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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

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SUHAIL NAJIM ABDULLAH AL      :   Civil Action No.:
SHIMARI, et al.,             :   1:08-cv-827
      Plaintiffs,             :
versus                        :   Thursday, October 17, 2024
      :                       :   Alexandria, Virginia
CACI PREMIER TECHNOLOGY,     :
INC.,                        :   Pages 1-24
      Defendant.             :
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The above-entitled motions hearing was heard before the Honorable Leonie M. Brinkema, United States District Judge. This proceeding commenced at 10:25 a.m.

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COMPUTERIZED TRANSCRIPTION OF STENOGRAPHIC NOTES

1 THE COURT: All right. Well, I've got a whole
2 bunch of motions in front of me. I'm not going to hear
3 argument on most everything, because a lot of them are, in
4 my view, repeats of motions that I heard before, and I don't
5 need to hear further argument on them. So I'm just going to
6 repeat or relate to you what my rulings are going to be.

7 As to CACI's motions, the first one is to exclude
8 character testimony by Major General Taguba. I'm denying
9 that motion. He -- the testimony needs to be there to
10 explain in part the basis for the conclusions that he made,
11 and so I'm allowing that testimony in. That's Docket
12 Number 1668.

13 The second motion to exclude the Taguba and Fay
14 reports. We went through that last time. I recognize the
15 dangers of some of that, but as I recall, I did give a
16 cautionary, and if I did not, this time I will give another
17 cautionary instruction to the jury as to how to approach
18 those reports since they are reports of findings, and the
19 actual witnesses, to some degree, are not present to be
20 heard from directly. But I've found before and I find again
21 that there are enough indicia of reliability. These are
22 official government reports. Actions were taken on the
23 basis of those reports by the military as to some of its own
24 people, and, therefore, I'm satisfied that they should come
25 in. So that motion, which is 1671, is denied.

1 The third one is whether or not the Court should
2 admit evidence of other civilian interrogators at Abu
3 Ghraib. Again, we did allow last time for there to be
4 evidence that there were other civilians on the base. I'm
5 going to follow the same rule on that issue that I did last
6 time. That's sufficient to address CACI's concerns. And so
7 I'm going to again deny that motion as to 1674.

8 In terms of a motion to exclude evidence
9 concerning training and experience of the CACI employees,
10 I'm not going to grant that motion. Again, I think -- and
11 that's Motion Number 1677. There's no unfair prejudice to
12 CACI. I think that CACI can develop sufficient evidence on
13 that issue.

14 And, again, you know, we had this whole issue in
15 the last trial, and I assume the evidence will be somewhat
16 the same in this case, that it was the military's decision
17 to upgrade these people to interrogator. It was not CACI
18 who sent them as interrogators. They were to be
19 interviewers, as I recall the testimony. And so, to some
20 degree, I mean, this issue to me is one that, you know, it
21 is appropriate to the case.

22 The relevance of plaintiffs' apprehension. I'm,
23 again, denying that motion. I said last time, and I'll say
24 it again, I think it's a mistake for CACI to spend time
25 attacking the bona fides of these plaintiffs in terms of any

1 connection that they might have had to suspicious activity.
2 I don't think that went anywhere with the jury, and, in any
3 case, I'm going to keep the same rule that I had last time
4 on that. So that motion is denied, that's 1681.

5 In terms of the motion to exclude irrelevant,
6 misleading or confusing regulatory policy evidence, there's
7 been a response that's now come in that I've had a chance to
8 read on that, and I'm going to deny that motion again.

9 If I find that either side is trying to argue law
10 to the jury, I will stop it during the trial. But the
11 contract between CACI and the military, the Army Field
12 Manual, which did come in in the previous trial, and other
13 documents that would shed light on what is now I think the
14 key issue in this case, which is the borrowed servant or
15 dual employment concept, it's definitely relevant to the
16 jury's consideration. So I'm denying that motion,
17 particularly in light of the response I got from the
18 plaintiff, that they're not going to have a whole slew of
19 documents coming in.

20 At the same time, I will allow CACI if -- because,
21 again, it may come in in the form of a jury instruction
22 rather than evidence. If there are CFR or other clear
23 statutory provisions that explain the relationship of
24 contractors in the intelligence field and how they are or
25 are not to be treated, then I would permit that. All right.

