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

PROOF BRIEF FOR DEFENDANT-CROSS-APPELLEE JAMES W. ZIGLAR

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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

Defendant –Cross-Appellee James W. Ziglar, during a portion of the time covered by the allegations of plaintiffs' Fourth Amended Complaint, served as the Commissioner of what formerly was the Immigration And Naturalization Service of the United States (hereinafter "INS"). Mr. Ziglar is a party only to No. 13-1662-cv(XAP), the cross-appeal, which this court has consolidated with other appeals in the same underlying case, No. 13-981-cv(L). Mr. Ziglar adopts by reference the Jurisdictional Statement set forth in the Brief Of Defendants-Cross-Appellees John Ashcroft And Robert Mueller (hereinafter referred to as "Ashcroft-Mueller Brief") in No. 13-1662-cv(XAP).

STATEMENT OF THE ISSUES

Whether the District Court correctly concluded that the pleading standards established by *Ashcroft v. Iqbal,* 556 U.S. 662 (2009), required the dismissal of all plaintiffs' claims against Mr. Ziglar for failure to state a claim upon which relief could be granted.

STATEMENT OF THE CASE

Mr. Ziglar adopts by reference the Statement of the Case set forth in the Ashcroft-Mueller Brief.

STATEMENT OF FACTS

Mr. Ziglar adopts by reference the Statement of Facts set forth in the Ashcroft-Mueller Brief, and adds the following.

This appeal addresses the sufficiency of Plaintiffs' fifth try at pleading claims against Mr. Ziglar – their Fourth Amended Complaint. Plaintiffs assert that the United States improperly detained and confined them after the events of September, 2011, and brought their lawsuit on their own behalf and on behalf of a putative class of person similarly detained and confined. Their Fourth Amended Complaint asserted six claims under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), alleging substantive violations and a seventh claim under 42 U.S.C. § 1985, alleging conspiracy. Claims One to Five and Claim Seven named as defendants in their individual

capacities the former Attorney General of the United States, John Ashcroft; the former head of the Federal Bureau of Investigation, Robert Mueller; and the former head of what was then constituted as the Immigration and Naturalization Service, James W. Ziglar; and five employees of the Bureau of Prisons ("BOP"). Claim Six named only the BOP personnel.

The District Court dismissed claims Four and Five as to all defendants. Plaintiffs did not appeal that judgment, so that aspect of the District Court's ruling is not at issue in this cross-appeal. (Nor is Claim Six, which did not name Mr. Ziglar.) The District Court dismissed Claim One, which sought to allege substantive due process violations in the conditions of plaintiffs' confinement, and Claim Two, which sought to allege violations of the equal protection clause in those conditions, against Mr. Ashcroft, Mr. Mueller, and Mr. Ziglar; and it dismissed Claim Three, which alleged the violation of plaintiffs' free exercise rights against the same defendants. The District Court dismissed the conspiracy count, Claim Seven, as to Mr. Ashcroft, Mr. Mueller, and Mr. Ziglar as well. The

District Court rested its ruling as to Claims One, Two, and Three as to Mr. Ashcroft, Mr. Mueller, and Mr. Ziglar on its conclusion that those claims failed to alleged sufficient facts to make out a "plausible" claim against those defendants within the meaning of *Ashcroft v. Iqbal, supra,* and then dismissed the § 1985 cause of action alleging a conspiracy, Claim Seven, because it rested on the substantive averments of Claims One, Two, and Three.

The District Court left Claims One, Two, Three, Six, and Seven standing against the BOP defendants. They appealed. Plaintiffs then obtained an order under FED. RULE CIV. PRO. 54(b) entering final judgment dismissing Claims One, Two, Three, and Seven as to Mr. Ashcroft, Mr. Mueller, and Mr. Ziglar, and plaintiffs filed this cross-appeal of that judgment.

