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 INTERNATIONAL INC, et ano,	)	
Defendants.	)	

MEMORANDUM IN SUPPORT OF DEFENDANT CACI PREMIER TECHNOLOGY, INC.'S MOTION TO DISMISS PLAINTIFFS' SECOND AMENDED COMPLAINT

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I. INTRODUCTION

Plaintiffs' Second Amended Complaint does not allege a single contact between any of the Plaintiffs and any employee of CACI PT[1] or of CACI International[2] and yet seeks to hold the CACI Defendants liable on a co-conspiracy theory for the conduct of others in allegedly inflicting injury on Plaintiffs while they were in United States custody. The Second Amended Complaint, however, does not allege facts sufficient to establish plausible claims that the CACI Defendants joined in any conspiracy to injure detainees at Abu Ghraib prison, much less that the CACI Defendants entered into a conspiracy the object of which was to injure these Plaintiffs. Instead, the Second Amended Complaint merely alleges that a few individual CACI PT employees engaged in misconduct *not involving Plaintiffs*, and from that premise asserts that any injuries suffered by detainees at Abu Ghraib prison were the product of a vast conspiracy to injure detainees. Because Plaintiffs allege no facts to support an assertion of conspiracy, the conspiracy claims in Plaintiffs' Second Amended Complaint (Counts II, V, VII, XI, XIV, and XVII) must be dismissed.[3]

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[1] "CACI PT" refers to Defendant CACI Premier Technology, Inc. ("CACI PT").

[2] "CACI International" refers to Defendant CACI International Inc. As CACI International notes in its own motion to dismiss, the arguments made in this memorandum apply equally to CACI International and CACI International joins in CACI PT's arguments.

[3] The claims in the Second Amended Complaint also should be dismissed on the grounds of immunity, preemption and political question. CACI PT recognizes, however, that the Fourth Circuit has determined that CACI PT's immunity defense should be revisited after the parties have had an opportunity to take discovery, *Al Shimari v. CACI Int'l Inc*, 679 F.3d 205, 220 (4th Cir. 2012), and the Court has indicated no inclination to revisit its preemption and political question analysis. Accordingly, the present memorandum addresses only Plaintiffs' conspiracy allegations under case law applying the *Twombly/Iqbal* standard that was still developing at the time of the Court's 2009 decision. The sufficiency of Plaintiffs' conspiracy allegations was not addressed by the Fourth Circuit. In the event that the Court is inclined to revisit its prior legal analysis of CACI PT's immunity, preemption, and political question defenses at the motion to dismiss stage, CACI PT stands ready to brief these defenses in light of developments in the law.

The Court's 2009 Decision

In moving to dismiss the Amended Complaint, the CACI Defendants argued that Plaintiffs had failed to allege sufficient facts to satisfy the pleading standards established by *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007). The Plaintiffs' sole "factual" allegation concerning the CACI Defendants' supposed entry into a conspiracy was that "CACI conveyed its intent to join the conspiracy, and 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*." Am. Compl. ¶ 72 (emphasis added). By what statements and actions CACI PT and CACI International supposedly made the corporate decision to join a conspiracy was left to the imagination, as the Amended Complaint identified no such alleged statements or acts by persons empowered to bind the CACI Defendants.

Despite the absence of factual allegations, the Court found the following allegations sufficient to state a plausible claim of conspiracy: (1) that unnamed CACI PT employees and unnamed co-conspirators, at unstated times and in unstated contexts, used the term "special treatment" as a code word for torturing detainees at Abu Ghraib prison (Memorandum Order at 66 [Dkt. #94] (citing Am. Compl. ¶ 70)); and (2) that Plaintiff Rashid was hidden from the International Committee of the Red Cross by unnamed persons, which in the Court's view stated a plausible conspiracy claim *against the CACI Defendants* because such conduct would have required the "participation and cooperation of multiple personnel." Memorandum Order at 66-67 [Dkt. #94] (citing Am. Compl. ¶ 43)).

The Court then examined whether the Amended Complaint alleged a plausible motive for the CACI Defendants to enter into the alleged conspiracy. The Amended Complaint alleged only that "CACI's motivation was wholly financial – it made millions of dollars as a result of

keeping quiet about and participating in the conspiracy to torture and mistreat plaintiffs." Am. Compl. ¶ 73. While the Court found that the CACI Defendants had "no independent motive to act in the alleged manner" and the Court could "think of no plausible motive Defendants might have to act independently in the egregious manner alleged by Plaintiffs," the Court nevertheless concluded that it was "possible that personnel at Abu Ghraib acted individually in pursuit of some perverted pleasure, but this possibility is insufficient to make Plaintiffs conspiracy allegations less than plausible." Memorandum Order at 68.

