UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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

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**DEFENDANT WARDEN MICHAEL ZENK'S MEMORANDUM OF LAW IN SUPPORT OF HIS MOTION TO DISMISS PLAINTIFFS' FOURTH AMENDED COMPLAINT**

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Dated: November 12, 2010

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**DEFENDANT MICHAEL ZENK'S MEMORANDUM OF LAW IN SUPPORT OF HIS MOTION TO DISMISS THE FOURTH AMENDED COMPLAINT**

Defendant Michael Zenk ("Zenk" or "Warden Zenk") respectfully submits this memorandum of law in support of his motion to dismiss each and every claim for relief in the Fourth Amended Complaint (the "Complaint") for failure to state a claim upon which relief can be granted, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure.

## PRELIMINARY STATEMENT

Warden Zenk is the former Warden of the Metropolitan Detention Center ("MDC") in Brooklyn, New York. Warden Zenk assumed his role as Warden of the MDC on **April 22, 2002**. As a threshold matter, the claims asserted against Warden Zenk by six of the eight plaintiffs fail for the simple reason that those plaintiffs were either released from the MDC's administrative segregation unit prior to Warden Zenk's tenure or were never housed at the MDC at all.

With respect to the constitutional claims raised by the remaining two plaintiffs, those claims must be dismissed because plaintiffs do not plead any specific factual allegations arising after April 22, 2002 that implicate Warden Zenk in the alleged constitutional violations. Following the Supreme Court's decision in Ashcroft v. Iqbal, Warden Zenk cannot be held liable for allegedly unlawful acts absent specific factual allegations demonstrating his direct personal involvement in those acts. Plaintiffs' failure to demonstrate Warden Zenk's personal involvement renders their constitutional claims against him unsustainable.

Similarly, plaintiffs' claim for conspiracy pursuant to 42 U.S.C. § 1985(3) should be dismissed because the Complaint fails to allege Warden Zenk's involvement in any conspiracy or agreement to violate plaintiffs' rights.

## RELEVANT FACTUAL BACKGROUND

### I. The Parties

Plaintiffs' claims arise out of their confinement following their arrest and detention in the weeks following the tragic events of September 11, 2001. Plaintiffs Ibrahim Turkmen ("Turkmen") and Akhil Sachdeva ("Sachdeva") were detained at the Passaic County Jail in New Jersey. Compl. ¶¶ 255, 272. Plaintiffs Ahmer Iqbal Abbasi ("Abbasi"), Anser Mehmood ("Mehmood"), Benamar Benatta ("Benatta"), Ahmed Khalifa ("Khalifa"), Saeed Hammouda ("Hammouda"), and Purna Raj Bajracharya ("Bajracharya" and together with Turkmen, Sachdeva, Abbasi, Mehmood, Benatta, Khalifa and Hammouda, collectively, the "plaintiffs") were detained in the Administrative Maximum ("ADMAX") Special Housing Unit ("SHU") at the MDC in Brooklyn. Id. at ¶¶ 145, 163, 175, 204, 218, 234.

Plaintiffs interpose claims against various government officials, including: the former Attorney General of the United States; the Director of the Federal Bureau of Investigation; the former Commissioner of the Immigration and Naturalization Service; two former Wardens of the MDC, including Warden Zenk; the former MDC Associate Warden for Custody; a former MDC Captain; and a former MDC Lieutenant.

#### A. Defendant Michael Zenk

Warden Zenk is the former Warden of the MDC. His tenure at the MDC began on April 22, 2002. The Complaint acknowledges that Warden Zenk did not become the Warden of the MDC until the spring of 2002, Compl. ¶¶ 24, 25, and this Court has previously taken

judicial notice of the fact that Warden Zenk's tenure at the MDC began on April 22, 2002. See Turkmen v. Ashcroft, No. 02 Civ. 2307(JG), 2006 WL 1662663, at *23 n.21 (E.D.N.Y. June 14, 2006) ("I note, however, that Zenk was not appointed Warden of the MDC until April 22, 2002."); Elmaghraby v. Ashcroft, No. 04 CV 01809 JG SMG, 2005 WL 2375202, at *27 (E.D.N.Y. Sept. 27, 2005) ("April 22, 2002, [was] the day Zenk became warden."). Warden Zenk left the MDC in April 2005.

With respect to plaintiffs' confinement, the Complaint contains only a single factual allegation regarding Warden Zenk: Plaintiffs allege that Warden Zenk ordered plaintiffs' continuing confinement by directing his "subordinates to ignore BOP regulations regarding detention conditions." Compl. ¶¶ 25, 68.

**B. Plaintiffs**

Plaintiff Ahmer Iqbal Abbasi

Abbasi was arrested on September 25, 2001. Compl. ¶ 142. On September 27, 2001 Abbasi was transported to the MDC and placed in the ADMAX SHU. Id. at ¶ 145. Abbasi was transferred out of the ADMAX SHU on February 14, 2002 -- more than two months before Zenk began his tenure as Warden of the MDC. Id. at ¶ 152. In June of 2002, Abbasi pled guilty to three criminal offenses, including entering into a fraudulent marriage, falsifying a social security card, and credit card fraud. Id. at ¶ 153. Abbasi was deported on August 20, 2002. Id.

