UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

SUHAIL NAJIM ABDULLAH AL SHIMARI, et al., Plaintiffs, v. CACI PREMIER TECHNOLOGY, INC., Defendant.	Case No. 1:08-CV-00827-GBL-JFA **PUBLIC VERSION**

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

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I. INTRODUCTION

For nine years, Plaintiffs and their counsel[1] have trotted out different conspiracy theories in an effort to hold CACI PT[2] liable for what others might have done to detainees at Abu Ghraib prison. While Plaintiffs' real complaint is with the United States' intelligence-collecting operation at Abu Ghraib prison, Plaintiffs have not sued either the United States or any military personnel for the obvious reason that they are immune. Accordingly, Plaintiffs have directed their fire at CACI PT, as a civilian contractor with a presence at Abu Ghraib prison. And Plaintiffs have relied on the artifice of co-conspirator liability as the vehicle for pursuing a contractor with which Plaintiffs had little or no contact. The fly in Plaintiffs' ointment, however, is that the Supreme Court stiffened the pleading rules in general, and the Supreme Court and Fourth Circuit have stiffened the rules in particular as it relates to pleading viable conspiracy claims. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007); *Ashcroft v. Iqbal*, 556 U.S. 662 (2009); *see also* Section III.A, *infra*.

Because a plaintiff must now allege a *plausible* basis for relief, this Court correctly dismissed the conspiracy claims in Plaintiffs' Second Amended Complaint ("SAC"). The Court did *sua sponte* grant Plaintiffs leave to amend, but specifically limited Plaintiffs' leave to amend: "Only amendments related to conspiracy allegations between CACI Premier Technology, Inc. and the United States Military will be permitted." [Dkt. #227]. Plaintiffs were not faithful to the Court's Order; rather than assert facts relating to CACI PT's corporate participation in a conspiracy (of which there are no facts), Plaintiffs instead allege that three low-level CACI PT

[1] All four Plaintiffs were members of the putative class in *Saleh v. Titan Corp.*, No. 05-1165 (D.D.C.), and many of Plaintiffs' counsel were part of the legal team for the plaintiffs in *Saleh*.

[2] "CACI PT" is Defendant CACI Premier Technology, Inc.

employees *personally* conspired with military personnel, and that CACI PT is liable for the actions of its employees' co-conspirators under a *respondeat superior* theory.

Indeed, Plaintiffs have now filed their fourth complaint with a third variation of their conspiracy claims. The new allegations in the Third Amended Complaint can be summarized as follows:

- Plaintiffs add new allegations concerning acts of alleged mistreatment of detainees other than Plaintiffs.
- Plaintiffs have added allegations (not authorized by the Court) bearing on *respondeat superior* theories of liability.
- Plaintiffs now allege that a handful of low-level CACI PT employees actually took over the entire military operation at Abu Ghraib prison, *Lord of the Flies*-style, and were the *de facto* last word on interrogation operations at the prison.
- Plaintiffs cite to the deposition of former military policeman Ivan Frederick as supposedly supporting Plaintiffs' claims of conspiracy (when in actuality, Frederick's deposition refutes Plaintiffs' position).
- Plaintiffs add paragraphs to their complaint summarizing the opinions of their own paid experts.
- Five years after initiating this litigation, Plaintiff Rashid now apparently remembers being shot in the leg.

The more things change, however the more they stay the same. The Third Amended Complaint and its new, implausible theory of conspiracy fails to adequately plead conspiracy for all the same reasons this Court rejected the conspiracy claims in the Second Amended Complaint: (1) Plaintiffs' allegations of misconduct have no connection to the named Plaintiffs; (2) Plaintiffs fail to allege an agreement between CACI PT and anyone else the object of which was to injure Plaintiffs; (3) Plaintiffs fail to allege facts demonstrating a corporate decision to engage in the alleged conspiracy; and (4) Plaintiffs identify no plausible motive for CACI PT to engage in such a conspiracy. Accordingly, this latest iteration of Plaintiffs' conspiracy claims should likewise be dismissed.

Plaintiffs' Third Amended Complaint alleges exactly four possible contacts between CACI PT employees and the Plaintiffs. None of these alleged contacts indicate any mistreatment by the CACI PT employee, yet Plaintiffs seek to hold CACI PT 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 Third Amended Complaint does not allege facts sufficient to establish plausible claims that CACI PT joined in *any* conspiracy to injure detainees at Abu Ghraib prison, much less that the corporation entered into a conspiracy the object of which was to injure *these Plaintiffs*.