Like all of plaintiffs' previous Complaints over the eleven years they have been trying to make out a claim against Mr. Ziglar, this latest pleading contains scant allegations as to what Mr. Ziglar did or omitted that violated any rights of the Plaintiffs. Of the Fourth Amended

Complaint's 306 paragraphs of averments, only 19 name Mr. Ziglar at all. Sixteen of those 19 lump him in with Mr. Ashcroft and Mr. Mueller without distinguishing among the three men as to who did what. Fourth Amended Complaint, Dkt. No. 726 ¶¶ 6, 7, 47, 48, 51, 53, 55- 56, 60, 66-68, 75, 79, 96 & 305. And the three averments that name only Mr. Ziglar, Dkt. No. 726 ¶¶ 23, 62 & 64, do no more than state conclusional allegations or aver facts that, at worst, are neutral as to Mr. Ziglar. *E.g.,* Dkt. No. 726 ¶ 62 (Mr. Ziglar "discussed the entire process of interviewing and incarcerating out-of-status individuals with Ashcroft and others"); Dkt. No. 726 ¶ 64 (Mr. Ziglar "had twice daily briefings with his staff regarding the 9/11 detentions").

Plaintiffs' Brief in this court makes it clear that these allegations of the Fourth Amended Complaint stated no plausible claims against Mr. Ziglar. Plaintiffs admit, for example, that their Fourth Amended Complaint alleged that defendant Ashcroft alone "devised a plan to round up and detain as many Arab and South Asian Muslims as possible, based on *his* discriminatory notion that such individuals are likely to be

connected to terrorism or terrorists." Pl. Br. at 10-11 (emphasis added). They then concede that their Fourth Amended Complaint alleged that Mr. Ashcroft and Mr. Mueller — but not Mr. Ziglar — "knew that Ashcroft's plan would result in the arrest and detention of many individuals in these targeted groups" without any proper reason to do so. *Id.* at 11. They admit that they also alleged that Mr. Ashcroft alone "ordered Mueller and Ziglar to hold" the detainees until the FBI could clear them. *Ibid.* In the same way, plaintiffs recognize that their Fourth Amended Complaint alleged that Mr. Ashcroft and Mr. Mueller, but again, not Mr. Ziglar, "met regularly with a small group of government officials" and "mapped out ways to exert maximum pressure on the detainees" and "made a plan to restrict the detainees' access to the outside world, and to spread misinformation among law enforcement personnel that the 9/11 detainees were suspected terrorists who 'needed to be encouraged *in every way possible* to cooperate.'" *Id.* at 11-12.

As to Mr. Ziglar, however, the most plaintiffs can come up with is that they alleged in their Fourth Amended Complaint that he "attended

many of" the meetings held by Mr. Ashcroft and Mr. Mueller, without specifying what those present discussed when he did so, *id.* at 12, and that Mr. Ziglar "received daily reports regarding arrests and detentions" which "made [him] aware that" the "detention of many individuals . . . without any non-discriminatory reason to suspect them or terrorism" did "in fact, occur." *Id.* at 11.

The holes in plaintiffs' pleading are legion, at least as regards Mr. Ziglar. For example, plaintiffs do not stoop to allege what unconstitutional methods or policies the participants discussed in meetings that Mr. Ziglar attended, or how he participated in the implementation of unconstitutional ways to exert pressure on detainees or otherwise cause them to be confined in a manner not consistent with the Constitution. Indeed, in other parts of their Fourth Amended Complaint, plaintiffs aver that their specific conditions of confinement at the MDC were developed at the MDC and approved by BOP personnel. Dkt. No. 726 ¶¶ 67; 75; 79 & 96. None of these allegations so much as mention Mr. Ziglar, though they contain the totality of the averments regarding the

interference with their religious practices, and are inconsistent with plaintiffs' claims against him. *Id.* ¶¶ 103-140.

