IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
SOUTHERN DIVISION

WISSAM ABDULLATEFF SA'EED AL-QURAISHI, et al.,	)	
Plaintiffs,	)	**Civil Action No. 8:08-cv-01696-PJM**
v.	)	
ADEL NAKHLA, et al.,	)	
Defendants.	)	

REPLY IN SUPPORT OF DEFENDANT
ADEL NAKHLA'S MOTION TO DISMISS

Plaintiffs' opposition to Mr. Nakhla's motion to dismiss confirms why all of the substantive claims asserted against him by 71 of the 72 plaintiffs named in the Second Amended Complaint (the "Complaint") must be dismissed and, additionally, why all of the civil conspiracy counts must be dismissed as well.

First, the opposition does not dispute the remarkable fact that these 71 plaintiffs fail to allege that Mr. Nakhla mistreated them in any way or ever even interacted with them. At the same time, the opposition does not even refer to, much less attempt to address, the legal point that this shortcoming renders the substantive claims by these 71 plaintiffs insufficient under Rule 12(b)(6).

Second, with respect to the conspiracy counts, plaintiffs make no attempt to address the Complaint's failure to plead, as the Supreme Court requires, factual allegations to support the boilerplate assertion of a conspiratorial agreement. Instead, plaintiffs focus on the overt act element of conspiracy and argue that they have pled a

sufficient number by Mr. Nakhla. But this is completely beside the point. The motion to dismiss asserts that plaintiffs failed to plead facts showing an agreement, not that they failed to plead overt acts. The Complaint contains no such allegations of fact, and the opposition identifies none.

Finally, while the opposition claims in conclusory fashion that Mr. Nakhla *admitted* to torturing detainees, this attempt to taint Mr. Nakhla and distract attention away from the legal issues has absolutely no bearing on the Court's consideration of the facial sufficiency of the Complaint. Notwithstanding the contents of the opposition brief, the Complaint itself does not allege that Mr. Nakhla admitted to torturing any of the plaintiffs in this case. Nor does it allege that he admitted to joining a conspiracy (and for good reason – Mr. Nakhla, in fact, never admitted to torture, nor to a conspiracy). Because the necessary allegations are absent from the Complaint, they are impertinent to the motion.

Dismissing these claims is critical to Mr. Nakhla. Even if the claims of one plaintiff remain in some part, dismissal of the conspiracy claims and the claims of the 71 other plaintiffs would narrow substantially the task of defending his name and, in particular, would reduce dramatically the discovery Mr. Nakhla would be obligated to take and participate in.

Moreover, because plaintiffs now have had three bites at the apple in this litigation – having amended their initial pleading twice, the second time after obtaining leave from the Court to do so specifically for the purpose of adding more detailed allegations of fact, *see* Plaintiffs' Memorandum of Law in Support of Their Motion for Leave to Amend [Dkt. No. 45], at 1 – and still have been unable to plead sufficient

allegations of fact to state claims against Mr. Nakhla, all of the claims asserted against him by 71 of the 72 named plaintiffs and all of the Complaint's conspiracy counts should be dismissed with prejudice.[1]

1. Lack of Factual Allegations to Support the Claims of 71 of the 72 Named Plaintiffs

In addition to the Complaint's six civil conspiracy counts, which are addressed below, each of the 72 named plaintiffs also purports to assert 12 different substantive causes of action against Mr. Nakhla. Specifically, each of the 72 plaintiffs seeks to hold Mr. Nakhla liable for torture; cruel, inhuman or degrading treatment; war crimes; assault and battery; sexual assault and battery; intentional infliction of emotional distress; and for aiding and abetting the commission of all six torts.[2] As set forth in Mr. Nakhla's opening brief, however, 71 of these plaintiffs fail to allege that Mr. Nakhla mistreated them, or caused them harm, in any way. Indeed, none of these 71 plaintiffs allege that they ever even came into contact with Mr. Nakhla.

