IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
- Alexandria Division -

IN RE: BLACKWATER ALIEN TORT CLAIMS ACT LITIGATION	**Case No. 1:09-cv-615** **Case No. 1:09-cv-616** **Case No. 1:09-cv-617** **Case No. 1:09-cv-618** **Case No. 1:09-cv-645** **(consolidated for pretrial purposes) (TSE/IDD)**

DEFENDANTS' REPLY MEMORANDUM IN SUPPORT OF THEIR MOTION TO STRIKE EXHIBITS G AND H TO PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO DISMISS AND FOR OTHER RELIEF

Plaintiffs' defense of their "John Doe" declarations rests on a single entirely erroneous premise: that a plaintiff may overcome a motion to dismiss for failure to state a claim by supplementing the allegations in the complaint with extrinsic evidence. That proposition defies both precedent and the rules of civil procedure. Even if extrinsic evidence were somehow appropriate at this stage, moreover, these declarations would be inadmissible because they violate both the requirements of the Federal Rules and the Fourth Circuit's guidelines for seeking permission to proceed with anonymity. For these reasons, the declarations should be stricken and the Court should require plaintiffs to seek permission before filing any additional anonymous pleadings.

ARGUMENT

I. PLAINTIFFS MISREAD *IQBAL*.

Plaintiffs' argument in support of admitting the John Doe declarations rests on a fundamental misconception of the Supreme Court's decision in *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009). Plaintiffs contend that *Iqbal* requires courts, in ruling on Rule 12(b)(6) motions, to consider evidence outside the complaint whenever the defendant contends that the complaint's

allegations are not "plausible." Plaintiffs' Opposition to Motion to Strike ("Opp."), at 4. *Iqbal*, however, emphasizes the need for courts to test the "*facial* plausibility"—not the *factual* plausibility—of the allegations in a complaint. 129 S. Ct. at 1949 (emphasis added). The very thrust of *Iqbal* is that "[t]o survive a motion to dismiss, *a complaint must contain* sufficient factual matter, accepted as true, to state a claim to relief that is plausible *on its face*." *Id.* (emphasis added) (citation and internal quotation marks omitted). This is a two-step inquiry, both elements of which are grounded entirely in the allegations *in the complaint*: "We begin our analysis by identifying the allegations in the complaint that are not entitled to the assumption of truth. . . . We next consider the factual allegations in respondent's complaint [that are entitled to the assumption of truth] to determine if they plausibly suggest an entitlement to relief." *Id.* at 1951.

Thus, the Court said, "[t]o survive a motion to dismiss, *a complaint* must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face. 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." *Id*. at 1949 (emphasis added) (citation and internal quotation marks omitted).

Plaintiffs' view that *Iqbal* has muddied "the formerly-clear waters . . . as to whether this Court is permitted to look beyond the four corners of the Complaint" (Opp. 4) is inconsistent with the very text of the Court's opinion, and simply makes no sense. On plaintiffs' view, *Iqbal* effectively converts every single motion under Rule 12(b)(6) into a motion for summary judgment. Nothing in the text or logic of *Iqbal* supports such a fundamental change to the way motions to dismiss are litigated.[1]

[1] This is especially true because *Iqbal* rests on the Court's 2007 decision in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), which was not interpreted to change the well-settled practice that

The only purpose for which evidence outside the complaint might be admissible here is to establish or refute the Court's jurisdiction over this case. *See* Defendants' Motion to Strike ("Mot."), at 7. But plaintiffs do not even attempt to justify their submission of the John Doe declarations on this basis. Accordingly, the declarations are plainly inadmissible.

II. THE DECLARATIONS ARE NOT BASED ON PERSONAL KNOWLEDGE AND DO NOT CONTAIN RELEVANT INFORMATION.

Even if extraneous evidence could be considered at this stage of the proceedings, the John Doe declarations would be inadmissible because they fail to comply with the personal knowledge requirements of Fed. R. Civ. P. 56(e). *See* Mot. 3-4. Plaintiffs concede that certain allegations in the declarations—including the declarants' stated fears of retaliation—are "based on hearsay." Opp. 12. They argue that the Court is "free to consider hearsay if it finds it helpful to the task at hand." *Id.* This simply is not the case under the Federal Rules. Rule 56(e) states that affidavits "*must be made on personal knowledge*." Fed. R. Civ. P. 56(e)(1) (emphasis added). As these declarations violate that requirement, they are inadmissible under the Federal Rules and should be stricken.

