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-00827-GBL-JFA
v.	)	
CACI PREMIER TECHNOLOGY, INC.,	)	
Defendant.	)	

REPLY OF DEFENDANT CACI PREMIER TECHNOLOGY, INC. IN SUPPORT OF ITS MOTION TO DISMISS PLAINTIFFS' THIRD AMENDED COMPLAINT

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I. INTRODUCTION

Plaintiffs' Third Amended Complaint fails to set forth plausible allegations that implicate CACI PT in a conspiracy with low-level military personnel for the purpose of mistreating the Plaintiffs. Like the earlier pleadings, the current complaint—the Plaintiffs' fourth—still fails to allege facts supporting any corporate agreement or motive to conspire, link any misconduct by a CACI PT interrogator to the Plaintiffs, or set forth any legal theory under which CACI PT could be held liable for the misconduct of military personnel. As a result, Plaintiffs' conspiracy claims should be dismissed with prejudice.

In a last-ditch effort to avoid this inexorable outcome, Plaintiffs advance all manner of arguments in an attempt to demonstrate the adequacy and plausibility of their allegations. None are availing. In the first place, the additional details in the Third Amended Complaint related to actions by CACI PT management fall short of establishing direct corporate liability for the alleged conspiracy because they do not give rise to any inference of a corporate agreement or set forth a plausible motive to conspire.

Plaintiffs' *respondeat superior* theory fares no better. With respect to CACI PT's potential liability for an alleged conspiracy between its employees and the military, Plaintiffs assert that the Third Amended Complaint "[a]ddress[ed] the Court's concerns" by including additional allegations including the location and time of the unwritten agreement between CACI PT personnel and military conspirators to torture detainees, the specific individuals from CACI PT and the military who joined this agreement, the manner in which the terms of the agreement were conveyed, and the connection between the conspiracy and the named Plaintiffs. Opp. 1-2. Plaintiffs' "kitchen- sink" approach, however, does not address the Court's stated concerns, particularly where, as here, the kitchen sink is not connected to a water line.

The Court dismissed the conspiracy allegations in the Second Amended Complaint because they relied on allegations of parallel conduct, which are insufficient under *Loren Data Corp. v. GXS, Inc.*,[1] and did not contain allegations that tied the use of code words or the activities of CACI PT personnel to the mistreatment of the named plaintiffs. Motions H'rg Tr. 41-42. The Third Amended Complaint does nothing to remedy these deficiencies: Plaintiffs' conspiracy claims still rely on allegations of parallel conduct and still fail to connect either the use of code words or the activities of CACI PT personnel to the mistreatment of the named plaintiffs—"not just any detainee." *Id.* at 42.

Because Plaintiffs cannot link CACI PT interrogators' alleged involvement in a conspiracy to the named plaintiffs, they cannot hold CACI PT vicariously liable for the conspiracy. And they certainly cannot hold CACI PT vicariously liable for the actions of military members—outside of CACI PT's employ—for participation in the alleged conspiracy. Nor can Plaintiffs subject CACI PT to liability for parallel conduct by military members that harmed the named plaintiffs merely because it was similar to conduct CACI PT interrogators allegedly ordered with respect to *other* detainees.

For the same reasons that the Court dismissed the conspiracy claims in the Second Amended Complaint, the Court should likewise dismiss the conspiracy claims in the Third Amended Complaint.

[1] *Loren Data Corp. v. GXS, Inc.*, No. 11-2062, 2012 WL 6685771 (4th Cir. Dec. 26, 2012) ("Specifically, when concerted conduct is a matter of inference, a plaintiff must include evidence that places the parallel conduct in 'context that raises a suggestion of a preceding agreement' as 'distinct from identical, independent action.'").

