UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

APRIL GALLOP, for Herself and as Mother and Next Friend of ELISHA GALLOP, a minor,

Plaintiffs,

v.

DICK CHENEY et al.,

Defendants.

08 Civ. 10881 (DC)

REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF DEFENDANTS' MOTION TO DISMISS

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PRELIMINARY STATEMENT

Defendants Richard Cheney, Donald Rumsfeld, and Richard Myers (collectively, the "defendants"), by their attorney Lev L. Dassin, the Acting United States Attorney for the Southern District of New York, respectfully submit this reply memorandum of law in further support of their motion to dismiss plaintiffs' complaint for failure to state a claim pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6).

As fully discussed in defendants' moving brief and in this reply brief, plaintiffs' complaint is legally deficient for numerous reasons and should be dismissed. Plaintiffs' attempt to cure these deficiencies by alleging additional facts through affidavits submitted in support of their opposition to defendants' motion to dismiss is misguided. *See* Affidavit of David Ray Griffin, dated June 22, 2009 (the "Griffin Affidavit"); Affidavit of William W. Veale, dated June 28, 2009 (the "Veale Affidavit"). Such affidavits cannot be used to cure a deficient complaint. And even if the Court were to consider the affidavits, they do not assist plaintiffs as the affidavits include only conclusory statements and personal opinions without evidentiary support, and thus fail to allege facts sufficient to support plaintiffs' claims. Accordingly, defendants' motion to dismiss the complaint should be granted.

ARGUMENT

I. PLAINTIFFS CANNOT CURE THEIR DEFICIENT COMPLAINT WITH AFFIDAVITS

Plaintiffs attempt to cure some of the defects of their complaint by alleging additional facts in the Veale and Griffin Affidavits, and accompanying exhibits. Indeed, courts have held that a party cannot amend its complaint by a response or affidavit filed in opposition to a motion to dismiss. *See Jordan v. Fox, Rothchild, O'Brien & Frankel*, 20 F.3d 1250, 1261 (3d Cir. 1994) ("In determining whether a claim should be dismissed under Rule 12(b)(6), a court looks only to the facts alleged in the complaint and its attachments

without reference to other parts of the record."); *see also City of Pittsburgh v. West Penn Power Co.*, 147 F.3d 256, 259 (3d Cir. 1998) ("When deciding a motion to dismiss, it is the usual practice for a court to consider only the allegations contained in the complaint, exhibits attached to the complaint and matters of public record."). Rather, in considering a motion to dismiss for failure to state a claim under Rule 12(b)(6), "a district court must limit itself to facts stated in the complaint or in documents attached to the complaint as exhibits or incorporated in the complaint by reference." *Kramer v. Time Warner Inc.*, 937 F.2d 767, 773 (2d Cir. 1991). Accordingly, "memoranda and supporting affidavits in opposition to a motion to dismiss cannot be used to cure a defective complaint" S*ee Branch v. Tower Air, Inc.*, 94 Civ. 6625 (JFK), 1995 WL 649935, at *6 (S.D.N.Y. Nov. 3, 1995); *see also Adler v. Aztech Chas. P. Young. Co.*, 807 F.Supp. 1068, 1072 (S.D.N.Y. 1992) ("Although plaintiffs did submit affidavits with their opposition to this motion containing factual allegations that might suffice to state a claim against [defendants], those affidavits are inadmissible to cure the defect in a complaint when deciding a motion to dismiss.").

Even if the Court decides to consider plaintiffs' affidavits, they will not defeat defendants' motion as the affidavits include only conclusory statements and personal opinions without evidentiary support and therefore fail to allege facts sufficient to support a claim. *See Boyer v. Channel 13, Inc.*, 04 Civ. 2137 (JSR), 2005 WL 2249782, at *6 (S.D.N.Y. Mar. 9, 2005) ("because [plaintiff's] affidavits neither supplement nor clarify the . . . complaint[ ], they do not cure the deficiencies in [plaintiff's] . . . claims previously identified").