When the Court issued its 2009 motion to dismiss ruling, the *Twombly* standard for evaluating the sufficiency of a complaint was new and developing, and the Supreme Court had not yet decided *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). *Iqbal* and subsequent Fourth Circuit decisions, however, make clear that Plaintiffs' conspiracy allegations fall far short of the threshold required to survive a motion to dismiss. None of that precedent was available to this Court at the time of the March 2009 decision.

The CACI Defendants' counsel advised Plaintiffs' counsel that the CACI Defendants would seek reconsideration of this Court's ruling the conspiracy counts based on *Iqbal* and Fourth Circuit jurisprudence. Plaintiffs asked the CACI Defendants to abstain from filing a motion for reconsideration so that Plaintiffs could file a Second Amended Complaint that supposedly would include additional factual allegations regarding Plaintiffs' conspiracy claims.[4]

[4] Plaintiffs originally agreed to file their Second Amended Complaint by November 28, 2012. Plaintiffs' counsel (Susan L. Burke, Esq.) subsequently requested an extension until December 3, 2012 so as not to interfere with her plans for the Thanksgiving holiday. The CACI Defendants agreed. On December 3, 2012, Ms. Burke advised that she would be withdrawing as counsel. Another of Plaintiffs' counsel (Baher Azmy, Esq.) advised the CACI Defendants' counsel on that same date that Plaintiffs anticipated filing their Second Amended Complaint on December 4, 2012. He subsequently advised that filing the Second Amended Complaint was on hold because Ms. Burke was withdrawing and did not want to sign the Second Amended

The CACI Defendants agreed. Plaintiffs' Second Amended Complaint, however, contains no additional facts that satisfy the *Twombly/Iqbal* standard for alleging conspiracy.

Indeed, since this Court's March 2009 motion to dismiss ruling, neither the Fourth Circuit nor any court in this District has permitted a conspiracy claim similar to that present here to survive a motion to dismiss under the *Twombly/Iqbal* standard. The Fourth Circuit and courts in this District have consistently dismissed comparable conspiracy claims in which conspiratorial liability is alleged but there are no facts plausibly alleging formation of a conspiracy. The same result is warranted here.

The Second Amended Complaint

The Second Amended Complaint alleges a few isolated acts of mistreatment of detainees or others by three individual, low-level CACI PT employees, but does not allege that any of these acts were committed on these Plaintiffs. Second Amended Complaint ("SAC") ¶¶ 64-86. These allegations, which the Court assumes as true for purposes of a motion to dismiss, do not establish grounds for concluding that these low-level employees joined a conspiracy to abuse detainees, or joined a conspiracy the object of which was the mistreatment of these Plaintiffs. Even more to the point, Plaintiffs' allegations of isolated incidents of misconduct by three low-level CACI PT employees, even if true, do not provide a plausible basis for concluding that CACI International, a multi-billion-dollar defense contractor, or its subsidiary CACI PT made the corporate decision to enter into a conspiracy with low-level soldiers to act in a manner inconsistent with United States policy. Indeed, with respect to Plaintiffs' claim that the CACI Defendants decided as corporate entities to join a criminal conspiracy, the Second Amended Complaint is noteworthy in its absence of facts.

Complaint. Delays by Plaintiffs in finding counsel admitted to this Court resulted in Plaintiffs not filing the Second Amended Complaint until December 26, 2012.

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 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*." SAC ¶ 80 (emphasis added). Such a rote recitation of a legal conclusion does not suffice under governing law. Consequently, Plaintiffs' conspiracy counts must be dismissed.

II. BACKGROUND

The Second Amended Complaint alleges harm suffered by Plaintiffs in a passive style that disconnects all alleged abuses from the abusers. SAC ¶¶ 11-63. Without providing any specificity whatsoever, Plaintiffs then allege that groups conspiring together inflicted all of these harms, and that CACI PT employees were among the conspirators. SAC ¶¶ 64-65. The Second Amended Complaint identifies three low-level CACI PT employees as members of the supposed conspiracy, and then alleges wrongful acts that these employees allegedly committed on others (but not on Plaintiffs) at Abu Ghraib prison. SAC ¶¶ 66-86.

