

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

DONALD VANCE and NATHAN ERTEL,)	
)	06 C 6964
Plaintiffs,)	
)	Judge Andersen
v.)	
)	Magistrate Judge Keys
DONALD RUMSFELD, UNITED STATES of)	
AMERICA and UNIDENTIFIED AGENTS,)	
)	
Defendants.)	JURY TRIAL DEMANDED

**PLAINTIFFS' RESPONSE TO
DEFENDANT RUMSFELD'S MOTION TO DISMISS**

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times and in difficult times) and to perform its historic and imperative function of reining in attempts to overreach.

Mr. Rumsfeld's motion to dismiss refuses to acknowledge the Plaintiffs' fundamental rights, and claims that the federal courts may not enforce them anyway because he was conducting a now five-year global war on terror. According to Mr. Rumsfeld, his branch of government is perfectly capable of weighing the interests at stake and in deciding the issues for itself. Though skillfully argued, Mr. Rumsfeld's fundamental points are as wrong as his decision to institutionalize torture of Americans, and at least as pernicious. Defendants' motion must be denied.

FACTS

In 2006, Plaintiffs Nathan Ertel and Donald Vance were detained indefinitely and tortured in a United States military prison in Iraq. Second Amended Complaint ("SAC") ¶ 1. They were not charged with any crime, nor had they committed any crime. SAC ¶ 1. To the contrary, Plaintiffs were loyal United States citizens who, at great risk to their personal safety, had been reporting to stateside FBI agents on official corruption that they witnessed in Iraq. SAC ¶¶ 18-19, 41-104. When the local U.S. officials who were implicated by these reports learned that Plaintiffs had been speaking to domestic law enforcement officers, they became angry and concerned about the details of what Plaintiffs had reported, and they retaliated against Plaintiffs in the most brutal way imaginable. *Id.* ¶¶ 19, 52-54, 132-37.

The officials falsely accused the Plaintiffs of treasonous acts and confined them, *incommunicado*, under a detention system where American citizens may be tortured and where they have no actual processes to challenge their imprisonment. SAC ¶¶ 132-37. In return for their bravery and their patriotism, Plaintiffs spent months in Camp Cropper, in total isolation,

where their interrogators deprived of their most basic needs such as food, water and sleep, and subjected them to unending interrogations about their reports to the FBI, with no legitimate process to prove the retaliation and regain their freedom. Id. ¶¶ 143-76.

Background

The story of how this heinous abuse of power came to pass begins not in Iraq, but at the Office of the Secretary of Defense. It was there that Defendant Donald Rumsfeld devised the policies that empowered the U.S. officials based in Iraq to detain Americans without factual grounds and to use torture as "needed" to obtain information. SAC ¶¶ 215-57. Among the list of torture techniques that Mr. Rumsfeld initially approved for use on detainees were 20-hour interrogations, isolation, dietary manipulation, sensory deprivation, and sleep deprivation. Id. ¶¶ 232-234 . All of these procedures contravened the Army field manual and international norms. Id. ¶¶ 242-52.

Under Mr. Rumsfeld's detention system, the abuses grew more and more brutal, yet he did nothing to reign them in. To the contrary, and despite ample knowledge that these tactics were producing egregious abuses by government officials in military prisons in Iraq, Guantanamo, and Afghanistan, Mr. Rumsfeld continued to approve similar unlawful interrogation techniques over the next several years. SAC ¶¶ 233-52. In fact, to use Mr. Rumsfeld's own words, he set out to "gitmo-ize" the entire U.S. system for detainees, including in Iraq. Id. ¶¶ 236-237. Further, Mr. Rumsfeld approved more forms of torture, formalized in a memorandum by then-Commander of U.S. forces in Iraq Lieutenant General Ricardo Sanchez, which added 29 new techniques, such as light control, use of loud music, and placing within interrogators' control the access to food, climate control, shelter, and clothing for those detained in U.S. custody. Id. ¶¶ 238-239, 253-255.

The results of Mr. Rumsfeld's policies were profound. The Red Cross, Amnesty International, and the United Nations Assistance Mission for Iraq began reporting widespread evidence that U.S. troops and intelligence officers were torturing detainees in Iraq and elsewhere, as did internal U.S. military reports and other sources. SAC ¶¶ 240-241, 245-51. Mr. Rumsfeld was apprised of all of these reports and others, but kept in place the policies that permitted use of the detainee torture tactics. *Id.* ¶¶ 242-252.