At footnote 1 of the Fourth Amended Complaint, plaintiffs referred to a report prepared by the Office of the Inspector General of the Department of Justice entitled *The September 11 Detainees: A Review Of The Treatment Of Aliens Held On Immigration Charges In Connection With The Investigation Of the September 11 Attacks* (hereinafter "*OIG Report*"). Dkt. No. 726, at 3 n.1. Plaintiffs stated that a "copy of this report was appended to the Second Amended Complaint as Exhibit 1," then they tried to "incorporate [it] by reference, *except where contradicted by the allegations of this Fourth Amended Complaint.*" *Ibid.* (emphasis added).[1] The reason plaintiffs attempted this sleight of hand – trying to slip into the Fourth Amended Complaint the favorable parts of the *OIG Report*, while keeping out the unfavorable

[1] Plaintiffs noted that this report is available at http:/www.usdoj.gov/oig/special/0306/full.pdf. Dkt. No. 726, at 3 n.1. The *OIG Report* was reproduced in the Joint Appendix in the prior appeal in this case, No. 06-3745-cv-(L). Citations in the text above are to that Joint Appendix ("JA").

parts — is that the *OIG Report* contains numerous findings about Mr. Ziglar that contradict any allegation that he participated in any of the wrongdoing that plaintiffs have alleged in their Fourth Amended Complaint. For example, the *OIG Report* specifically refuted any claim that Mr. Ziglar had a role in the creation and implementation of the "hold-until-cleared policy" that forms a large part of plaintiffs' claims against him in the Fourth Amended Complaint. *E.g.,* Dkt. No. 726 ¶ 23. It noted that Mr. Ziglar had expressed his concerns that the detainees were being held longer than necessary to determine their immigration status and that Mr. Ziglar tried to speed the matter along to avoid any problems. The *OIG Report* specifically stated that Mr. Ziglar had communicated with the Attorney General's Office in November, 2001, "to discuss concerns about the clearance process," and that he spoke with David Israelite, the [Attorney General's] Deputy Chief of Staff, about the issue. JA 333. The *OIG Report* then states what Mr. Ziglar stated that he told Mr. Israelite:

> "he alerted Israelite to the fact that September 11 detainee cases were not being managed properly and warned of

> possible problems for the Department. Ziglar told the OIG that he was frustrated at this time and felt powerless to resolve the situation because he had no authority over the FBI, which was responsible for determining which detainees were 'of interest.'" *Ibid.*

The *OIG Report* noted that Mr. Ziglar's call to Mr. Israelite followed an earlier call by Mr. Ziglar to FBI Director Mueller, on October 2, 2001, a call taken by FBI Deputy Director Thomas Pickard. In that earlier call, the report found, Mr. Ziglar "told Pickard that the FBI was putting the INS in the awkward position of holding aliens in whom the FBI had expressed 'interest' but then failing to follow through with a timely investigation." *Id.* at 332. Mr. Ziglar told the OIG that he informed Pickard that "unless the INS received written releases in a timely manner, the INS would have to start releasing September 11 detainees." *Ibid.*

The *OIG Report* made it clear that the "hold-until-cleared" policy was formulated and approved, not by James Ziglar, but by his superiors in the Department of Justice: Associate Deputy Attorney General Levey "told the OIG that" the "hold-until-cleared" policy "came from 'at least'

the Attorney General" and that the policy "was 'not up for debate'" in the Department of Justice (which at that time included the INS). *Id.* at 304. The OIG "found that this" policy was "communicated to the INS . . . by a number of Department [of Justice] officials, including Stuart Levey." *Id.* at 303.

In the same way, the *OIG Report* makes it clear that Mr. Ziglar had no role in another decision that forms a large part of the basis for the allegations of wrongdoing in the Fourth Amended Complaint, the decision as to where to house detainees. The *OIG Report* categorically stated that "[f]rom September 11 to September 21, 2001, INS Executive Associate Commissioner for Field Operations Michael Pearson made *all* decisions regarding where to house September 11 detainees." *Id.* at 284 (emphasis added). The OIG concluded that during that time, "Pearson decided whether a detainee should be confined at a [Bureau of Prisons] facility (such as the MDC), an INS facility, or an INS contract facility (such as Passaic)." *Ibid.* The OIG then stated that "Pearson's decision" regarding where to send the detainee "was relayed to the INS New York

District, which transferred the detainees to the appropriate facility." *Ibid.* The *OIG Report* found that after September 21, 2001, housing decisions were made by "three INS District Directors" on the basis of "input provided by the FBI." *Id.* at 284-285.