From the premise that three low-level CACI PT employees abused *other* detainees and joined a conspiracy to abuse detainees, Plaintiffs allege that the CACI Defendants joined this 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." SAC ¶ 80. Not one of these statements or acts is alleged; the allegations are purely conclusory. Plaintiffs do not allege what person(s) with the authority to bind the CACI Defendants supposedly communicated the decision to enter into a conspiracy. Indeed, the Second Amended Complaint cites prominently to the Jones/Fay Report for its allegations of acts of individual misconduct by three CACI PT employees, *see* SAC ¶¶65-66, but the Jones/Fay Report finds no factual basis for the vast

conspiracy alleged by Plaintiffs. Quite the contrary. The Jones/Fay Report states that the acts of abuse at Abu Ghraib were individual criminal acts, fostered by a leadership failure but not the result of any grand conspiracy: "The primary causes of the violent and sexual abuses were relatively straight-forward – *individual criminal misconduct*, clearly in violation of law, policy, and doctrine and contrary to Army values." Jones/Fay Report at 4 (emphasis added), *available at* http://fl1.findlaw.com/news.findlaw.com/hdocs/docs/dod/fay82504rpt.pdf.[5]

While Plaintiffs allege that the CACI Defendants had a financial motive to participate in the conspiracy, they also concede that payments to CACI PT were in exchange for contractual promises to provide services in a lawful manner. SAC ¶ 114. Indeed, Plaintiffs' concession that they are not seeking to hold the CACI Defendants liable for acts that were authorized by the United States government[6] leads to the self-defeating theory that the CACI Defendants somehow had a financial motive to engage in conduct that was not only unauthorized by the United States, but illegal, on the basis that engaging in such unauthorized and illegal conduct somehow would improve the CACI Defendants' standing with the United States government.

III. ANALYSIS

A. The Standard for a Motion to Dismiss Conspiracy Claims

On a Rule 12(b)(6) motion to dismiss, courts must dismiss a complaint unless the plaintiff alleges enough facts to nudge its claims across the line from conceivable to plausible. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). The complaint "must contain sufficient

[5] As noted in Section III.A, *infra*, this conclusion from the Jones/Fay Report may be considered in evaluating CACI's Rule 12(b)(6) motion because the Second Amended Complaint quotes from and refers to that report.

[6] *See* Joint Discovery Plan and Submission of Information Regarding Discovery in *Saleh v. Titan* [Dkt. #155] ("Plaintiffs allege that they were harmed when CACI engaged in misconduct not approved by the United States.").

factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Iqbal*, 556 U.S. at 678 (internal quotations omitted); *Bradford v. HSBC Mortg. Corp.*, 799 F. Supp. 2d 625, 629 (E.D. Va. 2011). For a complaint to allege a *plausible* claim, the facts must "permit the court to infer more than the mere possibility of misconduct." *A Society Without a Name v. Virginia*, 655 F.3d 342, 346 (4th Cir. 2011); *see also Twombly*, 550 U.S. at 555 (factual allegations must "be enough to raise a right to relief above the speculative level").

In assessing plausibility, legal conclusions couched as factual allegations are not accepted by the court. *Twombly*, 550 U.S. at 555 (internal citation omitted). Similarly, labels and conclusions, or a "formulaic recitation of the elements of a cause of action will not do." *Iqbal*, 556 U.S. at 678 (citing *Twombly*, 550 U.S. at 555). Complaints relying on "naked assertions" without further factual enrichment are insufficient. *Id.* (citing *Twombly*, 550 U.S. at 557). A plaintiff must plead more than facts merely consistent with a defendant's liability. *Id.* (citing *Twombly*, 550 U.S. at 557). A plaintiff cannot avoid the requirements of *Twombly*/*Iqbal* by offering legal conclusions and claiming a need for discovery. As this Court explained:

> This is precisely the sort of fishing expedition the Supreme Court sought to avoid in requiring the plaintiff to plead facts demonstrating their entitlement to relief and the defendant's liability for misconduct. [A] district court must retain power to insist upon some specificity in pleading before allowing a potentially massive factual controversy to proceed. Plaintiffs cannot be permitted to pursue "extensive discovery" with nothing more than a series of conclusory allegations and an unfounded hope that the process will yield favorable results.

Ali v. Allergan USA, Inc., No. 1:12-cv-115, 2012 WL 3692396, at *14 (E.D. Va. Aug. 23, 2012) (Lee, J.) (internal citations and quotations omitted) (alteration in original).

When ruling on a 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.). 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)).