This was the abyss into which Plaintiffs unwittingly stepped when they chose to report on the corruption that they were observing in Iraq.

Plaintiffs' Whistleblowing

While working for an Iraqi-owned security contractor, Shield Group Security ("SGS"), Plaintiffs witnessed what they believed was evidence of corruption by both U.S. and Iraqi officials. In particular, they saw members of a powerful Iraqi family, the Al-Khudaris, engaging in what appeared to be illegal arms transactions and bribery with Iraqi government officials, Korean government officials, U.S. government officials, private U.S. contractors, and local sheiks. *See* SAC ¶¶ 41-104.

One member of the Al-Khudairi family, Laith Al-Khudari, was a United States citizen who was working for the U.S. State Department in Iraq. SAC ¶¶ 66-67. Among other suspicious activities, Plaintiffs observed him on several occasions leaving the U.S. Embassy in secret and coming to SGS in the Red Zone, where he held closed-door meetings with the sheiks. SAC ¶¶ 68-69. Another family member, Mazin Al-Khudari, a citizen of Saudi Arabia, was Laith Al-Khudari's brother. *Id.* ¶ 84. Plaintiffs observed that Mazin Al-Khudairi had obtained a U.S. Embassy badge, despite the fact that he did not work for the U.S. Government, which allowed him to move freely within the U.S. Embassy as well as any other United States-controlled

property in Iraq. Id. ¶¶ 84-85. Mazin Al-Khudairi was also involved in manufacturing weapons and was holding meetings with both the Iraqi Ministry of Interior and the Ministry of Defense. Id. ¶ 86.

A third member (by marriage) of the Al-Khudari family, Haydar Jaffar, was running a large construction company that contracted with both the Army Corp of Engineers and the Iraqi Ministry of Defense. SAC ¶¶ 87-89. A fourth family member, Mustafa Al-Khudairi, ran SGS and Plaintiffs observed him to be stockpiling weapons. Id. ¶¶ 33, 100-01. Additionally, there was an American-born arms dealer closely associated with the Al-Khudairis and SGS, named Jeff Smith, who had ties to the President of Iraq. Id. ¶¶ 56-59.

Early on, when they began encountering these suspicious activities, Plaintiffs contacted local U.S. officials in Baghdad, but the officials were unreceptive and told Plaintiffs that there was really nothing that they could do. SAC ¶ 51. Eventually, Plaintiff Vance reached out to the Federal Bureau of Investigation ("FBI") in his hometown of Chicago, and he was connected with Special Agent Travis Carlisle, a member of the Joint Terrorism Taskforce, in the FBI's Chicago field office. Id. ¶¶ 43-44. Mr. Vance proceeded to share with Agent Carlisle information about what he and Mr. Ertel had been observing. Id. ¶¶ 45, 48.

At Mr. Carlisle's request, Plaintiff Vance agreed to continue reporting to Mr. Carlisle from Iraq. Continuously thereafter, Mr. Vance reported to the FBI through Carlisle about what he and Mr. Ertel were observing of the Al-Khudairis, as well as the bribery of sheiks and U.S. soldiers, and the flow of weapons into and out of SGS. SAC ¶¶ 45, 48, 50, 55-59, 65-69, 74-79, 85-90, 95-104. Plaintiffs also shared some of this information with two former co-workers who had taken U.S. government jobs at the U.S. Embassy in Baghdad, Doug Treadwell and Deborah Nagel. Id. ¶¶ 49, 100.

SGS learned of Plaintiffs' whistleblowing and took them hostage, whereupon Plaintiffs called Ms. Nagel and Mr. Treadwell from a cell phone desperately seeking help. SAC ¶¶ 120, 124. Mr. Treadwell told Plaintiffs to arm themselves, barricade themselves in, and that a rescue force would be sent to extract them. *Id.* ¶ 124. Eventually, a U.S. military rescue team did come to SGS and rescued Plaintiffs. *Id.* ¶¶ 125-28.