II. ANALYSIS

A. Plaintiffs' Third Amended Complaint Fails to Plausibly Allege that CACI PT Entered into Any Agreement to Harm the Plaintiffs

Plaintiffs assert that CACI PT had a direct role in the alleged conspiracy "distinct from the contributions to the conspiracy made by its employee interrogators." Pl. Opp. at 28. Plaintiffs support this claim with allegations that CACI PT "fail[ed] to adequately hire, train, and supervise its employees" and knew and acquiesced in its employees' misconduct. *Id.* This alternative conspiracy theory likewise fails because the Third Amended Complaint does not set forth any facts from which this Court could reasonably infer that CACI PT entered into a corporate agreement with low-level military personnel to harm anyone, let alone these Plaintiffs.

An indispensable component of a conspiracy is an actual agreement to conspire. *See* Motions Hr'g Tr. 40-41 (Mar. 8, 2013) ("The Court must be able to infer a conspiratorial agreement from the facts alleged, otherwise the conspiracy claims must be dismissed.") (citing *Wiggins v. 11 Kew Garden Court*, No. 12-1424, 2012 WL 3668019, at*2 (4th Cir. Aug. 28, 2012)). "Without an agreement, the independent acts of two or more wrongdoers do not amount to a conspiracy." *Murdaugh Volkswagen, Inc. v. First Nat'l Bank of S.C.*, 639 F.2d 1073, 1076 (4th Cir. 1981). As the Plaintiffs have previously acknowledged, in this Circuit a court must dismiss a conspiracy claim where it fails to state with "any specificity the persons who agreed to the alleged conspiracy, the specific communications amongst the conspirators, or the manner in which any such communications were made." *A Society Without a Name v. Virginia*, 655 F.3d 342, 346 (4th Cir. 2011).

Plaintiffs claim that CACI PT entered into a tacit agreement with low-level military conspirators—with whom there is no suggestion that CACI PT management had *any contact*

whatsoever[2]—"by failing to adequately hire, train, and supervise its employees and by turning a blind eye to, and giving tacit approval for, its employees' role in detainee mistreatment." Pl. Opp. at 2.[3] But even if these allegations were true, they still do not demonstrate an agreement *with military conspirators*. At most these allegations show a failure to supervise and reprimand CACI PT employees, with whom CACI PT cannot legally conspire. *See* Motions Hr'g Tr. 39-40; *see also Walters v. McMahen,* 795 F. Supp. 2d 350, 358 (D. Md. 2011) (citing *ePlus Tech Inc. v. Aboud,* 313 F.3d 166 (4th Cir. 2002); *Cohn v. Bond,* 953 F.2d 154, 159 (4th Cir. 1991); and *Marmott v. Maryland Lumber Co.*, 807 F.2d 1180, 1184 (4th Cir. 1986)).

The current complaint also does not allege any plausible motive for CACI PT to enter into a "torture conspiracy" or to harm these Plaintiffs. *See Weiler v. Arrowpoint Corp.*, No. 1:10cv157, 2010 WL 1946317, at *8-9 (E.D. Va. May 11, 2010) (Ellis, J.) (dismissing conspiracy claim where no allegations suggested that the defendants had any plausible motive to conspire to harm the plaintiff). Plaintiffs continue to maintain that CACI PT stood to profit from breaching its contract with the United States by (1) failing to provide appropriately trained interrogators, (2) failing to appropriately supervise interrogators, (3) failing to correct misconduct by interrogators, and (4) failing to report misconduct after it occurred. Pl. Opp. at 28-29. This so-called motive defies common sense. No rational person would believe that such a catastrophic—and allegedly intentional—failure to perform under an existing contract would

[2] The Third Amended Complaint alleges that CACI PT management had contact with "senior military personnel" and "prison leadership officials." TAC ¶¶ 164, 166. There is no indication in the complaint that CACI PT management ever even met the low-level military personnel with whom they are accused of conspiring.

[3] The allegations relating to hiring and training are utterly misguided. Hiring and training decisions necessarily occurred prior to CACI PT personnel's arrival at Abu Ghraib and, therefore, could not possibly have been made in conjunction with any agreement with on-site military conspirators.

somehow secure future contracts and ensure that CACI PT would "continue earning millions of dollars from United States government contracts and keep the CACI corporate family's stock price high." *Id.* at 29 (quoting TAC ¶ 183). The notion is ludicrous on its face.