II. PLAINTIFFS HAVE FAILED TO ALLEGE A CONSTITUTIONAL CLAIM

As explained in defendants' motion to dismiss, plaintiffs have failed to state a claim for violations of their First, Fourth, Fifth, and Ninth Amendment rights. *See* Memorandum of Law in Support of Defendants' Motion to Dismiss ("Defs. Mem.), at 4-9. In their opposition, plaintiffs have not cured their lack of valid and cognizable constitutional claims. *See* Plaintiffs' Memorandum in Opposition to Defendants' Motion to Dismiss ("Pls. Mem."), at n. 3 (discussing Ninth and First Amendment clams but conceding that "[f]or purposes of this motion at this time, however, [plaintiffs'] main constitutional cause of action rests on the substantive due process rights . . . under the Fifth Amendment").

With regard to their Ninth Amendment claim, plaintiffs concede that they have "no more authority for a Ninth Amendment claim now than the right to privacy and 'bodily integrity,' etc," established by *Griswold v. Connecticut*, 381 U.S. 479 (1965), *Roe v. Wade*, 410 U.S. 959 (1973), and their progeny. *See* Pls. Mem., at 20. Plaintiffs claim only that further development of the evidence through discovery "may well provide the basis for more clear and cogent cause of action." *Id.*

Instead of articulating a claim under the First, Fourth, or Ninth Amendments, plaintiffs re-allege a violation of their Fifth Amendment right to due process. Specifically, plaintiffs claim that they were "victims of an unprivileged, substantive deprivation of their liberty . . . in violation of the substantive right to Due Process of Law under the Fifth Amendment." Pls. Mem., at 10. Plaintiffs concede that their complaint is alleged "without reference to any binding or even analogous precedent." *Id.* at 12. Plaintiffs provide only speculation as to an alleged government conspiracy to cause an explosion at the Pentagon

in order to destroy certain financial records. Complaint, ¶ 42. However, the factual allegations contained in the complaint "must be enough to raise a right to relief above the speculative level." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 545 (2007) (internal citations omitted); *see* Defs. Mem. at 4. Plaintiffs' failure to substantiate their constitutional claims requires dismissal of Cause of Action One under Rule 12(b)(6) for failure to state a claim.[1]

III. PLAINTIFFS' CONSPIRACY CLAIM IS INSUFFICIENT

Defendants have interpreted plaintiffs' common law conspiracy claim (Cause of Action Two) as one brought under *Bivens* against defendants in their individual capacities. *See* Defs. Mem. at n. 4.[2] As explained in their moving brief, the conspiracy claim should be dismissed for failure to state a claim because plaintiffs have provided no factual basis to support a meeting of the minds. *Id.* at 5-8.

To the extent plaintiffs' conspiracy claim is brought under the Federal Tort Claims Act, 28 U.S.C. § 2671 *et seq*. ("FTCA"), the claim should be dismissed pursuant to Rule 12(b)(1) because the United States has not waived its sovereign immunity with respect to claims that its employees have committed constitutional torts. *See Castro v. United States*, 34 F.3d 106, 110 (2d Cir. 1994); *see also* Defs. Mem. at n. 4. Any conspiracy claim under

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[1] As explained in their motion, even if plaintiffs could sustain a claim under *Bivens*, defendants are entitled to qualified immunity because plaintiffs have failed to allege that defendants violated clearly established constitutional rights. *See* Defs. Mem. at 8-9.

[2] Plaintiffs incorrectly state that defendants failed to "raise any protest against plaintiffs' claims against the defendants individually under the Common Law." Pls. Mem. at 20. To the contrary, defendants' motion and this reply address plaintiffs' claims against defendants in their individual capacity as well as plaintiffs' common law conspiracy claim, as pled in their complaint. To the extent plaintiffs are alleging additional common law claims, they are not contained in their complaint.

the FTCA should also be dismissed because plaintiffs have not pled that they filed administrative claims within two years of the accrual of their conspiracy claim. *See* 28 U.S.C. § 2675(a); *see also* Defs. Mem. at n.4 (explaining that plaintiff Elisha Gallop's minority does not toll the running of the statute of limitations on an FTCA claim).

