UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

IBRAHIM TURKMEN, et al.,	:	
	:	
Plaintiffs,	:	
	:	02-CV-2307 (JG)(SMG)
v.	:	
	:	
JOHN ASHCROFT, Attorney General of the United States, et al.,	:	**Filed Electronically**
	:	
Defendants.	:	

DEFENDANT JAMES SHERMAN'S MEMORANDUM OF LAW IN SUPPORT OF HIS MOTION TO DISMISS

Defendant James Sherman hereby submits this Memorandum of Law in support of his Motion to Dismiss all claims in the Plaintiff's Fourth Amended Complaint.

I. PROCEDURAL HISTORY

Plaintiffs filed their original Complaint on April 17, 2002, in the United States District Court for the Eastern District of New York. After the United States moved to dismiss on behalf of all defendants, on June 18, 2003, Plaintiffs filed their Second Amended Complaint. Thereafter, the parties filed supplemental briefs in support of and opposing to the motions to dismiss. While the motions were pending, on September 30, 2004, Plaintiffs filed their Third Amended Complaint. Several of the defendants moved to dismiss Plaintiffs' Complaint asserting, *inter alia*, a qualified immunity defense.

On December 3, 2004, this Court denied two of the defendants (Hasty and Zenk) motion to dismiss only as to Plaintiffs' conditions of confinement (Claim 3) and excessive force (Claims 12-16 and 31) claims. Then on June 14, 2006, the district court granted in part and denied in part

the remaining claims in the omnibus motion to dismiss. Several of the individual defendants noticed interlocutory appeals, which were subsequently consolidated.

On December 18, 2009, the U.S. Court of Appeals for the Second Circuit affirmed in part the district court's decision, but vacated the portion of the decision denying dismissal of the conditions of confinement claims on the grounds that an outdated pleading standard was applied, and remanded the case for further proceedings consistent with the new pleading standard articulated by the U.S. Supreme Court in Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007) and Ashcroft v. Iqbal, __ U.S. ___, ___, 129 S.Ct. 1937, 1949 (2009). Turkmen, et al. v. Ashcroft, et al., 589 F.3d 542 (2nd Cir. 2009).

On March 25, 2010, eight individuals moved to intervene and to amend the Third Amended Complaint. On August 26, 2010, this court granted their motion, and on September 13, 2010, the Fourth Amended Complaint ("Complaint") was filed. For reasons articulated below, Defendant Sherman requests this Court to dismiss all claims against him in this Complaint.

II. FACTUAL HISTORY

On September 11, 2001, the al Qaeda terrorist network hijacked four commercial airplanes and crashed two of the planes into the Twin Towers of the World Trade Center and one plane into the Pentagon; the fourth plane crashed in rural Pennsylvania. Thousands of people were killed and injured. Hamdi v. Rumsfeld, 542 U.S. 507, 510 (2004).

These attacks gave rise to a variety of urgent responses. One of those responses was by Congress when it passed a resolution authorizing the President to "'use all necessary and appropriate force against those nations, organizations, or persons he determines planned,

authorized, committed or aided the terrorist attacks' or 'harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.'" Hamdi, 542 U.S. at 510 (quoting Authorization for Use of Military Force, Pub. L. 107-40, 115 Stat. 224 (2001)). One extension of the broad authority given the Executive Branch was a directive from the Attorney General for federal law enforcement officials "to use 'every available law enforcement tool' to arrest persons who 'participate in, or lend support to, terrorist activities.'"[1]

In the furtherance of executing that order, federal officials arrested and detained many people in the New York metropolitan area for violating federal immigration laws. OIG Report at p. 1. Between September 11, 2001, and August 6, 2002, 738 aliens were arrested and placed on an "INS Custody List" due to the FBI's suspicion that the aliens either might have a connection to the terrorist attacks or "because the FBI was unable, at least initially, to determine whether they were connected to terrorism." OIG Report at p. 2. The federal Bureau of Prisons ("BOP"), the entity responsible for the detainees once they were arrested and processed, determined early on to impose special conditions on the detainees. Id. at 19-20. These "included housing the detainees in the administrative maximum ("ADMAX") Special Housing Unit ("SHU"), implementing a communications blackout, and classifying the detainees as Witness Security ("WITSEC") inmates." Id. at 19. BOP imposed these conditions out of concern of the potential security risk of these detainees, coupled with the fact that "the FBI provided so little information about the detainees" that BOP "did not really know whom the detainees were." Id. Thus, BOP

[1] See The Department of Justice, Office of the Inspector General (OIG) Report ("OIG Report") released June 2, 2003, at p. 1.

decided to "err on the side of caution and treat the September 11 detainees as high-security detainees." Id.