Plaintiff Anser Mehmood

Mehmood was arrested on October 3, 2001. Compl. ¶¶ 157-59. Following his arrest, Mehmood was transported to the MDC and housed in the ADMAX SHU on October 4, 2001. Id. at ¶¶ 160-62. Mehmood was transferred out of the ADMAX SHU on February 6,

2002 -- more than two months before Zenk began his tenure as Warden of the MDC. Id. at ¶ 170. On March 29, 2002 Mehmood pled guilty to working with an unauthorized social security number and was deported to Pakistan on May 10, 2002. Id.

Plaintiff Ahmed Khalifa

Khalifa was arrested on September 30, 2001. Compl. ¶¶ 196-97. On October 1, 2001 Khalifa was transported to the MDC. Id. at ¶ 200. Khalifa was subsequently housed in the ADMAX SHU where he remained until he was deported on January 13, 2002 -- more than three months before Zenk began his tenure as warden of the MDC. Id. at ¶¶ 204, 212.

Plaintiff Purna Raj Bajracharya

Bajracharya was arrested on October 25, 2001. Compl. ¶¶ 230-32. On October 27, 2001 Bajracharya was transported to the MDC and housed in the ADMAX SHU. Id. at ¶ 234. Bajracharya was deported on January 13, 2002 -- more than three months before Zenk began his tenure as warden of the MDC. Id. at ¶ 237.[1]

Plaintiff Benamar Benatta

On September 5, 2001, Benatta entered Canada using false documentation and was detained for investigation by Canadian authorities. Compl. ¶¶ 172-73. On September 12, 2001, Canadian authorities transported Benatta back to the United States and into the custody of the INS. Id. at ¶ 173. On September 16, 2001, Benatta was taken to the MDC and housed in the ADMAX SHU where he remained until April 30, 2002 -- barely eight days after Zenk began his tenure as Warden of the MDC. Id. at ¶¶ 174, 188. On December 12, 2001, Benatta was indicted for possession of a false social security card and a false alien

[1] Although the Complaint alleges that Bajracharya was deported on January 13, 2001, it is assumed that this was a typographical error.

registration receipt card. Id. at ¶ 190. In 2006, Benatta was transferred to Canadian custody. Id. at ¶ 192.

Plaintiff Saeed Hammouda

Hammouda was arrested on October 14, 2001. Compl. ¶ 217. Thereafter, Hammouda was transported to the MDC and housed in the ADMAX SHU. Id. at ¶ 218. Hammouda remained in the ADMAX SHU until he was deported on June 14, 2002. Id. at ¶ 227.

Plaintiff Ibrahim Turkmen

Turkmen was arrested on October 13, 2001. Compl. ¶¶ 249-50. Following his arrest, Turkmen was transported to the Passaic County Jail where he remained until February 25, 2002. Id. at ¶¶ 255. There are no allegations that Turkmen had any involvement with or ever came into contact with Warden Zenk.

Plaintiff Akhil Sachdeva

Sachdeva was arrested on December 20, 2001. Compl. ¶ 272. Following his arrest, Sachdeva was transported to the Passaic County Jail where he remained until he was deported on April 17, 2002. Id. at ¶¶ 272, 273. There are no allegations that Sachdeva had any involvement with or ever came into contact with Warden Zenk.

## II. The Allegations Against Warden Zenk

Plaintiffs have included Warden Zenk as a defendant in their seven claims for relief. These claims are summarized and aggregated below:

**A. Constitutional Tort ("Bivens") Claims**

Conditions of Confinement

Plaintiffs claim the conditions of confinement in the ADMAX SHU violated their Fifth Amendment rights. Compl. ¶ 278, 282. Plaintiffs allege that Warden Zenk allowed MDC staff to abuse plaintiffs and ordered that plaintiffs continued to be detained under excessively harsh conditions. Id. at ¶¶ 25, 68. Plaintiffs claim these conditions included extended periods of confinement to their cells, denial of exercise and nutrition, sleep deprivation, arbitrary strip-searches, physical and verbal abuse, communications restrictions, and interference with access to counsel and religious practices. Id. at ¶¶ 5, 103-140. Plaintiffs further allege that they were subjected to these conditions on the basis of their race, religion, and/or ethnic or national original in violation of their right to equal protection. Id. at ¶¶ 7, 282.

Free Exercise of Religion

Plaintiffs allege that all the defendants implemented policies and practices which interfered with their religious practices in violation of plaintiffs' First Amendment rights to the free exercise of religion. Compl. ¶ 286.

Right to Counsel

Plaintiffs claim that all the defendants adopted, promulgated and implemented policies which interfered with plaintiffs' access to their lawyers and the courts, thereby violating plaintiffs' First Amendment and Fifth Amendment rights. Compl. ¶¶ 290, 294.

Strip-Searches

Plaintiffs allege that they were subject to unreasonable strip-searches in violation of their Fourth Amendment rights. Compl. ¶ 299. Plaintiffs contend that all the MDC

defendants were grossly negligent and/or deliberately indifferent in supervising the MDC staff responsible for conducting the strip-searches. Id. at ¶ 300. Plaintiffs also claim that these defendants approved the policies and practices which called for these strip-searches, resulting in a violation of plaintiffs' Fifth Amendment due process rights. Id. at ¶ 301.

