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IN THE

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,

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,

(Additional Caption On the Reverse)

On Appeal from the United States District Court for the Eastern District of New York

REPLY BRIEF FOR DEFENDANT-APPELLANT-CROSS-APPELLEE MICHAEL ZENK

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Defendants-Cross-Appellees,

and

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

Intervenors.

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Defendant-Appellant Michael Zenk ("Zenk") submits this reply brief in further support of his appeal from the judgment of the United States District Court for the Eastern District of New York (John Gleeson, J.) (the "District Court") entered on January 15, 2013, denying Zenk's motion to dismiss claims one, two, three, six, and seven of Plaintiffs-Appellees' Fourth Amended Complaint. SPA-1-62.[1]

PRELIMINARY STATEMENT

Plaintiffs do not dispute that only a single factual allegation is pled against Warden Zenk in the Fourth Amended Complaint. Nonetheless, Plaintiffs contend that this lone allegation in an amended pleading spanning 306 paragraphs -- that Warden Zenk "made rounds on the ADMAX and was aware of conditions there" -- is all that is necessary to overcome the presumption of qualified immunity and to plead multiple constitutional violations as to a federal warden. Under any pleading standard, however, such a threadbare allegation is insufficient to plead a claim that is plausible on its face.

Plaintiffs do not, because they cannot, contest the lack of factual allegations against Warden Zenk. Instead, Plaintiffs argue that it is not necessary for them to plead specific factual allegations regarding what may have transpired at the MDC

[1] Citations in the form of SPA-__ refer to pages in Defendants-Appellants' Special Appendix, filed with Defendants-Appellants' opening briefs (ECF No. 122). Citations in the form of A-__ refer to the Joint Appendix.

ADMAX SHU after April 22, 2002 -- which is the acknowledged date Warden Zenk assumed his role as Warden of the MDC. Rather, Plaintiffs contend that because the Complaint contains a handful of allegations that fail to exculpate Warden Zenk, no more is needed to advance Plaintiffs' claims at the pleading stage. This unsupported argument turns the well-established pleading standard enunciated in *Ashcroft v. Iqbal* on its head. Plaintiffs' claims must be buttressed by specific factual allegations as to Zenk -- they cannot rely on the absence of allegations that might exonerate Zenk to sustain these claims.

Moreover, on the rare occasion that Plaintiffs attempt in their brief to link a specific factual allegation to Warden Zenk, they do so only by flagrantly distorting their pleading. One example of this tactic (of several, as described below) arises in Plaintiffs' attempted defense of their free exercise of religion claim. There, Plaintiffs contend that the Complaint alleges that Plaintiff Hammouda did not receive a Koran until "months" after his arrival at the ADMAX SHU in mid-October 2001. Plaintiffs therefore suggest that because multiple months may have passed before Hammouda received his Koran, it does not foreclose the possibility that Hammouda still did not receive a Koran by April 2002, when Warden Zenk began his tenure at the MDC. This argument, however, is belied by the actual Complaint itself, where Plaintiffs allege only that Hammouda received his Koran one month -- not multiple months -- after arriving at the ADMAX SHU. As such,

Hammouda's receipt of a Koran "a month" later -- in or about November 2001 -- does indeed foreclose the possibility that Warden Zenk was somehow involved in the alleged decision to deprive him of one.

Like Plaintiffs' free exercise claim, the Complaint's other claims as to Warden Zenk simply do not withstand scrutiny. At bottom, Plaintiffs cannot overcome a basic fact: the Complaint utterly fails to take into account that Warden Zenk is differently situated than any of the other defendants. The commencement of his tenure as Warden at the MDC, in late April 2002, began at a juncture when only two Plaintiffs remained at the ADMAX SHU -- one of whom was released a mere eight days following Zenk's arrival at the MDC, and the other, a month-and-a-half later. Given that, more than ten years removed from their initial pleading, Plaintiffs' claims against Zenk now rest on a single conclusory allegation that Warden Zenk "made rounds on the ADMAX and was aware of conditions there," it is time for these unfounded claims to be dismissed as to Warden Zenk.

ARGUMENT[2]

I. Each of Plaintiffs' Claims Must Be Dismissed Because No Specific Allegations Are Alleged as to Warden Zenk

Plaintiffs concede -- as they must -- that the 86-page, 306-paragraph Complaint only mentions Zenk by name in eight paragraphs. As Zenk

[2] In addition to the arguments pertaining specifically to Zenk discussed herein, Zenk also adopts and incorporates by reference the generally applicable legal arguments set forth in the reply briefs of Defendants Sherman and Hasty.

demonstrated in his opening brief, all of those allegations are conclusory in nature. *See* Zenk Br. 13-23. Further, the particular factual allegations which attempt to support those conclusory allegations all either refer to time periods prior to Zenk's tenure at the MDC or are insufficiently specific to determine whether they occurred during the circumscribed time period applicable to Zenk. *Id.* Consequently, the Complaint lacks even a single specific factual allegation explicitly identifying any wrongful act taken by Zenk.