The detainees sent to BOP's Metropolitan Detention Center ("MDC") were initially "subjected to the most restrictive conditions of confinement authorized by BOP policy, including a 'lockdown' for 23 hours a day, restrictive escort procedures for all movement outside of the ADMAX SHU cells, and tight limits on the frequency and duration of legal telephone calls." Id. at p. 112. According to the Director of BOP, this determination "resulted from the FBI's assessment and was not the BOP's 'call.'" Id. James Sherman was the Associate Warden for Custody in the BOP's facility in Brooklyn, NY, also known as the MDC, during the relevant time period. Complaint, ¶ 26.

III. ARGUMENT

In their putative class action Complaint, the eight Plaintiffs allege that they were arrested following the September 11, 2001, terrorist attacks, treated as "of interest" to the government's terrorism investigation and placed in detention at the MDC where they were housed in the ADMAX SHU. Plaintiffs assert that in the ADMAX SHU, they were subjected to a variety of abuses that amounted to violations of a number of their constitutional and statutory rights. Plaintiffs assert seven (7) causes of action against all of the defendants. The claims are as follows:

1. Claim One is a Fifth Amendment Due Process claim based on Plaintiffs' claims that Defendants adopted, promulgated and implemented the policy and practice that subjected Plaintiffs to unreasonable detention and to outrageous, inhumane, punitive and degrading conditions of confinement;

2. Claim Two is a Fifth Amendment Equal Protection claim based on the imposition on Plaintiffs of harsh treatment not accorded similarly-situated non-citizens based on race, religion, and national origin;

3. Claim Three is a First Amendment claim based on Plaintiffs' claims that Defendants adopted, promulgated and implemented policies and practices intended to deny Plaintiffs the ability to practice and to observe their religion;

4. Claim Four is a First Amendment claim based on Plaintiffs' claims that Defendants adopted, promulgated and implemented policies and practices under which Plaintiffs were subjected to a "communications blackout" that interfered with their access to family, lawyers and the courts;

5. Claim Five is a Fifth Amendment Due Process claim based on the same allegations that are alleged to support Claim Four;

6. Claim Six is a Fourth and Fifth Amendment claim based on Plaintiffs' claims that Defendants engaged in excessive and unreasonable strip searches that had no legitimate purpose and were conducted in a deliberately humiliating manner; and,

7. Claim Seven is a statutory claim alleging that the Defendants conspired to violate Plaintiffs' civil rights.

For the reasons articulated below, this Court should dismiss all claims as alleged against Sherman.

A. Plaintiffs' Fifth Amendment Due Process Claim (Count I) Should Be Dismissed For Lack of Personal Involvement and, Alternatively, Because Sherman Is Entitled To Qualified Immunity.

1. Plaintiff's Fifth Amendment Due Process Claim (Count I) Does Not Satisfy the Personal Involvement Pleading Standard for Bivens Claims.

In order to assert a Bivens claim against a government official, a Plaintiff must establish that the officials were personally involved in the challenged conduct. The doctrine of respondeat superior does not apply to government officials; each government official, regardless of position or title, "is only liable for his or her own misconduct." Iqbal, 129 S.Ct. at 1949; see also Back v. Hasting on Hudson Free School Dist., 365 F.3d 107, 127 (2nd Cir. 2004); Ford v. Moore, 237

F.3d 156, 162-63 (2d Cir. 2001); Richardson v. Goord, 347 F.3d 431, 435 (2nd Cir. 2003) ("'linkage in the prison chain of command' is insufficient" for a Bivens claim); Poe v. Leonard, 282 F.3d 123, 140 (2nd Cir. 2002). Mere knowledge of discriminatory actions by subordinates does not impose constitutional liability upon the supervisor. Iqbal, 129 S.Ct. at 1949. Moreover, where the claims are discrimination in contravention of the First and Fifth Amendments, as in here, the plaintiffs must plead and prove that the defendant "acted with a discriminatory purpose." Iqbal,129 at S.Ct. at 1948 (citations omitted).