Nothing at this point (or anywhere else) in the *OIG Report* shows that Mr. Ziglar had any involvement in these decisions or that Mr. Pearson (or the three INS District Directors who performed this function after September 21, 2001) communicated with Mr. Ziglar at any time regarding this issue. The Fourth Amended Complaints allegations to the contrary constitute pure *respondeat superior* allegations.

Plaintiffs cannot incorporate only the "consistent" parts of the *OIG Report*, leaving the District Court and this court to guess at what portions form a part of the Fourth Amended Complaint and what portions do not. Plaintiffs having referred to the *OIG Report* and having attempted to incorporate part of it into their Fourth Amended Complaint, that report in its entirety has become a part of the Fourth Amended Complaint in this case for purposes of a FED. RULE CIV. PRO. 12(b)(6) motion, and the

plausibility of plaintiffs' allegations about Mr. Ziglar must be examined in light of the findings of that report, as well as the other averments of the Fourth Amended Complaint.

In its opinion finding that plaintiffs' Fourth Amended Complaint failed the *Iqbal* test, the District Court analyzed the allegations against Mr. Ashcroft, Mr. Mueller, and Mr. Ziglar without distinguishing one from the other. Indeed, the District Court's opinion never once addressed the sufficiency of the allegations as to any single one of the three men, but as to each claim for relief considered the allegations against the three as a group, collectively labeling the three men the "DOJ Defendants." Dkt. No. 767, at 36-40 (analyzing the sufficiency of allegations in support of each of plaintiffs' claims against "Ashcroft, Mueller, and Ziglar"). Due process requires that, in considering whether the averments of the Fourth Amended Complaint suffice to state plausible claims as to Mr. Ziglar, the court should focus on what the Fourth Amended Complaint alleged as to Mr. Ziglar specifically. Even so, the lack of plausible claims against Mr. Ashcroft and Mr. Mueller, as demonstrated in their Brief in this court,

bolsters Mr. Ziglar's contention that plaintiffs failed to allege claims against him as well.

SUMMARY OF ARGUMENT

Plaintiffs' Fourth Amended Complaint failed to allege enough facts to state any claim for relief against Mr. Ziglar that is plausible on its face, and so must be dismissed under *Ashcroft* v. *Iqbal*, 556 U.S. 662 (2009). For the reasons set forth below, and in the Ashcroft-Mueller Brief, the judgment of the District Court dismissing all of the claims in the Fourth Amended Complaint against Mr. Ziglar should be affirmed.

ARGUMENT

THE DISTRICT COURT CORRECTLY DISMISSED ALL OF THE CLAIMS AGAINST MR. ZIGLAR IN THE FOURTH AMENDED COMPLAINT

To state claims for relief against Mr. Ziglar under *Bivens*, the Fourth Amended Complaint had to allege facts sufficient to make "plausible" any claim that Mr. Ziglar "was personally involved in the constitutional violation" for which plaintiffs sought recovery. *Thomas v. Ashcroft*, 470 F.3d 491, 496 (C.A.2 2006). A federal court must dismiss a complaint

that does not "contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Iqbal*, 556 U.S. at 678 (quoting *Bell Atlantic Corporation* v. *Twombly*, 550 U. S. 544, 570 (2007)). This standard demands "more than a sheer possibility that a defendant has acted unlawfully." *Ibid.* It requires that a complaint do more than "plea[d] facts that are 'merely consistent with' a defendant's liability." *Ibid.* (quoting *Twombly*, 550 U.S. at 557). Rather, to state a claim under *Bivens,* plaintiffs must "plead that each Government-official defendant, through the official's own individual actions, has violated the Constitution." *id.* at 676, because "each Government official, his or her title notwithstanding, is only liable for his or her own misconduct." *Id.* at 677.