Unable to establish any plausible motive for prospectively entering an agreement to breach their contract with the government, Plaintiffs allege that CACI PT joined the conspiracy retroactively to protect that contract. *Id.* at 30. In effect, Plaintiffs continue to allege that because CACI PT learned of its employees' alleged misconduct after it had already occurred—meaning the alleged agreement was already made between CACI PT interrogators and the military conspirators—and did not go to the media or government and disclose this information, they somehow joined the conspiracy to torture. *Id.*at 29-30 (citing TAC ¶¶ 171-83). But the Court has rightly rejected this theory. *See* Motions Hr'g Tr. 31-32 (Mar. 8, 2013) ("I'm having trouble with that theory because the agreement was already made. The acts were already done. Is there an obligation to go out and tell the public well, all these bad things happened and our guys did it to[o]—and that makes them a part of the conspiracy. I'm not buying that.").

Because the Third Amended Complaint fails to allege an agreement with CACI PT and the military conspirators and fails to allege any plausible motive for entering into such an agreement, Plaintiffs' conspiracy claims must be dismissed.

B. Plaintiffs' Third Amended Complaint Fails to Connect CACI PT to Any Alleged Conspiracy to Harm the Plaintiffs

Despite multiple amendments to their pleadings and copious new allegations, Plaintiffs still fail to marshal even one allegation that ties misconduct by a CACI PT interrogator to the mistreatment Plaintiffs claim to have suffered. Plaintiffs' opposition sets forth the key allegations from the Third Amended Complaint, which Plaintiffs claim show "how Plaintiffs were harmed by the [alleged] conspiracy, including allegations connecting the specific

contributions made by CACI [PT] employees to the conspiracy with the harms suffered by the Plaintiffs." Pl. Opp. at 7. None of these allegations assert that a CACI PT interrogator directly abused a named plaintiff or that a CACI PT interrogator ordered the abuse of a named plaintiff. *Id.* Indeed, none of the allegations assert that the "code words" CACI PT interrogators purportedly used to order abuse were ever used in relation to a named plaintiff. *Id.*

Instead, Plaintiffs wholly rely on the impermissible inference that because they claim to have been subjected to mistreatment of the kind "regularly ordered by" CACI PT interrogators, those interrogators are somehow responsible for their mistreatment. *Id.*; *see also id.* at 9-11. This kind of specious assumption goes well beyond the reasonable inferences to which all plaintiffs are entitled. The Court need not accept as true "'unwarranted inferences, unreasonable conclusions, or arguments.'" *Nemet Chevrolet, Ltd. v. Consumeraffairs.com. Inc.*, 591 F.3d 250, 255 (4th Cir. 2009) (quoting *Wahi v. Charleston Area Med. Ctr., Inc.*, 562 F.3d 599, 615 n.26 (4th Cir. 2009)).

Plaintiffs make much of the fact that they have now tossed some names and dates into their complaint to flesh out their conspiracy allegations beyond bare legal conclusions. Pl. Opp. at 9-11. This information, however, only makes clear the lack of any connection whatsoever between the CACI PT interrogators' alleged conduct and the named Plaintiffs. Plaintiffs lob generic allegations of detainee abuse for which they claim CACI PT interrogators were responsible, but do not plead any *facts* that connect those allegations to the named plaintiffs. *Id.* The possibility that CACI PT interrogators *could* have ordered Plaintiffs' mistreatment because they allegedly ordered similar treatment with respect to other detainees is nothing more than speculation and is insufficient to carry Plaintiffs' burden. *Twombly*, 550 U.S. at 555 (the right to relief must be more than speculative).