Instead, the Third Amended Complaint adopts a new theory of the case: that a few individual CACI PT contractors somehow overrode the military chain of command and assumed "*de facto* authority" over the Military Police ("MPs") at Abu Ghraib prison and, hence, created and dictated the harsh conditions of detainee confinement. From that premise, Plaintiffs assert that any injuries suffered by detainees at Abu Ghraib prison—including the Plaintiffs—were the product of a vast conspiracy between CACI PT employees and the MPs. In terms of plausibility, this theory does not even surpass the laugh test. The notion that three low-level employees of a civilian contractor would or could accomplish this kind of *coup d'état*—or that the military leadership would permit such a thing—is ludicrous on its face. Moreover, this farcical theory is undergirded by demonstrably false and conclusory allegations and, therefore, fails.

The Third Amended Complaint, however, is not supported by sufficient facts to state a claim of conspiracy. Plaintiffs have not even attempted to set forth facts that would cure the deficiencies identified by the Court in dismissing the Second Amended Complaint. Instead, Plaintiffs attempt to end-run the Court's Order and assert an entirely new theory, one that is equally bereft of factual support. Most glaringly, it does not include a single allegation that a

CACI PT employee "set conditions" for any of these Plaintiffs. Instead, Plaintiffs ask the Court to assume that because CACI PT employees allegedly "set conditions" for other detainees, they must have been responsible for Plaintiffs' mistreatment as well. The current complaint also fails to allege that CACI PT made a corporate decision to enter into an agreement with anyone with the object of injuring the Plaintiffs. Moreover, beyond far-fetched speculation, Plaintiffs offer no plausible reason why CACI PT would enter into such a detrimental agreement.

Because Plaintiffs allege no facts to support an assertion of conspiracy, the conspiracy claims in Plaintiffs' Third Amended Complaint (Counts II, V, VIII, XI, XIV, and XVII) must be dismissed.[3]

II. BACKGROUND

Beginning with the *Saleh* case, in which Plaintiffs were members of the putative class and which was litigated by most of Plaintiffs' counsel here, and continuing to today, the contours of the supposed conspiracy that would hold CACI PT liable for the acts of others has morphed as needed by Plaintiffs to stay one step ahead of dismissal. In *Saleh*, the conspiracy theory began with the extravagant claim that CACI PT made the corporate decision to enter into a torture conspiracy with scores of military officers and enlisted personnel and high-ranking government officials, including the then-sitting Secretary of Defense and two Undersecretaries of Defense

[3] The claims in the Third 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.

and Lieutenant General Sanchez and four other General Officers. *Saleh v. Titan Corp.*, 580 F.3d 1, 2 (D.C. Cir. 2009) ("[t]he *Saleh* plaintiffs also allege a broad conspiracy between and among CACI, Titan, various civilian officials (including the Secretary and two Undersecretaries of Defense), and a number of military personnel.").[4] As Judge Robertson became increasingly skeptical of the *Saleh* plaintiffs' conspiracy theories, counsel dropped the high-ranking officials from their conspiracy allegations and shifted to a "conspiracy of thugs" that had CACI PT as a corporate conspirator with *low-ranking* soldiers who abused detainees at Abu Ghraib prison.

When Plaintiffs filed the instant action, they initially remained light on their feet in terms of spelling out the contours of the conspiracy alleged in this case, offering only vague references to military co-conspirators without stating the list of CACI PT's supposed co-conspirators. CACI PT, joined by CACI International Inc, moved to dismiss the conspiracy allegations in the Amended Complaint, and the Court denied that motion.

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 *Iqbal*, 556 U.S. at 662. Upon remand of this action from the Fourth Circuit, CACI PT advised Plaintiffs' counsel that CACI PT would seek reconsideration of this Court's ruling on the conspiracy counts based on *Iqbal* and Fourth Circuit jurisprudence. Plaintiffs asked CACI PT 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.[5] CACI PT agreed. Plaintiffs' Second Amended Complaint,

[4] The RICO Case Statement in which the *Saleh* plaintiffs and their counsel listed CACI PT's supposed co-conspirators is available on the website of Plaintiffs' counsel here: http://ccrjustice.org/files/Saleh_RICOcasestatement.pdf.

[5] Plaintiffs originally agreed to file their Second Amended Complaint by November 28, 2012. Plaintiffs' counsel (Susan L. Burke, Esq.) subsequently requested an extension until

however, contained no additional facts that satisfy the *Twombly/Iqbal* standard for alleging conspiracy.

