2013

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288. Paragraphs in the complaint that refer to CACI's Site Lead, who reported to "CACI Management" about the conduct of CACI interrogators at Abu Ghraib, and CACI's Chief Executive Officer, who publicly made false statements covering up CACI's role in the conspiracy, adequately allege at least persons with supervisory authority and apparent authority to bind the corporation, if not actual authority.

CERTIFICATE OF SERVICE

I hereby certify that on January 28, 2013, I electronically filed the Plaintiffs' OPPOSITION TO DEFENDANT CACI PREMIER TECHNOLOGY, INC.'S MOTION TO DISMISS PLAINTIFFS' SECOND AMENDED COMPLAINT through the CM/ECF system, which sends notification to counsel for Defendants.

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