13-0981-cv(L),

13-0999-cv(CON), 13-1002-cv(CON), 13-1003-cv(CON), 13-1662-cv(XAP)

United States Court of Appeals

for the

Second Circuit

IBRAHIM TURKMEN, AKIL SACHVEDA, ANSER MEHMOOD, BENAMAR BENATTA, AHMED KHALIFA, SAEED HAMMOUDA, PURNA BAJRACHARYA, AHMER ABBASI,

Plaintiffs-Appellees-Cross-Appellants,

ASIF-UR-REHMAN SAFFI, SYED AMJAD ALI JAFFRI, on behalf of themselves and all others similarly situated, SHAKIR BALOCH, HANY IBRAHIM, YASSER EBRAHIM, ASHRAF IBRAHIM, AKHIL SACHDEVA,

Plaintiffs-Appellees,

(For Continuation of Caption See Inside Cover)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR DEFENDANT-APPELLANT-CROSS-APPELLEE WARDEN DENNIS HASTY, FORMER WARDEN OF THE METROPOLITAN DETENTION CENTER (MDC)

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– v. –

WARDEN DENNIS HASTY, former Warden of the Metropolitan Detention Center (MDC), MICHAEL ZENK, Warden of the Metropolitan Detention Center, JAMES SHERMAN, SALVATORE LOPRESTI, MDC Captain,

Defendants-Appellants-Cross-Appellees,

JOHN ASHCROFT, Attorney General of the United States, ROBERT MUELLER, Director, Federal Bureau of Investigations, JAMES W. ZIGLAR, Commissioner, Immigration and Naturalization Service, JOHN DOES 1-20, MDC Corrections Officers, JOHN ROES, 1-20, Federal Bureau of Investigation and/or Immigration and Naturalization Service Agents, CHRISTOPHER WITSCHEL, MDC Correctional Officer, UNIT MANAGER CLEMETT SHACKS, MDC Counselor, BRIAN RODRIGUEZ, MDC Correctional Officer, JON OSTEEN, MDC Correctional Officer, RAYMOND COTTON, MDC Counselor, WILLIAM BECK, MDC Lieutenant, STEVEN BARRERE, MDC Lieutenant, LINDSEY BLEDSOE, MDC Lieutenant, JOSEPH CUCITI, MDC Lieutenant, LIEUTENANT HOWARD GUSSAK, MDC Lieutenant, LIEUTENANT MARCIAL MUNDO, MDC Lieutenant, STUART PRAY, MDC Lieutenant, ELIZABETH TORRES, MDC Lieutenant, SYDNEY CHASE, MDC Correctional Officer, MICHAEL DEFRANCISCO, MDC Correctional Officer, RICHARD DIAZ, MDC Correctional Officer, KEVIN LOPEZ, MDC Correctional Officer, MARIO MACHADO, MDC Correctional Officer, MICHAEL MCCABE, MDC Correctional Officer, RAYMOND MICKENS, MDC Correctional Officer, SCOTT ROSEBERY, MDC Correctional Officer, DANIEL ORTIZ, MDC Lieutenant, PHILLIP BARNES, MDC Correctional Officer, UNITED STATES OF AMERICA, JAMES CUFFEE,

Defendants-Cross-Appellees,

OMER GAVRIEL MARMARI, YARON SHMUEL, PAUL KURZBERG, SILVAN KURZBERG, JAVAID IQBAL, EHAB ELMAGHRABY, IRUM E. SHIEKH,

Intervenors.

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JURISDICTIONAL STATEMENT

The district court had jurisdiction over this matter pursuant to 28 U.S.C. §§ 1331, 1346(b). It denied portions of Mr. Hasty's Motion to Dismiss on January 15, 2013, and Mr. Hasty timely noticed his appeal on March 15, 2013 (No. 13-981). This interlocutory appeal concerns the denial of qualified immunity, as well as issues that "are inexplicably intertwined with" and "directly implicated by" the qualified immunity defense. As such, this Court has jurisdiction under 28 U.S.C. § 1291, pursuant to the collateral order doctrine. *Iqbal v Ashcroft* 556 U.S. 662, 673 (2009) (quoting *Swint v. Chambers Cnty. Comm'n*, 514 U.S. 35, 51 (1995) and *Hartman v. Moore*, 547 U.S. 250, 257 n. 5 (2006)). *See also Wilkie v. Robbins*, 551 U.S. 537, 550 n.4 (2007).

STATEMENT OF THE ISSUES

1. Whether the district court erred by extending *Bivens* relief to new factual and legal contexts that have never been recognized as warranting a *Bivens* remedy.
2. Whether the district court erred by concluding Plaintiffs adequately alleged Mr. Hasty's personal participation in a violation of clearly established law and that his conduct was so unreasonable he was not entitled to qualified immunity.

3. Whether the district court erred in permitting a 42 U.S.C. § 1985 conspiracy claim to proceed where it conflicts with settled Supreme Court precedent and Defendants are, in any case, entitled to qualified immunity from it.

STATEMENT OF THE CASE

The first complaint in this action was filed on April 17, 2002, after which it was amended three times between 2002 and 2004. Ultimately, the district court granted Defendants' motions to dismiss the Third Amended Complaint in part but denied those motions with respect to Plaintiffs' allegations relating to the conditions of their confinement at the MDC. *Turkmen v. Ashcroft*, No. 02-cv-2307, 2006 WL 1662663 (E.D.N.Y. June 14, 2006).

On appeal, this Court affirmed the district court's partial dismissal and vacated its denial of Defendants' motion to dismiss the conditions of confinement claims. *See Turkmen v. Ashcroft*, 589 F.3d 542, 547-50 (2d Cir. 2009) (per curiam). Those conditions of confinement claims were remanded for reconsideration given the Supreme Court's decision on federal pleading standards in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). *See* 589 F.3d at 547.

On remand, the district court permitted Plaintiffs to file the operative complaint, A __ (Dkt. No. 724), which they filed on September 13, 2010. A __ (Dkt. No. 726). Defendants moved to dismiss. The court granted the DOJ Defendants' motions in their entirety, but granted in part and denied in part the

MDC Defendants' motions. SPA 3. Mr. Hasty, whose motion the district court partially denied – thereby allowing certain constitutional tort claims, as well as a statutory conspiracy claim, to proceed against him – now files this appeal.

STATEMENT OF THE FACTS

A. Background

This case stems from the tragic events of September 11, 2001 ("9/11"). Al Qaeda's terrorist attacks not only constituted the deadliest to ever occur in this country – killing approximately 3,000 people – but their sheer magnitude also shocked the conscience of the American public. Congress responded within weeks by passing the Authorization for Use of Military Force ("AUMF"). *See* SPA 64 (Pub. L. No. 107-40, 115 Stat. 224 (Sept. 18, 2001)). Therein, Congress characterized the 9/11 attacks as "an unusual and extraordinary threat to the national security * * * of the United States" and sanctioned the President's use of "all necessary and appropriate force" against those responsible for the attacks so that their future attempts could be thwarted. *See id.*

In the aftermath of 9/11, the extent to which al Qaeda had infiltrated the United States was unknown. The FBI immediately launched an investigation into the 9/11 attacks and the potential for future attacks, known as "PENTTBOM."[1] *See* A __ (Dkt. No. 589-2 at 8) (U.S. Dept of Justice, Office of Inspector Gen., *The*

[1] "PENTTBOM" stands for "Pentagon/Twin Towers Bombing."

September 11 Detainees: A Review of the Treatment of Aliens Held on Immigration Charges in Connection with the Investigation of the September 11 Attacks (April 2003) ("OIG Report")).[2] Under the auspices of the AUMF, the Attorney General also issued an executive directive that called for federal law enforcement officials to use "every available law enforcement tool," including federal immigration law, to arrest those suspected of furthering terrorist activities. *Id*. The FBI thus conducted much of the PENTTBOM investigation in tandem with the INS. *See*, *e.g.*, A __ (Dkt. No. 589-2 at 17) (OIG Report). The two agencies subsequently arrested any undocumented alien encountered through the PENTTBOM investigation for immigration violations. A __ (Dkt. No. 589-2 at 21) (OIG Report).

The FBI and INS subsequently arrested approximately 750 undocumented aliens, many from the New York area. A __ (Dkt. No. 589-2 at 9) (OIG Report). Thereafter, the FBI designated each of these aliens as either "of interest" or "of high interest" to the PENTTBOM investigation, based on whether the FBI

[2] The OIG Report and the "Supplemental Report on September 11 Detainees' Allegations of Abuse at the Metropolitan Detention Center in New York" (Dec. 2003) are a lengthy examination by the DOJ independent Inspector General of the federal law enforcement response to 9/11. Collectively, the two reports are referred to as the "OIG Reports" or "Reports." As discussed *infra*, Part I.B, Plaintiffs previously appended the entire Reports to their Second and Third Amended Complaint and then explicitly incorporated the Reports into their Fourth Amended Complaint.

suspected the aliens of terrorist connections, or could not clear them of such ties. *See*, *e.g.*, A __ (Dkt. No. 589-2 at 2, 118) (OIG Report). Under its "hold-until-cleared" policy, the FBI directed the INS to detain these illegal aliens until the FBI could clear them of any ties to terrorism. A __ (Dkt. No. 589-2 at 44) (OIG Report). The INS thus worked in conjunction with the Bureau of Prisons ("BOP") to locate suitable detention facilities.