Accordingly, Mr. Ziglar "may be held liable only to the extent that [he] caused the plaintiff[s'] rights to be violated." *Leonhard v. United States,* 633 F.2d 599, 621 n.30 (C.A.2 1980). He "cannot be held liable for violations committed by [his] subordinates," *ibid.,* or for wrongs allegedly committed by other government officials, unless the plaintiffs

have alleged sufficient facts to establish (1) Mr. Ziglar's "direct participation" in the alleged torts; (2) Mr. Ziglar's "failure to remedy the alleged wrong after learning of it;" (3) Mr. Ziglar's "creation of a policy or custom under which unconstitutional practices occurred;" or (4) Mr. Ziglar's "gross negligence in managing subordinates." *Black v. Coughlin,* 76 F.3d 72, 74 (C.A.2 1996).

Plaintiffs' Fourth Amended Complaint fails this test. Their threadbare allegations regarding Mr. Ziglar fail to allege "enough facts" regarding Mr. Ziglar's personal involvement in constitutional wrongdoing alleged to state a claim for relief against him. The District Court rightly dismissed the Fourth Amended Complaint as to Mr. Ziglar.

As noted above, plaintiffs' brief in this court, at pages 10-12, does the best it can to muster all the averments of fact to establish the plausibility as to Mr. Ziglar of their substantive due process cause of action, Claim One, and their free exercise cause of action, Claim Three. But those pages of plaintiffs' brief demonstrate that, by plaintiffs' own analysis of the Fourth Amended Complaint, they have missed the mark.

Here is ***all*** they alleged against Mr. Ziglar as to those claims: (1) that Mr. Ziglar, along with Ashcroft and Mueller, received daily reports about arrest and detentions that "made [him] aware" that "***Ashcroft's*** plan" was resulting in the "arrest and detention of" Arab and South Asian Muslims "without any non-discriminatory reason to suspect them of terrorism," Pl. Br., at 11 (emphasis added); (2) that ***Ashcroft*** "ordered Mueller and Ziglar to "hold until cleared" 9/11 detainees whom, Mr. Ziglar knew, had been "accused only of civil immigration violations," *ibid.;* and (3) that Mr. Ziglar "attended many of [the] meetings" at which ***Ashcroft and Mueller*** **"**mapped out ways to exert maximum pressure on the detainees," "made a plan to restrict the detainees' access to the outside world," and "made a plan" to "spread misinformation among law enforcement" that the "detainees were suspected terrorists who 'needed to be encouraged *in any way possible* to cooperate." *Id.* at 11-12 (emphasis in original).

In testing the sufficiency of these averments, the court should bear in mind the injunction of *Bell Atlantic Corporation v. Twombly.* 550 U.S. 544, 557 (2007), that FED. RULE CIV. PRO. 8(a) demands, "at the

pleading stage" that the complaint contain "allegations plausibly suggesting" the claim at issue, and "not merely consistent with" it. *Id.* at 557. Thus the complaint, the Court in *Twombly* continued, must plead "enough facts to state a claim for relief that is plausible on its face." *Id.* at 570. "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.' " *Iqbal,* 556 U.S. at 678 (quoting *Twombly,* 550 U.S. at 557).

First, the fact Mr. Ziglar was "made aware" that Ashcroft's plan was resulting in the detention of persons whom the government had no non-discriminatory reason to suspect of terrorism falls short of the mark. Assuming the averment to be true — and as discussed below, in light of the *OIG Report* this court need not, and should not, make that assumption — it provides no plausible basis upon which to state a claim against Mr. Ziglar: his "awareness" that the Attorney General had formulated a policy that had this effect does not state a claim that Mr. Ziglar violated the Constitution.

Second, the allegation that Ashcroft ordered Mr. Ziglar (and Mr. Mueller) to "hold and detain until cleared" does not suffice to state a plausible claim against Mr. Ziglar. Plaintiff must show that Mr. Ziglar personally participated in the formulation or implementation of this policy and that the policy itself violated the Constitution. This averment states no more than that Mr. Ashcroft issued the order: whether Mr. Ziglar carried out that order and how nowhere appears in the Fourth Amended Complaint.