**B. Conspiracy to Violate Plaintiffs' Civil Rights**

Plaintiffs claim that Warden Zenk violated 42 U.S.C. § 1985(3) by entering into an agreement with defendants Ashcroft, Mueller, Ziglar, Hasty, Sherman, Lopresti and Cuciti to implement policies and practices pursuant to which plaintiffs were: (a) harassed and abused; (b) subjected to harsh and punitive conditions of confinement; (c) subjected to routine and unreasonable strip-searches; (d) burdened in their exercise of their religion; (e) denied adequate recreation and nutrition; and (f) denied access to counsel and communication with the outside world. Compl. ¶ 305. Further, plaintiffs allege that Warden Zenk conspired to deprive plaintiffs of their Fifth Amendment equal protection rights because of plaintiffs' race, religion, ethnicity and national origin. Id.

## STANDARD OF REVIEW

On a motion to dismiss, a court must accept the well-pled factual allegations in the complaint as true and draw all reasonable inferences in favor of the plaintiff. Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949-50 (2009). However, "the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions." Id. at 1949.

As the Supreme Court explained, to "survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" Id. (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007)). A claim

is facially plausible "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Id. At the motion to dismiss stage, a plaintiff is not "entitled to unlimited favorable inferences." Seymour's Boatyard, Inc. v. Town of Huntington, No. 08-CV-3248 (JG)(AKT), 2009 WL 1514610, at *4 (E.D.N.Y. June 1, 2009).

The plausibility standard requires more than "a sheer possibility that a defendant has acted unlawfully." Iqbal, 129 S. Ct. at 1949. "[W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged-but it has not 'show[n]'-'that the pleader is entitled to relief.'" Id. at 1950 (second alteration in original) (quoting Fed. R. Civ. P. 8(a)(2)).

## ARGUMENT

## POINT I

### ALL CLAIMS ASSERTED BY THOSE PLAINTIFFS NOT HELD IN THE ADMAX SHU AFTER APRIL 22, 2002 SHOULD BE DISMISSED FOR FAILURE TO STATE A CLAIM

All of the claims asserted by plaintiffs Abbasi, Mehmood, Khalifa, Bajracharya, Turkmen, Sachdeva and all similarly situated class members against Warden Zenk should be dismissed because these plaintiffs were not housed at the ADMAX SHU when Warden Zenk assumed his role as Warden of the MDC on April 22, 2002. Indeed, plaintiffs Turkmen and Sachdeva were never housed at the MDC.

Plaintiffs' first, fourth, fifth and sixth claims for relief are brought on behalf of all the MDC plaintiffs "and on behalf of the class against all Defendants." Compl. ¶¶ 277, 289, 293, 298. The second and seventh claims are brought on behalf of all plaintiffs against all defendants. Id. at ¶¶ 281, 304. The third claim is brought by plaintiffs Turkmen, Abbasi,

Mehmood, Benatta, Khalifa and Hammouda against all defendants. Id. at ¶ 285. Plaintiffs allege, inter alia, that their confinement in the ADMAX SHU violated their rights under the First, Fourth and Fifth Amendments of the Constitution. Id. at 277, 281, 285, 289, 293, 298. Plaintiffs also allege that Warden Zenk conspired with the other named defendants to violate plaintiffs' constitutional rights. Id. at ¶ 305.

Plaintiffs Abbasi, Mehmood, Khalifa and Bajracharya cannot demonstrate their entitlement to the requested relief because all four were released from the ADMAX SHU before Warden Zenk began his tenure at the MDC. Warden Zenk became Warden of the MDC on April 22, 2002. Turkmen v. Ashcroft, No. 02 Civ. 2307(JG), 2006 WL 1662663, at *23 n.21 (E.D.N.Y. June 14, 2006); Elmaghraby v. Ashcroft, No. 04 CV 01809 JG SMG, 2005 WL 2375202, at *27 (E.D.N.Y. Sept. 27, 2005); Compl. ¶¶ 24, 25. Abbasi was transferred out of the ADMAX SHU on February 14, 2002. Compl. ¶ 152. Mehmood was transferred out of the ADMAX SHU on February 6, 2002 and transferred to Passaic County Jail on April 4, 2002. Id. at ¶ 170. Khalifa was released from the ADMAX SHU and deported to Egypt on January 13, 2002. Id. at ¶¶ 212, 213. Barjracharya was released from the ADMAX SHU and deported to Nepal on January 13, 2002. Id. at ¶ 237.

Because Warden Zenk was not warden of the MDC during the period of Abbasi's, Mehmood's, Khalifa's or Barjracharya's incarceration, their claims must necessarily be dismissed. As this court has previously held, "[Warden] Zenk cannot, of course, be held liable for acts that occurred prior to his becoming warden." Elmaghraby, 2005 WL 2375202, at *17 n.15. See also Turkmen, 2006 WL 1662663, at *24 n.25 (dismissing plaintiffs' claims against Warden Zenk because "Zenk did not become Warden until after [plaintiff] was deported").

Similarly, plaintiffs Turkmen and Sachdeva have failed to demonstrate their entitlement to the requested relief because they were detained at the Passaic County Jail -- not the MDC. See Compl. ¶¶ 255, 272. Plaintiffs do not allege that Warden Zenk served as Warden, or in any supervisory capacity, at the Passaic County Jail during Turkmen's or Sachdeva's incarceration.