As a result of the paucity of allegations in the Complaint individually addressing Zenk, the Complaint relies exclusively on undifferentiated "group" allegations to plead Plaintiffs' claims against Zenk. However, reliance on vague, indiscriminate group pleading is particularly inappropriate in Zenk's case, given that only two of eight Plaintiffs purport to allege anything whatsoever with regard to Zenk, and even those Plaintiffs spent less than a quarter of their confinement under Zenk's administration.[3]

In their brief, Plaintiffs acknowledge that their Complaint is rife with

[3] Notwithstanding the Complaint's failure to specify which claims or allegations were intended to apply to Zenk, Plaintiffs now admit that only Plaintiffs Benatta and Hammouda purport to allege any claims at all against Zenk. *See* Pls.' Br. 9. The Complaint alleges that Benatta spent only eight days in the ADMAX SHU during Zenk's tenure, A-__ (Compl. ¶¶ 174, 188), and that Hammouda overlapped with Zenk at the MDC for only fifty-three days out of the eight months he spent in the ADMAX SHU, A-__ (Compl. ¶¶ 217, 227). However, Plaintiffs fail to point to even a single factual allegation pertaining to either of those two Plaintiffs that alleges any incident occurring after April 22, 2002 or particularly involving Zenk.

inappropriate "group" pleading, but argue that they have nonetheless sufficiently pleaded their claims because they support those "group" allegations by "alleg[ing] acts by specific individuals and link[ing] violations to individual defendants." Pls.' Br. 80. This argument lacks any merit. In truth, Plaintiffs fail to point to any paragraph of the Complaint linking any particular wrongful act or condition to Zenk. Rather, the only arguably "specific" allegation in the Complaint that Plaintiffs identify as individually addressing Zenk is that Zenk "made rounds on the ADMAX and was aware of conditions there." Pls.' Br. 80 (citing A-__ (Compl. ¶ 25)). As Plaintiffs well know, however, the allegation that Zenk "made rounds" is of limited relevance to Plaintiffs' claims against Zenk, as that allegation apparently concerns only Zenk's awareness of the alleged unofficial abuse, for which Plaintiffs have conceded Zenk cannot be held liable. *See* Pls.' Br. 71; SPA-32 n.12. As to any purported "official policy" condition alleged to have continued after April 22, 2002, it is of no consequence whether Zenk made rounds, as Zenk presumably would already be aware of a policy he himself would have allegedly "approved and implemented."

In any event, the single allegation that Zenk "made rounds" and "was aware of conditions" in the ADMAX SHU is itself conclusory, as it still fails to identify any individual Plaintiff, specific date, or particular incident implicating Zenk. Plaintiffs' reliance on *Gaston v. Coughlin* to argue the contrary is misplaced. *See*

Pls.' Br. 72 (citing *Gaston*, 249 F.3d 156, 166 (2d Cir. 2001)). In *Gaston*, unlike here, it was clear from the plaintiff's allegations what conditions the defendants had supposedly observed on their rounds. The plaintiff in *Gaston* specifically alleged visibly unsanitary conditions and broken windows resulting in below-freezing temperatures persisting consistently for as long as several months, during which the defendants were alleged to have made "daily" rounds. *Id.* at 165. Accordingly, assuming as true that the defendants made daily rounds, it was reasonable to infer that they could not help but observe those consistently perceptible conditions.

Here, by contrast, even assuming the truth of Plaintiffs' single allegation that Zenk "made rounds" -- without specifying how frequently, at what times of day, or in what areas of the ADMAX SHU those rounds occurred -- it is not apparent which alleged conditions or conduct Zenk might have observed. *See* A-__ (Compl. ¶ 25). Unlike in *Gaston*, the conditions alleged here undisputedly ceased or lessened in severity before Zenk ever arrived at the MDC. *See* Zenk Br. 18-23. Moreover, the purported conditions are alleged to have occurred sporadically, outside of ordinary business hours, or outside of the ADMAX SHU -- necessitating a number of unsupported inferences about the nature of the alleged "rounds" to reach the conclusion that Zenk became aware of any particular condition. *See, e.g.*, A-__ (Compl. ¶ 112) (strip searches conducted sporadically, and sometimes in

areas outside the ADMAX SHU); A-__ (Compl. ¶ 120) (bar taps conducted in the middle of the night); A-__ (Compl. ¶ 122) (recreation often offered between 6:00 and 7:00 a.m.).[4] Thus, even assuming Zenk "made rounds," Plaintiffs' allegations do not make clear what acts or conditions Zenk would have observed in April or May 2002 on those rounds.

Accordingly, *Gaston* has no application to the facts alleged here. *Gaston* merely recognized that it was reasonable to infer that defendants making "daily rounds" must have observed the obvious and persistent conditions alleged. Where, as here, the same allegation does not support a reasonable inference of Zenk's personal knowledge of any of the alleged sporadic acts by MDC staff members, it is insufficient to implicate Zenk in any claim based upon those conditions.