In 1995, the Second Circuit determined that a supervisory official was personally involved when that official:

> (1) participated directly in the alleged constitutional violation;
> (2) failed to remedy the violation after being informed of the violation through a report or appeal;
> (3) created or allows the constitution of a policy or custom under which unconstitutional practices occurred;
> (4) acted with gross negligence in supervising subordinates who commit the wrongful acts; or
> (5) exhibited deliberate indifference to the rights of inmates by failing to act on information indicating that unconstitutional acts were occurring.

Colon v. Coughlin, 58 F.3d 865, 873 (2nd Cir. 1995) (citations omitted). Applying Iqbal, several district courts have decided that or questioned whether only factors (1) and (3) pass the "active conduct" standard enunciated in Iqbal. See Bellamy v. Mount Vernon Hospital, 2009 WL 1835939, at *5 (S.D.N.Y. June 26, 2009) aff'd without opinion 2010 WL 2838534 (2nd Cir. July 21, 2010); Bellezza v. Holland, 2010 WL 3000184 (S.D.N.Y. July 30, 2010); but see D'Olimpio v. Crisafi, 2010 WL 2428128 (S.D.N.Y. June 15, 2010) and Qasem v. Toro, 2010 WL 3156031 (S.D.N.Y. August 10, 2010).

In addition, under Twombly and Iqbal, “threadbare recitals of the elements of a cause of action” supported by conclusory allegations are not entitled to be assumed as true for purposes of a motion to dismiss. Iqbal, 129 S.Ct. at 1949. Also, plaintiffs cannot evade the requirement to plead personal involvement by alleging vague and conclusory references to undefined "policies and practices." See Graham v. Henderson, 89 F.3d 75, 79 (2nd Cir. 1996) ("wholly conclusory" allegations are inadequate to state a constitutional claim); Sommer v. Dixon, 709 F.2d 173, 175 (2nd Cir.), cert. denied, 464 U.S. 857 (1983) ("[A] complaint containing only conclusory, vague, or general allegations of a conspiracy to deprive a person of constitutional rights cannot withstand a motion to dismiss."); Leeds v. Meltz, 85 F.3d 51, 53 (2nd Cir. 1996) ("While the pleading standard is a liberal one, bald assertions and conclusions of law will not suffice."). "[W]holly conclusory" allegations "can be dismissed on the pleadings alone." Graham, 89 F.3d at 79; see also Sommer, 709 F.2d at 175 ("[A] complaint containing only conclusory, vague, or general allegations of conspiracy to deprive a person of constitutional rights cannot withstand a motion to dismiss."); Ying Jing Gan v. City of New York, 996 F.2d 522, 536 (2nd Cir. 1993) (granting motion to dismiss due to failure to plead personal involvement where the complaint "contained only conclusory and speculative assertions" that subordinate "engaged in the alleged conduct 'pursuant to the practice, custom, policy and particular direction of'" supervisory defendant).

Without question, Plaintiffs fail to plead the necessary personal involvement by Sherman to support their claims against him. Of the 306 paragraphs that comprise Plaintiffs’ Complaint, Sherman is named in only 13 of them, and one of them is where he is identified as a party. See

Complaint, ¶ 26. In 11 of the paragraphs, Sherman is named along with other defendants concerning certain conditions of confinement. See Complaint, ¶¶ 69, 73-76, 79, 97, 126, 129, 130, and 132. In the last paragraph in which Sherman is mentioned, he is named as part of a "conspiracy" to violate Plaintiffs' civil rights. See Complaint, ¶ 305. As explained below, under Iqbal and Twombly, such allegations are not sufficient to demonstrate the necessary personal involvement to support Bivens claims against Sherman.