Accordingly, plaintiffs Abbasi, Mehmood, Khalifa, Barjracharya, Turkmen and Sachdeva have failed to state a claim to relief and their claims against Warden Zenk must be dismissed.

## POINT II

## EACH CONSTITUTIONAL CLAIM OF THE REMAINING PLAINTIFFS SHOULD BE DISMISSED UNDER THE QUALIFIED IMMUNITY DOCTRINE

### A. The Qualified Immunity Doctrine

Under the qualified immunity doctrine, government officials are liable only for violations of clearly established rights. Iqbal, 129 S. Ct. at 1945. Government officials are "shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982); see also Poe v. Leonard, 282 F.3d 123, 132 (2d Cir. 2002).

In Iqbal, the Supreme Court held that to plead "a violation of [a] clearly established right to overcome qualified immunity," a complaint must plausibly allege that "each Government-official defendant, through the official's own individual actions, has violated the Constitution." Iqbal, 129 S. Ct. at 1948, 1949 (emphasis added). The Court explained that in a Bivens action "the term 'supervisory liability' is a misnomer. . . . [E]ach

Government official, his or her title notwithstanding, is only liable for his or her own misconduct." Id. at 1949; see also id. at 1948 ("Government officials may not be held liable for the unconstitutional conduct of their subordinates.").[2]

Following Iqbal, in order to survive a motion to dismiss, a plaintiff seeking to impose liability on an official entitled to assert a qualified immunity defense must demonstrate the official's direct, personal involvement in the alleged misconduct. Allegations of "knowledge [of] and acquiescence" in a subordinate's unconstitutional act are insufficient. Id. at 1949 ("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.") (citation omitted).

In addition, the Supreme Court offered further guidance to district courts analyzing a defendant's entitlement to qualified immunity on a motion to dismiss. In order to overcome a qualified immunity defense, a complaint must contain sufficient well-pled factual allegations to render a plaintiff's claim "'plausible on its face.'" Id. (quoting Twombly, 550 U.S. at 570). 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.'" Id. (quoting Twombly, 550 U.S. at 557).

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[2] See also Bellamy v. Mount Vernon Hosp., No. 07 Civ. 1801(SAS), 2009 WL 1835939, at *6 (S.D.N.Y. June 26, 2009) (Scheindlin, J.) ("The Supreme Court's decision in Iqbal v. Ashcroft abrogates several of the categories of supervisory liability enumerated in Colon v. Coughlin. Iqbal's 'active conduct' standard only imposes liability on a supervisor . . . if that supervisor actively had a hand in the alleged constitutional violation.") (emphasis added). Not all courts in this circuit have reached the same conclusion regarding Iqbal's effect on supervisory liability claims. See, e.g., Sash v. United States, 674 F. Supp. 2d 531, 544 (S.D.N.Y. 2009) (Peck, Mag.) (noting, in dicta, that Iqbal was focused on constitutional claims requiring discriminatory intent, and that decisions applying Iqbal to other types of constitutional claims "may overstate Iqbal's impact on supervisory liability").

**B. Plaintiffs' First Claim for Violations of Their Due Process Rights Should Be Dismissed for Failure to Plead Warden Zenk's Personal Involvement in the Violation of a Clearly Established Right**

Plaintiffs' first claim for relief seeks recovery for violation of their due process rights because the defendants allegedly adopted, promulgated and implemented a policy under which plaintiffs were subjected to harsh conditions of confinement. Compl. at ¶ 278. Plaintiffs, however, fail to allege any personal acts by Warden Zenk which violated plaintiffs' constitutional rights. Moreover, the Complaints' only specific allegation regarding Warden Zenk -- that he ordered plaintiffs' continued confinement in violation of BOP regulations, id. at ¶¶ 25, 68 -- does not involve the violation of a clearly established constitutional right.

**1. Plaintiffs Fail to Plead Warden Zenk's Personal Involvement in the Imposition of the Conditions of Confinement**

Plaintiffs allege that by "adopting, promulgating, and implementing" a policy to unreasonably detain plaintiffs in harsh conditions of confinement, all of the named defendants "intentionally or recklessly" violated plaintiffs' due process rights. Compl. ¶ 278. Although the Complaint includes various references to intentional acts committed by other defendants, see, e.g., id. at ¶ 109, plaintiffs do not allege any facts plausibly demonstrating Warden Zenk's involvement in the alleged violations of plaintiffs' rights.

In Ashcroft v. Iqbal, the Supreme Court held that in order to survive a motion to dismiss, a complaint must contain "more than . . . unadorned, the-defendant-unlawfully-harmed-me accusation[s]." 129 S. Ct. at 1949. Furthermore, because a government official "is only liable for his or her own misconduct," in order to impose liability in the Bivens

context, a plaintiff must plead more than that a defendant knew of and acquiesced to unconstitutional conduct. Id.