Furthermore, whether the claim is brought under the FTCA or *Bivens*, plaintiffs have provided only conjecture as to any conspiracy, admitting in their complaint that they "do[ ] not know with certainty the outlines of the plot at its initiation." Complaint, ¶ 21. Plaintiffs offer pure speculation, citing opinions asserted by Richard Clarke in his book, *Against All Enemies*, as evidential support of a conspiracy. *See* Pls. Mem. at 7-8.

However, in order to establish liability for a conspiracy, "a plaintiff must plead and prove (1) an agreement between the conspirator and the wrongdoer; and (2) a wrongful act committed in furtherance of the conspiracy." *Bresson v. Thomson McKinnon Securities Inc.*, 641 F. Supp. 338, 348 (S.D.N.Y. 1986); *see also* Defs. Mem. at 5-8. "[A] bare bones statement of conspiracy . . . without any supporting facts permits dismissal." *Heart Disease Research Found. v. Gen. Motors Corp.*, 463 F.2d 98, 100 (2d Cir. 1972). Because plaintiffs have offered no evidence to support their conspiracy claim, *see* Defs. Mem. at 7, the claim in Cause of Action Two of the complaint must be dismissed for failure to state a claim under Rule 12(b)(6).[3]

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[3] Plaintiffs' claims under the Anti-Terrorism Act (the "ATA") should also be dismissed for failure to state a claim because they are expressly barred by the language of the ATA itself. *See* Defs. Mem. at 9. Plaintiffs do not contest this point. *See* Pls. Mem. at 20 (conceding that language of ATA "may well be fatal" to their claims but suggesting that the Court "defer ruling at this time").

IV. APRIL GALLOP'S CONSTITUTIONAL CLAIMS SHOULD BE DISMISSED AS UNTIMELY AND BARRED BY THE DOCTRINE OF INTRAMILITARY IMMUNITY

As explained in defendants' moving brief, April Gallop's claims brought under *Bivens* (counts one and two of the complaint) should be dismissed as untimely. Defs. Mem. at 11-13.[4] In their reply memorandum, plaintiffs admit that the statute of limitations is "problematic." Pls. Mem. at 18. Nevertheless, plaintiffs attempt to revive their claims by contending that they are entitled to equitable tolling. Pls. Mem. at 18-20. That argument is without merit.

Plaintiffs assert that under the doctrine of equitable tolling, the statute was triggered when April Gallop "was able to reasonably perceive and believe in an inside job." *Id.* According to plaintiffs, "the period never ran, or was repeatedly extended by additional acts of concealment in furtherance of the conspiracy." *Id.* at 19. Plaintiffs fail to provide any evidential support for these supposed acts of concealment, instead referring to an unspecified speech by defendant Cheney.

Such vague allegations are insufficient to establish equitable tolling. *See Singleton v. City of New York*, 632 F.2d 185, 192 (2d Cir. 1980), *cert denied*, 450 U.S. 920 (1981) ("To permit [plaintiff] to wait and toll the running of the statute simply by asserting that a series of separate wrongs were committed pursuant to a conspiracy would be to enable [plaintiff] to defeat the purpose of the time-bar, which is to preclude the resuscitation of stale claims."); *see also* Defs. Mem. at 12-13. Since plaintiffs do not clarify their vague speculations beyond the assertion that defendants' "fraudulent concealment" amounts to

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[4] As explained in defendants' moving brief, it seems that plaintiff Elisha Gallop's *Bivens* claims are tolled due to her infancy. *See* Defs. Mem. n. 7.

repeated acts that extended the limitations period, they fail to meet their burden of establishing equitable tolling.