Unhappy with even this minimal burden, Plaintiffs quibble with (and attribute to CACI PT) the Fourth Circuit's requirement that when relying on allegations of parallel conduct, "[t]he evidence must tend to exclude the possibility that the alleged co-conspirators acted independently." Pl. Opp. at 13 (citing CACI PT Mem. at 26 (citing *Loren Data Corp.*, No. 11-2062, 2012 WL 6685771, at *4 (quotation omitted)); *see also* Motions Hr'g Tr. 41-42. Plaintiffs cannot meet this requirement and so erect a straw man, stating that "[a]t the motion to dismiss stage . . . Plaintiffs need not disprove every conceivable alternative . . . ." *Id.* Neither CACI PT nor the Fourth Circuit advocates such a standard. Rather, under the appropriate standard, "when concerted conduct is a matter of inference, a plaintiff must include evidence that places the parallel conduct in 'context that raises a suggestion of a preceding agreement' as 'distinct from identical, independent action.'" *Loren Data Corp.*, No. 11-2062, 2012 WL 6685771, at *4 (quoting *Twombly*, 550 U.S. at 549, 556). Allegations of parallel conduct, by themselves, are not sufficient to give rise to an inference of a preceding agreement. *See id.*

With no allegations that CACI PT interrogators abused the Plaintiffs and no allegations that CACI PT interrogators ordered the Plaintiffs' abuse and no allegations that tend to exclude the possibility that CACI PT interrogators and their alleged military co-conspirators acted independently, Plaintiffs simply cannot—as a matter of law—assert a plausible claim of conspiracy.[4]

[4] Plaintiffs disingenuously argue that CACI PT has taken contradictory positions with respect to the allegations necessary to establish liability for a conspiracy. Opp. 19-20. To be clear, CACI PT recognizes the black-letter law of conspiracy claims that it is a party to a conspiracy can be held liable for actions of co-conspirators in furtherance of the conspiracy, even if the defendant had no involvement with the particular actions that injured the plaintiff. *Id.* at 20. This correct statement of law does not diminish, however, CACI PT's—and this Court's, *see* Motions Hr'g Tr. at 42-43—position that allegations that CACI PT employees ordered the MPs to implement harsh conditions upon detainees generally are inadequate to give rise to an inference that CACI PT employees engaged in a conspiracy to injure the named plaintiffs. As

The Supreme Court's decisions *Iqbal* and *Twombly* require more than claims from which the mere possibility of liability can be inferred; they require facts showing plausibility. "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678. Unless the plaintiffs' well-pleaded allegations of fact have "nudged their claims across the line from conceivable to plausible, their complaint must be dismissed." *Twombly*, 550 U.S. at 570; *see also Iqbal*, 556 U.S. at 680.

Plaintiffs' allegations fall woefully short. In what can only be described as a Hail-Mary effort to push their claims past the goal line "from conceivable to plausible," Plaintiffs aver that the alleged co-conspirators could not have acted independently because three intrepid, but malevolent CACI PT interrogators actually seized authority from the military chain of command at Abu Ghraib prison and, by virtue of their *de facto* authority, implemented pervasive practices of abuse for the entire detainee population that would have necessarily implicated the Plaintiffs. In terms of plausibility, these allegations are on par with an Oliver Stone movie: entertaining, but utterly bereft of substance.

To deflect the obvious frivolity of its contractor-*coup-d'état* theory of liability, Plaintiffs take issue with CACI PT's challenges to the veracity of their claims. Pl. Opp. at 15-18. Plaintiffs, however, rely on and incorporate into their complaint documents that simply do not support the inferences that Plaintiffs put forth. Plaintiffs cannot have their cake and eat it too—they cannot rely on and misrepresent outside documents to support their claims but ignore what those documents actually say and those sections that disprove their claims. When ruling on a

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discussed *supra*, allegations of parallel conduct, by themselves, are not sufficient to give rise to an inference of a conspiratorial agreement. *Id.* at 41-43; *see also Loren Data Corp.*, No. 11-2062, 2012 WL 6685771, at *4 (quoting *Twombly*, 550 U.S. at 549, 556).