Based on the FBI's assessment that the "detainees had a potential nexus to terrorism," the BOP concluded that they were "high-risk." A __ (Dkt. No. 589-2 at 134) (OIG Report). Plaintiffs[3] were among 84 of these aliens who the BOP decided to detain at its Metropolitan Detention Center, which the BOP chose because it was its only detention facility in the New York City area that was capable of housing detainees under highly restrictive conditions. A __ (Dkt. No. 589-2 at 118, 133) (OIG Report). The BOP informed MDC officials, including its warden Appellant-Defendant Dennis Hasty, that the detainees were "suspected terrorists." A __ (Dkt. No. 589-2 at 26, 133) (OIG Report). Thus "err[ing] on the side of caution," the BOP, including its Northeast Regional Director David Rardin, directed Mr. Hasty and others to segregate the "suspected terrorists" from the

[3] Although Ibrahim Turkmen and Akhil Sachdeva are named Plaintiffs in this action, their allegations relate solely to their confinement at Passaic County Jail in Passaic, New Jersey, and thus do not pertain to Appellant-Defendant Hasty.

primary prisoner population and to hold them in the "tightest" Special Housing Unit[4] possible. A __ (Dkt. No. 589-2 at 26, 123 n.93, 133) (OIG Report). Indeed, one of the decisions the BOP made "regarding the detention conditions it would impose on the [9/11] detainees * * * included housing the detainees in the administrative maximum (ADMAX) Special Housing Unit (SHU) * * *."[5] A __ (Dkt. No. 589-2 at 26) (OIG Report). This BOP directive conformed to DOJ recommendations "that the BOP should, within the bounds of the law, push as far toward security as they could." A __ (Dkt. No. 589-2 at 120) (OIG Report). The BOP also stressed adherence to the FBI's hold-until-cleared policy, requiring Mr. Hasty to continue the ADMAX SHU detention until the FBI had cleared the detainees of terrorist connections. A __ (Dkt. No. 589-2 at 45, 120) (OIG Report). During this time, the MDC did not conduct the "routine individualized assessments" that BOP facilities typically used to evaluate the propriety of continued SHU detention. *See* A __ (Dkt. No. 589-2 at 119) (OIG Report). But in

[4] The MDC and other BOP facilities had typically used SHUs to house inmates with disciplinary issues, or who otherwise required administrative separation from the general prison population. A __ (Dkt. No. 589-2 at 125) (OIG Report).

[5] Before 9/11, the MDC maintained only a SHU. After 9/11, MDC staff consulted with the BOP's Metropolitan Correctional Center ("MCC") regarding how to best convert its SHU into an ADMAX SHU. The MCC had created an ADMAX SHU after a terrorist convicted of the 1998 African embassy bombings seriously injured a guard during his confinement in a regular SHU. A __ (Dkt. No. 589-2 at 126 n.99) (OIG Report).

the case of the 9/11 detainees, the designation for ADMAX SHU detention "resulted from the FBI's assessment and was not the BOP's 'call.'" *Id*.

Accordingly, the conditions of confinement in the ADMAX SHU were harsh by any measure. "The BOP combined a series of existing policies and procedures that applied to inmates in other contexts to create highly restrictive conditions of confinement." A __ (Dkt. No. 589-2 at 198) (OIG Report). To be sure, the detainees "were subjected to the *most* restrictive conditions of confinement authorized by BOP policy," such as 23 hours of "lockdown" per day, "four-man hold" restraints during transfers, extensive camera surveillance,[6] and limits on possessions within their cells. A __ (Dkt. No. 589-2 at 119) (OIG Report) (emphasis added). It is from the next several months of Plaintiffs' ADMAX SHU detention that this lawsuit arises.

B. Plaintiffs' Lawsuits and Remaining Allegations

The allegations at issue here are the remnants of what was once a much larger pair of lawsuits, which has by and large been resolved for several years. After the DOJ refused to bring charges related to allegations of 9/11 detainee abuse, as investigated by its Office of Inspector General ("OIG"), two companion

[6] The BOP and MDC chose to implement the use of cameras to protect detainees from abuse and to also protect BOP and MDC staff from unfounded allegations of abuse. *See* A __ (Dkt. No. 589-2 at 157) (OIG Report).

lawsuits followed, both filed before Judge Gleeson in the Eastern District of New York.

The first is the case at bar. In April 2002, certain MDC detainees filed a putative class action on behalf of themselves and other male Arab or Muslim non-citizens – or male non-citizens perceived by Defendants to be Arab or Muslim – who were arrested after 9/11, charged with immigration violations, and allegedly mistreated during their confinement at the MDC or Passaic County Jail. *See Turkmen v. Ashcroft*, 02-civ-2307 (E.D.N.Y. filed April 17, 2002); A __ (Dkt. No. 589-2 at 118) (OIG Report). *See also supra* note 3. The second case before Judge Gleeson, *Elmaghraby v. Ashcroft*, 1:04-cv-01809-JG-SMG (E.D.N.Y. filed May 3, 2004),[7] alleged similar charges against many of the same government officials but only on behalf of two individual plaintiffs.

In response to an amended *Turkmen* complaint filed just months after the initial pleadings, the defendants moved to dismiss. Thereafter, various changes in the factual and legal landscape led the plaintiffs to amend their complaint three more times. Factually, the OIG published its two Reports regarding the 9/11 detainees' detentions at the MDC. *See supra* note 2. Prompted by widespread

[7] *Aff'd in part, rev'd in part and remanded sub nom. Iqbal v. Hasty*, 490 F.3d 143 (2d Cir. 2007) *cert. granted, cause remanded*, 129 S. Ct. 2430 (2009) and *cert. granted, cause remanded sub nom. Sawyer v. Iqbal*, 129 S. Ct. 2431 (2009) and *rev'd and remanded sub. nom.. Ashcroft v. Iqbal*, 556 U.S. 662 (2009).

media reports regarding alleged abuse at the MDC and authored by the DOJ's independent oversight body, the Reports document the results of over a year of investigation. *See* A __ (Dkt. No. 589-2 at 12) (OIG Report). The OIG interviewed dozens of detainees and government officials, and reviewed the detainees' immigration files, examined INS and BOP policies and procedures, and met with human rights advocates. A __ (Dkt. No. 589-2 at 13-15) (OIG Report). The OIG conducted this thorough evaluation of the allegations within six months of the 9/11 attacks, preserving the integrity of the factual record. *See* A __ (Dkt. No. 589-2 at 12) (OIG Report). The result is almost 300 pages of factual detail, focusing on the very issues in dispute here: the conditions of the detainees' confinement at the MDC, the allegations of abuse by correctional officers there, and the actions of senior managers regarding the MDC detentions. *See* A __ (Dkt. No. 589-2 at 11-12) (OIG Report).

This relevance and reliability is likely why the plaintiffs amended their complaint with each publication, attaching the most recent Report each time. In these earlier amended complaints, Plaintiffs had alleged over 30 causes of action against over 50 defendants. After appeals in the related *Elmaghraby* litigation[8] led

[8] Ehab Elmaghraby settled with the government in 2006, leaving Javaid Iqbal as the sole plaintiff before the Supreme Court in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). After the Supreme Court and Second Circuit's remand to the district court, Mr. Iqbal settled with the government in 2009.

to a heightened federal pleading standard, the plaintiffs again amended their complaint.

Filed on March 3, 2010, current Plaintiffs' operative fourth amended complaint ("FAC" or "complaint"), now alleges violations only against three "DOJ Defendants" and four "MDC Defendants," including Mr. Hasty.[9] Further, the FAC now only asserts seven claims against Mr. Hasty and these other Defendants – six of which were part of the original pleadings and the seventh an entirely new claim for relief: (1) violations of Plaintiffs' Fifth Amendment due process rights, stemming from their conditions of confinement; (2) violations of Plaintiffs' Fifth Amendment equal protection rights, also stemming from their conditions of confinement; (3) violations of Plaintiffs' First Amendment rights to free exercise of religion; (4) violations of Plaintiffs' First Amendment rights, stemming from a communications blackout (dismissed by Judge Gleeson on qualified immunity grounds); (5) violations of Plaintiffs' Fifth Amendment rights to due process, also stemming from a communications blackout (dismissed by Judge Gleeson on

[9] The "DOJ Defendants" are John Ashcroft, the former Attorney General; Robert Mueller, the former Director of the FBI; and James Ziglar, the former Commissioner of the Immigration and Naturalization Service ("INS"). The other "MDC Defendants" are Michael Zenk, Hasty's successor as MDC Warden as of April 2002; James Sherman, the former MDC Associate Warden for Custody; Salvatore Lopresti, the former MDC Captain; and Joseph Cuciti, the former MDC Lieutenant.

qualified immunity grounds); (6) violations of Plaintiffs' Fourth and Fifth Amendment rights, stemming from strip-searches; and (7) violations of 42 U.S.C. § 1985, stemming from an alleged conspiracy to violate Plaintiffs' civil rights.

Despite the extensive documentation in the OIG Reports to the contrary, Plaintiffs allege that Mr. Hasty "approved" and "implemented" the harsh conditions of confinement in the ADMAX SHU, A __ (Dkt. No. 726 ¶¶ 76, 278), "singl[ing] out" Plaintiffs based on their race, religion, and/or national origin. A __ (Dkt. No. 726 ¶ 282). Plaintiffs also contend that Mr. Hasty designed this policy to, among other wrongs, deny Plaintiffs' rights to religious expression. A __ (Dkt. No. 726 ¶ 284-87). Mr. Hasty is said to have "allowed" his subordinates to abuse Plaintiffs and "ignored" the evidence thereof, *see* A __ (Dkt. No. 726 ¶ 77), and that he did all of this despite lacking any "specific or incriminating evidence" connecting Plaintiffs to terrorism. A __ (Dkt. No. 726 ¶ 69-70).