1 So we'll have to see how the trial evolves, whether it comes
2 in as an actual exhibit or whether it comes in in the course
3 of a jury instruction. All right.

4 And I believe that took care of all of CACI's
5 motions.

6 In terms of the plaintiffs' motion to exclude
7 prejudicial evidence and questioning, I am not allowing the
8 introduction of evidence concerning the reasons for the
9 plaintiffs' detention; however, I am going to allow, because
10 it's certainly part of the case, evidence -- or questioning
11 of the plaintiffs that might suggest a motive to be biased
12 against the United States because the plaintiffs are seeking
13 damages. And so to the extent that, you know, bias is a
14 legitimate form of cross-examination to determine the bona
15 fides of what a person is testifying to. And so I'm not
16 prohibiting the defendants from asking questions of the
17 defendants that might -- I'm sorry, of the plaintiffs that
18 might relate to their motivation for testifying or for
19 saying what they say. All right. So I'm granting in part
20 and denying in part the plaintiffs' motion 1680.

21 I'm denying the plaintiffs' motion 1683 to exclude
22 the Rumsfeld memo. I allowed it in last time, I think it is
23 appropriate, because this case is a case for damages, and so
24 I think it's legitimate for the defense to be able to make
25 that argument.

1 The plaintiffs' motion to permit the admission of
2 opposing party statements, I'm allowing that. I'm granting
3 that motion. That may come in.

4 The motion to preclude comments and statements re
5 state secrets, I'm denying that motion. The state secret
6 issue permeated both sides' case; however, I don't want as
7 much of that as we had last time. That was painful to have
8 all those objections by the government during those
9 depositions, so I expect that they've been pared down. But
10 I will allow some of that to come in; I think that's only
11 fair to the defense.

12 And the big one, and the one that, Mr. Molster,
13 you wanted argument on, 1718, which is to preclude the
14 borrowed servant defense, I don't need to hear argument on
15 that. That is a legitimate issue in this case. It is a
16 fact-bound issue.

17 Now, if the facts come in differently during this
18 trial, then it's possible that defense doesn't come in. I
19 mean, jury instructions are based upon what the evidence is
20 in the case.

21 I'm going to allow the defense to make the
22 argument, if they want to raise it in the opening statement.
23 I don't know how they're going to do it. But the point is,
24 that was a key issue in the first case. My own view is that
25 the evidence was sufficient to support that defense to some

1 degree, enough to let it go to the jury, and I'm letting it
2 stay in the case. So I've looked at the papers on that.

3 And the last things I have are two third-party
4 motions to appear as amicus. I do not need any more law or
5 argument in this case. We've had more than enough. It's
6 within the Court's discretion, especially at the trial
7 level, whether or not to entertain amicus briefs, and I'm
8 not going to. So those two motions are denied.

9 That takes care of, I think, everything that was
10 pending in this case. All right.

11 MR. AZMY: Your Honor, just a point of
12 clarification.

13 THE COURT: At the lectern, please. At the
14 lectern.

15 MR. AZMY: So the motion re about prejudicial
16 statements and permitted testimony regarding bias, just to
17 get clarification on the contours, I mean, we understand
18 that bias might be relevant, but is there a limit? Does it,
19 you know, bump up against questions about the reasons for
20 apprehensions? Could we just get some clarity on that?

21 THE COURT: Well, I've already denied CACI's
22 motion to get into that issue as to why these folks were
23 arrested. All right. All right. Because there is -- as I
24 understand this record -- I mean, we're not trying any of
25 the plaintiffs for being terrorists or supporting terrorist

1 activities.

2 The jury will know that they were picked up. All
3 right. And they will know that the one plaintiff had
4 \$20,000 of cash on him, because that's relevant to some
5 degree, I think to the damages issue and the Rumsfeld
6 business. But I don't expect that the defense will try to
7 get around what I've made clear, is that they can go into
8 appropriate bias. You know, something like my house was
9 blown up, my children were killed, I mean, that would show
10 an anti-U.S. bias. That's not illegitimate, all right, in
11 this case.