Here, the factual allegations in the Complaint fail to demonstrate Warden Zenk's involvement in the alleged misconduct. Indeed, the allegations serve to highlight Warden Zenk's lack of participation in any constitutional violation. Plaintiffs fail to make any mention of Warden Zenk in those sections of the Complaint describing restraints and abuse, Compl. ¶¶ 104-10, arbitrary and abusive strip searches, id. at ¶¶ 111-18, lack of hygiene items and inadequate or unhealthy food, id. at ¶¶ 128-30, or deliberate interference with religious rights, id. at ¶¶ 131-39.

Moreover, the Complaint clearly demonstrates that Warden Zenk had no connection to the conditions which caused plaintiffs' sleep deprivation, as those conditions only existed "[u]ntil March 2002" -- one month before Warden Zenk's arrival at the MDC on April 22, 2002. Id. at ¶ 119. Similarly, because Warden Zenk arrived at the MDC in the spring of 2002, he could not possibly have been personally involved in any alleged denial of recreation or exposure to the elements which occurred during "the fall and winter." Id. at ¶¶ 123, 127.

The lack of any specific allegations against Warden Zenk is in sharp contrast to the allegations throughout the Complaint expressly identifying various defendants who participated in or were responsible for the alleged improprieties. See, e.g., id. at ¶ 114 ("illegal strip-searches were documented" in logs reviewed "by MDC management, including Hasty"); ¶ 129 (plaintiffs "were denied all access to the commissary, pursuant to a written MDC policy created by Cuciti and Lopresti, and approved by Sherman and Hasty"). Plaintiffs do not -- because they cannot -- make similar allegations with respect to Warden Zenk.

Finally, the Complaint's conclusory allegations that Warden Zenk ignored evidence of his subordinates' misconduct is similarly unavailing. Warden Zenk's knowledge of a constitutional violation, without more, is insufficient to defeat his entitlement to qualified immunity. Iqbal, 129 S. Ct. at 1949 ("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.").

Accordingly, Warden Zenk is entitled to qualified immunity and plaintiffs' Fifth Amendment Due Process claims must be dismissed.

**2. Plaintiffs Fail to Demonstrate a Violation of a Clearly Established Right**

The Complaint contains only one factual allegation in support of the claim that Warden Zenk violated plaintiffs' rights to due process -- plaintiffs allege that Warden Zenk ordered plaintiffs' continuing confinement by directing MDC staff to ignore BOP regulations requiring weekly and monthly reviews of plaintiffs' detention. Compl. at ¶¶ 25, 68.[3] Under the circumstances presented in this case, the failure to comply with such regulations is not a violation of plaintiffs' clearly established rights.

A defendant is entitled to qualified immunity where "'officers of reasonable competence could [have] disagree[d],' whether their conduct violated a clearly established procedural due process right." Iqbal v. Hasty, 490 F.3d 143, 167 (2d Cir. 2007) (alterations in original) (citation omitted) (overruled on other grounds). See also Tellier v. Fields, 280 F.3d 69, 84 (2d Cir. 2000). In Iqbal v. Hasty, the Second Circuit, analyzing the same BOP regulations at issue here, explained that during 2001 and 2002, the right to a hearing under

[3] Although the Complaint does not specify the exact BOP regulation at issue, it is presumed that the plaintiffs refer to 28 C.F.R. § 541.22, which provides the procedures for reviewing the status of inmates in administrative segregation.

BOP regulations was not clearly established. 490 F.3d at 167. The Court found that an officer could have reasonably assumed that an approximately six-month period of confinement without a hearing was constitutionally permissible because it "was comparable to the duration of confinements in cases that [the Second Circuit] characterized in Tellier as involving 'relatively brief periods of confinement.'" Id. (quoting Tellier, 280 F.3d at 85 (listing period of confinement of up to ten months as "relatively brief")).

In addition, the court noted that such confinement was reasonable if a defendant could have reasonably understood that plaintiffs' segregation was related to matters of national security. Id. Finally, the court determined that the regulation itself was unclear, which further "undermine[d] [the] certainty as to established requirements of law." Id.

Here, both Benatta and Hammouda were held in administrative segregation for relatively brief periods of time, substantially shorter than the ten-month period noted in Tellier. In addition, Warden Zenk could have reasonably understood that Benatta's and Hammouda's segregation was related to matters of national security. Although it is broadly alleged that all defendants knew that there was no information tying plaintiffs to terrorism, only defendants Hasty, Sherman and Lopresti are specifically alleged to have received information alerting them to plaintiffs' lack of connection to terrorist activity. Compl. ¶ 69. By omitting Warden Zenk's name from these allegations, plaintiffs undermine their claim that Warden Zenk knew of any lack of evidence against them, further supporting the reasonableness of Warden Zenk's actions in permitting plaintiffs' continuing confinement.

Finally, plaintiffs' allegations are premised on the same BOP regulation which the Second Circuit in Hasty determined contained language that exacerbated the uncertainty regarding the "established requirements of [the] law." 490 F.3d at 167. Accordingly,

plaintiffs' rights were not clearly established at the time of their confinement in the ADMAX SHU and, as a result, Warden Zenk is entitled to qualified immunity on plaintiffs' claim.