Unable to link any specific allegation to Zenk, Plaintiffs next resort to arguing that each of their constitutional claims against Zenk should survive because a handful of factual allegations in the Complaint fail to exculpate him. *See, e.g.*, Pls.' Br. 71 (arguing that, though the Complaint alleges that physical abuse of detainees "lessened" before Zenk arrived at the MDC, it does not allege that it ceased); *id.* (the Complaint "nowhere suggest[s] that the official transport

[4] In addition, even assuming that any of Plaintiffs' allegations of unofficial abuse could pertain to Zenk, despite their concessions to the contrary, it is not reasonable to infer that MDC staff members engaged in the serious misconduct alleged during the limited time that their highest-ranking supervisor was personally present and observing them, absent specific factual allegations supporting such an inference. *See* Zenk Br. 28-29.

policy of handcuffing, shackling, and subjecting Plaintiffs to a four-man hold changed under Zenk's leadership"); *id.* at 72 (though Plaintiffs "included detail about *de facto* denial of recreation during the winter, their allegations are not limited to winter"); *id.* (though constant illumination policy ceased prior to April 22, 2002, "the Complaint nowhere suggests the noisy bar taps throughout the night ever ceased"). Plaintiffs' arguments miss the point. The fact that several allegations in the Complaint fail to affirmatively foreclose the possibility of Zenk's involvement is patently insufficient to satisfy *Iqbal*'s pleading standards:

> The plausibility standard . . . asks for more than a sheer possibility that a defendant has acted unlawfully. Where a complaint pleads facts that are "merely consistent with" a defendant's liability, it "stops short of the line between possibility and plausibility of 'entitlement to relief.'"

Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (citation omitted). Plaintiffs' arguments that the Complaint "nowhere suggests" that Zenk did not engage in misconduct is exactly the sort of pleading held insufficient in *Iqbal*. *Id.* *Iqbal* clearly requires more than specific factual allegations that succeed -- occasionally -- in not expressly contradicting Plaintiffs' conclusory allegations. As Plaintiffs are unable to point to even a single specific factual allegation affirmatively supporting their conclusory allegations against Zenk, all of their claims must be dismissed.

II. Plaintiffs Fail to Identify any Specific Allegations Implicating Zenk in any Unconstitutional Condition of Confinement

Plaintiffs simply do not respond to the majority of Zenk's arguments that their allegations do not apply to Zenk. As set forth below, the few allegations that Plaintiffs assert are supportive of their claims either do not apply to Zenk or simply do not rise to the level of a constitutional violation. Accordingly, contrary to the District Court's holding, those conditions are patently insufficient to support any inference of punitive intent against Zenk. *See* Zenk Br. 26-29 & n.16; SPA-29 & n.11.

A. The Complaint Does Not Allege any *De Facto* Denial of Recreation Occurring in the Spring and Summer Months During Which Zenk Was Warden

With regard to the alleged condition of "*de facto* denial of recreation," purportedly caused by "rain and . . . freezing cold . . . during the dead of winter," A-__ (Compl. ¶ 122), Plaintiffs argue that their allegations could be interpreted to extend to Zenk's tenure as Warden in the months of April, May and June of 2002 on the sole basis that the inclusion of the word "rain" could be interpreted to apply to "all seasons." Pls.' Br. 72. However, as the Complaint makes clear, these allegations pertain only to the "fall and winter months:"

> Thus, while "recreation" was nominally offered several times a week, the MDC Plaintiffs and class members were constructively denied exercise during the fall and winter months.

A-__ (Compl. ¶ 123) (emphasis added). Plaintiffs' improper attempt to modify

their own allegations through their opposition brief should be disregarded.

It is perhaps unsurprising that certain allegations in the Complaint are directed solely to the fall and winter of 2001, as Plaintiffs' original Complaint was filed on April 17, 2002 (and presumably was researched and drafted even earlier in 2002) -- before Zenk ever became employed at the MDC. *See* Zenk Br. 4 n.5. Yet after four amendments, and despite gaining access to two voluminous official reports pertaining to the factual underpinnings of their claims, Plaintiffs have done little more to incorporate Zenk into their Complaint than to tack the word "Zenk" on to a handful of allegations originally intended to pertain to an earlier time period.

In any event, even assuming that Plaintiffs' allegations did extend to April, May and June 2002, the temperate weather conditions incident to those months do not support a claim of *de facto* denial of recreation. "[A]n occasional day without exercise when weather conditions preclude outdoor activity . . . . is not a denial of constitutional rights," *Anderson v. Coughlin*, 757 F.2d 33, 36 (2d Cir. 1985). And occasional exposure to rain during outdoor recreation simply does not amount to a constitutional violation. *See, e.g., Gamble v. City of New York*, No. 04 Civ. 10203 (TPG), 2009 U.S. Dist. LEXIS 88562, at *13-14 (S.D.N.Y. Sept. 25, 2009) (plaintiff's claim that "on approximately ten occasions in 2004, his head, face, ears, and neck were drenched" during outdoor recreation due to defendants' failure

to provide adequate raingear or indoor recreational space "does not rise to the level of" a constitutional violation).