As the Fourth Circuit succinctly stated, "[a] court decides whether this [*Twombly/Iqbal*] standard is met by separating the legal conclusions from the factual allegations, assuming the truth of only the factual allegations, and then determining whether those allegations allow the court to reasonably infer that 'the defendant is liable for the misconduct alleged.'" *A Society Without a Name*, 655 F.3d at 346 (quoting *Iqbal*, 556 U.S. at 678). As the Fourth Circuit observed in rejecting an aiding and abetting claim brought under ATS, the *Twombly/Iqbal* requirement for plausible fact-based allegations applies with full force to claims asserted under ATS. *Aziz v. Alcolac, Inc.*, 658 F.3d 388, 401 (4th Cir. 2011).

There are special *Iqbal/Twombly* standards that apply to claims of conspiracy. *First, w*hen a plaintiff seeks to foist liability on a defendant for the conduct of others through allegations of conspiracy, a court must be able to infer a conspiratorial agreement from the ***facts*** alleged, or else the conspiracy claims must be dismissed. *Wiggins v. 11 Kew Garden Court*, No. 12-1424, 2012 WL 3668019, at*2 (4th Cir. Aug. 28, 2012). These ***facts*** must demonstrate that the conspirators "positively or tacitly came to a mutual understanding to try to accomplish a

common and unlawful plan." *Ruttenberg v. Jones*, No. 07-1037, 2008 WL 2436157, at *8 (4th Cir. June 17, 2008). A conclusory allegation of conspiracy, coupled with allegations of parallel conduct, is insufficient to state a claim. *Twombly*, 550 U.S. at 556. This is "a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Iqbal*, 556 U.S. at 679. In performing this task, the district court "do[es] not act as the [plaintiffs'] advocate" by searching for fanciful inferences of conspiracy not supported by the facts alleged. *Beaman v. Deputy Director*, No. 7:12-cv-163, 2012 WL 4460436, at *2 (W.D. Va. May 29, 2012) (citing *Beaudett v. City of Hampton*, 775 F.2d 1274, 1278 (4th Cir. 1985), and *Gordon v. Leeke*, 574 F.2d 1147, 1151 (4th Cir. 1978)), *aff'd*, 2012 WL 5911387 (4th Cir. Nov. 27, 2012).

Second, allegations reflecting parallel conduct are insufficient to state a cognizable conspiracy claim. "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." *Loren Data Corp. v. GXS, Inc.*, No. 11-2062, 2012 WL 6685771, at *4 (4th Cir. Dec. 26, 2012) (quoting *Twombly*, 550 U.S. at 549, 556). As the Fourth Circuit explained less than a month ago, "[t]he evidence must tend to exclude the possibility that the alleged co-conspirators acted independently, and the alleged conspiracy must make practical, economic sense." *Id.* Indeed, in *A Society Without a Name*, 655 F.3d at 346, the Fourth Circuit stressed the pleading burden a plaintiff faces when seeking to maintain a conspiracy claim:

> In addition, where a conspiracy is alleged, the plaintiff must plead facts amounting to more than "parallel conduct and a bare assertion of conspiracy. . . . Without more, parallel conduct does not suggest conspiracy, and a conclusory allegation of agreement at some unidentified point does not supply facts adequate to show

> illegality." The factual allegations must plausibly suggest agreement, rather than being merely consistent with agreement.

Id. (emphasis added) (quoting *Twombly*, 550 U.S. at 556-57) (omission in original).

Third, to state a conspiracy claim against a corporation, a plaintiff must allege facts reflecting affirmative *corporate* engagement in the conspiracy. In the context of supervisory liability, the Supreme Court explained in *Iqbal* that "the supervisor's mere knowledge" that subordinates are engaged in improper conduct is insufficient to give rise to liability; instead, a supervisor can only be held liable for "his or her own misconduct." 556 U.S. at 677. Yet the Second Amended Complaint alleges only that the CACI Defendants committed torts on the theory that they knew or should have known about their employees' conduct, and offers no ***facts*** concerning a corporate decision to enter into a conspiracy. This directly contradicts *Iqbal's* holding that such allegations, standing alone, cannot give rise to liability.[7] *Iqbal* requires a plaintiff to identify how "each defendant, through the official's own individual actions," violated the plaintiff's rights. *Iqbal*, 556 U.S. at 676. That requirement is designed to ensure that the burdens of defending against this sort of lawsuit are imposed upon an employer only when the complaint "plausibly suggest[s]" that the employer engaged in its own misconduct.