Plaintiffs argue that John Doe No. 2 cannot explain the basis for his personal knowledge "without revealing sufficient facts that would permit Mr. Prince to ascertain his identity." Opp. 12. But the introduction of anonymous evidence without even the hearsay basis for the declarant's purported knowledge deprives the defendants and the Court of any ability to assess the credibility or reliability of the allegations made. Moreover, the anonymous nature of the

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Rule 12(b)(6) motions are decided on the basis of the non-conclusory allegations of the complaint. And the principle that a court must determine whether the factual allegations in the complaint support a plausible inference that the plaintiff is entitled to relief was applied by lower courts long before *Twombly* and *Iqbal*. *See, e.g., Cayman Exploration Corp. v. United Gas Pipe Line Co.*, 873 F.2d 1357, 1359 n.2 (10th Cir. 1989).

declarations effectively shields the declarants from potential liability for defamation or prosecution for perjury, thus defeating one of the purposes of the testimonial oath they took.

Moreover, plaintiffs fail to explain the relevance of the John Doe allegations. Rule 56(e) requires, in addition to personal knowledge, that affidavits "set out facts that would be admissible in evidence." Fed. R. Civ. P. 56(e)(1). The only purpose for which plaintiffs claim the allegations in the affidavits would be admissible is to bolster their RICO claims. Opp. 13. As explained in defendants' briefs in support of their motions to dismiss, however, plaintiffs have no standing to challenge the purported conduct described in the declarations because they cannot claim any injury resulting from the acts alleged. *See* Defendants' Consolidated Memorandum in Support of Motions to Dismiss, at 16-18; Defendants' Reply Memorandum in Support of Motions to Dismiss, at 13.

Because the affidavits are not based on personal knowledge and do not contain relevant factual allegations, they would be inadmissible even on a motion for summary judgment, and should be stricken here.

III. PLAINTIFFS HAVE FAILED TO ESTABLISH THAT ANONYMITY IS WARRANTED.

Plaintiffs' claim that they are entitled to file anonymous declarations rests on a mischaracterization of Fourth Circuit's opinion in *James v. Jacobson*, 6 F.3d 233 (4th Cir. 1993). *James* enumerates a non-exhaustive list of factors, *all* of which "should be considered by courts considering anonymity requests." *Id.* at 238. Plaintiffs, however, argue that the "risk of retaliatory physical or mental harm" (*id.*) is the "only one . . . which is relevant here." Opp. 6. Among the factors plaintiffs suggest are not "relevant here" is, for example, "the risk of unfairness to the opposing party from allowing an action against it to proceed anonymously." *James*, 6 F.3d at 238. This, along with all of the other *James* factors plaintiffs wish to ignore, weighs heavily *against* allowing the filing of anonymous declarations here. *See* Mot. 5-7.

Moreover, plaintiffs cite no authority for the proposition that a party may unilaterally assume the authority to file anonymous declarations. The handful of cases they cite all involve decisions by *the court* to permit anonymity. *See* Opp. 9-10 (citing *United States v. Shryock*, 342 F.3d 958, 961 (9th Cir. 2003); *United States v. Gotti*, 459 F.3d 296 (2d Cir. 2006); and *United States v. Paccione*, 949 F.2d 1183, 1192 (2d Cir. 1991)). Accordingly, these cases provide no support for allowing a party to file anonymous declarations without prior judicial permission and without factual basis in a manner directly causing extreme and unfair prejudice to the defendants.[2]

CONCLUSION

For the foregoing reasons and the reasons stated in their initial brief, defendants respectfully request that the Court strike the anonymous declarations filed in opposition to Defendants' motions to dismiss.

Dated: August 25, 2009

[2] *James* sets forth factors that "should be considered by courts considering anonymity *requests*." 6 F.3d at 238 (emphasis added). Plaintiffs here chose not to request judicial permission to file these declarations anonymously or under seal. Perhaps this decision was motivated by their assessment that the Court likely would have denied such a motion. *See* Opp. 7 n.5. If permission to file were denied, these salacious, scandalous allegations would not be reported widely in the media, and defendants' reputations would not be further tarnished in the eyes of the prospective jury pool. That plaintiffs now seek to rely on more anonymous, unsworn extrinsic evidence in their defense of these anonymous declarations is just as improper. *See* Opp. 3, 7-9. Defendants reserve the right to seek sanctions for this inappropriate conduct as well. *See* Mot. 9 n.2.

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/s/

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CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of August 2009, I will electronically file the foregoing Reply Memorandum 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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