Plaintiffs' allegations with regard to their alleged *de facto* denial of recreation simply do not apply to Zenk -- and even if they did, those allegations would still be patently insufficient to state a violation of any "clearly established" constitutional right.

B. Plaintiffs' "Bar Tap" Allegations Are Insufficient to Support an Inference of Punitive or Intentional Sleep Deprivation

With regard to the alleged condition of sleep deprivation, Plaintiffs again improperly rely on the absence of exculpatory allegations in their attempt to implicate Zenk in their claims. Plaintiffs have conceded that their allegations do not implicate Zenk in any of the alleged unofficial conduct of the prison guards, *see* Pls.' Br. 9, 71 (adopting the District Court's statement to that effect at SPA-32 n.12), and that the official policy of constant illumination in Plaintiffs' cells ceased in March 2002 -- prior to Zenk's arrival at the MDC. Pls.' Br. 72. Nevertheless, Plaintiffs maintain that this claim should survive because "the Complaint nowhere suggests the noisy bar taps throughout the night ever ceased during the operation of the ADMAX SHU." Pls.' Br. 72 (citing A-__ (Compl. ¶¶ 119-121)).

Yet, even assuming that that practice could be attributed to Zenk, Plaintiffs fail to allege or argue how that practice -- alone -- was clearly established to be unconstitutional. The Complaint itself describes the alleged "bar taps" as a routine

"safety procedure in which correctional personnel use a mallet to tap on each bar in the facility weekly to produce a noise and check for stress or damage." A-__ (Compl. ¶ 120) (emphasis added). Plaintiffs raise no objection to the legitimacy of that procedure except that, "contrary to past MDC practice, bar taps on the ADMAX unit were conducted twice a night, in the middle of the night." *Id.* Stripped of any allegations of unofficial abuse, which Plaintiffs concede do not apply to Zenk, Pls.' Br. 9, 71, the minimally invasive "safety procedure" described in the Complaint is insufficient to suggest that Plaintiffs were punitively deprived of sleep. *See, e.g., Smith v. Schwartz*, No. 10-721-GPM, 2011 U.S. Dist. LEXIS 56242, at *8 n.2 (S.D. Ill. May 26, 2011) (interruption of sleep over period of twenty-six days caused by loud noise of routine prisoner counts "amounts to mere annoyance, not a[ ] [constitutional] violation"); *accord Lunsford v. Bennett*, 17 F.3d 1574, 1580 (7th Cir. 1994) ("[P]eriodic loud noises that merely annoy, rather than injure the prisoner do[] not demonstrate a disregard for the prisoner's welfare.").

Furthermore, while Plaintiffs insinuate that the bar taps were conducted at night for the purpose of depriving them of sleep, an obvious alternative explanation is that this important security measure was conducted more frequently at night in maximum security areas for legitimate security purposes reasonably related to the

increased risk of escape after dark.[5] *See, e.g.*, *Brown-El v. Harris*, 26 F.3d 68, 69 (8th Cir. 1994) (recognizing that legitimate penological interests may involve increased security measures at night because "prison staff is reduced at night and escape risks increase after dark"); *Iqbal*, 556 U.S. at 682 (where an "obvious alternative explanation" existed for the conduct alleged, plaintiff's inference of "purposeful, invidious discrimination" was not plausible). Accordingly, the mere possibility that bar taps may have continued into Zenk's tenure at the MDC is insufficient to support any claim against Zenk.

C. The "Official Transport Policy" Does Not Constitute Unconstitutional Punishment

Plaintiffs' contention that the Complaint "nowhere suggest[s] that the official transport policy . . . changed under Zenk's leadership" also cannot support Plaintiffs' claims. Pls.' Br. 71. Even assuming that the absence of an allegation that a policy continued during a subsequent warden's tenure is sufficient to plead its actual continuation, "[t]he mere fact that [Plaintiffs were] subject to transport in restraints does not justify an inference that [they were] subjected to unconstitutional punishment." *Merryfield v. Schearrer*, No. 07-3288-SAC, 2008

[5] The allegation that the bar taps were conducted differently from "past practice" does not preclude that obvious alternative explanation, because, as Plaintiffs themselves allege, "[t]he ADMAX SHU at MDC was established after September 11, 2001 to make available more restrictive confinement." A-__ (Compl. ¶ 76). Any such "past practices" thus were not addressed to comparable security concerns.