Moreover, the doctrine of intramilitary immunity would bar plaintiff April Gallop's constitutional claims in any event.[5] The doctrine of intramilitary immunity emerged from the Supreme Court's holding in *Feres v. United States*, 340 U.S. 135 (1950), that the FTCA does not permit military personnel to sue the United States government for compensation for injuries that "arise out of or are in the course of activity incident to service," even if those injuries would be otherwise actionable under the FTCA. *Id.* at 146. The Court's reasoning in *Feres* was confined to the FTCA, but the Second Circuit noted in *Overton v. New York State Division of Military & Naval Affairs*, 373 F.3d 83 (2d Cir. 2004), that subsequent judicial decisions have significantly expanded the intramilitary immunity doctrine and "it now generally protects the government from suit for injuries arising from 'activit[ies] incident to [military] service.'"[6] *Id.* at 89 (quoting *United States v. Stanley*, 483 U.S. 669, 681 (1987)); *see also Stanley*, 483 U.S. at 683-84 ("We hold that no *Bivens* remedy

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[5] Although defendants raise this argument for this first time in their reply brief, the Court may consider it in its discretion. *See In re Global Crossing, Ltd. Securities Litigation*, 322 F. Supp. 2d 319, 335 n.15 (S.D.N.Y. 2004) (considering argument first raised in reply to motion to dismiss "for the sake of judicial economy"); *McNamee v. City of New York*, No. 98 Civ. 6275, 2002 WL 441177, at *5 (S.D.N.Y. Mar. 21, 2002) (granting a qualified immunity defense to defendant even though it was first raised in reply papers where Magistrate gave plaintiff an opportunity to respond). Defendants have no objection to plaintiffs filing a sur-reply to respond to defendants' argument. *See, e.g.*, *Lee v. Coughlin*, 26 F. Supp. 2d 615, 617, n.2 (S.D.N.Y. 1998) (allowing plaintiff a chance to submit a surreply to a new issue raised in defendant's reply); *see also* S.*E.C. v. Homa*, No. 99 C 6895, 2006 WL 3267645, at *8 n. 7 (N.D. Ill. Nov. 6, 2006) (noting that the district court may consider matters raised first in reply, so long as the opponent is allowed to respond) (*citing Black v. TIC Inv. Corp.*, 900 F.2d 112, 116 (7th Cir. 1990)).

[6] As alleged in plaintiffs' complaint, April Gallop was a career member of the United States Army and reported to work at the Pentagon on the morning of 9/11. *See* Complaint, ¶¶ 6, 33-34.

is available for injuries that arise out of or are in the course of activity incident to service.") (internal quotations omitted); *Chappell v. Wallace*, 462 U.S. 296 (1983) (holding that enlisted servicemembers could not bring *Bivens*-style suits seeking damages from their superior officers for alleged constitutional violations); *Jones v. N.Y. State Div. of Military & Naval Affairs*, 166 F.3d 45, 50-52 (2d Cir. 1999) (holding that intramilitary immunity applies to suits for damages under 42 U.S.C. § 1983); *see generally Dibble v. Fenimore*, 545 F.3d 208, 214-15 (2d Cir. 2008) (discussing *Feres* doctrine and noting that "subsequent judicial decisions have significantly expanded the intramilitary immunity doctrine" to bar *Bivens* and 42 U.S.C. § 1983 actions).