Following the rescue, Plaintiffs were taken to the U.S. Embassy where they debriefed with U.S. officials whom they had never met. These men claimed to be with the FBI and with "Air Force Intelligence," although they provided only first names and Plaintiffs have no personal knowledge for whom they actually worked. SAC ¶ 129. Plaintiffs told these men that they had observed corruption involving the Al-Khudairis and foreign and U.S. officials and that they had been reporting information daily to Agent Carlisle in Chicago as well as to Ms. Nagel and Mr. Treadwell in Iraq. *Id.* ¶ 130.

Retaliation

Plaintiffs slept at the Embassy that night until they were awoken at gun point. Armed guards escorted them off of the Embassy grounds where they were met by military officers and arrested. SAC ¶¶ 131, 138-39.

Plaintiffs had done nothing wrong and there was no evidence (credible or otherwise) to suggest that they had. Rather, upon learning that Plaintiffs possessed information which was potentially embarrassing to U.S. officials in Iraq and that such information had already been transferred to the stateside FBI, the local U.S. officials decided to label Plaintiffs as potential enemy combatants so that they could interrogate Plaintiffs to learn what they had been reporting to Carlisle, and to prevent further information from reaching the stateside FBI. This detention (without any prior review of the allegations) was purely retaliatory. SAC ¶¶ 132-137, 165-176.

Torturous Interrogations

On information and belief, Plaintiffs were first taken to Camp Prosperity, where they were detained for approximately two days. SAC ¶¶ 139-43. For their entire detention at Camp Prosperity, Plaintiffs were kept in solitary confinement 24 hours per day. Id. ¶ 142. The lights in their cells were kept on the entire time. There was no toilet in Plaintiffs' cells, and they were allowed to go to the bathroom only twice per day. Id. ¶ 142. They were fed only twice per day. Id. ¶ 143.

After a couple of days at Camp Prosperity, Plaintiffs were taken to Camp Cropper, where they spent the remainder of their respective detentions in solitary confinement, housed in tiny cells with bugs and feces on the cell walls. SAC ¶¶ 146-147. Each Plaintiff received only a thin plastic mat to lay on the concrete floor. Id. ¶ 148.

The interrogators used numerous tactics to cause Plaintiffs' pain and disorientation. The cells were purposefully kept extremely cold, and the lights were always turned on. SAC ¶ 147. Food and water were often withheld from them for an entire day. Id. ¶¶ 150-51. When they would try to sleep, heavy metal or country music would be piped into their cells at intolerably loud volumes. Guards would pound on the cell doors when they observed Plaintiffs sleeping. Id. ¶ 149.3 Plaintiffs were periodically threatened and physically assaulted. SAC ¶¶ 156-57. Guards would constantly "shake down" Plaintiffs' cells and falsely claim to have found contraband (despite Plaintiffs having no access to any property of any kind) and threaten to use "excessive force" against Plaintiffs if they did not immediately comply with all instructions. Id. ¶¶ 156-58.

Throughout the time these tactics were used, Plaintiffs were interrogated endlessly. SAC ¶ 165. Before each interrogation, Plaintiffs would ask for an attorney, but each such request was

invariably denied. *Id.* ¶¶ 166-68. Both Mr. Vance and Mr. Ertel informed every interrogator that they had been talking to Special Agent Carlisle, and that Mr. Carlisle would confirm their identities and their stories. *Id.* ¶ 169. Initially, the interrogators stated that they knew Mr. Carlisle and that they knew that Mr. Vance had been speaking with him; later, interrogators denied that a Travis Carlisle even existed. *Id.* ¶ 171.

The interrogations covered all of the same information about which Plaintiffs had been reporting to Agent Carlisle, including specifically what Plaintiffs had told Agent Carlisle about U.S. officials on the ground in Iraq. SAC ¶¶ 171-74. Plaintiffs were threatened that if they “did not do the right thing” and answer the interrogators' questions, they would never be allowed to leave. *Id.* ¶ 176.

The Detainee Status Board

About a week after their detention, Plaintiffs were served with a letter stating that they were being held as “security internees” because of their affiliation with SGS, which was suspected of aiding insurgents, and because Plaintiffs were suspected of receiving weapons from U.S. soldiers. SAC ¶¶ 179-80; SAC Exhs. A & B. Ironically, that was the very subject matter of the reports that Plaintiffs had been making about SGS for the past seven months. *Id.* ¶¶ 179-80. The letter stated that Plaintiffs could appeal that decision to the Detainee Status Board and present “reasonably available” evidence. *Id.* ¶¶ 177-78.