12 MR. AZMY: That's helpful, Your Honor. Thank you.

13 THE COURT: All right.

14 MR. AZMY: And one other question.

15 We had an alternative ground in our motion in
16 limine around the dual agency instruction. Is that
17 something you're going to consider now or perhaps later?

18 THE COURT: Later.

19 MR. AZMY: Thank you.

20 THE COURT: All right. Yes, Mr. O'Connor.

21 MR. O'CONNOR: Your Honor, I have one
22 clarification, I guess.

23 The plaintiffs' motion on opposing party
24 admissions, at the outset of the hearing Your Honor had said
25 basically a lot of these motions have been brought before

1 and issues dealt with before. As I understand it, that --
2 two of the things that they wanted to put in were things the
3 Court did not let Torin Nelson testify to last time and
4 excluded it as not a party-opponent admission.

5 Is the Court reversing itself on those? Is that
6 what I understand?

7 THE COURT: I think at this point I'm going to
8 allow that in. Yeah. Yes. All right.

9 MR. O'CONNOR: And we had some logistical
10 questions if the Court wants to entertain them.

11 THE COURT: Go ahead. Oh, yes, while we're doing
12 that. I'm not going to hold court on Election Day.

13 MR. O'CONNOR: That was the question.

14 THE COURT: Was that one of the ones? Yeah. And
15 I will tell the jury that at the outset. Probably shouldn't
16 do it the day after election even more so, but we're going
17 to have to try this case. So we are going to come in on
18 Wednesday unless, and I hope it hasn't happened, if for some
19 reason there is any kind of significant civil unrest, then,
20 you know -- and I'm not going to raise that issue with the
21 jury ahead of time. But you all should be watching our
22 website. If for some reason there are problems, then, you
23 know, it's possible we wouldn't be conducting trial that
24 Wednesday. We'll have to just see how things work out. I'm
25 not expecting that up here. Okay.

1 MR. O'CONNOR: Well, that answered Question 1,
2 Your Honor.

3 THE COURT: All right.

4 MR. O'CONNOR: Question 2, the Court's rules call
5 for a submission of instructions of voir dire. Are we doing
6 that again or ...

7 THE COURT: I think I'm going to do what I did
8 last time, except for the jury instructions. I'm letting
9 you know right now, I'm going to be working with my staff
10 and try to give it to you before the trial starts.

11 Now again, remember, trials are never predictable.
12 Even though this is a retrial, things could change. I don't
13 know whether they will or will not. And that being the
14 case, the jury instructions could shift, but I want to
15 have -- so that you're aware of it, I'm going to look again
16 at the borrowed servant instruction. The dual servant
17 instruction, which I'm not sure we used last time, I can't
18 recall what we did, but I'm going to invite both sides to
19 submit on that as well. I'd like to have all those issues
20 preliminarily resolved before the trial gets started. All
21 right. And so I think you should review the instructions --
22 you probably still have your copies of them from the last
23 trial -- and if there are any objections to those
24 instructions, get them to me ahead of time. I'd like to
25 have the charge almost ready to go. Okay.

1 MR. O'CONNOR: And so --

2 THE COURT: And same thing with the voir dire. I
3 mean, you've got a transcript of what the voir dire was.
4 And my intention I think is to give just about the exact
5 same voir dire.

6 MR. O'CONNOR: But if we have proposals that we
7 want to preserve ourselves, we should file a new set next
8 week?

9 THE COURT: Yes. If you have additional ones or
10 you have objections to the ones that were asked previously,
11 yeah, get that on the record. And the trial starts on a
12 Wednesday. Get those to me no later than Thursday of next
13 week. All right.

14 MR. O'CONNOR: Understood, Your Honor.

15 THE COURT: I'm going to ask the jury section to
16 try to get you the jury list by next Monday. Today is
17 Thursday. By next Monday, so you'll have it more than a
18 week in advance of the trial, because the trial starts on
19 Wednesday.

20 MR. O'CONNOR: The next logistical question, Your
21 Honor. Just in terms of trying to plot out the trial days,
22 is the Court going to go a full day on Halloween?

23 THE COURT: Of course.

24 MR. O'CONNOR: Okay. I'm not asking otherwise.

25 THE COURT: And you can't bring costumes to court.

1 MR. O'CONNOR: I'm not asking otherwise, just in
2 terms of if we were going to lose a couple hours, that could
3 affect whether we have witnesses here.