Plaintiffs also allege that the DOJ Defendants "spread the word among law enforcement personnel that the 9/11 detainees were suspected terrorists, or people who knew who the terrorists were, and that they needed to be encouraged in any way possible to cooperate." A __ (Dkt. No. 726 ¶ 61). Plaintiffs concede that, while Mr. Hasty allegedly approved a policy that prohibited Plaintiffs from receiving Korans, that policy actually forbade *all* items in Plaintiffs' cell, not just Korans. A __ (Dkt. No. 726 ¶ 132). And although Plaintiffs allege that Mr. Hasty

ignored reports of his staff's abusive conduct, they also contend that "[t]he usual channel for filing complaints of mistreatment were cut off at MDC." A __ (Dkt. No. 726 ¶ 140. Notably absent from the FAC is any allegation that Mr. Hasty ever once directly interacted with Plaintiffs.

C. The District Court's Order

On November 10, 2010, Mr. Hasty moved to dismiss all FAC claims against him, as did the other MDC and DOJ Defendants. *See* A __ (Dkt. No. 744). Mr. Hasty's motion relied on the insufficiency of Plaintiffs' allegations in light of the prevailing law on supervisory liability, the absence of a *Bivens* cause of action, his right to qualified immunity, and the impropriety of alleging a conspiracy among the Defendants. *See id*. On January 15, 2013, the district court granted Mr. Hasty's motion regarding Plaintiffs' claims of First and Fifth Amendment violations stemming from a communications blackout, but denied Mr. Hasty's motion as to the remaining five claims. SPA at 3 ("Opinion"). The district court reached the same conclusions regarding the other MDC Defendants but dismissed all of Plaintiffs' claims against all of the DOJ Defendants. SPA at 3-4.

As an initial matter, the district court parses Plaintiffs' claims into two broad categories. It refers to the first category of claims as the "official conditions," which the MDC Defendants allegedly "created as a matter of express policy." SPA at 32. Specific allegations under the "official conditions" category include

regular handcuffing, denial of personal possessions, and strip searches. *Id*. The district court refers to the second category of claims as the "unofficial abuse," which allegedly occurred independent of the MDC Defendants' policy and include such allegations as verbal and physical abuse. *Id*.

The Opinion begins with a review of what, if any, liability remains for supervisors under *Bivens* after the Supreme Court decision, *Ashcroft v. Iqbal*, 556 U.S. 662 (2009) – what was an appeal from the *Elmaghraby* litigation. *See supra* note 7. Notably, the district court acknowledges that, "after *Iqbal*, in order for [a] plaintiff to assert a valid *Bivens* claim against a government official, he 'must plead that *each* Government official defendant, through the official's *own individual* actions, has violated the Constitution.'" SPA at 22 (quoting *Iqbal*, 556 U.S. at 676) (emphasis added). Despite recognizing the degree of specificity required, the court nonetheless holds that Plaintiffs sufficiently plead the personal involvement of all of the MDC Defendants, including Mr. Hasty, with respect to all remaining claims.[10]

The district court further explains in a footnote that, despite the extraordinary circumstances underlying this case, the Fifth Amendment allegations

[10] The district court did not reach the question of personal involvement with respect to Claims Four and Five because it upheld Defendants' entitlement to qualified immunity on those claims

regarding the Plaintiffs' conditions of confinement do not present a new *Bivens* context. SPA at 26-27 n.10. The court thereby presumes, without conducting the necessary analysis, that a *Bivens* cause of action already exists for these claims. *Id*. As for the First Amendment claim, the district court concedes that the Supreme Court has expressed doubts about the propriety of creating a *Bivens* action for violations of the First Amendment. SPA at 49-50. Yet the district court concludes that Plaintiffs cannot be left without a remedy and thus extends *Bivens* to their free exercise claim. This is the first extension of *Bivens* to a new category of rights in over 30 years.

Addressing the issue of qualified immunity, the district court observes that "the determination of whether the right at issue [i]s clearly established must be undertaken in light of the *specific context* of the case, not as a broad general proposition." SPA at 25 (emphasis added) (quoting *Saucier v. Katz*, 533 U.S. 194, 202 (2001), *abrogated on other grounds by Pearson v. Callahan*, 555 U.S. 223 (2009)). But, without scrutinizing or identifying the specific context facing Mr. Hasty and the other Defendants, the district court determines that none of the MDC Defendants are eligible for qualified immunity because the First, Fourth, and Fifth Amendment rights that they allegedly violated were clearly established and *every* MDC Defendant acted unreasonably. SPA at 34-35, 41, 57-58, 60.

Lastly, the court relies on its holdings regarding the conditions of confinement and religious freedom claims to derivatively decide that Plaintiffs adequately plead a conspiracy between Mr. Hasty and the other MDC Defendants to violate Plaintiffs' civil rights. SPA at 61.

SUMMARY OF THE ARGUMENTS

The district court's findings cannot be reconciled with the relevant law. As a starting point, the court extended non-statutory relief under its common law powers – *Bivens* liability – to new circumstances and for new rights, a result the Supreme Court has counseled against for 30 years.

The district court's findings also conflict with the Supreme Court's more recent guidance. Despite the Court's 2009 *Iqbal* decision that requires not just possible but *plausible* allegations of each Defendant's personal involvement in the alleged wrongs to adequately state a claim, the district court condoned Plaintiffs' vague and conclusory assertions that Mr. Hasty and the other MDC Defendants violated Plaintiffs' constitutional rights. The court reached its conclusions in the face of reliable and public evidence, which Plaintiffs themselves had introduced into the record, that illustrates the implausibility of the pleadings. And although the district court acknowledged *Iqbal*'s elimination of supervisory liability, such that only allegations that the defendant's personal and active conduct independently meets the elements of the tort at issue suffice, it permitted claims to

proceed against Mr. Hasty based on allegations that at best reflect only that he was aware of the allegedly tortious acts of others.

The district court also failed to appropriately consider the particular circumstances under which Plaintiffs' claims arise in determining the objective reasonableness of Mr. Hasty's alleged actions. Taken in context, Plaintiffs' allegations do not establish that Mr. Hasty violated Plaintiffs' clearly established rights.

The district court also disregarded precedent within its own Circuit. Although this Court has long recognized that plaintiffs cannot plead conspiracies among members of the same organization, the court completely failed to take this threshold issue into account with regard to Plaintiffs' claims under 42 U.S.C. § 1985(3).

Lastly, Mr. Hasty further incorporates all arguments that Appellant-Defendant Sherman and Appellant-Defendant Zenk raise in their respective briefs, including but not limited to those specifically referenced herein.

STANDARD OF REVIEW

The standard of review is "de novo [for] the grant or denial of a motion to dismiss a complaint." *Turkmen v. Ashcroft*, 589 F.3d 542 (2d Cir. 2009) (citing *Woods v. Rondout Valley Cent. Sch. Dist. Bd. of Educ.,* 466 F.3d 232, 235 (2d Cir. 2006)). This Court also reviews de novo the defense of qualified immunity. *See*

Arlio v. Lively, 474 F.3d 46, 51 (2d Cir. 2007). Subordinate legal issues, such as whether the specific law, for which qualified immunity is being asserted, was clearly established and Section 1985's applicability to employees of a single entity, also present a legal issue which this Court reviews de novo. *See Grace v. Corbis–Sygma*, 487 F.3d 113, 118 (2d Cir. 2007) (legal issues reviewed de novo). *See also N.Y. Civil Liberties Union v. Grandeau*, 528 F.3d 122, 128 (2d Cir. 2008).

ARGUMENT

I. The District Court Improperly Allowed Plaintiffs' Substantive Due Process Claim To Proceed Against Mr. Hasty.

Plaintiffs' substantive due process claim, Claim One, is based on their allegations regarding what the district court termed the "official conditions" of confinement, which include policies, such as 23-hour lockdown, that were a function of their being held in the high security ADMAX SHU. Plaintiffs also allege that their due process rights were violated because they were subjected to certain "unofficial abuse." In order to state a claim, as the district court acknowledged, Plaintiffs must sufficiently allege that Mr. Hasty, "with the intent to punish[,] engaged in conduct that caused the conditions or restrictions that injured [them]." SPA at 27.

In permitting that claim to proceed against Mr. Hasty, the district court erred on three grounds, each of which independently provides a basis for reversal.

First, the district court took the unprecedented step of extending *Bivens* to substantive due process claims. In doing so, it neglected to even test, as Supreme Court precedent requires, the context in which the claims arise and the special factors counseling against the extension of *Bivens*.

Second, the district court allowed Plaintiffs' claim to proceed, despite the lack of specific and well pled allegations that Mr. Hasty personally participated in the decisions and alleged actions underlying the claim. The complaint and the materials Plaintiffs incorporated therein, specifically the OIG Reports, leave no doubt that Plaintiffs' assignment to the ADMAX SHU and the policies and procedures that flowed from that assignment were based on existing regulations that were applied at the behest of other decisions made by other officials, including the FBI's designation of the detainees as "of interest" and senior BOP officials' directions about how they should be detained. And, the complaint makes equally clear that Plaintiffs attempt to predicate their "unofficial abuse" claim against Mr. Hasty on a theory of supervisory liability that the Supreme Court has rejected.