Prior to their Board hearing, Plaintiffs each requested that they be permitted to call each other as a witness, as well as Ms. Nagel, Mr. Treadwell, and Agent Carlisle, and that they be provided with their previously seized laptops and cellular telephones so that they could prove their whistleblowing and prior statements about SGS. SAC ¶¶ 182-83. Despite that request and despite the ready availability of this evidence (Treadwell and Nagel were local, Carlisle was

available by phone and the military possessed Plaintiffs' laptops and cell phones), neither Mr. Vance nor Mr. Ertel were ever provided with any of that evidence. Id. ¶¶ 184, 187, 192.

Indeed, the hearings were perfunctory at best. They did not afford Plaintiffs any genuine opportunity to rebut the factual assertions against them nor to offer additional evidence showing their innocence: Plaintiffs could not even see the bulk of the purported evidence, were not provided their requested rebuttal evidence, and they were denied the opportunity to hear, let alone examine, whatever adverse witnesses existed. SAC ¶¶ 190-92.

This Case

Plaintiffs had no means to challenge their detentions nor the brutal interrogations and torture tactics while they were held at Camp Cropper. The only mail that was permitted was letters to family through the Red Cross, and detainees were prohibited from telling family where they were or how they were being treated. SAC ¶¶ 161-164. Moreover, communications with an attorney were forbidden and Plaintiffs were not allowed to send correspondence to a court.

Id.

Accordingly, Plaintiffs had to suffer all of the mistreatment until they were released. For Mr. Ertel, this took six weeks, SAC ¶ 207; for Mr. Vance it took over three months. SAC ¶ 209. During the additional time, the interrogators continued Mr. Vance's interrogations on topics apparently of interest to the persons who detained him. Id. ¶ 209. Towards the end of the three months, Mr. Vance was grilled with questions about how he was treated during his detention, what he would do if he were released, and whether he would hire an attorney. Id. ¶ 175.

After making their way back the United States, Plaintiffs filed this case to enforce their rights as American citizens under the United States Constitution. Id. ¶ 7. Presently before the Court is the Plaintiffs' Second Amended Complaint. Mr. Rumsfeld previously opposed their

filing the Second Amended Complaint, arguing that it was futile for the same general reasons he now advances to dismiss it. Dckt. 106. Following briefing, the Court overruled Mr. Rumsfeld's objections and held that the SAC would not be futile. Dckt. 115.

ARGUMENT

I. APPLICABLE STANDARDS

A. On a Motion to Dismiss

Federal notice pleading standards apply to this case as well as to any other, and, although Mr. Rumsfeld pays lip service to the standards, he does not abide by them. His Motion ignores many of the facts Plaintiffs pleaded, misconstrues others, and simply contradicts still others without providing any valid basis for doing so. All such arguments are unavailing at the pleadings stage.

This Court recently summarized the standard on a motion to dismiss as follows:

In ruling on a motion to dismiss, the court must draw all reasonable inferences in favor of the plaintiff, construe allegations of the complaint in the light most favorable to the plaintiff, and accept as true all well-pleaded facts and allegations in the complaint. Under Fed.R.Civ.P. 8(a)(2), a complaint need only contain "a short and plain statement of the claim showing that the pleader is entitled to relief." The Supreme Court has interpreted that language to impose two minimal hurdles. "First, the complaint must describe the claim in sufficient detail to give the defendant 'fair notice of what the . . . claim is and the grounds upon which it rests.' Second, the complaint's allegations "must plausibly suggest that the plaintiff has a right to relief, raising that possibility above a 'speculative level'; if they do not, the plaintiff pleads itself out of court."

Kelderhouse v. Fox, No. 05-4503, 2008 WL 2340137, * 1 (N.D. Ill. June 3, 2008) (citations omitted); see also St. John's United Church of Christ v. City of Chicago, 502 F.3d 616, 625 (7th Cir. 2007) (Dismissal is proper only when the complaint "fails to set forth 'enough facts to state a claim to relief that is plausible on its face.'" (citations omitted); Alvarado v. Battaglia, 539 F. Supp. 2d 1022, 1024-25 (N.D. Ill. 2008) ("So long as a well-pleaded complaint sufficiently states