Fourth, a complaint must provide a plausible motive to enter into the alleged conspiracy. *Loren Data Corp.*, 2012 WL 6685771, at *4 (quoting *Matsushita Electric Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 595 (1986)). "If the alleged co-conspirators had no rational economic motive to conspire, and if their conduct is consistent with other, equally plausible explanations, the conduct does not give rise to an inference of conspiracy." *Id.* The Court's

[7] A corporation cannot conspire with its employees – and employees, when acting within the scope of their employment, cannot conspire amongst themselves. *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)).

2009 ruling stood this burden on its head, requiring the Defendants to demonstrate the absence of a motive to enter the conspiracy. The burden is on the Plaintiffs, however, to allege a plausible motive for CACI to enter the conspiracy that tends to exclude the possibility of independent conduct. *Wag More Dogs, LLC v. Cozart,* 680 F.3d 359, 365 (4th Cir. 2012) ("At bottom, a plaintiff must 'nudge [their] claims across the line from conceivable to plausible' to resist dismissal." (quoting *Twombly,* 550 U.S. at 570)).

B. Plaintiff's Second Amended Complaint Falls Far Short of the Pleading Standard Required for Conspiracy Claims

The conspiracy allegations in Plaintiffs' Second Amended Complaint rely on three premises, each of which is unsupported and unsound. *First*, Plaintiffs allege that they were injured as a result of a conspiracy rather than by independent acts of misconduct. Plaintiffs do not, however, provide any ***facts*** to support such a conclusion. *Second*, because Plaintiffs do not claim to have had any contact whatsoever with CACI personnel, they allege that because three CACI PT employees are identified as having potentially mistreated *persons other than Plaintiffs* at Abu Ghraib prison, it is plausible to conclude that these employees were in a conspiracy to injure these Plaintiffs as well. Binding precedent precludes crediting such a leap of faith. *Third,* Plaintiffs allege that because three low-level CACI PT employees were identified as having potentially engaged in misconduct involving other detainees, it is plausible to conclude that the CACI Defendants made the corporate decision to join in an illegal conspiracy to mistreat these Plaintiffs in a way antithetical to the desires of the United States government with which CACI PT contracted. When these flimsy allegations and unsupported inferences are considered in light of the four principles applicable to consideration of conspiracy claims under *Twombly*/*Iqbal*, it is clear that Plaintiffs' conspiracy allegations must be dismissed.

1. Plaintiffs Have Not Alleged *Facts* Supporting an Inference That They Were Injured as a Result of a Conspiracy Involving Anyone, Much Less Involving the CACI Defendants

Plaintiffs do not allege any contact whatsoever with CACI PT personnel. Plaintiffs also do not allege any facts concerning when and how anyone conspired together in an effort to mistreat these Plaintiffs. Plaintiffs allege that unnamed CACI PT employees used "code words" such as "special treatment" to signal to military personnel that they should mistreat particular detainees (SAC ¶ 70), but Plaintiffs do not allege that any such supposed "code words" were used in connection with Plaintiffs. Thus, Plaintiffs' allegation that they were injured as a result of a conspiracy is based solely on Plaintiffs' willingness to state that legal conclusion and the fact that others in a vast prison compound were also mistreated at different times and presumably by different people. As case law applying the *Twombly/Iqbal* standard has developed, it is clear that Plaintiffs' allegations cannot be used to prop up a claim of conspiracy.

"[A] conclusory allegation of agreement at some unidentified point does not supply facts adequate to show illegality." *Twombly*, 550 U.S. at 557. An agreement to conspire, at some point prior to a date certain, among yet unknown people, falls short of the standard announced in *Twombly*. *Keck v. Virginia*, No. 3:10cv555, 2011 WL 4589997, at *14 (E.D. Va. Sept. 9, 2011) (report and recommendation adopted by *Keck v. Virginia*, No. 3:10cv555, 2011 WL 4573473, at *1 (E.D. Va. Sept. 30, 2011) (Payne, J.)). Plaintiffs' Amended Complaint provides even less detail about the agreement to conspire, not even alleging the date parameter found inadequate in *Keck*. This unsupported assertion of conspiracy has been consistently rejected in this Circuit. *See, e.g., A Society Without a Name*, 655 F.3d at 347 (allegations that the defendants "entered into a conspiracy" is a mere conclusory statement); *Wills v. Rosenberg*, No. 1:11cv1317, 2012 WL 113676, at *3 (E.D. Va. Jan. 13, 2012) (Brinkema, J.) (dismissal where no specific factual allegations explain the conspiracy); *Robinson v. Stewart*, 2012 U.S. Dist. LEXIS 108556 (E.D.