Third, even if the conditions of confinement claim were well pled as to Mr. Hasty, the district court improperly denied Mr. Hasty's entitlement to qualified immunity. Appropriately viewed in context, as they must be, Mr. Hasty's alleged actions – even if they amount to the kind of participation necessary for a *Bivens* claim – were entirely reasonable. He followed facially valid instructions about the

official conditions under which Plaintiffs and the other detainees should be held. Plaintiffs' allegations do not support a conclusion that Mr. Hasty violated their clearly established rights.

A. The District Court's Extension of a *Bivens* Claim to a New Category of Rights and a Novel Factual Context Contradicts Supreme Court Guidance.

Although the Supreme Court created a *Bivens* cause of action to permit victims to hold federal officials personally liable for constitutional violations in certain circumstances, it has consistently emphasized the limited nature of *Bivens,* and cautioned that courts should exercise care before extending it to new claims or new contexts. *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 68-69 (2001) ("[O]ur decisions have responded cautiously to suggestions that *Bivens* remedies be extended into new contexts.") (internal quotations omitted). To guide district courts in striking that balance, the Supreme Court created a two-part analysis that requires courts to consider (1) whether "any alternative, existing process for protecting the interest[s]" at issue exists, and (2) the extent to which "any special factors" counsel hesitation in extending *Bivens*. *Wilkie v. Robbins*, 551 U.S. 537, 550 (2007).

Rather than undertake the required analysis, however, the district court simply relied on a dissenting opinion to conclude that this Court "has long assumed that mistreatment claims like those alleged here give rise to a *Bivens* claim." SPA

at 26-27 n.10 (citing *Arar v. Ashcroft*, 585 F.3d 559, 597 (2d Cir. 2009) (Sack, J., dissenting)). But that approach does no justice to the required analysis because it examines the claim at the most generic level without any consideration of the specific context in which it arose or the special factors that might apply. It provides no sound basis for the district court's unprecedented extension of *Bivens* to permit the imposition of personal liability on federal officials for alleged substantive due process violations.

The result is one that simply cannot be reconciled with the Supreme Court's caution against extending *Bivens* to new claims and contexts, and its consistent refusal to do so. Indeed, the Supreme Court has rejected every new *Bivens* cause of action brought before it in the last 30 years, most recently in 2012 when it decided *Minneci v. Pollard*, 132 S.Ct. 617, 622-623, 626 (2012). There, Justice Scalia noted in a concurring opinion that *no* additional *Bivens* actions should *ever* be created: "I would limit *Bivens* and its two follow-on cases[11] * * * to the precise circumstances that they involved." *Id.* at 626 (Scalia, Thomas, JJ., concurring). As Judge Easterbrook, of the Seventh Circuit, noted just last year, "[w]hatever presumption in favor of a *Bivens*-like remedy may once have existed has long since

[11] *Davis v. Passman*, 442 U.S. 228 (1979) (extending *Bivens* relief for alleged due process clause violation in employment discrimination case) and *Carlson v. Green*, 446 U.S. 14 (1980) (extending *Bivens* relief for alleged eighth amendment violation against prison officials).

been abrogated." *Vance v. Rumsfeld*, 701 F.3d 193, 198 (7th Cir. 2012) *cert. denied*, 2013 WL 488898 (U.S. June 10, 2013) (denying *Bivens* cause of action for allegations of detainee abuse overseas).

Mr. Sherman's brief discusses in further detail why the district court's extension of *Bivens* to cover Plaintiffs' substantive due process claims was in error and should be reversed. *See* Sherman Br. at Part II.A. To avoid repetitive briefing, Mr. Hasty hereby adopts that argument and incorporates it by reference into this brief.

B. Plaintiffs Have Not Sufficiently Alleged that Mr. Hasty Was Personally Involved in Creating the Challenged Conditions of Confinement.

Even if the district court were correct in concluding that a *Bivens* claim should lie for Plaintiffs' alleged substantive due process violations, it should nonetheless have dismissed the claim as to Mr. Hasty. To state an actionable *Bivens* claim, Plaintiffs must plead that Mr. Hasty, through his "own individual actions," violated the Constitution. SPA at 22 (quoting *Iqbal*, 556 U.S. at 676). But, mere legal conclusions couched as facts are insufficient. *See Iqbal*, 556 U.S. at 678 (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). Plaintiffs have not satisfied their burden to posit specific and plausible allegations that Mr. Hasty was meaningfully involved or responsible for the challenged conditions of confinement.

1. The District Court's Conclusion that Plaintiffs Adequately Alleged a Due Process Violation by Mr. Hasty Based on their "Official" Conditions of Confinement Cannot Be Reconciled with the Entirety of Plaintiffs' Allegations.

In concluding that Plaintiffs sufficiently alleged Mr. Hasty's personal involvement in their challenged conditions of confinement, the district court accepted at face value the FAC's articulated allegations. In particular, the district court focused on Plaintiffs' allegations that Mr. Hasty "ordered the creation" of the ADMAX SHU, "ordered" his subordinates to create a policy of "extremely restrictive conditions of confinement" for the ADMAX SHU, and "approved" of that policy once created. SPA at 33. It is error to assign any significant weight to those allegations, in light of the OIG findings that Plaintiffs expressly rely upon, incorporate by reference, and attached to previous versions of their complaint.[12] The district court however refused to consider the full complement of those findings.

The district court based its refusal to consider the OIG's findings regarding who was responsible for determining that Plaintiffs should be placed in the ADMAX SHU, and the corresponding conditions of confinement, on Plaintiffs' contention that they were incorporating the entire OIG Reports into the FAC,

[12] On motions to dismiss, courts may consider attachments to a prior complaint, even if they are not attached to an amended version. *See Jeffrey M. Brown Assocs., Inc. v. Rockville Ctr. Inc.*, 7 Fed. App'x. 197, 202 (4th Cir. 2001).

"except where contradicted by [their] allegations." A __ (Dkt. No. 726 ¶¶ 3 n.1, 5 n.2); SPA at 35 n.14). It has long been settled, however, that "[a] copy of a written instrument that is an exhibit to a pleading is part of the pleading for all purposes." Fed. R. Civ. Proc. 10(c). *See also Cortec Indus., Inc. v. Sum Holding L.P.*, 949 F.2d 42, 47 (2d Cir. 1991) (citing *Cosmas v. Hassett*, 886 F.2d 8, 13 (2d Cir. 1989)) ("[T]he complaint is deemed to include any written instrument attached to it as an exhibit or any statements or documents incorporated in it by reference."); *Goldman v. Belden*, 754 F.2d 1059, 1065-66 (2d Cir. 1985)). And Plaintiffs' selective incorporation cannot overcome the propriety of assessing the Reports as a whole.

The district court nonetheless accepted Plaintiffs' novel attempt to selectively incorporate only on the portions of the OIG Reports that they deem favorable, while rejecting those that are at odds with their cursory allegations, without ever specifying which parts they were accepting and which they were disavowing. As support, the district court relied on *DiFolco v. MSNBC Cable L.L.C.*, 622 F.3d 104, 111 (2d Cir. 2010). SPA at 35 n.14). But that case does not support what the district court has done here.

DiFolco is a breach of contract and defamation case in which this Court held that, because the plaintiff "referred in her complaint" to certain e-mails that she had not attached as exhibits, the district court could "deem them incorporated in

the complaint and therefore subject to consideration in its review of the adequacy of the complaint." 622 F.3d at 112. In so holding, the Court confirmed that, in addition to the facts alleged in the complaint, courts may consider on motions to dismiss documents attached to or incorporated by reference in the complaint, as well as documents upon which the complaint relies so heavily that they are "integral" to it, and about which there is no dispute regarding the documents' authenticity, accuracy, or relevance. *Id.* at 111. The OIG Reports easily qualify. First, Plaintiffs previously attached them to their pleading, and the FAC expressly incorporates them by reference. Second, much of the FAC's allegations rely on the findings of the OIG, such that the Reports are integral to it. And, there should be no serious dispute about the Reports' reliability or accuracy. They are the product of a year-long investigation into the very allegations at issue, conducted by the independent oversight body of the U.S. government's top attorneys.[13] *See* A ___ (Dkt. No. 589-2 at 10 & n.6, 12) (OIG Report). Indeed, Plaintiffs essentially concede the OIG Reports' reliability by relying so heavily on them and

[13] In light of the inherent reliability of government reports, courts often take judicial notice of them, even where plaintiffs do not incorporate them into their complaints. *See, e.g., B.T. Produce Co. v. Robert A. Johnson Sales, Inc.*, 354 F. Supp. 2d 284, 285 n.2 (S.D.N.Y. 2004) (taking judicial notice of USDA report because "[c]ourts have frequently taken judicial notice of official government reports as being capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned") (internal citations omitted).

acknowledging that their findings are "well-documented." *See* A __ (Dkt. No. 726 ¶ 3 n.1). As a result, the district court should have considered the entirety of the Reports in evaluating Mr. Hasty's motion to dismiss, including those aspects that undermine Plaintiffs' conclusory allegations.

Indeed, the district court itself previously appreciated the reliability of the OIG Reports, and the importance of considering them on a motion to dismiss to place plaintiffs' allegations in context. In the related case of *Elmaghraby, et. al. v. Ashcroft, et. al.*, the district court relied on the OIG Reports in evaluating defendants' motions to dismiss. No. 04-CV-1809, 2005 WL 2375202, at *19 (E.D.N.Y. Sept. 25, 2005). The district court then reasoned that "[w]hile motions to dismiss are evaluated based on facts alleged in the complaint, this does not mean that the complaint must be viewed in a factual vacuum." *Id.* at *2 n.4. The district court's decision to reverse course here does not appear to be supported or supportable.