Plaintiffs allege that Sherman violated their Fifth Amendment Right to Due Process in several ways. They allege that he knew that the FBI had no information connecting the detainees to terrorism, but that he continued to hold the detainees in restrictive confinement without any individualized assessment even though he knew that the detention without an individualized assessment was unlawful. See Complaint, ¶¶ 69, 73 - 74. They further allege that Sherman approved and implemented policies and conditions created by his subordinates in order to carry out the policy of several high-ranking federal officials, co-defendants former U.S. Attorney General John Ashcroft, FBI Director Robert Mueller and former Commissioner of the Immigration and Naturalization Service James Ziglar, to subject the detainees to harsh treatment designed to obtain their cooperation. See Complaint, ¶¶ 75 - 76. None of these allegations meet the standard set in Iqbal of alleging facts to show actual unconstitutional misconduct by Sherman. Rather, they are simply boiler-plate generalized conclusory statements designed to attempt meet the necessary elements of this cause of action.

To the extent Plaintiffs rely on the Department of Justice Office of the Inspector General (OIG) Report, released June 2, 2003, and the Supplemental OIG Report, released in December

2004, ("OIG Reports"), attached to and incorporated into Plaintiffs' Complaint, to support their claims against Sherman, those too fail to demonstrate sufficient personal involvement by Sherman. Sherman is not mentioned in either of these OIG Reports, supporting the conclusion that he lacks the necessary personal involvement for these Bivens claims.[2]

For those foregoing reasons, Count I against Sherman should be dismissed.

2. Alternatively, Sherman Is Entitled To Qualified Immunity As to Count I

Qualified immunity protects government officials unless their actions violate "clearly established statutory or constitutional rights of which a reasonable person would have known." Behrens v. Pelletier, 516 U.S. 299, 305 (1996); Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). Qualified immunity balances two important interests –"the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably." Pearson v. Callahan, ___ U.S. ____, 129 S.Ct. 808, 815 (2009).

When ruling on a motion to dismiss for qualified immunity, courts apply a two-pronged analysis: 1) whether the allegations in the complaint, viewed in the light most favorable to the plaintiff, state a claim for a constitutional violation by the government official; and 2) whether

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[2] Plaintiffs expressly incorporated these Reports in their Complaint. See notes 1 and 2 of the Complaint. The Plaintiffs then assert that they adopt these Reports only to the extent they support and not contradict the allegations in the Complaint. Id. Plaintiffs may not select which portions of the Reports for this Court to consider as true. This Court looks at all four corners of documents attached to or otherwise incorporated into a complaint and to the extent the documents contradict the allegations in the complaint, the court need not accept as true the allegations in the complaint. See In Re Lois/USA, Inc., 264 B.R. 69, 90 (S.D.N.Y. 2001) (citing Barnum v. Millbrook Case Limited Partnership, 850 F. Supp. 1227, 1232 (S.D.N.Y. 1994) aff'd without opinion 43 F.3d 1458 (2nd Cir. 1994)).

the particular right in question was "clearly established" at the time of the event. Id., 129 S.Ct. at 818. Overruling the two-step process mandated in Saucier v. Katz, 533 U.S. 194 (2001), the Pearson Court held that it was at the lower court's discretion to determine which of the two prongs should be addressed first in light of the particular facts and circumstances, but that the courts were not prevented from following the Saucier procedure. Id.; see also Travella v. Town of Wolcott, 599 F.3d 129, 133 (2nd Cir. 2010).

The Second Circuit has held that a right is clearly established if (1) the law is defined with reasonable clarity, (2) the Supreme Court or the Second Circuit has recognized the right, and (3) "a reasonable defendant [would] have understood from the existing law that [his] conduct was unlawful." Anderson v. Recore, 317 F.3d 194, 197 (2nd Cir. 2003) (quoting Young v. County of Fulton, 160 F.3d 899, 903 (2nd Cir. 1998)). A court does not make a generalized, "abstract legal" inquiry into whether the plaintiff has any constitutional rights, Gittens v. LeFevre, 891 F.2d 38, 42 (2nd Cir. 1989), but instead asks the "more particularized" question of whether, under the particular circumstances of the case, a defendant could have reasonably believed that his acts were lawful. Saucier, 533 U.S. at 202. If at the time the official acted, "officers of reasonable competence could disagree on the legality of [the] actions," qualified immunity applies and the suit must be dismissed. Anderson, 317 F.3d at 197; Dunahy v. Buscaglia, 134 F.3d 1185, 1190 (2nd Cir. 1998).