Plaintiffs do not dispute this. To the contrary, they acknowledge that these 71 plaintiffs have alleged no such facts against Mr. Nakhla. *See* Plaintiffs' Opposition to Nakhla's Motion to Dismiss [Dkt. No. 59] ("Pl. Opp'n"), at 4 (conceding that only "[o]ne

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[1] Further to this point, back in June of 2004, the same counsel who represent plaintiffs here filed a putative class action in the United States District Court for the Southern District of California alleging that Mr. Nakhla had participated in a conspiracy to torture detainees held by the United States at Abu Ghraib and elsewhere in Iraq. In that previous round of litigation, during which the complaint similarly was amended on multiple occasions, Mr. Nakhla also moved to dismiss in part on the ground that plaintiffs had failed to plead sufficient allegations of fact to state a claim against him. Thus, it has now been several years that plaintiffs' counsel have been on notice that they must plead facts about Mr. Nakhla to state claims against him.

[2] *See* SAC Counts 1 (Torture), 3 (Aiding and Abetting Torture), 4 (Cruel, Inhuman or Degrading Treatment), 6 (Aiding and Abetting Cruel, Inhuman and Degrading Treatment), 7 (War Crimes), 9 (Aiding and Abetting War Crimes), 10 (Assault and Battery), 12 (Aiding and Abetting Assaults and Batteries), 13 (Sexual Assault and Battery), 15 (Aiding and Abetting Sexual Assaults and Batteries), 16 (Intentional Infliction of Emotional Distress), and 18 (Aiding and Abetting Intentional Infliction of Emotional Distress).

of the [plaintiffs] in this lawsuit identifies Nakhla" as allegedly committing or aiding in acts of abuse against him).[3] But while the opposition acknowledges this, it does not even refer to the fact that Mr. Nakhla seeks dismissal on this ground and, accordingly, it advances no argument to explain how the claims asserted against Mr. Nakhla on behalf of these 71 plaintiffs conceivably could survive his motion to dismiss.

To fully appreciate the scope of the Complaint's deficiencies as to these 71 plaintiffs, consider, for example, the claims asserted on behalf of Plaintiff Amir Mohammed Ibraheem Al Ogaidi. While Mr. Al Ogaidi, like every other plaintiff in this action, purports to assert 12 substantive causes of action against Mr. Nakhla – including a claim for sexual assault and battery – the sum total of the Complaint's factual allegations regarding Mr. Al Ogaidi are as follows:

- Mr. Al Ogaidi was detained on July 21, 2007 – more than three years after the Complaint alleges Mr. Nakhla left Iraq. Incredibly, this date came not only three years after Mr. Nakhla left Iraq, but also more than one year after Mr. Nakhla successfully obtained dismissal of all claims asserted against him in a putative class action (filed by the same counsel who represent plaintiffs here) alleging that Mr. Nakhla had participated in a conspiracy to torture Iraqi detainees.

- Mr. Al Ogaidi was held at two different United States military facilities – neither of which the Complaint alleges Mr. Nakhla worked at, much less visited, during his time in Iraq.

- While detained, Mr. Al Ogaidi was "beaten" – how or by whom the Complaint does not specify.

- Mr. Al Ogaidi was released on September 5, 2007, without being charged with a crime.

[3] The original plaintiff in this action, Wissam Abdullateef Sa'eed Al-Quraishi, is the only plaintiff that Mr. Nakhla is alleged in the Complaint to have mistreated. The allegations by Mr. Al-Quraishi are false and will be vigorously contested at the appropriate stage of this litigation, if necessary. For the reasons set forth in Defendant L-3 Services, Inc.'s motion to dismiss and supporting papers, which are incorporated here by reference, all 18 claims asserted by Mr. Al-Quraishi against Mr. Nakhla should be dismissed with prejudice along with the claims asserted on behalf of the other 71 plaintiffs.

See SAC §§ 97-100. That is it. Leaving aside the shear impossibility, based on other allegations in the Complaint, that Mr. Nakhla could have mistreated, let alone sexually abused, Mr. Al Ogaidi, *see id.* ¶ 6, the Complaint is devoid of any allegation that he harmed Mr. Al-Ogaidi in any manner at all. Although this is but one example, the claims asserted by the other 70 plaintiffs who do not identify Mr. Nakhla as having mistreated them are no less deficient.