Va. Aug. 2, 2012) (failure to allege facts that defendant personally participated in wrongful conduct or conspired to violate plaintiff's rights held insufficient to state a claim); *Coles v. McNeely*, 2011 U.S. Dist. LEXIS 94283 (E.D. Va. Aug. 23, 2011) (bare, conclusory allegation of conspiracy insufficient to support inference that defendants came to a mutual understanding to try to accomplish a common and unlawful plan).

Indeed, this Court recently reinstated Plaintiffs' ATS claims, in part based on the precedent in *In re Xe Services Alien Tort Litigation*, 665 F. Supp. 2d 569, 582 (E.D. Va. 2009) (Ellis, J.). In *In re XE Services*, the court did hold that war crimes could be a cognizable tort under ATS, but nevertheless dismissed the plaintiffs' ATS claims because they failed to allege sufficient *facts* that showed a plausible entitlement to relief against the defendants in that case. *Id.* at 590. Judge Ellis noted that the plaintiffs' complaint alleged that the "defendants engaged in acts that were 'deliberate, willful, intentional, wanton, malicious and oppressive and constitute war crimes,' that the acts occurred 'during a period of armed conflict,' that the war crimes were committed against the decedents 'and others,' that defendants are liable for the war crimes, and that the misconduct caused 'grave and foreseeable' injuries to the plaintiffs." *Id.* As Judge Ellis correctly observed, however, "[t]hese sections allege no facts, but merely recite the elements, as plaintiffs understood them, for claims of war crimes under the ATS." *Id.* As a result, Judge Ellis found that these allegations were not entitled to the "presumption of truth." *Id.*

The Fourth Circuit's decision in *Aziz*, 658 F.3d at 401, is similarly instructive. In *Aziz*, the court adopted the stringent "purposefulness" standard for aiding and abetting liability under ATS. *Id.* at 398. While recognizing the existence of aiding and abetting liability under ATS, the court nevertheless noted that the plaintiffs still were required to plead sufficient facts to satisfy the *Twombly/Iqbal* standard. *Id.* at 401. While the plaintiffs alleged that the defendant acted

"with the purpose of facilitating the use of [its] chemicals in the manufacture of chemical weapons to be used, among other things, against the Kurdish population in northern Iraq," *id.*, the court held that this conclusory statement failed under *Twombly/Iqbal*: "Such a cursory allegation, however, untethered to any supporting facts, constitutes a legal conclusion that neither binds us nor is entitled to the assumption of truth." *Id.* (internal citations and quotations omitted). This analysis applies with full force here, where Plaintiffs' sole allegation concerning CACI's entry into a conspiracy is that someone said or did something, at some time and at some place, to signal CACI's corporate decision to bind itself to a conspiracy. SAC ¶ 80. Plaintiffs' non-factual allegation should fair no better than the plaintiffs' allegation in *Aziz*.

Fourth Circuit precedent requires Plaintiffs not only to allege an agreement to conspire, but to provide facts making the assertion of agreement plausible. *See Robertson v. Sea Pines Real Estate Cos.*, 679 F.3d 278, 289 (4th Cir. 2012). In *Robertson*, there was direct evidence detailing the content of the agreement to conspire, and as a result, a conspiracy claim was validly alleged. *Id.* Plaintiffs provide no comparable level of detail here, as they have alleged no facts as to how their alleged conspiracy was formed and how (or why) an object of the supposed conspiracy was to mistreat these Plaintiffs.

2. Even if Plaintiffs Plausibly Could Allege That They Were Injured as Part of a Conspiracy, Case Law Applying the *Twombly*/*Iqbal* Standard Does Not Permit the Inference That CACI PT Employees Conspired to Injure Plaintiffs Because They Are Alleged to Have Mistreated Persons Other Than Plaintiffs

If one principle is clear from post-*Twombly*/*Iqbal* treatment of conspiracy allegations, it is that allegations of similar parallel conduct are insufficient as a matter of law to plead a cognizable conspiracy claim. As the Fourth Circuit has admonished, a plaintiff asserting a conspiracy claim must not only allege conduct that is "distinct from identical, independent

action, but also must allege conduct that "tend[s] to exclude the possibility that the alleged co-conspirators acted independently." *Loren Data Corp.*, 2012 WL 6685771, at *4; *see also A Society Without a Name*, 655 F.3d at 346 ("parallel conduct does not suggest conspiracy" (quoting *Twombly*, 550 U.S. at 556-57)).