Plaintiffs cannot satisfy this test. They fail to allege that Sherman committed any violations of clearly established law. Accordingly, Plaintiffs' claims must be dismissed under the doctrine of qualified immunity for failure to state a claim.

A subordinate official is not liable for constitutional violations that occur while following his superior's orders, unless the order was "facially invalid." Varrone v. Bilotti, 123 F.3d 75, 81-82 (2nd Cir. 1997); see also Anthony v. City of New York, 339 F.3d 129, 138 (2nd Cir. 2003); Lauro v. Charles, 219 F.3d 202, 216 n.10 (2nd Cir. 2000); Washington Square Post No. 1212 Am. Legion v. Maduro, 907 F.2d 1288, 1293 (2nd Cir. 1990); cf. Diamondstone v. Macaluso, 148 F.3d 113, 126 (2nd Cir. 1998) (same). "[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, 339 F.3d at 138 (quoting Bilida v. McCleod, 211 F.3d 166, 174-75 (1st Cir. 2000)) (other citations omitted).

For the subordinate official, the test becomes whether "it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." Saucier, 533 U.S. at 202. Where a subordinate official acts pursuant to or executes orders that he reasonably believes in good faith is valid, his actions are "objectively reasonable," and the doctrine of qualified immunity shields him from claims for damages. Anthony, 339 F.3d at 138; see also Sec. & Law Enforcement Employees v. Carey, 737 F.2d 187, 211 (2nd Cir. 1984) ("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'") (quoting McCann v. Coughlin, 698 F.2d 112, 124 (2nd Cir. 1983)).

In this case, the Complaint fails to allege facts to support the premise that Sherman acted in bad faith or otherwise believed his actions were unlawful, Plaintiffs' conclusory allegations to

the contrary. See Complaint, ¶¶ 69, 73 - 74. Moreover, the OIG Reports incorporated into the Complaint support Sherman's contention that he is entitled to qualified immunity. As the OIG Reports make clear, Sherman's superiors and other higher-level federal officials determined the manner by which to house the Plaintiffs at the MDC, and they did so after weighing several potential security risks in the aftermath of the September 11 attacks. See OIG Reports at 19, 115 n. 91. The OIG Reports is devoid of any mention of any involvement by Sherman with the decision-making process for any of these orders. The OIG Reports also concluded that his superiors and other higher-level federal officials instructed Sherman to maintain the detention of Plaintiffs until told those persons were cleared of any terrorist activities by the FBI. Id. at 113, 116. Moreover, in light of the post- September 11 circumstances surrounding the detention of Plaintiffs, it was reasonable for Sherman to rely on the validity of his superiors' and other high-level federal officials' orders regarding the confinement of the Plaintiffs. For all these reasons, the doctrine of qualified immunity applies, and these claims against Sherman should be dismissed.

B. Plaintiffs' Fifth Amendment Equal Protection Claim (Count II) Should Be Dismissed For Lack of Personal Involvement and, Alternatively, Because Sherman Is Entitled To Qualified Immunity.

For the same reasons that Count I should be dismissed, this Court should dismiss Count II against Sherman.

In addition, Plaintiffs fail to allege facts to support the necessary element of a Fifth Amendment Equal Protection claim – discriminatory intent. Iqbal, 129 S.Ct. at 1948 (citing Washington v. Davis, 426 U.S. 229, 240 (1976)). This requires more than "intent as volition or

intent as awareness of consequences . . . it involves a decision maker's undertaking a course of action 'because of,' not merely 'in spite of'' [the action's] adverse effects upon an identifiable group." Iqbal, 129 S.Ct. at 1948 (citing Personnel Administrator of Mass. v. Feeney, 442 U.S. 256, 279 (1979)). Facts therefore must be plead to show that the federal official adopted and implemented the detention policies for the purpose of discriminating on account of a protected class, and not for a neutral, investigative reason. Id.