The Court's 2013 Decision

In moving to dismiss the conspiracy counts in the Second Amended Complaint, CACI PT argued that Plaintiffs' allegations of a few isolated acts of mistreatment of other detainees (not Plaintiffs) by three individual, low-level CACI PT employees did not establish grounds for concluding that these employees joined a conspiracy to abuse detainees or to mistreat the Plaintiffs. CACI PT further argued that Plaintiffs' allegations, even if true, did not provide a plausible basis for concluding that 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. The Court agreed.

On March 8, 2013, the Court concluded that Plaintiffs alleged insufficient facts to state a claim of conspiracy between CACI PT and the United States military. Motions Hr'g Tr. 34, 40-41, Mar. 8, 2013. Because Plaintiffs sought to impose liability on CACI PT for conduct alleged against co-conspirators, they needed to allege facts from which the Court could infer a conspiratorial agreement. *Id.* at 40-41 (citing *Wiggins v. 11 Kew Garden Court*, No. 12-1424, 2012 WL 3668019, at*2 (4th Cir. Aug. 28, 2012)). The Court stated that Plaintiffs "failed to set forth facts to support a claim between—of conspiracy between CACI and the military as there are no facts which plausibly establish that plaintiffs were directly injured by a CACI contractor

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December 3, 2012 so as not to interfere with her plans for the Thanksgiving holiday. CACI PT agreed. On December 3, 2012, Ms. Burke advised that she would be withdrawing as counsel. Another of Plaintiffs' counsel (Baher Azmy, Esq.) advised CACI PT's 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 Complaint. Delays by Plaintiffs in finding counsel admitted to this Court resulted in Plaintiffs not filing the Second Amended Complaint until December 26, 2012.

or any member of the alleged conspiracy to which CACI PT allegedly joined." *Id.* at 34. Specifically, the Court found that the allegations in ¶¶ 64, 80, 81, 86, and 97 of the Second Amended Complaint—identifying three low-level CACI PT employees as "co-conspirators" who engaged in misconduct and charging that CACI PT failed to inquire into or report past acts of abuse—coupled with allegations of parallel conduct failed to state a claim for conspiracy. *Id.* (citing *Twombly*, 550 U.S. 544; *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.'").

In particular, the Court noted Plaintiffs' failure to allege facts that tended "to exclude the possibility that the alleged co-conspirators acted independently." *Id.* at 42. Plaintiffs relied on allegations that unnamed CACI PT employees used code words to indicate that the military police should "apply special treatment to detainees." *Id.* But Plaintiffs did not allege a CACI PT employee used these code words in relation to any of the Plaintiffs or any other facts that would tie the activities of CACI PT employees to the Plaintiffs' alleged mistreatment. *Id.* Thus, the Court concluded that because Plaintiffs failed to allege an actionable claim for an underlying tort that could be connected to CACI PT, they were precluded from bringing an action for conspiracy to commit that tort. *Id.* at 36 (citing *Citizens for Fauquier County v. SPR Corp.*, 37 Va. Cir. 44, 50 (Va. Cir. Ct. 1995) ("Where there is no actionable claim for the underlying alleged wrong, there can be no action for civil conspiracy based on that wrong."). The Court also concluded that Plaintiffs failed to allege facts showing an agreement of any kind between military personnel and CACI PT that related to the Plaintiffs. *See id.* at 42; *see also id.* at 28 ("I need to have facts about what happened here as it relates to these plaintiffs.").

The Court further concluded that Plaintiffs failed to allege facts showing that CACI PT as a corporation entered into any agreement to mistreat the Plaintiffs. The Court did not accept Plaintiffs' theory that CACI PT entered a conspiracy by later ratifying its employees' allegedly improper conduct, explaining, "I'm having trouble with that theory because the agreement was already made. The acts were already done." *Id.* at 31-32 ("[I]t seems to me that the conspiracy was already underway in Iraq before the corporation even knew about it. And when they learned of it, they didn't retroactively join[] acts that had already taken place."). The Court deflected Plaintiffs' arguments that CACI PT could be liable for conspiracy—rather than directly liable—under a theory of *respondeat superior*. *See id.* at 32 ("I understand vicarious liability. . . . But I'm focused on the conspiracy itself."); *see also id.* at 33.

The Court further questioned why CACI PT, which had a substantial contract with the Government, would plausibly enter into a conspiracy to breach that contract. *Id.*at 21-22 ("What would be their incentive to do such a thing?"). Ultimately, because at most the allegations in the Second Amended Complaint "merely demonstrate[d] parallel conduct of detainee torture, not conduct directed at [Plaintiffs]," and gave no basis for believing that CACI PT entered into an agreement to hurt the Plaintiffs or would have had any motive to do so, the Court dismissed the conspiracy claims as they related to a conspiracy between CACI PT and the military without prejudice. *Id.*at 43, 45.