U.S. Dist. LEXIS 73833, at *19-20 (D. Kan. Sept. 25, 2008) (noting the absence of any specific allegations that the restraints caused injury or pain or were imposed for an extended period of time). Absent specific allegations of independent harm or improper purpose during the post-April 22, 2002 period, there is simply no "*per se* right [for detainees] to be free of restraints during transport." *Id.* at *21.

Here, Plaintiffs concede that they "do not seek to hold Zenk accountable for [any alleged] unofficial abuse during transports." Pls.' Br. 71. However, without those inapplicable allegations of unofficial abuse, Plaintiffs' allegations against Zenk as to this condition amount to nothing more than the hypothetical continuation of a pre-existing policy of "handcuffing, shackling, and subjecting Plaintiffs to a four-man hold" during transport. *Id.* As such, Plaintiffs fail to allege any harm incident to the official transport policy necessary to negate the legitimate security concerns advanced by that policy and support any inference of punitive intent. Accordingly, none of Plaintiffs' allegations regarding the official transport policy provide any support for their claims against Zenk.

D. To the Extent Any of Plaintiffs' Allegations May Apply to Zenk, He Is Entitled to Qualified Immunity

As demonstrated in the preceding sections, none of the allegations identified by Plaintiffs in support of their claims against Zenk individually amounts to a constitutional violation at all -- let alone a clearly established constitutional violation. Plaintiffs' argument that "abusing and punishing detainees violates

clearly established law" assumes its own conclusion. *See* Pls.' Br. 81 (capitalization omitted). Obviously, it is unconstitutional to punish unconvicted detainees. The proper inquiry is whether it was "clearly established" that the particular conduct allegedly engaged in by Zenk was sufficiently egregious -- alone -- to create conditions amounting to "punishment" absent any other showing of punitive intent (which Plaintiffs have not pleaded as to Zenk).

The few conditions that Plaintiffs argue may apply to Zenk are significantly less onerous than those alleged as to other defendants, and in and of themselves are not clearly unconstitutional. Plaintiffs' arguments, and the District Court's holding, both ignore Zenk's dissimilar circumstances, and instead inappropriately rely on the totality of the conditions alleged in the Complaint's indiscriminate group allegations to infer discriminatory intent. *See* SPA-28 (indiscriminately listing in upholding claims against all MDC Defendants allegations that Plaintiffs were "constructively denied the opportunity to exercise; denied sleep; repeatedly placed in handcuffs and shackles; deprived of hygienic implements, such as soap and toilet paper; subjected to extremely cold conditions; deprived of sufficient food; frequently verbally and physically abused; and repeatedly strip-searched"). But Zenk is alleged to have been involved, if at all, in only a few, less harsh conditions -- none of which, as demonstrated above, alone amount to a constitutional violation at all. Accordingly, it is not at all clearly established that

those conditions in combination amounted to unconstitutional "punishment." Plaintiffs cite no authority to the contrary.

It is even less "clearly established" that those conditions would amount to a constitutional violation when the absolute maximum duration those conditions were imposed could be no longer than eight or fifty-three days. Plaintiffs' argument that "detainees may not be punished, even for 'only' eight or 53 days," Pls.' Br. 83, again assumes its own conclusion. Of course detainees may not be punished, for even one day; but in order to determine whether a particular condition amounts to "punishment," a court must consider a number of factors -- including duration. *See, e.g., Laureau v. Manson*, 651 F.2d 96, 103 (2d Cir. 1981) (noting that "the duration of confinement should be taken into account in judging the constitutionality of certain conditions"). All of the conditions that could possibly apply to Zenk were both less severe and imposed for significantly shorter durations than the conditions alleged as to any other defendant. Accordingly, the conditions of confinement that could even arguably pertain to Zenk fall much further down the "clearly established" spectrum than any other defendant, and the District Court erred in failing to consider Zenk's circumstances separately. *See* SPA-34-35. Accordingly, Zenk is entitled to qualified immunity.

III. Plaintiffs' Fifth Amendment Equal Protection Claim Must Be Dismissed Because Plaintiffs Fail to Allege the Essential Element of Discriminatory Intent as to Zenk

Discriminatory intent is an essential element of Plaintiffs' claim that Zenk violated their equal protection rights. But Plaintiffs fail to allege, even conclusorily, that Zenk harbored any discriminatory intent towards Plaintiffs. The allegations that Plaintiffs identify in support of their equal protection claim simply do not mention or apply to Zenk. Thus, ignoring Zenk, Plaintiffs argue that:

- the MDC Defendants could not have relied on the FBI's "high interest" designation because the Complaint alleges that some Plaintiffs were placed in the ADMAX SHU without a high-interest designation. Pls.' Br. 89. Zenk, however, was not employed at the MDC when any Plaintiff was placed in the ADMAX SHU.
- Plaintiffs were inappropriately held in the ADMAX SHU after the MDC Defendants learned there was no information tying them to terrorism, *id.* at 89-90 (citing A-__ (Compl. ¶¶ 69-74)); but Zenk is not mentioned in any of those allegations.[6]

[6] To the contrary, the Complaint indicates that soon after Zenk's arrival at the MDC, his new administration took steps to ensure that no Plaintiff remained in the ADMAX SHU without an appropriate designation. Benatta was promptly released from the ADMAX SHU only eight days after Zenk's arrival. A-__ (Compl. ¶ 188). And three days after that, inquiries were sent to the FBI with regard to Hammouda -- in response to which the FBI confirmed that Hammouda was still of interest to the investigation. A-__ (Compl. ¶ 226).