Even if Sherman could be held liable for the acts of others, which we contend he cannot, Plaintiffs do not allege any facts that, if true, show that Sherman approved or implemented confinement policies because of an intent to discriminate against the detainees on account of their national origin or any other protected class. Rather, the facts demonstrate otherwise – that Sherman carried out orders implemented by higher-level federal officials because of national security concerns after the September 11 attacks. Therefore, because there are no facts alleged that meet the necessary intent element, this claim must be dismissed against Sherman.

Even if Sherman had played a role in creating the detention and confinement polices vis-à-vis Plaintiffs, which we contend Plaintiffs' Complaint does not so allege, a classification of aliens based upon nationality satisfies equal protection where, as here, there is a "facially legitimate and bona fide reason" for the classification. The OIG Reports, incorporated into Plaintiffs' Complaint, supplies the legitimate rationale for the classification – the investigation into the September 11 attacks that were conducted by men of Middle Eastern descent. OIG Reports, pp. 2-3; Iqbal, 129 S.Ct. at 1951 (because the September 11 attacks were perpetrated by 19 Arab Muslim hijackers 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"). Nationality distinctions have long been a fact of life in immigration law. See Harisiades v. Shaughnessy, 342 U.S. 580, 597 (1952) (Frankfurter, J., concurring); Fiallo v. Bell, 430 U.S. 787, 792 (1977); Matthews v. Diaz, 426 U.S. 67, 78-80 (1976); see also Narenji v. Civiletti, 617 F.2d 745, 746-47 (D.C. Cir. 1980), cert. denied, 446 U.S. 957 (1980) (holding that regulation requiring all immigrant Iranian post-secondary school students to provide information as to their residence and immigration status has a rational basis and is constitutional). Because of the "changing world conditions" occasioned by the events of September 11, see Diaz 426 U.S. at 81, the United States had an entirely legitimate interest in treating some illegal aliens differently from others with respect to the length of their detentions for the purpose of investigating their backgrounds.

Accordingly, Plaintiffs fail to state a claim under the Equal Protection Clause against Sherman and this claim should be dismissed.

C. Plaintiffs' First Amendment Claim, Free Exercise of Religion (Count III), Should Be Dismissed.

Plaintiffs assert that Sherman and all other defendants violated their constitutional rights under the First Amendment by intentionally or recklessly interfering with their free exercise of religion. See Complaint, ¶¶ 284 – 287. Their claim against Sherman, however, is supported by the allegations within one paragraph, ¶ 132. There, Plaintiffs allege that a written MDC policy that had been created by others, defendants Cuciti and Lopresti, deliberately interfered with Plaintiffs' ability to keep anything, including a Koran, in their cell for a period of the time while

they were in detention. See Complaint, ¶ 132. Sherman allegedly approved this policy, as did his direct superior, then Warden Hasty (also a defendant in this case).[3] For the same reasons as in Section III.A.1, under Iqbal, Plaintiffs fail to allege sufficient personal involvement by Sherman for their Bivens claim to survive a motion to dismiss. Moreover, even if this Court finds otherwise, Sherman would be entitled to qualified immunity, as explained in Section III.A.2, because he was a subordinate official approving policies created by others under the orders of higher-level federal officials, and there are no facts alleged that, if proven, could show that he acted in bad faith or did not have a reasonable belief that the orders were lawful.

D. Plaintiffs' First Amendment Claim, Communications Blackout and Interference with Counsel (Count IV) Should Be Dismissed.

Plaintiffs also claim that Sherman violated their right to obtain access to legal counsel and to petition the courts for redress of their grievances in violation of their First Amendment rights. Complaint, ¶ 290. They rely on one factual allegation to support this claim against Sherman. See Complaint, ¶ 79. In that allegation, Plaintiffs claim that Sherman's superior, Hasty, implemented higher-level federal officials' policy regarding access to counsel, and that the written policy created by Lopresti and Cuciti allegedly was approved by Hasty and Sherman. Id. As with the other claims, under the pleading standard for Bivens claims enunciated in Iqbal, this claim against Sherman must fail because it does not allege the requisite threshold of personal involvement by Sherman. See Section III.A.