At the same time, the Court dismissed with prejudice the conspiracy claims related to conspiracies between CACI PT and CACI International, Inc, and also between CACI PT and its employees. *Id.* at 44. The Court found Plaintiffs' factual allegations related to a conspiracy between CACI PT and CACI International, Inc, deficient in every critical respect, leaving the Court to guess:

> [W]hen this conspiracy was formed, what was the object of the conspiracy, who is the third party involved in the conspiracy? Is it just the three people named in the complaint who are low-level CACI employees or is it the three individuals who are mentioned in the military who are subject matter of the military court marshals? Who are the parties?

Id. at 38. The Court also concluded that Plaintiffs could not claim conspiracy between CACI PT and its employees under the inter-corporate immunity doctrine, which holds that coworkers cannot conspire with one another or their corporate employer. *Id.*at 39.[6]

The Third Amended Complaint

The Third Amended Complaint alleges incidents where three low-level CACI PT employees purportedly ordered MPs to mistreat detainees, but does not allege that any of these so-called orders were directed at these Plaintiffs. TAC ¶¶ 78-158. The fact that Plaintiffs now characterize these incidents as "orders" to mistreat detainees rather than "code words" encouraging mistreatment, *see* SAC ¶ 70, is irrelevant. Neither allegation establishes 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. Allegations that CACI PT employees mistreated detainees other than Plaintiffs did not support the conspiracy alleged in the Second Amended Complaint, and adding a few more allegations of mistreatment of detainees other than Plaintiffs does not move the needle in terms of conspiracy claims by these Plaintiffs. Five times zero still equals zero.

Moreover, even if true, Plaintiffs' allegations of isolated incidents of misconduct by three low-level CACI PT employees (relating to detainees other than these Plaintiffs) do not provide a

[6] The Court also granted CACI International, Inc's motion to dismiss the Second Amended Complaint with prejudice because the facts set forth in the complaint "d[id] not support an alter ego liability theory against CACI International." *See id.* at 43; *see also* Dkt. No. 215 (order dismissing the Second Amended Complaint as to CACI International Inc).

plausible basis for concluding that 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 CACI PT decided as a corporation to join a criminal conspiracy, the Third Amended Complaint is just as silent as the Second Amended Complaint.

Plaintiffs' new conspiracy-related allegations miss the mark because, in the end, they suffer from the same deficiencies as the single paragraph in the Second Amended Complaint (SAC ¶ 80), where the Plaintiffs simply alleged 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. As with the Second Amended Complaint, the new allegations in the Third Amended Complaint (1) have no connection to the Plaintiffs, (2) do not adequately describe any unlawful agreement between CACI PT personnel and military personnel, (3) do not extend to CACI PT as a corporate entity, and (4) do not establish any plausible motive for the conspiracy. Consequently, Plaintiffs' conspiracy counts must be dismissed.

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. *Twombly,* 550 U.S. at 570. The complaint "must contain sufficient 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*, No. 12-1424, 2012 WL 3668019, at*2. 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.*, No. 11-2062, 2012 WL 6685771, at *4 (quoting *Twombly*, 550 U.S. at 549, 556). As the Fourth Circuit recently explained, "[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, like

the prior complaint, the Third Amended Complaint alleges only that CACI PT committed torts on the theory that it knew or should have known about its 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 burden is on the Plaintiffs to allege a plausible motive for CACI PT 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)).

[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)).

B. Plaintiffs' Third Amended Complaint Does Not Cure the Fatal Deficiencies This Court Identified For Its Conspiracy Claims

The Third Amended Complaint suffers from the same fatal defects as the Second Amended Complaint. The absence of factual allegations to cure the defects in the Second Amended Complaint requires dismissal of Plaintiffs' conspiracy claims.

1. The Third Amended Complaint Does Not Allege Facts Supporting a Corporate Agreement to Conspire

Plaintiffs elected not to pursue claims against any individuals they allege conspired to cause them injury. Instead, Plaintiffs pursued CACI PT as a supposed corporate conspirator. In granting Plaintiffs leave to file a Third Amended Complaint, the Court limited that leave to factual allegations regarding "conspiracy allegations between CACI Premier Technology, Inc. and the United States Military." [Dkt. #227]. But Plaintiffs essentially have abandoned the very conspiracy they were given leave to replead—a conspiracy between CACI PT as a corporate conspirator and the United States military. Plaintiffs' apparent new theory is not that CACI PT entered into a conspiracy, but that a few low-level CACI PT employees personally entered into a conspiracy and that there is some means by which CACI PT would be liable for its employees' alleged co-conspirators' conduct.