**C. Plaintiffs' Second Claim for Violation of Their Equal Protection Rights Should Be Dismissed Because Plaintiffs Fail to Allege Warden Zenk's Personal Involvement**

Plaintiffs' second claim for relief seeks recovery for violations of plaintiffs' Fifth Amendment Equal Protection rights because the defendants allegedly subjected plaintiffs to harsh treatment based on plaintiffs' "race, religion, and/or ethnic or national origin." Compl. ¶ 282. Plaintiffs allege that Warden Zenk and six other defendants engaged in "racial, religious, ethnic, and national origin profiling" by detaining plaintiffs under "unreasonable and excessively harsh conditions." Id. at ¶ 7.

To state a claim under the Equal Protection Clause, the allegations in the Complaint must demonstrate that the plaintiff "was treated differently than others similarly situated as a result of intentional or purposeful discrimination." Awan v. Lapin, No. 09-CV-126 (JG), 2010 WL 963916, at *7 (E.D.N.Y. Mar. 17, 2010). To overcome qualified immunity, plaintiffs' factual allegations must show that the defendant's own acts contributed to the alleged constitutional violation and "that the defendant acted with discriminatory purpose." Iqbal, 129 S. Ct. at 1948. "[P]urposeful discrimination requires more than 'intent as volition or intent as awareness of consequences.'" Id. (citation omitted). Rather, it "involves a decisionmaker's undertaking a course of action 'because of,' not merely 'in spite of,' [the action's] adverse effects upon an identifiable group.'" Id. (alteration in original) (quoting Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 279 (1979)).

Here, plaintiffs fail to allege that Warden Zenk took any actions which violated plaintiffs' rights to equal protection under the law. As discussed supra, in those sections of

the Complaint detailing plaintiffs' conditions of confinement, the Complaint does not include Warden Zenk in the list of those defendants who participated in or had direct responsibility for the alleged misconduct. Rather, plaintiffs make only the unsupported conclusory allegation that all the defendants -- as opposed to Warden Zenk specifically -- "intentionally violated their rights to equal protection of the law under the Fifth Amendment to the United States Constitution." Compl. ¶ 282. These bare assertions "amount to nothing more than a 'formulaic recitation of the elements' of a constitutional discrimination claim" and as such are "not entitled to be assumed true." Iqbal, 129 S. Ct. at 1951 (citation omitted).

Further, plaintiffs' Complaint does not contain any factual allegations sufficient to plausibly suggest that Warden Zenk acted with a discriminatory purpose. In Iqbal, the Supreme Court held that even if the well-pled facts in a complaint give rise to an inference that plaintiffs were subject to a discriminatory policy, to impose liability, the complaint must also "contain facts plausibly showing" that the defendant himself acted with a discriminatory purpose. Iqbal, 129 S. Ct. at 1952. The Complaint is devoid of any such allegations relating to Warden Zenk. Notably, although the Complaint omits any allegations plausibly showing Warden Zenk's state-of-mind, the Complaint contains specific allegations of discriminatory intent against the other named defendants. See, e.g., Compl. ¶ 77 (alleging Warden Hasty referred "to the detainees as 'terrorists,' purposefully avoided the ADMAX unit, and isolate[ed] them from any avenue of complaint or assistance").

Thus, plaintiffs' pleading does not permit this court to infer more than the mere possibility of Warden Zenk's misconduct. Accordingly, plaintiffs' claim for violations of their equal protection rights under the Fifth Amendment must be dismissed.

**D. Plaintiffs' Third Claim Should Be Dismissed Because There is No Bivens Claim for Violation of the Free Exercise Clause and Because Plaintiffs Fail to Allege Warden Zenk's Personal Involvement**

Plaintiffs seek recovery for violations of their First Amendment free exercise of religion rights because the defendants allegedly "adopted, promulgated, and implemented policies and practices" that denied plaintiffs the ability to practice and observe their religion. Compl. ¶ 286. Plaintiffs allege that they were verbally and physically abused, and denied the means by which they maintain their religious practice, including Halal food and daily prayer requirements. Id.

Plaintiffs' claim for relief for violation of their First Amendment right to the free exercise of religion must be dismissed because Bivens does not apply in the First Amendment free exercise context. Even if Bivens is applicable, plaintiffs' claims must be dismissed because plaintiffs have again failed to allege Warden Zenk's personal involvement.

**1. Bivens Is Inapplicable to First Amendment Free Exercise Claims**

Plaintiffs' First Amendment claim of religious discrimination must be dismissed because there is no implied private cause of action for violation of the Free Exercise Clause. Implied Bivens causes of action are generally disfavored and as such the Supreme Court "has been reluctant to extend Bivens liability 'to any new context.'" Iqbal, 129 S. Ct. at 1948 (quoting Corr. Servs. Corp. v. Malesko, 534 U.S. 61, 68 (2001)).

In Iqbal, the Supreme Court stated that it had "not found an implied damages remedy under the Free Exercise Clause." Id. Indeed, the Court noted that it had "declined to extend

Bivens to a claim sounding in the First Amendment." Id.[4] Accordingly, plaintiffs have failed to plead a plausible entitlement to the requested relief and their First Amendment claims should be dismissed as a matter of law.