What is more, the *OIG Report* made it clear that Mr. Ziglar strongly opposed the arrest and detention until cleared of such persons. The *OIG Report,* as demonstrated above, contradicts and refutes any allegation that Mr. Ziglar designed this program or willingly implemented it in an unconstitutional fashion. To the contrary, the Inspector General concluded that the Attorney General developed this program and that Mr. Ziglar opposed its implementation and sought to moderate its effects. Plaintiffs would like the court to ignore this aspect of the *OIG Report*, while accepting only those parts that are "consistent" with plaintiffs'

allegations. But this court need not guess at which parts of this report it should consider incorporated by reference into the Fourth Amended Complaint and which parts it should not, especially if it must apply so vague a criterion as whether the passage is "consistent" with the Fourth Amended Complaint. Plaintiffs have made the *OIG Report* a part of the Fourth Amended Complaint, and they must take the bad with the good. When a plaintiff "knowingly chose to characterize the document, without attaching it, in a manner to its liking," the Court may consider the entire document on a FED. RULE CIV. PRO. 12(b)(6) motion. *In re Lyondell Chem. Co.*, 491 B.R. 41, 50 (Bankr. S.D.N.Y. 2013). A moving defendant thus may rely on "extrinsic matter" in instances where "the plaintiff purports to characterize the extrinsic matter in its complaint." *Id.* at 50 n. 48. [2]Plaintiffs' attempt selectively to incorporate the *OIG Report*

[2] *Compare Cortec Industries, Inc. v. Sum Holding L.P.,* 949 F.2d 42, 47 (C.A. 2 1991);*Brass v. American Film Technologies, Inc.,* 987 F.2d 142, 150 (C.A.2 1993) (*dictum*); & *International Audiotext Network, Inc. v. American Telephone & Telegraph Co.,* 62 F.3d 69, 72 (C.A. 2 1995), with *Chambers v. Time Warner, Inc.,* 282 F.3d 147, 153 (C.A. 2 2002).

permits this Court to consider that the entire OIG report in deciding this appeal.

In such circumstances, a federal court "need not feel constrained to accept as truth conflicting pleadings that ... are contradicted either by statements in the complaint itself or by documents upon which its pleadings rely." *In Re Livent, Inc. Noteholders Securities Litigation* 151 F.Supp.2d 371, 405 (S.D.N.Y 2001). *E.g., Hirsch v. Arthur Andersen & Co.,* 72 F.3d 1085, 1095 (C.A.2 1995) (sustaining dismissal of the complaint where "attenuated allegations" supporting a claim "are contradicted both by more specific allegations in the complaint and by facts of which [the court] may take judicial notice"); *Salahuddin v. Jones,* 992 F.2d 447, 449 (C.A. 2 1993)(dismissing claim that is based on "wholly conclusory and inconsistent allegations"); *Rapoport v. Asia Elecs. Holding Co.,* 88 F.Supp.2d 179, 184 (S.D.N.Y. 2000) (granting motion to dismiss where the documents on which plaintiffs' securities fraud claim purport to rely contradict allegations in plaintiffs' complaint); *American Centennial Ins. Co. v. Seguros La Republica, S.A.,* No. 91 Civ. 1235, 1996 WL

304436 at *16 (S.D.N.Y. June 5, 1996)("Allegations are not well pleaded if they are 'made indefinite or erroneous by other allegations in the same complaint[, or] ... are contrary to facts of which the Court will take judicial notice.' ") (quoting *Trans World Airlines, Inc. v. Hughes,* 449 F.2d 51, 63 (C.A. 2 1971)).

The gross inconsistency between plaintiffs' theory of liability in the Fourth Amended Complaint as to Mr. Ziglar, and the conclusions the Inspector General reached in the *OIG Report,* establishes that plaintiffs' allegations have failed to state "plausible" claims.