In order to hold CACI PT liable on a conspiracy theory, Plaintiffs ask this Court to conclude that three CACI PT employees' alleged involvement in mistreating detainees other than Plaintiffs supports an inference that they conspired to mistreat Plaintiffs. From that premise (which is *not* supported by facts alleged in the Third Amended Complaint), Plaintiffs apparently seek an inference that CACI PT made the corporate decision to join in a torture conspiracy that caused injury to Plaintiffs. The Court concluded that Plaintiffs failed to allege sufficient facts to support an inference of corporate participation in a conspiracy in the Second Amended

Complaint. Mot. H'rg 31-34. The additional facts Plaintiffs allege in the Third Amended Complaint do nothing to cure this deficiency.

Plaintiffs' primary method of augmenting their allegations from the prior complaint is to dump in expert reports that espouse theories of liability based on the supposed foreseeability of misconduct in the context of Abu Ghraib prison. *See, e.g.*, TAC ¶¶ 144 (charactering the opinion of Professor Geoffrey S. Corn), 145 (charactering the opinion of Dr. Philip Zimbardo). This approach is more than novel—it is unauthorized both by this Court's order granting leave to amend and by the federal rules of pleading. Generally, pleadings do not rely on expert reports, primarily because they set forth the ***opinions*** of their authors—not facts. Thus, Plaintiffs' invocation of the opinions of its own paid experts does nothing to strengthen Plaintiffs' factual allegations.

Plaintiffs' "allegations" implicating CACI PT as a corporate entity amount to legal conclusions, which must be disregarded, expert opinions, which have no bearing on this motion, and dubious inferences, which cannot be credited. These are insufficient to create a viable conspiracy claim. *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). To state a viable claim, Plaintiffs needed to allege what person(s) with the authority to bind CACI PT supposedly made a corporate decision to enter into a conspiracy to engage in corporate conduct the object of which was to harm the Plaintiffs. *See Iqbal*, 556 U.S. at 676 (requiring a plaintiff to identify how "each defendant, through the official's own individual actions," violated the plaintiff's right). Plaintiffs also needed to 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. *Cf. Hill v. Lockheed Martin Logistics Mgmt., Inc.*, 354 F.3d 277, 289 (4th Cir. 2004) (not just any corporate

employee may bind a corporation to an agreement); Restatement (Third) of Agency § 2.01 cmt. b (same). They did not allege either. As a result, Plaintiffs' conspiracy claims against CACI PT are no more viable than they were in the Second Amended Complaint.

2. Plaintiffs Also Have Failed to Allege a Plausible Motive for CACI PT 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 PT'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 CACI PT to conspire with low-level soldiers to engage in conduct antithetical to the desires of the United States government.

As the Third Amended Complaint alleges, CACI PT received millions of dollars to perform its contractual obligation to provide intelligence services in a lawful manner. *See, e.g.*, TAC ¶ 15 ("it was CACI PT's responsibility to provide 'the best value Interrogation Support Cell management and support; functioning as resident experts for the implementation of an Interrogation Support Cell, [in accordance with Department of Defense, US Civil Code, and International] regulations and standard operating procedures.'"); *id.* ¶ 204 ("The United States paid CACI PT millions of dollars in exchange for its contractual obligation to provide intelligence services."). The Third Amended Complaint also notes that "CACI PT knew that the United States government has denounced the use of torture and other cruel, inhuman, or degrading treatment at all times." *Id.* ¶ 189. It further states that "CACI PT knew that it was

illegal for them to participate in, instigate, direct, or aid and abet the torture of Plaintiffs and other detainees." *Id.*

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 and in breach of CACI PT's contract, 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 current complaint necessarily is limited to claims that CACI PT engaged in conduct contrary to the desires of CACI PT's contracting partner.

Moreover, 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 CACI PT 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 at 4, *available at* http://fl1.findlaw.com/news.findlaw.com/hdocs/docs/dod/fay82504rpt.pdf.[8]

3. The Third Amended Complaint Does Not Connect Any Allegedly Improper Conduct By CACI PT Employees to These Plaintiffs' Injuries

Though the Court did not grant Plaintiffs leave to amend to pursue a theory of conspiracy between individual CACI PT *employees* and military personnel, this is where Plaintiffs now hang their hat. However, Plaintiffs cannot even state facts sufficient to support *that* (unauthorized)

[8] As noted in Section III.A, *supra*, this conclusion from the Jones/Fay Report may be considered in evaluating CACI PT's Rule 12(b)(6) motion because the Third Amended Complaint quotes from and refers to that report. *See, e.g.*, TAC ¶¶ 81, 82, 88, 97, and 158.

theory of conspiracy because they do not allege *facts* tying any conduct by CACI PT employees to injuries allegedly suffered by Plaintiffs.