Rule 12(b)(6) motion, courts consider the complaint and documents incorporated into the complaint by reference. *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007) (citing 5B Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure § 1357 (3d ed. 2004) (noting that matters incorporated by reference, integral to the claim, and exhibits to the complaint whose authenticity is unquestioned may be considered on a motion to dismiss)); *Sec'y of State for Defence v. Trimble Navigation Ltd.*, 484 F.3d 700, 705 (4th Cir. 2007); *Girgis v. Salient Solutions, Inc.*, No. 1:11-cv-1287, 2012 WL 2792157, at *7 (E.D. Va. July 9, 2012) (Lee, J.).[5] Thus, it is not impermissible for CACI PT to challenge Plaintiffs' contention that the incorporated documents support their preposterous theory.

Recognizing CACI PT's right to challenge Plaintiffs' characterization of the incorporated documents, Plaintiffs cherry-pick statements from the government reports that they claim support their contractor-*coup-d'état* theory. Opp. 16-17. But even taken out of context, these statements do not get Plaintiffs across the finish line. The fact that military leadership was ineffective—even if true—does not give rise to a reasonable inference that three civilian contractors were, therefore, somehow able to commandeer authority over detention and interrogation operations. *Id.* The reports on which Plaintiffs rely certainly do not conclude that civilian interrogators somehow, covertly, seized control of interrogation operations at Abu Ghraib from the military. Even the allegation that two interrogators gave improper instructions or encouragement to military police does not, by itself, give rise to a reasonable inference that those interrogators had *de facto* authority over the military police at Abu Ghraib prison. *Id.*

[5] The court may also consider "official public records, documents central to a plaintiff's claim, and documents sufficiently-referred to in the Complaint without converting the motion to dismiss into one for summary judgment." *Seale & Assoc., Inc. v. Vector Aerospace Corp.*, No. 1:10-cv-1093, 2010 WL 5186410, at *2 (E.D. Va. Dec. 7, 2010) (quoting *Witthohn v. Fed. Ins. Co.*, 164 F. App'x. 395, 396-97 (4th Cir. 2006)).

C. CACI PT Cannot Be Held Vicariously Liable for the Misconduct of Alleged Conspirators Who Are Not Employees

Plaintiffs rely on various tort cases to establish the proposition that a corporation can be held vicariously liable for the misconduct of its employees within the scope of their employment. Pl. Opp. at 21-23. But this proposition is unremarkable and not in question. What CACI PT challenges is Plaintiffs' assertion that under their conspiracy theory CACI PT can be held vicariously liable under the doctrine of *respondeat superior*—not for the conduct of its own employees—for the conduct of non-employees. CACI PT Mem. at 27-28. In other words, despite no direct corporate liability for conspiracy, Plaintiffs argue that because the CACI PT interrogators can be held vicariously liable for the acts of their alleged co-conspirators and CACI PT can be held vicariously liable for the acts of its employees, CACI PT can be held vicariously liable for the acts of the non-employee co-conspirators—in effect, vicarious liability squared.

The leading case is the Ninth Circuit's decision in *Oki Semiconductor Co. v. Wells Fargo Bank, N.A.*, 298 F.3d 768, 777 (9th Cir. 2002). In *Oki Semiconductor*, thieves stole $9 million worth of semiconductors from the plaintiff and laundered the proceeds from the theft through a Wells Fargo employee with whom the thieves conspired. *Id.* at 771. The Wells Fargo employee was not personally involved in stealing the semiconductors. *Id.* The plaintiff sued Wells Fargo and made the same argument Plaintiffs make here. Specifically, the plaintiff correctly argued that the Wells Fargo employee, as a co-conspirator of the actual thieves, would be liable on a co-conspirator theory for the damage caused by the actual theft. *Id.* at 776. From that premise, the plaintiff argued that Wells Fargo was liable for the actions of the actual thieves because, as the money launderer's employer, it was liable for its employee's participation in a conspiracy. *Id.*