Had the district court considered the entirety of the factual findings and conclusions contained in the OIG Reports, it could not have reasonably concluded that Plaintiffs adequately pled a claim against Mr. Hasty for the official conditions of confinement. The Reports show that *BOP*, in conjunction with the FBI and DOJ, was responsible for directing and establishing the parameters of detainee

detention, including ordering that they be held in the ADMAX SHU. For example, the Reports document that:

- The FBI requested the INS to house "high interest" detainees at the MDC. A __ (Dkt. No. 589-2 at 25) (OIG Report).
- "[The] BOP made several decisions * * * includ[ing] housing the detainees in the administrative maximum (ADMAX) Special Housing Unit (SHU)." A ___ (Dkt. No. 589-2 at 26) (OIG Report).
- The BOP directed that detainees "convicted of, charged with, associated with, or in any way linked to terrorist activities" be placed under the highest level of restrictions permitted under their policies. A ___ (Dkt. No. 589-2 at 119) (OIG Report).
- BOP's Northeast Region Director mandated that wardens within the Northeast Region, including Mr. Hasty, not release "terrorist related" inmates from restrictive detention "until further notice." A __ (Dkt. No. 589-2 at 120) (OIG Report).
- BOP's Assistant Director for Correctional Programs confirmed that any detainee who "may have some connection to or knowledge of on-going terrorist activities," must be housed "in the Special Housing Unit" in the "tightest" allowable conditions until the FBI cleared him of terrorist connections. A __ (Dkt. No. 589-2 at 123 n.93) (OIG Report).

- "[T]he BOP *combined* a series of existing policies and procedures that applied to inmates in other contexts to create highly restrictive conditions of confinement * * *." A __ (Dkt. No. 589-2 at 198) (OIG Report) (emphasis added).
- "MDC officials *used* existing BOP policies applicable to inmates in disciplinary segregation, and confined the [9/11] detainees in the ADMAX SHU." A __ (Dkt. No. 589-2 at 167) (OIG Report) (emphasis added).
- The detainees "were subjected to the most restrictive conditions of confinement authorized by BOP policy * * *." A __ (Dkt. No. 589-2 at 119) (OIG Report).
- The BOP's restrictive conditions were consistent with DOJ recommendations. *See* A __ (Dkt. No. 589-2 at 119-120) (OIG Report).
- Out of the 288 total pages that Plaintiffs concede are "well-documented," A __ (Dkt. No. 726 ¶ 3 n.1), the OIG Reports reference Mr. Hasty *twice*. *See* A ___ (Dkt. No. 589-2 at 124 n.94) (OIG Report) ("Dennis Hasty was the MDC Warden at the time of the [9/11] attacks and was replaced by [Mr.] Zenk in April 2002."); A ___ (Dkt. No. 589-2 at 209) (OIG Report) ("Initially, Dennis Hasty, the MDC Warden at the time, and the former Associate Warden for Custody told us they were under the impression that the MDC would be asked to house only about 16 [9/11] detainees, the

capacity of one block of SHU cells if each detainee was housed individually.").

These findings directly undermine the plausibility of Plaintiffs' stock and cursory allegations that Mr. Hasty personally "ordered the creation" of the ADMAX SHU, and dictated the corresponding policies and procedures for Plaintiffs' detention. Surely, the OIG's litany of specific factual findings trumps Plaintiffs' generalized allegations.

When Plaintiffs' allegations, including the OIG Reports they incorporate and rely upon, are considered as a whole, it becomes clear that Mr. Hasty did not, through his "own individual actions," violate Plaintiffs' due process rights with respect to their official conditions of confinement. As a result, the district court's conclusion that Plaintiffs' Claim One based on those conditions of confinement should proceed against Mr. Hasty should not stand.

2. Plaintiffs Do Not Sufficiently Allege Mr. Hasty's Involvement in the Asserted "Unofficial Abuse."

In addition to their challenges related to their confinement in the ADMAX SHU, Plaintiffs' Claim One also posits constitutional violations based on "outrageous, excessive, cruel, inhumane, punitive, and degrading" conditions of confinement. A __ (Dkt. No. 726 ¶ 278). The district court termed these allegations as ones of "unofficial abuse," including being handled violently and being exposed to excessive and unnecessary strip searches. SPA 32.

Plaintiffs do not allege that Mr. Hasty himself engaged in such alleged abuses, or even that he crafted a policy calling for and endorsing them. The same is true of Plaintiffs' separate claim for relief based on the alleged strip-searches.[14] Instead, they predicate their claim on general allegations that Mr. Hasty "was made aware of the abuse that occurred through inmate complaints, staff complaints, hunger strikes, and suicide attempts." SPA at 33-34. The district court concluded that those allegations are sufficient for the claim to proceed against Mr. Hasty. SPA at 33-35.

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[14] The district court analyzed Plaintiffs' Claim Six regarding the alleged unlawful strip-searches in the context of their request for damages under the Fourth and Fifth Amendments. The court analyzed the former "in tandem" with Plaintiffs' First Claim for Relief and the latter in isolation. *See* SPA 58-60. Mr. Hasty's basis for contesting this Claim does not vary between the Fourth and Fifth Amendments and so here addresses the district court's erroneous finding that Plaintiffs adequately plead *any* claim regarding the alleged strip-searches.

Plaintiffs address the alleged strip-searches in paragraphs 111-118 of the FAC. Only one of these allegations mentions Mr. Hasty, and even then, it does so indirectly: "Many, though not all, of these illegal strip-searches were documented in a 'visual search log' created by MDC staff for review by MDC management, including Hasty. Other illegal searches were captured on videotape." A ___ (Dkt. No. 726 ¶ 114). In so pleading, Plaintiffs in no way allege Mr. Hasty's involvement in the strip-searches. In fact, in their sole allegation against Mr. Hasty, Plaintiffs do not even argue that he actually reviewed the log. Moreover, Plaintiffs never allege that Mr. Hasty approved any strip-search policy. *See* A __ (Dkt. No. 726 ¶ 111).

The district court's conclusion exposes Mr. Hasty to liability for the alleged actions of his subordinates—actions that, by Plaintiffs' own allegations, Mr. Hasty did not participate in. That result contravenes the Supreme Court's *Iqbal* decision.

In *Iqbal*, the Supreme Court expressly held that "each Government official * * * is only liable for his or her own misconduct." *Iqbal*, 556 U.S. at 677. Thus, to state a claim against a supervisor, there must be specific and plausible allegations that the supervisor played an active role in the alleged wrong. *See*, *id.*, at 676 ("plaintiff must plead that each Government official defendant, through the official's own individual actions, has violated the constitution."). Following the guidance of *Iqbal*, the district court for the Southern District of New York subsequently concluded that "a supervisor is only held liable if that supervisor participates directly in the alleged constitutional violation or if that supervisor creates a policy or custom under which unconstitutional practices occurred." *Bellamy v. Mt. Vernon Hosp.*, 07-cv-1801, 2009 WL 1835939, at *6 (S.D.N.Y. June 26, 2009), *aff'd*, 387 Fed. App'x. 55 (2d Cir. 2010) (emphasis added); *see also, Brown v. Rhode Island*, No. 12-1403, 2013 WL 646489, at *1 (1st Cir. Feb. 22, 2013) (holding that "no claim [under § 1983 (which is analogous to *Bivens*)] exists against the governor or prison director in their personal capacities, since

respondeat superior is unavailable and plaintiff has not alleged *any direct actions* taken by either of those defendants.") (emphasis added).[15]

Notwithstanding the mandate that federal officials can only be held liable for their own actions that directly caused the plaintiff injury, the district court held that liability could be founded on "deliberate indifference." SPA 28. This holding runs contrary to Supreme Court precedent because it permits claims imposing personal liability to be predicated on something less than the direct participation in the alleged wrong. *See Iqbal*, 556 U.S. at 677. As the Supreme Court made clear, "[defendants] may not be held accountable for the misdeeds of their agents." *Id.*

[15] There are other post-*Iqbal* cases in this Circuit that do not conclude that *Iqbal* necessarily eradicated all but active conduct for supervisory liability. The district court cites one such case, along with other decisions from other Circuits. A ___ (Dkt. No. 767 at 23-24) (citing, *inter alia*, *D'Olimpio v. Cristafi*, 718 F. Supp. 2d 340, 347 (S.D.N.Y. 2010) (holding that each of the five *Colon* categories for personal liability of supervisors may still apply as long as they are consistent with the elements of particular constitutional tort alleged). Other district court decisions in this Circuit have also taken a position contrary to the *Bellamy* view. *See*, *e.g.*, *Plair v. City of New York*, 789 F. Supp. 2d 459 (S.D.N.Y. 2011). It appears that the Second Circuit has not, since *Iqbal*, had an opportunity to address its bases for supervisory liability that it established in *Colon v. Coughlin*, 58 F.3d 865 (2d Cir. 1995). In *Colon*, the Court held that a supervisor may be held liable for constitutional violations by a subordinate where the supervisor: (1) participates directly in the alleged violation; (2) fails to remedy the violation after being informed of it through a report or appeal; (3) creates or allows the continuation of a policy or custom under which unconstitutional practices occurred; (4) acts with gross negligence in supervising subordinates who commit the wrongful acts; or (5) exhibits deliberate indifference to the rights of inmates by failing to act on information indicating that unconstitutional acts were occurring. *Id.* at 873.