In particular, Plaintiffs make no allegations that connect CACI PT personnel to Plaintiffs' alleged mistreatment. Instead, Plaintiffs rely heavily on allegations that CACI PT employees ordered the MPs to implement harsh conditions upon detainees generally, or with respect to detainees other than Plaintiffs. TAC ¶¶ 18, 22-24, 39, 59, 68, 85, 101, 108-09, 111, 115-16, 120-21, 125, 127, 131-35, 141-42, 158. Not one of these allegations, however, claims that a CACI PT employee ordered an MP or anyone else to inflict improper conditions of detention on any of the Plaintiffs. *Id.* Nor do these paragraphs allege any other facts that would tie the activities of CACI PT employees to the Plaintiffs' mistreatment. *Id.*

Like the Second Amended Complaint, the Third Amended Complaint identifies three low-level CACI PT employees as members of a supposed conspiracy, and then asserts wrongful acts that these employees allegedly committed on others (but not on Plaintiffs) at Abu Ghraib prison. *Compare* TAC ¶¶ 22, 78-158 *with* SAC ¶¶ 66-86. With respect to *these Plaintiffs*, the Third Amended Complaint [redacted]

[redacted]

Because they cannot allege facts linking the CACI PT employees' conduct either directly or indirectly to Plaintiffs' claimed injuries, Plaintiffs rely entirely on the spurious assumption that because CACI PT employees allegedly ordered harsh conditions for other detainees that were similar to those Plaintiffs claim to have experienced, CACI PT must have conspired against the Plaintiffs. *Id.* This conclusory allegation fails to support a claim of conspiracy as a matter of law. *See Twombly*, 550 U.S. at 557 ("[A] conclusory allegation of agreement at some unidentified point does not supply facts adequate to show illegality.").

[redacted]

Plaintiffs' attempts to bolster their claim by alleging miscellaneous "facts"—such as laundry listing alleged co-conspirators (*i.e.*, almost anyone at Abu Ghraib, named or unnamed, who was not a detainee) and providing that the conspiracy was formed at some time prior to October 2003—fail. TAC ¶¶ 78-79. 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.)).

As this Court recognized in dismissing Plaintiffs' prior complaint, unsupported assertions of conspiracy have 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). The Third Amended Complaint does not allege any ***fact*** that, if true, would connect in any way conduct by any CACI PT employee to the mistreatment of any of these Plaintiffs. That, standing alone, requires dismissal of Plaintiffs' conspiracy counts.

4. Case Law Applying the *Twombly*/*Iqbal* Standard Does Not Permit the Inference That CACI PT Employees Entered into an Agreement to Injure Plaintiffs Because They Allegedly Mistreated Other Detainees

In dismissing the conspiracy allegations in the Second Amended Complaint, this Court squarely rejected Plaintiffs' syllogism that if they can allege that individual CACI PT employees mistreated *other detainees*, then it is reasonable to assume that they were part of a conspiracy that resulted in injuries to *these Plaintiffs*. Mot. H'ring at 42; *see also id.* at 28 ("I need to have facts about what happened here *as it relates to these plaintiffs*.") (emphasis added).

To pursue a conspiracy claim, Plaintiffs needed to allege facts from which the Court could infer a conspiratorial agreement. Mot. Tr. 40-41. 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 still 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. Thus, even if Plaintiffs were permitted to try to pursue a conspiracy theory involving CACI PT employees as individual conspirators, Plaintiffs' allegations that individual CACI PT employees mistreated *the detainees* are legally insufficient because they do not tend to exclude the possibility that any harm Plaintiffs suffered was from independent or parallel (non-conspiratorial) action.