- the alleged "creation of a fraudulent document" warrants an inference of discriminatory intent, Pls.' Br. 90; however, Zenk is not alleged to have participated in that conduct. *See* A-__ (Compl. ¶ 74).
- the MDC Defendants "allowed their subordinates to abuse and racially taunt Plaintiffs," Pls.' Br. 91; but Plaintiffs do not purport to hold Zenk responsible for such "unofficial abuse," *id.* at 71; SPA-32 n.12.

Clearly, Plaintiffs cannot rely on any of those inapplicable allegations to establish discriminatory intent as to Zenk.

By contrast, Plaintiffs' allegation that Zenk "made rounds" in the ADMAX SHU and "was aware of conditions there," A-__ (Compl. ¶ 25), alleges at most knowledge -- not purpose. As the Supreme Court made clear in *Iqbal*, mere knowledge of the discriminatory purpose of others is insufficient to establish a supervisor's own discriminatory intent:

> In the context of determining whether there is a violation of a clearly established right to overcome qualified immunity, purpose rather than knowledge is required to impose *Bivens* liability on . . . an official charged with violations arising from his or her superintendent responsibilities.

Iqbal, 556 U.S. at 677. Plaintiffs have failed to point to any allegation in the Complaint showing that Zenk himself harbored any discriminatory purpose.

Plaintiffs try to circumvent their failure to adequately plead discriminatory intent by arguing that the harsh confinement policy was discriminatory on its face.

Pls.' Br. 88. The only citation Plaintiffs provide for that premise, however, is to the District Court's opinion. *See id.* (citing SPA-6). The District Court's opinion, in turn, cites only to the oral argument transcript. SPA-6, 36. The reason neither Plaintiffs nor the District Court cite any paragraph in the actual Complaint for that premise is because the Complaint simply fails to allege that the harsh confinement policy was facially discriminatory. Rather, the Complaint alleges that the DOJ Defendants used a facially discriminatory policy to identify and classify persons as "of interest" to the investigation and ordered all such persons confined in restrictive conditions pending FBI clearance; the Complaint then alleges that the MDC Defendants, to implement that order, developed a policy subjecting all "of interest" detainees to identical conditions of confinement. *See, e.g.*, A-__ (Compl. ¶¶ 1-2, 55, 75). It should be noted that the Supreme Court held in *Iqbal* that nearly identical allegations asserted only a facially neutral policy to house all post-September-11 detainees in restrictive conditions of confinement until cleared by the FBI:

> Though respondent alleges that various other defendants . . . may have labeled him a person "of high interest" for impermissible reasons, his only factual allegation against petitioners accuses them of adopting a policy approving "restrictive conditions of confinement" for post-September-11 detainees until they were "'cleared' by the FBI." Accepting the truth of that allegation, the complaint does not show, or even intimate, that petitioners purposefully housed detainees in the ADMAX SHU due to their race, religion, or national origin.

Iqbal, 556 U.S. at 682-83 (citation omitted).

Similarly, the Complaint here does not allege that Zenk had anything whatsoever to do with the policies pursuant to which Plaintiffs claim they were initially arrested, designated as "of interest" to the FBI's investigation, or placed in the ADMAX SHU. Neither does it allege that Zenk ever differentiated amongst ADMAX SHU detainees in any way.[7] To the contrary, once placed in the ADMAX SHU, the Complaint alleges that all detainees, including Plaintiffs, were treated uniformly. The few exceptions to that uniform treatment cited by Plaintiffs and the District Court (regarding five Israeli detainees and one Austrian or Australian allegedly treated more favorably than Plaintiffs) do not apply to Zenk, as the "favorable treatment" alleged was their prompt release from the ADMAX SHU long before April 22, 2002. *See* SPA-39-40; A-__ (Compl. ¶ 43). Yet those are the only allegations even arguably differentiating Plaintiffs' equal protection claim here from the claim the Supreme Court found inadequate in *Iqbal*.

Plaintiffs cannot evade the requirement of pleading Zenk's discriminatory intent by relying on allegations of discriminatory conduct by <u>others</u> or inferences

[7] The fact that all of the detainees Zenk found in the ADMAX SHU when he arrived were Arab or Muslim men does not render the uniform treatment of all those detainees unconstitutional. To plead an equal protection claim based upon discriminatory <u>effect</u>, Plaintiff must allege a facially neutral policy motivated by discriminatory animus. *See, e.g.*, *Hayden v. County of Nassau*, 180 F.3d 42, 48 (2d Cir. 1999) ("[A] facially neutral statute violates equal protection if it was motivated by discriminatory animus and its application results in a discriminatory effect."). As demonstrated above, Plaintiffs do not allege even conclusorily that Zenk harbored any discriminatory animus towards Plaintiffs.

drawn from conditions that are not applicable to Zenk. As Plaintiffs have alleged neither a facially discriminatory policy nor individualized discriminatory intent as to Zenk, this Court should dismiss this claim against Zenk.