**2. Plaintiffs Have Failed to Allege Warden Zenk's Personal Involvement in the Alleged Violation of Plaintiffs' First Amendment Rights**

Even if plaintiffs' claim is actionable under Bivens, plaintiffs' claim must nevertheless be dismissed because plaintiffs have failed to plead Warden Zenk's personal involvement in violating plaintiffs' constitutional rights. To state a claim for a violation of an inmate's right to the free exercise of religion under the First Amendment, "'a plaintiff must plead and prove that the defendant acted with discriminatory purpose.'" Awan v. Lapin, No. 09-CV-126 (JG), 2010 WL 963916, at *11 (E.D.N.Y. Mar. 17, 2010) (quoting Iqbal, 129 S. Ct. at 1948). In the qualified immunity context, "purposeful discrimination requires more than 'intent as volition or intent as awareness of consequences.'" Iqbal, 129 S. Ct. at 1948 (citation omitted).

Here, the specific allegations of interference with plaintiffs' religious rights are made only against MDC prison guards and staff members. See Compl. ¶ 134 (alleging misconduct by MDC staff), ¶ 136 (alleging misconduct by MDC guards). In addition, plaintiffs do not allege Warden Zenk's involvement in the creation or implementation of policies which interfered with plaintiffs' religious rights. Compl. ¶ 132 (detailing interference with plaintiffs' ability to practice their religion "pursuant to a written MDC policy (created by Cuciti and Lopresti, and approved by Hasty and Sherman)") Indeed, the Complaint is devoid

[4] The Court in Iqbal did not expressly decide Bivens' applicability to free exercise claims because the petitioners did not raise that issue. 129 S. Ct. at 1948.

of the sort of "factual enhancement" necessary to demonstrate Warden Zenk's personal involvement. See Iqbal, 129 S. Ct. at 1949.

Further, plaintiffs have failed to sufficiently allege that Warden Zenk acted with a discriminatory purpose. Even assuming Warden Zenk was aware of his subordinates' unconstitutional acts, his knowledge does not justify the imposition of liability because it does not permit an inference that Warden Zenk acted with a discriminatory purpose. "[P]urposeful discrimination requires more than 'intent as volition or intent as awareness of consequences.'" Id. at 1948 (citation omitted).

Accordingly, plaintiffs' allegations are insufficient to state a plausible First Amendment claim and must be dismissed.

**E. Plaintiffs' Fourth and Fifth Claims for Constitutional Violations Based on Communications Blackout and Interference With Counsel Should be Dismissed Because Plaintiffs Have Alleged No Personal Involvement by Warden Zenk**

Plaintiffs' fourth and fifth claims seek recovery for violation of their First and Fifth Amendment rights because the defendants allegedly "intentionally or recklessly violated MDC Plaintiffs' rights to obtain access to legal counsel and to petition the courts for redress of their grievances." Compl. ¶¶ 290, 294. Plaintiffs allege that Warden Zenk was made aware of "some of" the restrictions on plaintiffs' communications and access to counsel. Id. at ¶ 97.

Plaintiffs' allegations amount to nothing more than an attempt to hold Warden Zenk liable for the actions of his subordinates based solely on his presence at the MDC Brooklyn. However, "[g]overnment officials may not be held liable for the unconstitutional conduct of their subordinates . . . a plaintiff must plead that each Government-official defendant, through the official's own individual actions, has violated the Constitution." Iqbal, 129

S. Ct. at 1948. The allegations that Warden Zenk knew of the alleged interference are insufficient to allow a plausible inference of misconduct. Mere knowledge and acquiescence in subordinates' unlawful conduct cannot justify the imposition of liability. Id. at 1949 (in a "Bivens action-where masters do not answer for the torts of their servants-the term 'supervisory liability' is a misnomer. . . [a Government official] is only liable for his or her own misconduct").

Plaintiffs' First and Fifth Amendment claims should be dismissed under the qualified immunity doctrine because plaintiffs have failed to plead Warden Zenk's personal involvement in the alleged conduct. Plaintiffs' allege that MDC employees interfered with plaintiffs' ability to call their attorneys, Compl. ¶ 85, contact their consulate, id. at ¶ 101, and make social calls. Id. at ¶ 86. While plaintiffs vaguely allege that these "troubles continued throughout the spring of 2002," id. at ¶ 90, the Complaint does not include a single specific allegation of Warden Zenk's personal involvement.

Because plaintiffs have failed to plead Warden Zenk's personal involvement in the allegedly unconstitutional conduct, their First and Fifth Amendment claims for interference with their right to counsel must be dismissed.

**F. Plaintiffs' Sixth Claim for Relief Alleging Fourth and Fifth Amendment Violations for Unreasonable Strip-Searches Should Be Dismissed Because Plaintiffs Have Alleged No Personal Involvement by Warden Zenk**

Plaintiffs' sixth claim seeks recovery for violations of their Fourth and Fifth Amendment rights because the MDC defendants were allegedly negligent in supervising the MDC staff who conducted the strip-searches of plaintiffs during their confinement in the ADMAX SHU. Compl. ¶ 300. Plaintiffs also claim that these defendants approved the policy under which these strip-searches were conducted. Id. at ¶ 301.

In Iqbal, the Supreme Court expressly held that bare assertions that a defendant knew of, condoned, and adopted an invidious policy constitute conclusory allegations which are not entitled to be assumed true. 129 S. Ct. at 1951. Here, plaintiffs' claims against Warden Zenk consist exclusively of exactly these types of conclusory allegations. See Compl. ¶¶ 297-302. The Complaint is entirely devoid of any factual allegations which would nudge plaintiffs' claims against Warden Zenk from merely conceivable, to plausible. Iqbal, 129 S. Ct. at 1951.