4 THE COURT: I'm going to make sure the jurors can
5 be here until close to 6.

6 MR. O'CONNOR: And one thing we just want to put
7 on the record from a conversation we had yesterday with
8 counsel, we called Mark Billings, a former CACI employee at
9 the last trial. Plaintiffs served him with a subpoena -- a
10 trial subpoena calling for him to appear the second day of
11 trial, so the 31st. We conferred yesterday, and I confirmed
12 to plaintiffs' counsel that we are going to call him in our
13 case. And so my understanding is that he does not need to
14 appear here until our case because he's basically being
15 released from that obligation based on my representation
16 that he's going to be here, so they'll get a chance to
17 question him.

18 MR. FARIDI: Good morning, Your Honor.
19 Muhammad Faridi on behalf of the plaintiffs.

20 That is accurate. If CACI calls Mr. Billings
21 during its case, we will not call him during our case in
22 chief or during our rebuttal case.

23 THE COURT: Again, we're starting on Wednesday.
24 When do you think Billings would be appearing?

25 MR. O'CONNOR: If their case is about as long as

1 last time, Your Honor, I would expect it to go to the end of
2 the week or possibly into Monday. So I would expect him
3 either Monday or Wednesday, depending on, you know,
4 whether -- you know, basically depending on when they rest.
5 He's a first-half-of-our-case witness.

6 THE COURT: All right. That's fine then. So
7 you're going to wait until he's called in the defense case
8 to use him?

9 MR. FARIDI: Yes.

10 THE COURT: All right. That's fine. No problem.

11 MR. FARIDI: We have just one other issue to raise
12 with Your Honor.

13 CACI recently, about a week or so ago, served a
14 *Touhy* request on the United States government seeking the
15 government's permission to bring to trial two witnesses who
16 were never previously deposed in this case or not identified
17 as witnesses on CACI's witness list. That request is still
18 pending with the U.S. government and hasn't weighed in on
19 whether or not it will allow any testimony of those two
20 individuals.

21 The first is Major General Church who issued the
22 Church report, a report that Your Honor hasn't considered
23 before. It's another report that came many months after the
24 Taguba report, the Fay/Jones report, so CACI is seeking to
25 call him.

1 The other person is Colonel Rivas. He was also
2 with the United States military and had some role at Abu
3 Ghraib. Again, another witness who we had never heard about
4 before in this case, was never deposed, was never on the
5 witness list. And, Your Honor, this is just -- these are
6 just surprise witnesses. And CACI hasn't withdrawn its
7 *Touhy* request, and I'm not sure whether they still intend on
8 calling these two individuals, but I just wanted to inform
9 the Court of this issue. We're not seeking relief as of
10 yet.

11 THE COURT: Were either of these witnesses listed
12 on the previous witness list?

13 MR. FARIDI: No.

14 THE COURT: All right. Mr. O'Connor.

15 MR. O'CONNOR: Your Honor, the plaintiffs also
16 served a *Touhy* request with a new witness on it as well
17 who -- that was actually granted by the United States, but I
18 hear he's not coming because he's outside of the subpoena
19 power of the Court.

20 I don't think we're bound by the witnesses that we
21 called at the last trial. It's Chief Rivas; it's not
22 Colonel Rivas. He's all over the org chart that has been
23 admitted all over from the ICE. He actually, as I
24 understand it, attended the last trial, unbeknownst to me
25 and everyone else who was here, and called me and said, you

1 know, a lot of the things that have been said about control
2 of CACI personnel at the trial is not accurate. I've had a
3 few phone conversations with him. I've been trying to meet
4 with him; I've not been able to meet with him.

5 So that's where we are right now. But we've made
6 a *Touhy* request. I don't know if the government's going to
7 grant it or not. I think it's not ripe at this point
8 because we don't know what the government is going to say.
9 But that's the story with him.

10 And then Admiral Church, it's another, as Your
11 Honor said, government report that has -- it's an official
12 government report where he made findings relating to CACI
13 and its personnel. I'm not sure that even if -- I mean,
14 provided we're able to put in portions of the Church report,
15 I'm not sure that we would intend to even call Admiral
16 Church.