Moreover, Plaintiffs fail to allege facts sufficient to show that Sherman could not have

[3] Although Plaintiffs allege that verbal and physical abuse was inflicted on them in order to deny them the ability to practice and observe their religion, Complaint ¶ 286, they do not allege that

reasonably believed in good faith that the instructions from his superior and the higher-level federal officials were lawful in light of the circumstances that gave rise to the detention. Anthony, 339 F.3d at 138. Therefore, even if this Court determines that Plaintiffs' claim against Sherman is sufficiently pled to meet the Iqbal standard, Sherman is entitled to qualified immunity.

Finally, this claim is premised on a "communications blackout" that lasted until mid-October 2001, approximately one month after the detention process began, that allegedly interfered with their access to family, lawyers and the courts. See Complaint, ¶¶ 79, 294. Plaintiffs, however, fail to allege an essential element of an access claim, the underlying cause of action and its lost remedy. Christopher v. Harbury, 536 U.S. 403, 415-416 (2002) (in an backward-looking access claim, the underlying cause of action and its lost remedy "must be addressed by allegations in the complaint sufficient to give fair notice to a defendant") (citation omitted); see also Lewis v. Casey, 518 U.S. 343, 353 (1996) (in forward-looking access claims, plaintiffs must identify a nonfrivolous underlying claim and a proposed remedy); Morgan v. Montanye, 516 F.2d 1367 (2nd Cir. 1975). Their claim against Sherman therefore must be dismissed.

E. Plaintiffs' Fifth Amendment Claim, Communications Blackout and Interference with Counsel (Count V) Should Be Dismissed.

In addition to their First Amendment claim based on the "communications blackout" to family and counsel, Plaintiffs assert that the adoption, promulgation and implementation of the policy and practice under which they were subjected to these communications blackout also

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Sherman engaged in this alleged abuse.

violated their Fifth Amendment right to Due Process. See Complaint, ¶ 294. For the reasons explained in Section III.D, this claim against Sherman also must be dismissed.

Also, along with monetary damages, Plaintiffs seek declaratory and other relief from the Court for the alleged interference with counsel. See Complaint, ¶ 295. Because Plaintiffs are suing Sherman and all other defendants in their individual capacity, this requested relief is not possible, and it should be struck from the Complaint. See e.g. Boddie v. New York State Div. of Parole, 2009 WL 1033786, at *6 (E.D.N.Y. April 17, 2009) (individuals sued in their individual capacities do not have the power or authority to effectuate a court order granting prospective declaratory or injunctive relief).

F. Plaintiffs' Fourth and Fifth Amendment Claim, Excessive and Unreasonable Strip-Searches (Count VI) Should Be Dismissed.

Plaintiffs allege that the defendants subjected Plaintiffs to excessive and unreasonable strip-searches with no rational relation to a legitimate penological purpose and by doing so, intentionally or recklessly violated Plaintiffs' right to be free of unreasonable searches in violation of their Fourth Amendment rights. See Complaint ¶¶ 297-300. They further allege that the creation and approval of the policy and practice under which Plaintiffs were strip-searched violated their right to be free from punishment under the Due Process Clause of the Fifth Amendment. See Complaint ¶ 301. Plaintiffs, however, do not allege any facts that reflect any involvement by Sherman in the strip-searches or that he created, approved or implemented policies and procedures relating to those strip-searches. Plaintiffs simply lump Sherman in with the rest of the defendants when asserting this claim. For the reasons explained in Section III.A,

Count VI against Sherman should be dismissed because Plaintiffs have failed to meet the pleading standard under Iqbal to support a Bivens claim against Sherman.

Even if Plaintiffs had amended their complaint so as to allege facts reflecting Sherman's personal involvement in the alleged misconduct, Sherman would be entitled to qualified immunity, see Section III.B, because the acts as alleged, do not demonstrate a violation of a clearly established constitutional right. See e.g. Miller v. Bailey, 2008 WL 1787692, at *8 (E.D.N.Y. April 17, 2008) (strip searches performed in front of other staff not constitutionally defective); Harris v. City of New York, 2003 WL 554745, at *4 (S.D.N.Y. Feb. 26, 2003) (prisoner possesses only limited right of bodily privacy and routine visual body cavity searches after contact visits with people outside the institution are not per se unreasonable); Hollgarth v. Dawson, 2007 WL 2812151, at *16 (C.D.Ill. Sept. 19, 2007) (verbal harassment and intimidation during strip searches did not give rise to an Eight Amendment violation); Omar v. Casterline, 288 F. Supp. 2d 775 (W.D.La. 2003) (repeated strip searches based on safety and security concerns do not violate the Fifth Amendment despite conducted on occasion by female officers where observing officers laughed at him while being searched) (citing Oliver v. Scott, 276 F.3d 736, 745 (5th Cir. 2002)).