Indeed, plaintiffs' Complaint demonstrates Warden Zenk's lack of involvement in the allegedly unconstitutional strip-searches. The factual allegations in the Complaint relate to actions taken by MDC officers and staff -- not Warden Zenk. For instance, plaintiffs allege that "MDC staff" used strip-searches as a means of punishment. Compl. ¶ 115. Additional specific allegations refer only to conduct by guards and officers, not by Warden Zenk. Id. at ¶¶ 115, 116.

Further, the few specific allegations in the Complaint relate to conduct which occurred prior to the April 22, 2002 start date of Warden Zenk's tenure at the MDC. For example, Mehmood alleges that he was strip-searched four times in a single day -- October 25, 2001. Compl. ¶ 112. Benatta alleges that he was "strip-searched on September 23, 24, and 26 of 2001, despite the fact that he was not transported out of his cell on any of those days." Id. at ¶ 113.

Allowing plaintiffs' claims to proceed against Warden Zenk based on nothing more than conclusory allegations concerning the conduct of Warden Zenk's subordinates would create exactly the type of supervisory liability prohibited by the Supreme Court in Iqbal.

Plaintiffs have failed to sufficiently allege their entitlement to relief and, accordingly, their claim must be dismissed.

## POINT III

## PLAINTIFFS' SEVENTH CLAIM FOR RELIEF SHOULD BE DISMISSED BECAUSE PLAINTIFFS HAVE FAILED TO ALLEGE THAT WARDEN ZENK CONSPIRED TO VIOLATE PLAINTIFFS' RIGHTS

Plaintiffs' seventh claim for relief seeks recovery under 42 U.S.C. § 1985(3) because Warden Zenk allegedly entered into an agreement and "conspired" with various other defendants to deprive plaintiffs of their constitutional rights. Compl. ¶ 305.

To state a claim for conspiracy under § 1985(3), a plaintiff must allege:

> '(1) a conspiracy; (2) for the purpose of depriving a person or class of persons of the equal protection of the laws, or the equal privileges and immunities under 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.'

Russell v. County of Nassau, 696 F. Supp. 2d 213, 243 (E.D.N.Y. 2010) (quoting Thomas v. Roach, 165 F.3d 137, 146 (2d Cir. 1999)).

Broad allegations of conspiracy are insufficient to state a plausible claim for a violation of § 1985. Arar v. Ashcroft, 585 F.3d 559, 569 (2d Cir. 2009); Russell, 696 F. Supp. 2d at 243. See also Seymour's Boatyard, No. 08-CV-3248 (JG)(AKT), 2009 WL 1514610, at *11 (E.D.N.Y. June 1, 2009) ("Vague and conclusory allegations that defendants have engaged in a conspiracy must be dismissed."). The complaint "'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.'" Arar, 585 F.3d at 569 (citation omitted). Further, a plaintiff must "'make allegations that plausibly suggest that each Defendant participated in the alleged conspiracy.'" Hinds County v. Wachovia Bank, N.A.,

620 F. Supp. 2d 499, 513 (S.D.N.Y. 2009) (holding that "'averments of agreements made at some unidentified place and time' . . . are 'insufficient to establish a plausible inference of agreement, and therefore to state a claim'") (citation omitted).

Here, plaintiffs devote a single paragraph of their 306 paragraph Complaint to support their conspiracy allegations. Compl. ¶ 305. Plaintiffs do not allege any factual basis to support a meeting of the minds between Warden Zenk and any of the named defendants. Plaintiffs' unsubstantiated allegation of some undefined agreement is inadequate to demonstrate their entitlement to relief. See Russell, 696 F. Supp. 2d at 244 (dismissing conspiracy claim based on conclusory allegations that defendants "agreed and conspired with each other to deprive Plaintiff of [constitutional] rights").

Moreover, the Complaint simply fails to allege any overt acts engaged in by Warden Zenk which were reasonably related to the promotion of the conspiracy. Instead, plaintiffs offer a formulaic recitation of the elements of a § 1985 claim, alleging that defendants "agreed and conspired" to deprive plaintiffs of their constitutional rights. Compl. ¶ 305. These types of allegations were specifically rejected as insufficient in Twombly. See Iqbal, 129 S.Ct. at 1950 (discussing the Twombly decision in which the court held that plaintiffs' unsubstantiated allegations of an "agreement" and a "conspiracy" were deficient because they did not give rise to a "'plausible suggestion of conspiracy'") (quoting Twombly, 550 U.S. at 565-66).

Accordingly, the § 1985 conspiracy claim must be dismissed.

## POINT IV

## PLAINTIFFS' CLAIMS SHOULD FURTHER BE DISMISSED FOR THE REASONS SET FORTH IN OTHER DEFENDANTS' MOTIONS TO DISMISS

Warden Zenk incorporates by reference the arguments made in the other motions to dismiss.

## CONCLUSION

For all the reasons set forth above, Warden Zenk's Motion to Dismiss the Fourth Amended Complaint should be granted.

Dated: New York, New York
November 12, 2010

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

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