17 THE COURT: Why didn't you present that in the
18 first trial?

19 MR. O'CONNOR: Your Honor, because our view is
20 that these reports shouldn't be in, period. And -- but as
21 Your Honor has said, the parties, after the first trial,
22 should rethink exactly what they're doing with the case, and
23 there's about two paragraphs in the Church report that I
24 think are important and go to reach conclusions that are not
25 entirely in line with the Jones/Fay report, and I think the

1 jury's entitled to know that the government investigations
2 are -- there is some disagreement among them, and that's it.
3 I mean, we've got a few paragraphs from the Church report
4 about CACI personnel that we intend to seek to offer.

5 THE COURT: What I'm going to require that you do
6 is you're going to have to specifically -- you have to
7 indicate immediately to the plaintiffs what the specific
8 paragraphs are that you want to use from the Church report,
9 and that will then open up the ability of the plaintiffs to
10 indicate if there are any passages of the Church report that
11 you want to introduce. All right.

12 I mean, this was a publicly-available report, I am
13 assuming.

14 MR. O'CONNOR: That's right, Your Honor. It was
15 for the Department of Defense. It's a public report.

16 THE COURT: And so even though I don't like this,
17 and I realize now I probably was remiss and nobody, I don't
18 think, asked me to issue an order saying you're frozen to
19 the witness lists unless you supplement it ahead of time, we
20 didn't do that. So I'm glad we're doing this now and not
21 the day before trial.

22 Now, I'm not going to be available right before
23 the trial, which is why I had to shift it to Wednesday. So
24 if we have any of these last-minute issues, they've got to
25 be resolved no later than next Friday; all right?

1 MR. O'CONNOR: Understood, Your Honor.

2 THE COURT: So I'm not holding up the jury.

3 So that's my ruling on the Church report. Okay.

4 You may use your paragraphs, but you've got to let
5 the defense know -- the plaintiffs know by the end of
6 business today what you want to use from it. And then you
7 all should let the CACI people know by close of business
8 Monday as to what other portions, if any, of the Church
9 report you want to put in; all right?

10 MR. O'CONNOR: That's fine, Your Honor. Thank
11 you.

12 Two other small things that I -- just to give the
13 Court a heads-up. And I'm not sure that it's something that
14 needs to be decided today.

15 Sabrina Harman. Your Honor might remember
16 plaintiffs had attempted to serve her -- she lives in
17 Alexandria -- for the last trial. They didn't get her
18 served, and the Court ended up allowing her 2013 deposition
19 to be -- a portion to be played at trial.

20 We subpoenaed Ms. Harman basically to prevent that
21 because she lives in Alexandria and we want a trial cross
22 and not a reading. She contacted me and expressed -- and
23 also contacted government counsel and expressed some concern
24 about appearing during trial because of -- she was
25 implicated in the scandal. We had said that if the

1 plaintiffs would agree, we would do a de bene esse
2 deposition, and we could do this in a conference room.

3 Plaintiffs have not agreed to that, so, as I
4 understand it, she's going to appear. But I wanted to just
5 make sure that I've put on the record that we were willing
6 to do it that way, and if she ends up not complying with the
7 subpoena, our view is that this could have been done by a de
8 bene esse deposition. But there's nothing to do now on
9 that.

10 THE COURT: Look, she must comply unless the
11 government provides some objection.

12 Do you need a *Touhy* --

13 MR. O'CONNOR: She was granted.

14 THE COURT: She was granted?

15 MR. O'CONNOR: The plaintiffs requested her, and
16 she was granted.

17 So I'm assuming the Court would send the marshals
18 out to find her if she doesn't show up.

19 THE COURT: That's right. Yes. All right.

20 MR. O'CONNOR: And the last thing is, we raised
21 with the government one of the issues with -- and to comment
22 on something Your Honor said a little bit ago. We have
23 substantially cut back the pseudonymous depositions. We
24 think that is -- that inures to our substantial prejudice
25 that we had to do it this way, but that's life. I mean, I

1 have to play in the field that we have.

2 We have cut out objections in a lot of these.
3 Particularly the ones who were not CACI employees, we've
4 tried to cut out most of the objections just to make it
5 shorter.