G. Plaintiffs' Section 1985 Claim, Conspiracy to Violate Plaintiffs' Civil Rights (Count VII), Should Be Dismissed.

Plaintiff's final claim against all the defendants is a statutory one, a claim that the defendants conspired with each other to implement a policy and practice to violate Plaintiffs'

civil rights. See Complaint ¶¶ 303-306. This Court should dismiss this claim against Sherman because it fails to establish the necessary elements of the claim.

To state a claim under Section 1985(3), a plaintiff must allege (1) a conspiracy; (2) for the purpose of depriving a person or class of person of the equal protection of the laws; (3) an overt act in furtherance of the conspiracy; and (4) an injury to the plaintiff's person or property, or a deprivation of a right or privilege of a citizen of the United states. Thomas v. Roach, 165 F.3d 137, 146 (2nd Cir. 1999). A conspiracy is an agreement between parties where one acts in furtherance of the object of the conspiracy and each conspirator has knowledge of the scope and nature of the agreement. Dove v. Fordham Univ., 56 F. Supp. 2d 330, 335 (S.D.N.Y. 1999). To state a Section 1985 conspiracy claim, the plaintiff must also show that the conspiracy was motivated by "some racial, or perhaps otherwise class-based, invidious discriminatory animus behind the conspirators' actions." Morpurgo v. Inc. Village of Sag Harbor, 697 F. Supp. 2d 309, 339 (E.D.N.Y. 2010) (citing Mian v. Donaldson, Lufkin & Jenrette Sec. Corp., 7 F.3d 1085, 1088 (2nd Cir. 1993)). This claim also must be alleged with specificity, as bare claims of an illegal agreement, supported only by allegations of conduct easily explained as individual action, is insufficient to survive a motion to dismiss. See Iqbal v. Hasty, 490 F.3d 143, 177 (2nd Cir. 2007), rev'd on other grounds sub nom. Iqbal, 129 S.Ct. at 1954; see also Gyadu v. Hartford Ins. Co., 197 F.3d 590, 591 (2nd Cir. 1999). Plaintiffs must "make an effort to provide some details of time and place and the alleged effects of the conspiracy ... [including] facts to demonstrate that the defendants entered into an agreement, express or tacit, to achieve the unlawful end." Warren v. Fischl, 33 F. Supp. 2d 171, 177 (E.D.N.Y. 1999) (citations omitted).

Here, Plaintiffs do not allege anything other than conclusory and general allegations to support their claim. There are no facts alleging a meeting of the minds to enter into an agreement to conspire to deprive Plaintiffs' their civil rights, much less facts demonstrating that Sherman acted with discriminatory animus. As such, this claim against Sherman should be dismissed. Ciambriello v. County of Nassau, 292 F.3d 307, 325 (2nd Cir. 2002); X-Men Sec., Inc. v. Pataki, 196 F.3d 56, 71 (2nd Cir. 1999).

H. Plaintiffs' Claims Should Further Be Dismissed for the Reasons Set Forth in Other Defendant's Briefs.

Sherman's arguments are not intended to be read as inconsistent with the arguments raised in co-defendants' briefs. Moreover, Sherman incorporates and adopts herein the arguments that form the bases of his co-defendants' motions to dismiss.

IV. CONCLUSION

For the foregoing reasons, Sherman requests this Court to dismiss all claims against Sherman.

Dated: Washington, D.C.
November 12, 2010

Respectfully submitted,

/s/ Debra L. Roth
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CERTIFICATE OF SERVICE

I hereby certify that on November 12, 2010, I caused a true copy of DEFENDANT JAMES SHERMAN'S MOTION TO DISMISS and MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT JAMES SHERMAN'S MOTION TO DISMISS to be served via ECF to the following parties of record:

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