Because nothing is more basic than the principle that "a plaintiff is required to allege facts that support a claim for relief," the 71 plaintiffs identified in paragraphs 21 through 412 of the Complaint – none of whom allege that Mr. Nakhla actually did anything to them – have failed to state a claim against Mr. Nakhla. *Bass v. E.I. DuPont de Nemours & Co.*, 324 F.3d 761, 765 (4th Cir. 2003) (alterations omitted).[4] Accordingly, all of the causes of action that they attempt to assert against Mr. Nakhla must be dismissed with prejudice.

2. Lack of Factual Allegations to Support the Complaint's Conspiracy Counts

As noted in Mr. Nakhla's opening papers, because 71 of the 72 plaintiffs do not allege any facts to describe how Mr. Nakhla could have harmed them, the Complaint attempts, in the alternative, to hold him vicariously liable for the conduct of others by asserting six causes of action against Mr. Nakhla for civil conspiracy.[5] Relying primarily

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[4] Indeed, in *Bass*, a case relied upon by plaintiffs in their opposition, the Fourth Circuit affirmed the district court's dismissal of the plaintiff's hostile work environment and civil conspiracy claims precisely because the plaintiff had failed to plead facts to support the bald assertions that she had been harassed based on her gender and race and that the defendant and the EEOC had "conspired together." *See* 324 F.3d at 764-66.

[5] *See* SAC Counts 2 (Civil Conspiracy to Torture), 5 (Civil Conspiracy to Treat Plaintiff [sic] in a Cruel, Inhuman or Degrading Manner), 8 (Civil Conspiracy to Commit War Crimes), 11 (Civil Conspiracy to Assault and Batter), 14 (Civil Conspiracy to Sexually Assault and Batter), and 17 (Civil Conspiracy to Inflict Emotional Distress).

on the Supreme Court's recent decision in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S. Ct. 1955 (2007), Mr. Nakhla has moved to dismiss these claims on the ground that the Complaint is devoid of factual allegations establishing a basis for such a claim, including most importantly facts that suggest there was a conspiratorial agreement between Mr. Nakhla and his alleged co-conspirators.[6] Indeed, in plain violation of the rule set forth in *Twombly*, the Complaint sets forth no facts indicating an agreement. Instead, it merely states in the barest terms possible that "[d]efendants agreed with each other and others to participate in a series of unlawful acts." SAC ¶¶ 473, 487, 502, 517, 532, 545.

Mischaracterizing Mr. Nakhla's motion as resting on the ground that the Complaint's conspiracy counts "fail[] to plead overt acts by Nakhla," Pl. Opp'n, at 4, plaintiffs simply avoid addressing the Complaint's failure to plead facts that plausibly suggest the existence of a conspiratorial agreement.[7] As a result, plaintiffs do not actually contend that the Complaint pleads such facts and never even attempt to identify specific paragraphs containing them. This is not surprising. The Complaint contains no factual assertions at all regarding how, when or where an agreement was allegedly reached, what it encompassed, and who was a party to it.

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[6] Mr. Nakhla also has incorporated by reference the papers filed in support of Defendant L-3 Services, Inc.'s motion to dismiss, which demonstrate that, in any event, conspiracy liability is not recognized under Iraq law.

[7] The closest plaintiffs come is to quote from an unpublished decision, decided a decade before *Twombly*, in which the Fourth Circuit stated that "[a] conspiracy claim does not require an express agreement; proof of a tacit understanding suffices." Pl. Opp'n, at 4-5 (quoting *Tysons Toyota, Inc. v. Globe Life Ins. Co.*, 1994 U.S. App. LEXIS 36692, *15 (4th Cir. Dec. 29, 1994)). But this misses the point. The Complaint is deficient for failing to plead factual allegations suggesting the existence of any agreement or understanding at all – express, tacit or otherwise.

Plaintiffs' suggestion that the Complaint sufficiently states a conspiracy claim against Mr. Nakhla because it pleads, without more, "a litany of overt acts" by him, Pl. Opp'n, at 5, is precisely the type of argument that *Twombly* rejected. In the absence of any allegations "rais[ing] a suggestion of a preceding agreement," such acts "could just as well be independent action." *Twombly*, 127 S. Ct. at 1966. Because the Complaint contains no assertions of fact suggesting the existence of a conspiratorial agreement – and plaintiffs have advanced no argument otherwise – it fails to state a claim for civil conspiracy. Accordingly, Counts 2, 5, 8, 11, 14, and 17 must be dismissed in their entirety, with prejudice.