Plaintiffs' attempt to tie CACI PT employees to a conspiracy to mistreat these Plaintiffs is based entirely on allegations, such as those contained in the Jones/Fay Report, that three low-level CACI PT employees mistreated persons other than Plaintiffs (SAC ¶¶ 65-79), and supposedly instructed soldiers to give "special treatment" to persons other than Plaintiffs. SAC ¶¶ 70. As the Fourth Circuit explained in *Loren Data* and *Society Without a Name*, allegations of parallel conduct fails to support an inference of conspiracy, and do not tend to exclude the possibility of independent, non-conspiratorial action. Indeed, not only is the possibility of independent, non-conspiratorial misconduct not excluded by Plaintiffs' allegations, but it is the precise conclusion reached by the Jones/Fay Report, the very source of Plaintiffs' allegations that three CACI PT employees mistreated persons other than Plaintiffs: "The primary causes of the violent and sexual abuses were relatively straight-forward – *individual criminal misconduct*, clearly in violation of law, policy, and doctrine and contrary to Army values." Jones/Fay Report, *supra*, at 4 (emphasis added). Thus, the failure of Plaintiffs' allegations to exclude the Jones/Fay Report's conclusion, that detainee abuse occurred through independent criminal acts made possible by a failure of Army leadership, requires dismissal of Plaintiffs' conspiracy allegations.

3. Plaintiffs Have Not Alleged a Plausible Claim That the CACI Defendants Made a Corporate Decision to Enter Into a Conspiracy to Mistreat Plaintiffs

It is not enough that Plaintiffs ask this Court to infer that individual CACI PT employees conspired to mistreat these Plaintiffs based on their alleged involvement in separate acts of

mistreating persons other than Plaintiffs. In order to hold the CACI Defendants in this case on a conspiracy theory, Plaintiffs ask this Court to conclude that three CACI PT employees' alleged involvement in mistreating others supports an inference that they conspired to mistreat Plaintiffs, ***and*** that the inference that these low-level employees conspired to mistreat Plaintiffs supports a further inference that CACI made the corporate decision to join in a torture conspiracy that caused injury to Plaintiffs. Plaintiffs' sole allegation regarding the CACI Defendants' supposed corporate entry into a conspiracy is that the CACI Defendants supposedly joined the alleged 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." SAC ¶ 80.

Plaintiffs' legal conclusions, which must be disregarded, and dubious inferences, which cannot be credited, are insufficient to create a viable conspiracy claim against the CACI Defendants. *Twombly*, 550 U.S. at 556 (conclusory allegations of conspiracy, coupled with allegations of parallel conduct, do not state a cause of action for conspiracy). Indeed, the lesson of *Iqbal* is that district courts should be wary of allowing plaintiffs to hold supervisors and employers in a case on a conspiracy theory without concrete and plausible allegations that a decision to join a conspiracy reached the level of the supervisor or employer. *Iqbal*, 556 U.S. at 676-77. Alleging that someone said something to someone else at some time and at some place to signal an intent to conspire does not meet this standard.

In this regard, Judge Ellis's decision in *In re Xe Services* is instructive. As in the present case, the plaintiffs in *In re Xe Services* did not sue the individuals who were alleged to have directly injured the plaintiffs or their decedents, but sued their employer on the theory that the employer was a knowing, corporate participant in the misconduct. 665 F. Supp. 2d at 590. However, once Judge Ellis set aside the conclusory statements about the *corporation's* supposed

participation, and instead focused on what facts were actually alleged about corporate participation, he correctly dismissed the plaintiffs' claims because there were no actual, plausible facts of corporate participation alleged. *Id.* at 590-91.

Similarly, in *Wiggins*, a case recently decided by the Fourth Circuit, the plaintiff alleged that several defendants conspired with court officials to prevent the plaintiff from obtaining real estate. *Wiggins*, 2012 WL 3668019, at*1-2. The Fourth Circuit found the allegations insufficient to show agreement with the judiciary where the plaintiff failed to allege facts concerning the judiciary's conduct aside from making ordinary legal rulings. *Id.* at *4-5. Similarly here, Plaintiffs do not allege any specific conduct of any person *with the authority to cause the CACI Defendants to enter into a conspiracy*.[8] As the Fourth Circuit held in *Wiggins*, such conclusory statements do not properly plead formation of a conspiracy. *Id.* at *4.