IV. Plaintiffs' First Amendment Free Exercise Claim Must Be Dismissed Because Plaintiffs Fail to Allege that Zenk Suppressed any Plaintiff's Religious Practices

The Complaint fails to allege any involvement whatsoever by Zenk in any of the allegations purportedly supporting Plaintiffs' free exercise of religion claim. *See* Zenk Br. 31-33. As the Complaint lacks any specific allegations legitimately implicating Zenk, Plaintiffs resort to outright distortion of their pleading to salvage this claim. Namely, Plaintiffs now argue that "the allegation that the other[Plaintiffs] received Koran's [sic] 'months' after requesting them does not foreclose the possibility that Zenk's arrival also pre-dated Hammouda's access to a Koran." Pls.' Br. 95. That argument, however, is simply factually inaccurate. The allegation that Plaintiffs cite does not allege that Hammouda received a Koran "months" after his arrival; it alleges that he received a Koran "a month" after his arrival. *Compare* A-__ (Compl. ¶ 132) ("Hammouda and Mehmood did not receive [a Koran] until a month after they were each detained.") *with* Pls.' Br. 95 (arguing that "the allegation that [Plaintiffs] received Korans 'months' after requesting them does not foreclose the possibility that Zenk's arrival also pre-dated Hammouda's access to a Koran"). As Hammouda is alleged to have arrived at the

MDC in mid-October, A-__ (Compl. ¶ 217), his alleged receipt of a Koran "a month" later clearly establishes that Zenk was not involved as of April 2002 in depriving him of one.

As Plaintiffs' own allegations preclude any free exercise claim on behalf of Hammouda, their entire free exercise claim against Zenk is based on the solitary allegation that Benatta, who spent a total of eight days in the ADMAX SHU under Zenk's supervision, "never received" a Koran. Pls.' Br. 94-95; A-__ (Compl. ¶ 132).[8] However, that allegation alone is insufficient to state a claim, particularly absent an allegation that Benatta ever requested one from Zenk. Moreover, as several courts have already held, eight days without either requesting or receiving a Koran does not amount to a constitutional violation. *See, e.g.*, *Marsh v. Corr. Corp. of Am.*, No. 97-2070, 1998 U.S. App. LEXIS 1323, at *9-10 (10th Cir. Jan. 28, 1998) (allegation of 15-day deprivation of religious items was insufficient to

[8] Plaintiffs somewhat confusingly attempt to assert that their allegations of unofficial abuse with respect to this claim now do pertain to Zenk. *See* Pls.' Br. 95 ("Each of the MDC Defendants knew of these abuses and was 'deliberately indifferent to the risk that their subordinates, MDC prison guards, would violate the Detainees' free exercise rights. This includes Zenk.") (emphasis added) (citation omitted). However, Plaintiffs have already conceded that Zenk is not liable for any unofficial abuse with regard to their conditions of confinement, Pls.' Br. 9, 71, SPA-32 n.12, and all of Plaintiffs' free exercise allegations are subsumed within their conditions of confinement claim. *See* A-__ (Compl. ¶ 103) (noting, under the heading "Inhumane Conditions of Confinement at MDC," that "[t]hese conditions included . . . denial of a chance to practice their religion"). In any event, none of those allegations specifically refer to Zenk, Benatta, Hammouda, or any applicable time period.

plead First Amendment violation); *accord McCroy v. Douglas Cnty. Corr. Ctr.*, No. 8:10CV69, 2010 U.S. Dist. LEXIS 38643, at *7-8 (D. Neb. Apr. 20, 2010) (15-day "temporary deprivation of religious items does not rise to the level of a constitutional violation"); *Murden v. DeRose*, No. 3:09-CV-135, 2012 U.S. Dist. LEXIS 19112, at *17 (M.D. Pa. Feb. 15, 2012) (allegation that "Plaintiff was without a copy of the Koran for a period of approximately sixteen (16) days . . . do[es] not rise to the level of a constitutional violation").

Simply put, Plaintiffs have failed to point to even a single allegation showing any interference whatsoever by Zenk in Benatta's or Hammouda's exercise of religion, let alone a "clearly established" constitutional violation. Accordingly, Zenk is entitled to qualified immunity, and this claim should be dismissed.