V. ALL OF APRIL GALLOP'S CLAIMS ARE BARRED UNDER THE DOCTRINE OF JUDICIAL ESTOPPEL

In their moving brief, defendants established that all of April Gallop's claims should be dismissed pursuant to the doctrine of judicial estoppel because she is barred from asserting in this current case a position that is contrary to what she argued in *Gallop v. Riggs National Bank*, 04 Civ. 7281 (GBD) (alleging that "terrorist deeds" included flying a passenger airline into the Pentagon). *See* Defs. Mem. at 9-11. Plaintiffs respond in their opposition that the "phraseology" cited in the *Riggs* case stated "a foregone conclusion, in passing, as background for a wholly separate claim, in a different case with different parties, where the assertion had no bearing on the merits of the claim or the Court's disposition of it," and that it therefore "cannot remotely meet the test for an estoppel which the law prescribes." Pls. Mem. at 16. However, plaintiffs' disingenuous attempts to evade the doctrine fail because a review of the amended complaint in the *Riggs* case reveals that April Gallop's entire cause of action rested on the presumption that terrorists caused the events of 9/11 (including a terrorist flying an airliner into the Pentagon), *see* Exhibit B to

Declaration of Heather K. McShain, dated May 6, 2009 ("McShain Decl."), and April Gallop sought to collect damages from Riggs Bank for its failure to detect that it was contributing "to concealing the true source and/or destination of funds passing through accounts at Riggs Bank and ultimately being used for the benefit of the terrorists, and ultimately facilitated and significantly contributed to the terrorists being able to complete their terrorist deeds on September 11, 2001," Exhibit C to McShain Decl.

Plaintiffs also assert that the "inconsistency" does not threaten the judicial system, as articulated in *Bates v. Long Island R.R. Co.*, 997 F.2d 1028, 1038 (2d Cir. 1993) (identifying the two objectives that protect the judicial system to be to "preserve the sanctity of the oath by demanding absolute truth and consistency in all sworn positions" and to "protect judicial integrity by avoiding the risk of inconsistent results in two proceedings"). Quite to the contrary, April Gallop's complaint in the current action, if allowed to persist, threatens the sanctity of the judicial system in light of the inconsistent claims she asserted, and which were adopted by the Court, in the *Riggs* case. *See* McShain Decl., Exs. B-C; *see also* Defs. Mem. at 9-11.

VI. PLAINTIFFS' COMPLAINT IS FRIVOLOUS AND MAY BE DISMISSED FOR THAT REASON ALONE

As explained in defendant's moving brief, the Court may in its discretion dismiss the complaint in its entirety as frivolous. In recent years, courts have repeatedly dismissed cases based on delusional conspiracy theories concerning the events of September 11, 2001. *See Stitch v. United States*, 108 Fed. Appx. 32 (2d Cir. 2004) (dismissing frivolous claims of a government conspiracy to enable hijackers to seize airliners on September 11, 2001)*; see also Haas v. Guiterrez*, 07 CV 3623 (GBD), 2008 WL 2566634 (S.D.N.Y. June 26, 2008); *Wood ex rel United States v. Applied Research Associates, Inc.*, 07 CV 3314 (GBD), 2008 WL

2566728 (S.D.N.Y. June 26, 2008); *Morgan ex rel. United States v. Science Applications Intern. Corp.,* 07 CV 4612 (GBD), 2008 WL 2566747 (S.D.N.Y. June 26, 2008) (each dismissing with prejudice frivolous claims that a terrorist attack was not responsible for the destruction of the World Trade Center complex on September 11, 2001).

In this case, plaintiffs allege despite substantial public evidence to the contrary that no airliner hit the Pentagon, but that the damage to the facility on September 11, 2001 was the result of a government conspiracy "to bring about an unprecedented, horrifying and frightening catastrophe of terrorism inside the United States, which would give rise to a powerful reaction of fear and anger in the public." Complaint at ¶ 2. As an additional motive for the conspiracy and explosion, plaintiffs allege that defendants contrived of those acts to, *inter alia*, destroy records that could account for missing Department of Defense funds. Complaint at ¶ 42. These allegations render this complaint frivolous and demand its outright dismissal.

CONCLUSION

For the foregoing reasons and those stated in defendants' memorandum of law in support of their motion to dismiss, defendants respectfully request that the Court dismiss the complaint in its entirety.

Dated: New York, New York
July 24, 2009

Respectfully submitted,

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