3. The Allegations of Admissions by Nakhla

The opposition claims that Mr. Nakhla "confessed" to military investigators that he "personally tortured many of the victims," Pl. Opp'n, at 2, and that he similarly confessed that he "participated in a conspiracy to torture detainees," *id.* at 4. These claims have no bearing whatsoever on the issues presented by Mr. Nakhla's motion under Rule 12(b)(6). Regardless what plaintiffs' opposition says, their actual Complaint does not allege that Mr. Nakhla confessed to abusing any plaintiff in this case. Nor does their Complaint allege that he confessed to being a member of a conspiracy. These assertions, raised for the first time in plaintiffs' legal brief, are impertinent to a motion to dismiss under Rule 12(b)(6) challenging the sufficiency of the Complaint.[8]

Moreover, even if such allegations were in the Complaint, they still would be insufficient to meet plaintiffs' fundamental burden, recognized in *Twombly*, to plead

[8] The Complaint asserts vaguely that Mr. Nakhla "confessed his involvement to some acts of torture," without linking the alleged confession to any particular plaintiff. SAC ¶ 417. While the insinuation is false, the Court need not address its veracity. Even assuming that the allegation is true, it is insufficient to stave off dismissal, since it does not allege that Mr. Nakhla admitted to any conduct against the plaintiffs in this case.

allegations of fact rather than legal conclusions. In other words, what is required are facts, not labels, and this requirement cannot be circumvented by characterizing an otherwise boilerplate allegation as an admission. *See Twombly*, 127 S. Ct. at 1964-65 ("[P]laintiff's obligation to provide 'grounds' for his 'entitle[ment] to relief' requires more than labels and conclusions. . . ."). In the absence of any supporting factual allegations, bald assertions that Mr. Nakhla admitted to "torture" or a "conspiracy" fall far short of the mark.[9]

In closing, although impertinent to the motion, we would be remiss if we did not point out that the assertions that Mr. Nakhla admitted to torture or to a torture conspiracy are patently false. If the case proceeds, we will demonstrate so at the appropriate time.[10]

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[9] Furthermore, under plaintiffs' own theory, even if the Complaint properly pled a conspiracy, Mr. Nakhla could not be held liable for any acts of his alleged co-conspirators that occurred after January 14, 2004. That is because, as plaintiffs correctly recognize in their opposition, a member of a conspiracy is no longer liable for the acts of others after he withdraws from the conspiracy. After pointing out that "disclosure of the illegal enterprise to law enforcement officials" constitutes an affirmative act of withdrawal, Pl. Opp'n at 6 (citing *United States v. Gypsum Corp.*, 38 U.S. 422, 464-65 (1978)), the opposition claims that Mr. Nakhla disclosed the alleged torture conspiracy to military investigators during the military's investigation into alleged abuses at Abu Ghraib. As demonstrated in public records, Mr. Nakhla spoke to military investigators on January 14 and 18, 2004 – before at least 59 of the 72 plaintiffs allege their detentions began and also several months before Mr. Nakhla left Iraq, when he otherwise would be deemed to have withdrawn from any alleged conspiracy occurring there.

[10] The opposition also includes the defamatory assertion, which is twice repeated in plaintiffs' five-page opposition, that Mr. Nakhla assisted an unnamed individual who is alleged to have sexually assaulted an unidentified minor detainee, who is not a plaintiff in this case. Mr. Nakhla vigorously denies this accusation, which has absolutely no bearing on the viability of the claims asserted against Mr. Nakhla *by the plaintiffs in this lawsuit.*

CONCLUSION

For the foregoing reasons, and for those set forth in Mr. Nakhla's opening memorandum and in the papers filed in support of Defendant L-3 Services, Inc.'s motion to dismiss, Mr. Nakhla respectfully requests that the Court dismiss the Second Amended Complaint in its entirety with prejudice.

Dated: January 26, 2009

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of January 2009, I filed the foregoing with the Clerk of Court via the CM/ECF system, which will send notification of such filing to the counsel of record in this matter who are registered on the CM/ECF system, in accordance with Fed. R. Civ. P. 5(a) and Local Rule 101(1)(c).

/s/ Miles Clark
Miles Clark