The Ninth Circuit disagreed and held that the doctrine of *respondeat superior* only could render an employer liable for the acts of its employees, and not for the acts of an employee's co-

conspirators. *Id.* at 777. Oki Semiconductor's injury, however, arose from the actual theft of its semiconductors, and not from the laundering of the proceeds, and the bank's employee had not participated in the actual theft. *Id.* Given those facts, the court held that the doctrine of *respondeat superior* could not be stretched to render an employer liable for the actions of its employee's co-conspirators because such a result would be inconsistent with the purpose of *respondeat superior* liability. As the Ninth Circuit explained:

> Essentially, Oki asks us to craft a rule holding an employer strictly liable for the conduct of its employees' RICO co-conspirators, even if those employees did not participate directly in the conduct which proximately caused loss. . . . We decline Oki's invitation to create such a mischievous new rule. As it stands, *respondeat superior* balances the benefits an employer receives from an employee against the liabilities an employer incurs as a result of its employee's actions. An employer can minimize its liability by closely monitoring its employee to ensure that she commits no transgressions during the course of her employment. An employer, however, reaps no benefits from non-employee RICO conspirators, and it cannot monitor their activities to ensure compliance with the law. To extend an employer's liability to cover the acts of non-employee RICO conspirators would demolish the equitable balance the doctrine of *respondeat superior* seeks to achieve. .

Id.

In this case, Plaintiffs do not and cannot allege that CACI PT interrogators participated directly in the conduct that harmed the named plaintiffs. Thus, because the Plaintiffs' proposed double layer of vicarious liability would punish CACI PT for the acts of non-employees, the doctrine of *respondeat superior* does not apply. *See also Day v. DB Capital Group, LLC,* No. DKC 10-1658, 2011 WL 887554, at *21 (D. Md. Mar. 11, 2011) (dismissing claims seeking to hold employer liable on *respondeat superior* theory for conspiratorial conduct of its employees).

Plaintiffs try to side-step these precedents by citing cases in which *respondeat superior* was applied to impose liability on a corporation *for its employee's conduct* in a conspiracy. Pl. Opp. at 26-28. For example, Plaintiffs cite *Commercial Business Systems v. Bellsouth Servs.*,

453 S.E.2d 261 (Va. 1995), in which Bellsouth was held vicariously liable for an employee who conspired to injure CBS's business by awarding a contract to CBS's competitor in exchange for bribes. Pl. Opp. at 26. But in this case the plaintiff's harm was a direct result of Bellsouth's employee's misconduct. Thus, it is inapposite to the present action, where Plaintiffs seek to hold CACI PT liable for the acts of soldiers with whom individual CACI PT employees supposedly conspired.

The two other cases Plaintiffs cite are equally unavailing. This Court's decision in *Stith v. Thorne,* 488 F. Supp. 2d 534, 553 (E.D. Va. 2007), simply applied *Commercial Business Systems*. *Id.*at 553. The Eleventh Circuit opinion, *United States v. Stevens,* 909 F.2d 431 (11th Cir. 1990), relies on precedent (*United States v. Hartley*, 678 F.2d 961 (11th Cir. 1982)) that was later expressly overruled. *See United States v. Goldin Indus.*, 219 F.3d 1268, 1271 (11th Cir. 2000) (*en banc*)). Conversely, although not binding in this circuit, the logic underlying *Oki Semiconductors* is directly on point and should be applied.

III. CONCLUSION

For the foregoing reasons, the Court should dismiss Counts II, V, VIII, XI, XIV, and XVII of the Third Amended Complaint. Moreover, if the Court is inclined to revisit its analysis of CACI PT's immunity, preemption, and political question defenses, the Court should dismiss the Third Amended Complaint in its entirety on the basis of these defenses.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 8th day of May, 2013, I will electronically file the foregoing with the Clerk of Court using the CM/ECF system, which will then send a notification of such filing (NEF) to the following:

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