Plaintiffs seek to tag Defendants as conspirators based on an allegation, entirely devoid of facts, that CACI PT and CACI International joined an alleged 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." SAC ¶ 80. If anything, this allegation is less factual than the allegations found wanting in *In re Xe Services* and *Wiggins*. Plaintiffs do not allege what person(s) 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. Nor do Plaintiffs allege what the unnamed person(s) with unstated authority said or did to convey an intent to cause their corporations to enter into a criminal conspiracy. These omissions are particularly important

[8] Plaintiffs admit in recent briefing that they cannot identify who supposedly bound the CACI Defendants to the alleged conspiracy. *See* Plaintiffs' Reply in Support of their Motion Seeking Reinstatement of the Alien Tort Statute Claims at 19 [Dkt. #157].

because not just any corporate employee may bind a corporation to an agreement. *See, e.g.*, *Hill v. Lockheed Martin Logistics Mgmt., Inc.*, 354 F.3d 277, 289 (4th Cir. 2004); Restatement (Third) of Agency § 2.01 cmt. b. Thus, as in *In re Xe Services* and *Wiggins*, Plaintiffs' allegation that some unnamed employee of one or both of the defendants said or did something to convey an intent to have both corporate entities enter into a conspiracy falls far short of the factual allegations required to state a claim.[9]

4. Plaintiffs Also Have Failed to Allege a Plausible Motive for the CACI Defendants to Enter into a Conspiracy

As CACI PT has explained in Section III.A, *supra*, a plaintiff alleging a conspiracy must allege a plausible motive for the defendant to enter into the conspiracy. If the party had no rational economic motive to join a conspiracy, and the party's conduct is consistent with plausible explanations other than participation in a conspiracy, the conspiracy count must be dismissed. *Loren Data Corp.*, 2012 WL 6685771, at *4. Here, Plaintiffs not only fail to allege facts concerning CACI's supposed entry into a conspiracy, and rely on parallel conduct that as a matter of law supplies no inference of conspiracy, but Plaintiffs also allege no 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.

As the Second Amended Complaint alleges, CACI PT received payment for performing its contractual obligation to provide intelligence services in a lawful manner. SAC ¶¶ 111, 114. The Second Amended Complaint also notes that the United States government, which was the entity with which CACI PT contracted, has a policy that prohibits treatment of detainees in an

[9] Indeed, this Court reached a similar conclusion in finding that allegations that a defendant "personally participated directly in [the] [d]efendants' scheme" alleged no specific facts as required under the pleading standard. *Girgis*, 2012 WL 2792157, at *10 (Lee, J.).

unlawful manner. SAC ¶ 114. CACI PT, as a company, thus had no incentive whatsoever to act in a way contrary to United States law and in a manner at odds with United States policy, as that would only injure its relationship with CACI PT's contracting partner. Indeed, given that Plaintiffs have specifically disavowed seeking recovery based on any actions approved by the United States, their Amended Complaint necessarily is limited to claims that the CACI Defendants engaged in conduct contrary to the desires of CACI PT's contracting partner.

Moreover, although most of the members of the conspiracy alleged by Plaintiffs are low-ranking Army personnel. These personnel had no incentive to enrich CACI PT through the mistreatment of detainees. Thus, the rational conclusion is not that there was a vast conspiracy to mistreat detainees, a conspiracy that would benefit neither the CACI Defendants nor the soldiers with whom they supposedly conspired, but that the Jones/Fay Report is correct in concluding that the abuses involved individual acts of misconduct and not a conspiracy. Jones/Fay Report, *supra*, at 4.

This Court's 2009 motion to dismiss ruling reasoned that Plaintiffs could proceed on a conspiracy theory because the CACI Defendants had no independent motive to act as alleged other than participation in a conspiracy. Memorandum Order at 67. With all respect to the Court, the Court's reasoning in 2009 – that the absence of a motive to engage in independent misconduct supports an inference of conspiracy – has the standard backwards as that standard has developed since the time of this Court's ruling. The absence of a plausible motive to conspire, combined with the Court's correct conclusion that the CACI Defendants had no independent motive either, requires dismissal of the conspiracy claims because they are not plausible. *See Scharpenberg v. Carrington*, 686 F. Supp. 2d 655, 662 (E.D. Va. 2010) (Lee, J.) (noting that the absence of an economic incentive suggested a lack of motive to conspire to harm

the plaintiff); *see also 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).

IV. CONCLUSION

For the foregoing reasons, the Court should dismiss Counts II, V, VIII, XI, XIV, and XVII of the Second Amended Complaint. Moreover, if the Court is inclined to revisit its analysis of the CACI Defendants' immunity, preemption, and political question defenses, the Court should dismiss the Second 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 14th day of January, 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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