Third, the allegation that Mr. Ziglar attended "many of the meetings" at which Ashcroft and Mueller allegedly mapped out their wrongful strategy does not state a plausible claim as to Mr. Ziglar. First, an allegation that Ashcroft and Mueller formulated a strategy to exert maximum pressure on detainees does not state a claim. Such a policy could well be constitutional, and the mere allegation of such a plan falls far short of "suggesting" a violation of the Constitution. So, too, a policy of restricting a detainee's access to the outside world, or to spread

misinformation to law enforcement to believe the detainees were terrorists who needed to be encouraged in any way possible to cooperate is merely consistent with the averment of a constitutional wrong, not suggestive of one. As the District Court in this case observed, the defendants had every right to expect that their subordinates and other law enforcement agencies would act lawfully. The government exerts pressure on defendants every day, often maximum pressure, and can plausibly do so in a way consistent with all the requirements of the Constitution. This allegation is perfectly consistent with lawful behavior. It does not suggest unlawful behavior. It fails the *Iqbal* test.

More important, the mere allegation that Mr. Ziglar "attended many of these meetings" does not suffice to state a plausible claim. Plaintiffs have not alleged that he attended any meetings where the participants discussed any of these strategies for dealing with detainees. They have not alleged what Mr. Ziglar did if such discussions did arise, or what steps he took after the meeting to further the strategies. Here, again, the *OIG Report* raises the inference that if Mr. Ziglar did attend a meeting where

the participants discussed these strategies, he nevertheless took steps to see that the policies at issue were carried out in conformity with the Constitution.

Plaintiffs similarly attempt to show that they have pleaded plausible equal protection (Claim Two) and conspiracy (Claim Seven) causes of action against Mr. Ziglar, but they fail here, too. They again cannot meet the *Iqbal* test.

Plaintiffs' Brief in this Court, at page 49, addresses their allegations of "discriminatory intent" against Mr. Ziglar. First, they point to ¶¶ 23 and 62 of the Fourth Amended Complaint, Dkt. No. 726, which they say shows that Mr. Ziglar was part of a small group that mapped out plaintiffs' conditions of confinement, "despite receiving daily reports indicating a lack of evidence connecting these individuals to terrorism." Pl. Br. at 49. But those averments, insofar as they concern what Mr. Ziglar did, allege only that he attended many of the meetings in which Mr. Ashcroft and Mr. Mueller allegedly mapped out this strategy. As noted above, plaintiffs' allegations about the meetings are perfectly consistent with a

constitutional course of action, and therefore do not suggest, an unconstitutional course of action. And the *OIG Report's* conclusions about Mr. Ziglar's conduct flatly contradict the slant plaintiffs try to put on these meetings, at least as far as concerns Mr. Ziglar.

Plaintiffs go so far as to advance the argument that the evidence of the *OIG Report* demonstrating that Mr. Ziglar's "concerns about this process only corroborates his knowing violation of the law." Pl. Br. at 49. That is "damned if you do, damned if you don't" argument: through plaintiffs' peculiar looking glass, Mr. Ziglar faces liability if he acquiesced in the alleged strategy mapped out in the meetings, and faces liability if he opposed carrying out that strategy. Such inconsistent pleadings in fact demonstrate that plaintiffs' claims against Mr. Ziglar are not plausible.

Finally, plaintiffs contend that "Ziglar's discriminatory intent is also suggested by his discriminatory application of the immigration law," citing ¶¶ 58-60 of the Fourth Amended Complaint, Dkt. No. 726. Pl. Br. At 49-50. The allegations of ¶ 58 are pure *respondeat superior.* They claim that the INS failed to follow certain procedures, but do not name any

person who engaged in or directed or acquiesced in this failure, let alone allege that Mr. Ziglar did so. Under *Iqbal,* such an allegation cannot support a *Bivens* claim against him. Paragraph 59 similarly alleges that persons unknown communicated certain facts regarding detention to the plaintiffs, but does not name Mr. Ziglar (or anyone else) as having done so or acquiesced in or directed others to do so. What is more, the averments of ¶ 59 do not come within a mile of alleging discriminatory administration of the immigration laws by Mr. Ziglar.