Under that framework, "knowledge" does not equate to "misconduct." Thus, a *Bivens* defendant can no longer be held liable where he or she knew of an alleged wrong committed by someone else but did not intervene to stop it. The *Bellamy* court confronted this very issue and concluded that "*Iqbal*'s 'active conduct' standard only imposes liability on a supervisor through [S]ection 1983 [which is analogous to *Bivens*] if that supervisor actively had a hand in the alleged constitutional violation." 2009 WL 1835939, at *4.

Although this Court has not yet addressed that precise issue, it recently noted that "[after *Iqbal*], supervisory liability * * * is not applicable where * * * the plaintiff describes only negligence and fails to allege that the supervisors, *by their own actions*, violated clearly established constitutional rights." *DeBoe v. Du Bois*, Civ. No. 12-53, 2012 WL 5908447, at *3 (2d Cir. Nov. 27, 2012) (emphasis added). While this Court in *DeBoe* was referring to negligence, and the district court here was considering deliberate indifference, *Iqbal* unquestionably requires a level of involvement in the alleged wrong that Plaintiffs have not pled as to Mr. Hasty. *Bivens* liability is for the individual who commits the act—those who might have known about it, and who did not intervene, is not subject to *Bivens* liability. *See, c.f., Joseph v. Fischer*, 08-civ-2824, 2009 WL 3321011, at *16 (S.D.N.Y. Oct. 8, 2009) (post-*Iqbal* decision holding that a supervisory "defendant

is not liable under [S]ection 1983 if the defendant's failure to act deprived the plaintiff of his or her constitutional right.")

The district court nonetheless concluded that deliberate indifference—*i.e.,* knowledge of an alleged wrong without taking action—is enough to state a *Bivens* claims against a supervisor. *See* SPA 32-33 n.13. On that basis, the district court determined that Plaintiffs' due process claim could proceed against Mr. Hasty. That conclusion was error.

Plaintiffs do not allege that Mr. Hasty had any personal interaction with the Plaintiffs, that he created a policy for the so-called "unofficial abuse," or even that he in any way encouraged or condoned it. In the face of similar allegations, the *Joseph* court concluded that that the plaintiff's claims based on the defendant's "failure to take corrective measures," and "fail[ure] to intervene to correct the errors" are " the type of claim *Iqbal* eliminated." *Id*. at *15.

C. Mr. Hasty Is Entitled to Qualified Immunity for Plaintiffs' Due Process Claim.

In any case, even if Plaintiffs do plausibly allege Mr. Hasty's personal involvement in the challenged conditions of confinement, the district court should have dismissed the claim in light of Mr. Hasty's entitlement to qualified immunity. Qualified immunity "generally turns on the objective legal reasonableness of the action assessed in the light of the legal rules that were clearly established at the time it was taken." *Lore v. City of Syracuse*, 670 F.3d 127, 162 (2d Cir. 2012)

(quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)) (internal quotations omitted). It has thus long been the case that "prison officials have a right to qualified immunity for actions taken in their official capacity if they act in good faith and on the basis of a reasonable belief that their actions were lawful." *Sec. & Law Enforcement Emps v. Carey*, 737 F.2d 187, 211 (2d Cir. 1984).

Consequently, an official cannot be held personally liable for constitutional violations stemming from the execution of his superior's orders, unless those orders are "facially invalid." *Varrone v. Bilotti*, 123 F.3d 75, 81-82 (2d Cir. 1997) (discussing objective legal reasonableness standard). That is, "[p]lausible instructions from a superior or fellow officer support qualified immunity where, viewed objectively in light of the surrounding circumstances, they could lead a reasonable officer to conclude that the necessary legal justification for his actions exists * * *." *Anthony v. City of New York*, 339 F.3d 129, 138 (2d Cir. 2003) (quotation marks and citations omitted).

As discussed above, with respect to the "official conditions of confinement" that Plaintiffs challenge, Mr. Hasty was simply following the directives of his superiors at the BOP, with the input and guidance of the FBI and INS. A ___ (Dkt. No. 744 at 16-18). That is, BOP, INS, and FBI officials ordered Mr. Hasty to place "high interest" 9/11 detainees in the ADMAX SHU, and directed that they be subject to the "tightest" security possible. *See* A ___ (Dkt. No. 744 at 16 (citing A

___ Dkt. No. 589-2 at 119-20, 123 n.93, 125) (OIG Report). Faced with the same factual scenario, a reasonable officer in Mr. Hasty's situation could have reasonably taken the same actions as Plaintiffs allege Mr. Hasty took. *See Walczyk v. Rio*, 496 F.3d 139, 154 (2d Cir. 2007) (quoting *Malley v. Briggs*, 475 U.S. 335, 341) (1986) (holding that a federal official is "entitled to qualified immunity if 'officers of reasonable competence could disagree' on the legality of the action at issue in its particular factual context"). In the immediate aftermath of 9/11, with the investigation just underway and so much unknown, Mr. Hasty had no reasonable basis to question the FBI's assessment, nor the BOP's orders in connection with those assessments. *See* A ___ (Dkt. No. 744 at 18 (citing A ___ Dkt. No. 589-2 at 19-20, 119-20) (OIG Report)).

Plaintiffs' allegations that Mr. Hasty never received "specific or incriminating information" about the detainees do not change that result. A __ (Dkt. No. 726 ¶ 70). Under the circumstances, it was hardly the responsibility of the warden of a detention center to question the facially valid judgment of the FBI and his BOP superiors, who could have good reason not to share details of the investigation with him. In fact, it would be *unreasonable* for a warden in Mr. Hasty's position to dismantle the mandated conditions of confinement simply because he did not have personal information that the detainees were indeed

connected to terrorism. *See* A ___ (Dkt. No. 726 ¶¶ 69-70); A __ (Dkt. No. 589-2 at 123 n.93) (OIG Report).

Moreover, the applicable law at that time affirmatively permitted administrative detention for inmates who posed security threats. SPA 65. In September 2001, and for months thereafter, the 9/11 detainees were in an "exceptional circumstance[] ordinarily tied to security or complex investigative concerns" that permitted the MDC to hold them in prolonged administrative detention. SPA [28 C.F.R. §§ 541.22(a), (c)(1)]. Plaintiffs' allegations that Mr. Hasty—and Mr. Zenk, who succeeded him as MDC Warden—ordered the prolonged detention without having a Segregation Review Official ("SRO") perform its review and related tasks do nothing to impeach the reasonableness of Mr. Hasty's actions. A ___ (Dkt. No. 726 ¶ 68). The sole basis for the detainees' confinement in the ADMAX SHU—the FBI's investigative interest—was outside the scope of MDC officials' discretion. Therefore, the exigencies of the FBI investigation co-opted the SRO's role.

Mr. Hasty's compliance with his superiors' orders, even if they may now seem overly harsh with the benefit of hindsight, deserves protection under qualified immunity because its "very purpose * * * is to protect officials when their jobs require them to make difficult on-the-job decisions." *DiBlasio v. Novello*, 413 Fed. App'x 352, 356 (2d Cir. 2011) (quoting cases). Responding to

domestic national security threats is precisely within the ambit of those "difficult on the job decision[s]" that merit recourse to qualified immunity. *See id*. (granting qualified immunity to official for allegedly false or defamatory statements made during a public health emergency, and noting that qualified immunity is particularly appropriate in "emergency" situations where "officials are forced to act quickly"). *See also Benzman v. Whitman*, 523 F.3d 119, 126 (2d Cir. 2008) ("We therefore conclude that a suit against a federal official for decisions made as part of federal disaster response * * * efforts implicate the sort of 'special factors' that counsel against creation of a *Bivens* remedy."). For the district court to abandon this reality was error.

In addition, Mr. Sherman outlines other bases for the application of qualified immunity to Plaintiffs' due process claim. *See* Sherman Br. at Part II.B. Generally, Mr. Sherman argues that, under the government's broad powers in the realm of immigration law, it was not "clearly established" that the MDC Defendants transgressed Plaintiffs' due process rights during their valid detentions. In the interest of avoiding duplicative briefing, Mr. Hasty hereby adopts and incorporates those arguments.

II. Plaintiffs Do Not Adequately Allege A Valid Equal Protection Clause Claim Against Mr. Hasty.

In Claim Two, Plaintiffs contend that Defendants violated the Equal Protection Clause of the Fifth Amendment by discriminating against them based on

their race, ethnicity, and/or country of origin. A __ (Dkt. No. 726 ¶ 282). Plaintiffs' equal protection violation is based on "only the harsh confinement policy" that forms the basis of Plaintiffs' Claim One. SPA 36. The district court held that, in order to state a viable claim, "plaintiffs must plausibly allege that defendants' (1) discriminatory animus (2) caused plaintiffs' injuries." SPA 35. Applying this standard, the district court dismissed the equal protection claim against the DOJ Defendants, but allowed it to proceed against the MDC Defendants, including Mr. Hasty.

An essential element of an equal protection claim is that the "defendant acted with discriminatory purpose." *Iqbal*, 556 U.S. at 676. "A complaint that pleads facts that are merely consistent with [that purpose] stops short of the line between possibility and plausibility." *Id*. at 678 (ellipses omitted). Where an equally reasonable but alternative explanation exists, courts cannot conclude that the alleged explanation for a defendant's actions is plausible. *See id*. at 682.