V. Plaintiffs Fail to Allege Zenk's Personal Involvement in the Alleged Excessive Strip Searches

Plaintiffs do not refer to Zenk by name even once in the entire section of the Complaint pertaining to the alleged strip searches. *See* Zenk Br. 33-35; A-__ (Compl. ¶¶ 111-118, 297-302). The only allegations Plaintiffs point to in their brief as including Zenk are two general and conclusory allegations that do not relate specifically to strip searches. First, Plaintiffs point to paragraph 25 of the Complaint, which alleges only that Zenk "made rounds" and was "aware of conditions" in the ADMAX SHU. A-__ (Compl. ¶ 25) (cited at Pls.' Br. 100).

Second, Plaintiffs point to paragraph 75 of the Complaint, which alleges only that "Hasty ordered Lopresti and Cuciti to design extremely restrictive conditions of confinement. These conditions were then approved and implemented by Hasty and Sherman, and, later, by Zenk." A-__ (Compl. ¶ 75) (cited at Pls.' Br. 100). However, neither of those allegations even mention strip searches, let alone contain any specific factual allegations relevant to them.

Furthermore, even if the Complaint had sufficiently alleged that improper strip searches continued into Zenk's tenure, Plaintiffs' own allegations indicate that no official policy regarding the alleged strip searches was ever formally instituted, *see* Zenk Br. 34-35 (citing A-__ (Compl. ¶ 111)), and Plaintiffs have conceded that they do not intend to hold Zenk liable for unofficial abuse. Pls.' Br. 71; SPA-32 n.12. Plaintiffs argue only that the fact that "Defendant Cuciti declined to put the policy in writing explains why it was applied inconsistently, but does not make it any less a policy." Pls.' Br. 100 (citation omitted). However, Plaintiffs fail to explain how an official policy can be neither written nor *de facto*, or how Zenk could possibly have "approved and implemented" such an ephemeral "policy."

Those conclusory allegations are clearly insufficient to satisfy *Iqbal*'s requirement of personal involvement. As Plaintiffs can point to no allegation indicating Zenk's personal involvement in the alleged strip searching, Zenk is entitled to qualified immunity, and this claim should be dismissed.

VI. Plaintiffs' Conspiracy Claim Should Be Dismissed Because Plaintiffs Have Failed to Allege that Warden Zenk Conspired to Violate Plaintiffs' Rights

As discussed in Zenk's opening brief, Plaintiffs' conspiracy claim against Zenk consists of a single conclusory allegation that all Defendants conspired to implement the alleged conditions from which all of Plaintiffs' claims arise. *See* Zenk Br. 35-37; A-__ (Compl. ¶ 305). Yet, as demonstrated by Plaintiffs' failure to identify even a single allegation that Zenk spoke to, met, corresponded, or agreed in any way with any other defendant, the Complaint is utterly devoid of factual support for that allegation.

In their brief, Plaintiffs argue only that "throughout, the Complaint alleges concerted action by MDC Defendants." Pls.' Br. 102 (citing A-__ (Compl. ¶¶ 68-75, 130, 132)). But the allegations Plaintiffs cite in support of that proposition do not support their claim against Zenk. Paragraphs 130 and 132 of the Complaint fail to mention Zenk at all, and discuss only policies no longer in effect in April 2002. *See* Zenk Br. 19-21 & n.13. Paragraphs 68-75 of the Complaint contain only conclusory allegations that Zenk approved and implemented policies created by his predecessors. However, the alleged continuation of a pre-existing policy, without any factual basis to support that any communication or agreement with any other defendant actually took place, is exactly the sort of mere "parallel conduct" held insufficient to plausibly allege a claim for conspiracy in *Twombly*. *See Bell*

Atl. Corp. v. Twombly, 550 U.S. 544, 556-57 (2007) (holding that "an allegation of parallel conduct and a bare assertion of conspiracy will not suffice" to adequately allege a conspiracy without additional factual allegations "plausibly suggesting (not merely consistent with) agreement"); *accord Arar v. Ashcroft*, 585 F.3d 559, 569 (2d Cir. 2009) (dismissing conspiracy claim on qualified immunity grounds where the plaintiff had "fail[ed] to specify any culpable action taken by any single defendant, and [did] not allege the 'meeting of the minds' that a plausible conspiracy claim requires").

Absent specific factual allegations that Zenk participated in a conspiracy, those vague and conclusory allegations are insufficient to make out a cognizable claim under 42 U.S.C. § 1985(3). *See, e.g.*, *Webb v. Goord*, 340 F.3d 105, 110 (2d Cir. 2003) ("In order to maintain an action under Section 1985, a plaintiff 'must provide some factual basis supporting a meeting of the minds, such that defendants entered into an agreement, express or tacit, to achieve the unlawful end.'").

CONCLUSION

For the reasons set forth above, this Court should reverse the District Court's ruling and dismiss Plaintiffs' claims against Zenk in their entirety.

Dated: New York, New York
November 26, 2013

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Rule 32(a)(7)(B) of the Federal Rules of Civil Procedure because this brief contains 6,411 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman 14-point font.

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