6 One of the issues that arises is the government
7 heretofore has required us also to alter pitch, which Your
8 Honor might have concluded also contributed to the problems
9 with playing these in a trial. The -- we've asked the
10 government today if they would consider pulling back on
11 that, on the pitch adjustment requirement, and they're going
12 to let us know. Because, fairly, their counsel said I need
13 to go talk to my client.

14 The issue with pitch adjustment is if we make any
15 edits to the -- what's going to be played on the fly during
16 trial, you can't. So that's why we ended up reading in
17 some, because it takes an hour or longer. You need to take
18 the pitch off, then make the changes, and then we adjust the
19 pitch. But we're in discussions with the government; we'll
20 see where that goes.

21 THE COURT: Well, we need to get a resolution of
22 that soon.

23 When did you request that resolution?

24 MR. O'CONNOR: We raised it with them -- with
25 Mr. Elliott outside of court this morning, Your Honor.

1 THE COURT: And he's here today, I think. I see
2 him.

3 MR. O'CONNOR: He is.

4 THE COURT: Yes.

5 How long is it going to take to get back on that?
6 I have to tell you, I'm not in favor of the pitch issue. I
7 think there's enough masking of the information in this
8 case.

9 MR. ELLIOTT: Good morning, Your Honor. I will
10 take it back to my client this afternoon and get back to you
11 as soon as possible.

12 THE COURT: Let them know the Court's not in favor
13 of it.

14 MR. ELLIOTT: Understood.

15 THE COURT: Okay.

16 MR. ELLIOTT: Thank you.

17 THE COURT: Quite frankly, that would help
18 everybody better understand what's going on here without
19 identifying these individuals. Unless somebody has a truly
20 unique accent, such that everybody went, oh, yeah, that's
21 Joe Schmo, there's no reason for that, and I think it makes
22 things unduly complicated. All right. Okay.

23 MR. O'CONNOR: Yes, Your Honor. If it turns out
24 that one of them is James Carville, we'll adjust the pitch.
25 But other than that, you got it.

1 Those were all the logistical questions that we
2 had. Thank you, Your Honor.

3 THE COURT: Great. Is there any -- yes.

4 MR. MOLSTER: I have two, Your Honor. Thank you.
5 Friday, are you going to sit on Friday?

6 THE COURT: Yes, we will. I'm going to make sure
7 that -- what I do is I shift my motions docket to 8:30 so
8 that I can try to keep the case on schedule. I mean, I'm
9 going to be starting the trial 9:30 after the first day.

10 MR. MOLSTER: That's my second question.

11 THE COURT: 9:30 to 6. Friday it might be 10 to 6
12 depending upon how much I have on my civil docket, but I
13 don't think I have any heavy civil dockets during the time
14 of the trial. I've tried to keep things fairly light.

15 MR. MOLSTER: Thank you very much, Your Honor.

16 THE COURT: Very good.

17 And, again, even though I know this is a
18 hard-fought case, I'll still remind you all that there's
19 still time to try to work this one out.

20 There are other government contractors who were
21 involved with Abu Ghraib who did resolve cases. A
22 resolution by settlement does not involve any kind of
23 admission of liability, and so I'll just leave it with you
24 all in that respect.

25 But, you know, we had what I thought was a very

1 conscientious jury last time. They spent I think it was
2 eight days trying to figure the case out, and they were
3 unable to. It was more than one juror who, you know, was on
4 CACI's side. I mean, it was a split jury. I talked to them
5 briefly afterwards, and it was a very difficult case for the
6 jury. I think it will still be a difficult case for the
7 jury. And it makes, in my view, good sense to try to settle
8 cases like this. So I'm still recommending that you think
9 about that. And, again, we have really great magistrate
10 judges here. Judge Vaala or Judge Anderson would be
11 available to work with you if there were any serious
12 interest in trying to resolve it.

13 But assuming that does not happen, I'll either see
14 you next Friday, if there are any last-minute motions that
15 have to be resolved, or I'll see you the following
16 Wednesday. All right.

17 We'll recess court for the day.

18 (Proceedings adjourned at 10:53 a.m.)

19 -----
20 I certify that the foregoing is a true and accurate
21 transcription of my stenographic notes.

22
23 Stephanie Austin

24 Stephanie M. Austin, RPR, CRR

25