In holding that Plaintiffs adequately plead an equal protection claim against the MDC Defendants, the court reasoned that the MDC Defendants "effectuated the harsh confinement policy and held the detainees in restrictive conditions of confinement because of their race, religion and/or national origin." SPA 40.

Yet, Plaintiffs do not allege that any of the MDC Defendants, including Mr. Hasty, made individual decisions about who would be subjected to the conditions

of harsh confinement such that the individual's race, religion, or national origin could even be taken into consideration. Nor do they credibly allege that the MDC Defendants exercised any authority over determining which detainees could leave the ADMAX SHU, or when. *See* A __ (Dkt. No. 726 ¶ 43) (noting FBI oversight in detainee releases); A __ (Dkt. No. 726 ¶ 68) (alleging that MDC did not conduct its own reviews of 9/11 detainees for removal from ADMAX SHU).[16] Instead, the FBI made the initial decisions about who would be detained in the ADMAX SHU and for how long, by designating Plaintiffs as "of interest" or "of high interest" and later determining whether they could be cleared. There are no allegations sufficient to support a finding that Mr. Hasty acted with the requisite discriminatory purpose.

Indeed, Plaintiffs' allegations regarding the race-based animus largely focus on defendants other than Mr. Hasty and other MDC personnel. Specifically, Plaintiffs allege that the DOJ Defendants harbored the "discriminatory notion that all Arabs and Muslims were likely to have been involved in the terrorist attacks, or at least to have relevant information about them". A __ (Dkt. No. 726 ¶ 48). And so, "Ashcroft told Mueller to vigorously question any male between 18 and 40

[16] Indeed, the OIG Report notes this lack of review and states that the reviews were not done because the BOP "relied on the FBI's assessment of 'high interest.'" A ___ (Dkt. No. 589-2 at 125) (OIG Report).

from a Middle Eastern country whom the FBI learned about, and to tell the INS to round up every immigration violator who fit that profile." A __ (Dkt. No. 726 ¶ 41). Ashcroft then ordered that "all such Plaintiffs and class members be detained until cleared and otherwise treated as 'of interest.'" A __ (Dkt. No. 726 ¶ 47). Plaintiffs further allege that "each 'of interest' Plaintiff was subjected to a 'hold until cleared' policy" whereby they were retained by INS "in immigration custody until the [FBI] affirmatively cleared them of terrorist ties." A __ (Dkt. No. 726 ¶ 2). And, according to Plaintiffs, "Mueller ordered that [Plaintiffs] be kept on the INS custody list (*and thus in the ADMAX SHU*) even after local FBI offices reported that there was no reason to suspect them of terrorism." A __ (Dkt. No. 726 ¶ 67) (emphasis added).

Plaintiffs also allege that the DOJ Defendants "creat[ed] and implement[ed] the policy to place MDC Plaintiffs and class members in unduly restrictive and punitive conditions of confinement." A __ (Dkt. No. 726 ¶ 6). As to the MDC Defendants, Plaintiffs allege that they "ordered prolonged placement of MDC Plaintiffs" in the ADMAX SHU [which] * * * violated pre-existing BOP regulations pertaining to the rules for detaining individuals under administrative

detention or disciplinary segregation. A __ (Dkt. No. 726 ¶¶ 6, 68).[17] Plaintiffs also allege that while detained they were subject to the kind of discriminatory abuse that would violate the equal protection clause. A __ (Dkt. No. 726 ¶¶ 103-40).

Thus, to the extent Plaintiffs make any allegations of racial, ethnic, or country of origin based animus, they make them in the context of their initial arrests and designations as "of interest" or "of high interest", or their alleged abuse at the hands of guards at the MDC. These are all events for which Mr. Hasty was not involved and equally for which he is not a proper *Bivens* defendant. Although Plaintiffs allege that Mr. Hasty and the other MDC Defendants created the specific practices and policies constituting the allegedly harsh conditions of confinement, those allegations cannot support Plaintiffs' equal protection claim. Aside from the fact, discussed above, that the force of those allegations are contradicted by the OIG Reports on which Plaintiffs rely, taken at face value they evince no discriminatory animus on Mr. Hasty's part. To the contrary, Plaintiffs' allegations make clear that Plaintiffs' placement in the ADMAX SHU and the corresponding policies and practices were a function of their FBI designations. To state an equal

[17] The BOP regulations, however, are not alleged to contemplate detention policies or procedures relating to FBI designations relating to "of interest" suspects connected to ongoing terrorism investigation.

protection claim, Plaintiffs must "plead sufficient factual matter to show that" the defendant "adopted and implemented the detention policies at issue * * * for the purpose of discriminating on account of race, religion, or national origin" and "not for a neutral, investigative reason." *Iqbal*, at 676-77. Their allegations regarding Mr. Hasty do not suffice.

A. The District Court Erroneously Concluded that Plaintiffs Have Pled Plausible Allegations Sufficient to Support an Equal Protection Claim Against Mr. Hasty.

In nonetheless finding that Plaintiffs' equal protection claim could proceed against Mr. Hasty, the district court relied on Plaintiffs' allegations regarding the following: the MDC Defendants' role in creating the conditions of confinement in the ADMAX SHU and the detainees' placement and detention there without hearings or individualized determinations of dangerousness; the MDC Defendants' knowledge of how the detainees were treated; the MDC Defendants' falsely documenting individualized assessments of detainees that did not take place; keeping the detainees in the ADMAX SHU even after learning the FBI had not developed any information to tie them to terrorism. SPA 40. In addition, the district court cited allegations that Mr. Hasty referred to the detainees as "terrorists," and that "MDC staff" insulted detainees' religion, made ethnic slurs, referred to them as terrorists and engaged in specific acts to violate Plaintiffs' freedom to practice their religion. *Id*. But none of these allegations, either

standing alone or considered together, are sufficient to plausibly establish that Mr. Hasty acted with the requisite purpose to discriminate based on Plaintiffs' race, religion or national origin.

First, as detailed in Part I.B.1, *supra*, the allegations pertaining to the creation of the conditions of confinement and Plaintiffs' detention in the ADMAX SHU do not even adequately establish that Mr. Hasty was anything more than superficially involved, or doing anything other than following facially valid orders, much less that he acted with a discriminatory purpose.

Second, Mr. Hasty and the other MDC Defendants applied the harsh confinement policy to *all* detainees housed in the ADMAX SHU equally, without regard to race, nationality or country origin. Plaintiffs' complaint acknowledges as much. For example, Plaintiffs describe the detention of five Israelis – whom the MDC Defendants did not confuse for Arabs or Muslims – under the same conditions of confinement as Plaintiffs. A __ (Dkt. No. 726 ¶ 43).

Plaintiffs attempt to distinguish the treatment of those individuals by arguing that the Israelis received Consular visits earlier than other detainees and were among the first detainees to leave the ADMAX SHU. A ___ (Dkt. No. 726 ¶ 43). But Plaintiffs do not allege that Mr. Hasty controlled or influenced the timing of Consular visits, which Consulates attempted visits, and how any Consular visits affected the removal of detainees from the ADMAX SHU. Nor do they allege that

Mr. Hasty had any role in determining when they would be permitted to leave the ADMAX SHU. These allegations do not support a conclusion that Mr. Hasty acted with discriminatory animus.[18]

The district court also considered as compelling that Mr. Hasty, and others, "continued to hold the MDC Detainees in the ADMAX SHU even after learning that the FBI had not developed any information to tie them to terrorism." SPA 40. But even if Mr. Hasty and the other MDC Defendants never knew the evidence against Plaintiffs, they were aware that the FBI had designated them as "of interest" or "of high interest". Armed with this information, the MDC Defendants could reasonably conclude that Plaintiffs at least *might* be connected to terrorism and therefore should remain in the ADMAX SHU – and subject to its harsh conditions – for as long as the FBI investigation remained open or the designations unchanged.[19] Discriminatory animus played no role in this calculus. Indeed, the district court held that the same allegations of knowledge were not, on their own, adequate to state an equal protection claim against the DOJ Defendants. SPA 39

[18] In fact, one of the named putative representative Plaintiffs is neither of Muslim nor of Arab descent. Plaintiff Purna Raj Bajracharya ("Bajracharya") is a Nepalese Buddhist, but Plaintiffs attempt to circumvent that fact by conclusorily pleading that Defendants "perceived" non-Arabs and non-Muslims, who they arrested, to be Arab or Muslim. A ___ (Dkt. No. 726 ¶¶ 1, 29, 33, 33(f), 43). Plaintiffs, however, provide this explanation only in the context of the arrests. *Id.*

[19] Although the district court had these arguments before it, they were not addressed in the Opinion. *See, e.g.*, A ___ (Dkt. No. 756 at 10).

(dismissing equal protection clause claim against the DOJ Defendants despite Plaintiffs' allegations that the DOJ knew that the FBI investigation was not uncovering incriminating evidence).

Third, the allegation that Mr. Hasty referred to the detainees as "terrorists" is both cursory and insufficient. The term "terrorist" does not itself betray any constitutionally protected animus as it could be applied indiscriminately to a wide swath of individuals, including American Caucasian Christian men. No credible inference of discriminatory animus can legitimately be drawn from this sparse allegation.

Fourth, the allegations regarding religious insults and racial slurs made by certain unnamed "MDC Staff" do not give rise to an inference of discriminatory animus as to Mr. Hasty. Plaintiffs do not even include facts sufficient to conclude that Mr. Hasty was involved in the alleged acts. *See supra* Part I.B.2.