Plaintiffs do not explain how the allegation that "at least several CACI PT personnel assumed *de facto* supervisory authority over military police officers" demonstrates an agreement to mistreat the Plaintiffs beyond the conclusory reasoning that:

> Because the abuse of Plaintiffs by guards at the Hard Site was unquestionably perpetrated by . . . [MPs] under the charge and control of [former Staff Sergeant] Frederick, and because Frederick testified [redacted] ***because of the necessity of, at minimum, a tacit agreement among the interrogators and MPs to engage in improper conduct***—and aiding and abetting tortious conduct, [redacted]

TAC ¶ 22 (emphasis added); *see also id.* ¶¶ 78, 158. Plaintiffs link this "tacit agreement among the interrogators and MPs" to the named Plaintiffs by alleging:

> Frederick commanded all of the MP guards at the Hard Site, including those who were responsible for Plaintiffs, and identified [redacted] No other superiors have ever been identified as procuring or encouraging the abuse of the detainees at the Hard Site during the relevant time frame

TAC ¶ 158(g).

By advocating this theory, Plaintiffs invite the Court to take a trip "down, down, down" the rabbit hole straight to Wonderland.[11] The idea that the military abdicated authority over the MPs to three low-level civilian contract employees and allowed those employees to "position[] themselves at the top of the power structure" at Abu Ghraib prison is laughable. TAC ¶ 96. The Abu Ghraib prison scandal is probably the most investigated act of the United States government is the last twenty years. Plaintiffs apparently contend that the multitude of Executive branch and

[11] LEWIS CARROLL, ALICE'S ADVENTURES IN WONDERLAND & THROUGH THE LOOKING-GLASS 2-3 (Bantam Classic Reissue ed., Bantam Dell 2006) (ALICE'S ADVENTURES IN WONDERLAND, 1865).

Congressional investigations into the Abu Ghraib scandal somehow missed that a few low-level CACI PT employees had taken over interrogation operations at Abu Ghraib prison and had displaced the Generals, Colonels, Lieutenant Colonels, Majors, and Captains who thought they were running the show.[12] Plaintiffs' contention is simply fabricated and not supported by the materials Plaintiffs reference as supporting their position.

In the first place, Plaintiffs' reliance on Ivan Frederick's deposition to support this new theory is simply disingenuous. Plaintiffs' counsel must have attended a different Frederick deposition than the one attended by CACI PT's counsel, and must be reading from a different transcript than the one provided to CACI PT. Sensibly, the federal rules do not permit such cynical tactics, and allow this Court to review the Frederick testimony in order to determine whether Plaintiffs' reliance on his testimony in the Third Amended Complaint is faithful to what Frederick actually said. *See supra* Section III.A. Even more important, when there is a conflict between a document and the manner in which a plaintiff characterizes it in his complaint, the actual contents of the document control on a Rule 12(b)(6) motion. *Space Tech. Dev. Corp. v. Boeing Co.*, 209 F. App'x 236, 238 (4th Cir. 2006); *Fayetteville Investors v. Commercial Builders, Inc.*, 936 F. 2d 1462, 1465 (4th Cir. 1991); *Witherspoon v. Jenkins*, No. 1:11-cv-963, 2011 WL 6934589, at *2 (E.D. Va. Dec. 30, 2011).

[12] The government reports on the Abu Ghraib scandal include, but are not limited to: the Taguba Report (MG Antonio M. Taguba Article 15-6 Investigation of the 800th Military Police Brigade); the Jones/Fay Report (Article 15-6 Investigation of the Abu Ghraib Prison and 205th Military Intelligence Brigade by Lieutenant General Jones and the Article 15-6 Investigation of the Abu Ghraib Detention Facility and 205th Military Intelligence Brigade by Major General Fay); the Schlesinger Report (Final Report of the Independent Panel to Review DoD Detention Operations, August 2004); the Church Report (report of Vice Admiral Albert T. Church, III, Director of the Navy Staff, relating to Review of Department of Defense Detention Operations and Detainee Interrogation Techniques); the Department of Army Investigator General Report—Report of LTG Paul T. Mikolashek, Department of the Army Inspector General Inspection Report on Detainee Operations dated 21 July 2004; and the Senate Armed Services Committee Report (Inquiry into the Treatment of Detainees in U.S. Custody (Nov. 20, 2008)).

To start, Frederick did not recognize any of the Plaintiffs and expressed that he did not have any reason to believe they were even at Abu Ghraib. O'Connor Decl., Ex. 2 at 185-86, 188. More importantly, many of the "abusive acts" Plaintiffs claim CACI PT personnel "created" and were solely responsible for initiating—for example, the use of women's underwear, nudity, stress positions, chaining to bars, dietary restrictions, and environmental manipulation, *see, e.g.*, TAC ¶¶ 23, 119-21, 131-35—occurred at Abu Ghraib *prior* to October 2003, the date that CACI PT interrogators first arrived at the site. O'Connor Decl., Ex. 2 at 194-95.