This leaves the averments of Dkt. No. 726 ¶ 60, which contains six subparts. Most of those deal with allegedly anti-Muslim remarks by Mr. Ashcroft or allegedly anti-Muslim steps taken by that person, or contain allegations of actions taken by unnamed persons phrased in the passive tense, *e.g.,* "these unconstitutional detention policies have not been applied to all noncitizens in the United States alleged to have violated the immigration laws," ¶ 60(b), with no hint as to ***who*** might have applied the law in such an assertedly discriminatory fashion. Only ¶¶ 60(a) and (f) mention Mr. Ziglar by name: (a) lumps him in with Mr. Ashcroft and Mr.

Mueller as an architect of the "hold until cleared" policy, which the *OIG Report* shows Mr. Ziglar opposed and tried to modify and moderate; while (f) slurs Mr. Ziglar with the accusation, totally unsupported by reference to specific facts, that he acted out of his "personal bias against Muslims, South Asians, and Arabs." Without specific allegations demonstrating such prejudice, however, this type of character assassination cannot state a plausible claim, especially because plaintiffs have not pleaded any facts to show that the actions Mr. Ziglar supposedly took because of this bias, as listed in ¶¶ 60(f), violate the Constitution.

With regard to plaintiffs' equal protection claim, the Supreme Court's statement in *Iqbal* bears emphasis: "It should come as no surprise that a legitimate policy directing law enforcement to arrest and detain individuals because of their suspected link to the attacks would produce a disparate, incidental impact on Arab Muslims, even though the purpose of the policy was to target neither Arabs nor Muslims." 556 U.S. at 682. The light this statement casts on the Fourth Amended Complaint in this case shows that plaintiffs' equal protection claims, even if arguably

consistent with a violation of equal protection, do not suggest such a violation, and so do not pass the *Iqbal* test.

Plaintiffs' Fourth Amended Complaint offers conclusions about Mr. Ziglar's supposed prejudice and makes vague and generalized allegations about his participation in various decisions, but one reads it in vain to determine exactly what Mr. Ziglar did or failed to do that violated any of the plaintiffs' substantive due process or equal protection rights as alleged. Plaintiffs have thus failed sufficiently to allege that Mr. Ziglar, through his own actions, may be held liable for any injuries plaintiffs may have suffered. The Fourth Amended Complaint thus fails the test of *Ashcroft v. Iqbal*, because it does not set forth facts making out a "plausible" basis for believing the plaintiffs can prove a legally-sufficient claim against James Ziglar.

With regard to plaintiffs' § 1985 conspiracy claim, setting aside the vague allegations of an agreement among Mr. Ashcroft, Mr. Mueller, and Mr. Ziglar (which themselves are not plausible), plaintiffs have not sufficiently alleged that the goal of any such "agreement" was to

compromise plaintiffs' constitutional rights, let alone to do so with unlawful animus. The law has long been settled: a § 1985 claim requires proof of such an unconstitutional purpose. *E.g., Griffin v. Breckinridge*, 403 U.S. 88, 102 (1971). The plaintiffs have simply failed to allege any facts that support a plausible claim that Mr. Ziglar entered into an agreement with anyone with such a purpose. Their § 1985 cause of action, Claim Seven, flunks the *Iqbal* test as well.

Because the Fourth Amended Complaint treats Mr. Ziglar largely as it treats defendant Ashcroft and Mueller, Mr. Ziglar respectfully adopts and incorporates herein all the arguments made by those defendants in the Ashcroft-Mueller Brief.

CONCLUSION

The judgment of the United States District Court for the Eastern District of New York dismissing the claims against James W. Ziglar in the Fourth Amended Complaint should be affirmed.

Respectfully submitted,

/s/ W A McDaniel, Jr.

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CERTIFICATE OF COMPLIANCE WITH FEDERAL RULE OF APPELLATE PROCEDURE 32(A)

I hereby certify that this brief complies with the requirements of FED. RULE APP. PRO. 32(a)(5) and (6) because it has been prepared in 16-point Baskerville Old Face, a proportionally spaced font.

I further certify that this brief complies with the type-volume limitation of FED. RULE APP. PRO. 32(a)(7)(B) because it contains 5,227 words, excluding the parts of the brief exempted under FED. RULE APP. PROC. 32(a)(7)(B)(iii), according to the count of Microsoft Word.

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