B. Plaintiffs' Group Pleading Cannot Substitute for Specific Allegations Establishing Discriminatory Intent For Each Individual Defendant.

Under *Bivens*, officials "cannot be held liable unless *they themselves* acted on account of a constitutionally protected characteristic." *Iqbal*, at 693 (emphasis added). Thus, any analysis of putative *Bivens* equal protection claims requires an evaluation of the allegations pertaining to each *individual* defendant. *Pearce v. Labella*, 473 Fed. App'x 16, 20 (2d Cir. 2012) ("[T]he plaintiffs' broad and

conclusory allegations against 'the defendants' as a group do not suffice to overcome Roefaro's individual qualified immunity"); *Cmty. House, Inc. v. City of Boise*, 623 F.3d 945, 966 (9th Cir. 2010) (noting that the district court "lump[ed] all the defendants together and that, in denying qualified immunity to all, the court ma[de] no distinction whatsoever between defendants in their official capacities and defendants in their individual capacities"). Indeed, the very predicate of a *Bivens* action is to impose personal liability for an individual officer's own actions.

Plaintiffs nonetheless used "group-form" allegations for the defendants who had been employed at the MDC, styling much of their pleadings as against the "MDC Defendants" as a whole. *See, e.g., id.* ¶ 98 ("The MDC Defendants subjected all MDC Plaintiffs and class members to such restraints routinely, as a matter of policy."), ¶ 74 ("[T]he MDC Defendants realized that [Plaintiffs] were not terrorists, but merely immigration detainees."). *See also*, *id.* ¶¶ 71-72, 146, 165, 176, 299. These kinds of general pleadings should not be credited in a case seeking to establish individualized liability. *See Iqbal*, at 676 ("plaintiff must plead that *each* Government official defendant, through the official's *own individual* actions, has violated the Constitution.") (emphasis added).

The absence of any plausible allegation that Mr. Hasty was ever motivated, or dictated any action, based on race, ethnicity, or country of origin, undermines Plaintiffs claim here. In denying Mr. Hasty qualified immunity, the district court

held that "[i]t was clearly established in 2001 that creating and implementing a policy expressly singling out Arabs and Muslims for harsh conditions of confinement violates their Fifth Amendment equal protection rights." SPA 41. Mr. Hasty never "singl[ed] out Arabs and Muslims for harsh conditions of confinement." *See supra* Part III.A The full set of incorporated pleadings contradict the conclusion that Mr. Hasty's actions were anything other than facially valid and entitled to immunity. For matters of unconstitutional discrimination, Plaintiffs must show that Mr. Hasty purposefully discriminated against them in an unconstitutional manner. *Iqbal*, at 677. This, they have not done.

III. Plaintiffs' First Amendment Claim Should Be Dismissed as to Mr. Hasty.

Plaintiffs' effort to pursue a claim against Mr. Hasty for violations of the First Amendment based on alleged interference with their right to freely practice their religion should be rejected, and the district court's ruling sustaining this claim should be reversed.

First, no *Bivens* remedy for violations of First Amendment rights has ever been upheld. *See Iqbal*, 556 U.S. at 675 (expressing doubt that a First Amendment claim is actionable under *Bivens* but declining to so decide because "Petitioners do not press this argument."); *see also Bush v. Lucas*, 462 U.S. 367 (1983) (declining to imply First Amendment *Bivens* remedy). In nonetheless finding that a *Bivens*

remedy should apply here, the district court misapplied the test, particularly in concluding that special factors did not counsel hesitation.

Second, even if there were a viable *Bivens* claim for violations of the First Amendment, Plaintiffs' allegations do not suffice to overcome Mr. Hasty's entitlement to qualified immunity. Plaintiffs do not posit any specific allegations about Mr. Hasty's direct involvement in the alleged conduct, as required to state a viable claim. Nor do they otherwise establish that his alleged conduct violate any clearly established right, such that no reasonable officer in Mr. Hasty's position would have believed that his actions were proper.

Part I of Mr. Sherman's brief includes detailed arguments on both points that apply equally to Mr. Hasty. To avoid duplicative briefing, Mr. Hasty hereby adopts those arguments and incorporates them by reference into this brief.

In addition, Mr. Hasty addresses the allegations specific to him here. In the FAC, with respect to their free exercise claim, Plaintiffs allege that Mr. Hasty (and Mr. Sherman) "approved" a subordinate's policy that delayed the delivery of Korans to Plaintiffs, and (2) that evidence and complaints about Plaintiffs' interrupted prayers were "brought to [his] attention." *See id.* ¶¶ 132, 137; A __ (Dkt. No. 744 at 24-26). Neither allegation is sufficient to establish that Mr. Hasty, through his "own individual actions," intentionally denied Plaintiffs the freedom to exercise their religion. *See Iqbal*, at 676.

To state their free exercise claim, Plaintiffs "must plead that [Mr. Hasty], with the (1) intent to suppress their religious practices, (2) burdened those practices." SPA 55. Plaintiffs' allegation regarding Mr. Hasty's approval of a broader policy that "prohibited the 9/11 detainees from keeping *anything*, including a Koran, in their cell" provides no basis for inferring Mr. Hasty's intent to suppress Plaintiffs' religious practices. A __ (Dkt. No. 726 ¶ 132) (emphasis added). Instead, taking Plaintiffs' complaint at face value, the reasonable inference is that any ban on Korans was purely incidental to the broader policy. In fact, allegations in the FAC undermine the notion that the policy was approved with the intent to interfere with religious practices. For instance, only one Plaintiff is alleged to have never received a Koran, while others who requested one did, ultimately, receive one. *See* A __ (Dkt. No. 726 ¶ 132).

If, as the district court surmised, Mr. Hasty deliberately withheld Korans (along with all other personal items) with the intent to curb Plaintiffs' religious expression, then a court ought to infer that no Plaintiff would have *ever* received a Koran. The fact that Plaintiffs did receive Koran, supports the reasonable inference that any delay in receiving Korans was based on an across-the-board security policy that forbade *all* items within *all* detainee cells, regardless of the detainees' religious affiliations or practices. *Id*.

The only other allegation specific to Mr. Hasty – that "[e]vidence and complaints about [MDC guards interrupting Plaintiffs' prayers] were brought to the attention of MDC management, including Hasty" – boils down to an impermissible failure-to-act theory. A __ (Dkt. No. 726 ¶ 137). That kind of indirect liability did not survive *Iqbal*. *See supra* Part I.B.2. At best, Plaintiffs allege only that Mr. Hasty was aware of Plaintiffs' abuse. They do not allege that he directed, encouraged or condoned it. Mere "awareness" cannot support an inference of intent to suppress. *See Iqbal*, 556 U.S. at 676; *see also supra* Part I.B.2, *supra*.

IV. Plaintiffs' 42 U.S.C. § 1985(3) Conspiracy Claim Cannot Proceed Against Employees of the Same Government Entity.

Plaintiffs' conspiracy claim under 42 U.S.C. § 1985, which they allege against all Defendants for purportedly depriving Plaintiffs of their rights to equal protection, is impermissible. Among other failings, Plaintiffs' claim alleges a conspiracy among members of the same entity, even though the Supreme Court has held that members of the same entity cannot conspire with one another. *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984). *See also Hartline v. Gallo*, 546 F.3d 95, 99 n.3 (2d Cir. 2008) ("Under the intra[-]corporate conspiracy doctrine, officers, agents and employees of a single corporate entity are legally incapable of conspiring together.") (internal quotations omitted).

Although Plaintiffs allege a conspiracy among both the DOJ and MDC Defendants, the district court's dismissal of all claims against the DOJ Defendants narrowed the alleged conspiracy to among only the MDC Defendants. The district court then concluded that this narrowed claim could proceed. SPA 61. But the claim as currently constructed alleges a conspiracy among a handful of colleagues who all worked at the same federal prison facility at approximately the same time. The intra-corporate conspiracy bars such claims. *See Herrmann v. Moore*, 576 F.2d 453, 459 (2d Cir. 1978) (noting that past "precedent [was] bind[ing]" it to apply intra-corporate conspiracy doctrine to dismiss conspiracy alleged under § 1985). *See also Dunlop v. City of N.Y.*, No. 06-cv-0433, 2008 WL 1970002, at *9 (S.D.N.Y. May 06, 2008) (intra-corporate conspiracy doctrine applies to public entities).

Although Mr. Hasty briefed this issue below, the district court never addressed it. *See* A __ (Dkt. No. 744 at 23 n.18); A __ (Dkt. No. 756 at 19-20). The district court's legal conclusion that a conspiracy claim could proceed against the MDC Defendants is erroneous.

Finally, Mr. Sherman discusses in detail the application of qualified immunity in connection with this claim under Plaintiffs' alleged causes of action. *See* Sherman Br. at Part III. Broadly speaking, Mr. Sherman argues that the FAC pleads no facts to suggest Defendants' meeting of the minds and that it was not

clear at the time of the alleged acts that § 1985 applied to federal officers or intra-corporate conspiracies. To avoid repetitive briefing, Mr. Hasty hereby adopts that argument and incorporates it by reference into this brief.

CONCLUSION

For the foregoing reasons, the district court's decision to deny the motion to dismiss Claims One, Two, Three, Six, and Seven should be reversed.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure, the foregoing brief is in 14-Point Times Roman proportional font and contains 12,169 words and thus is in compliance with the type-volume limitation set forth in Rule 32(a)(8)(B) of the Federal Rules of Appellate Procedure.

Respectfully Submitted,
/s/ Shari Ross Lahlou
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