Indeed, Frederick expressly identified the actual chain of command at Abu Ghraib with respect to interrogations. Military interrogators reported Lt. Col. Steven Jordan, Captain Carolyn Wood, and Col. Thomas Pappas. *Id.* at 202. Contrary to Plaintiffs' mischaracterization of Frederick's deposition testimony, Frederick places the military in charge at Abu Ghraib and does not allege that the military leadership reported to or took orders from CACI PT personnel. *Id.* In terms of his relationship with interrogators, Frederick testified that he did not distinguish between military interrogators and CACI PT interrogators. *Id.* at 207. He confirmed that they were "one and the same" as far as he was concerned. *Id.*

Frederick also testified that when he received instructions from an interrogator—be it a military or CACI PT interrogator—they were specific to a detainee. *Id.* at 208-09. Meaning, neither military nor CACI PT interrogators "set conditions" for the detainee population at large, only for their assigned detainees. *Id.* [redacted] *Id.* at 226-27. That testimony is fatal to Plaintiffs' reliance on the Frederick deposition for the implausible proposition that low-level CACI PT employees set the conditions for interrogations for the entire Abu Ghraib detainee population. [redacted]

[redacted] *see* TAC ¶ 133, Plaintiffs allege no facts indicating that they were assigned to CACI PT interrogators. Moreover, Plaintiffs' allegations show that [redacted] *Id.* at ¶ 124.

Thus, Plaintiffs' theory that a few low-level CACI PT employees seized authority from the military chain of command and implemented pervasive practices of abuse that would have necessarily implicated the Plaintiffs is nothing more than hot air. The alleged misconduct of the CACI PT employees, if it is true, amounts to nothing more than independent or parallel conduct, which this Court has already ruled is insufficient to state a claim for conspiracy. Mot. H'ring 41 (citing *Loren Data Corp.*, 2012 WL 6685771).

Fourth Circuit is precedent is clear that 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." *See Loren Data Corp.*, 2012 WL 6685771, at *4; *see also A Society Without a Name*, 655 F.3d at 346 (citation omitted). Under *Loren Data* and *A Society Without a Name*, allegations of parallel conduct fail to support an inference of conspiracy, and do not tend to exclude the possibility of independent, non-conspiratorial action. *Id.* Thus, because Plaintiffs have not alleged any agreement between CACI PT personnel and anyone else to mistreat the Plaintiffs and cannot rely on bolstered allegations of parallel conduct, their conspiracy claims must be dismissed.

5. Even If Plaintiffs Could Plausibly Allege That CACI PT *Employees* Conspired with Soldiers Who Harmed Plaintiffs, CACI PT Would Not Be Liable for the Actions of its Employees' Co-Conspirators on a *Respondeat Superior* Theory

Unable to reach CACI PT with allegations of an agreement, Plaintiffs try to tag the corporation with liability for the conduct of non-CACI PT employees (even though CACI PT was not a corporate conspirator) by heaping *respondeat superior* liability on top of co-conspirator liability. Courts considering Plaintiffs' novel "vicarious liability squared" theory have rejected it as a bridge too far. *See Oki Semiconductor Co. v. Wells Fargo Bank, N.A.*, 298 F.3d 768, 777 (9th Cir. 2002). In *Oki Semiconductor*, the Ninth Circuit 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. *Id.* at 777. As the Ninth Circuit explained, under *respondeat superior* an employer is responsible for its employees because it reaps the benefits of their work and can monitor their conduct to minimize liability. *Id.* Conversely, an employer reaps no benefit from and has no similar ability to monitor non-employee co-conspirators. *Id.*

Thus, application of *respondeat superior* does not extend to the actions of non-employee co-conspirators. Thus, Plaintiffs' cannot use *respondeat superior* to punish CACI PT for the acts of non-employees. *Id.*; *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). Because Plaintiffs have not, and cannot, allege that any CACI PT employee directly injured them, it does not matter for this action whether those employees individually conspired with soldiers who mistreated Plaintiffs (though even that is not plausible alleged). The reason is because *Oki Semiconductor* and its progeny sensibly hold that a corporation (such as CACI PT) is not liable for the acts of its

employees' co-conspirators. This Court considered this issue with respect to the Second Amended Complaint and found Plaintiffs' allegations wanting. Mot. H'ring 32-34. There is nothing in the Third Amended Complaint that should alter this outcome.

IV. 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,

/s/ J. William Koegel, Jr.

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CERTIFICATE OF SERVICE

I hereby certify that on the 15th day of April, 2013, I will serve the non-public version of the foregoing by electronic mail on the below-listed counsel. Also on April 15, 2013, I will electronically file the public version of 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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