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13-981-cv(L)

13-999-cv(CON), 13-1002-cv(CON), 13-1003-cv(CON), 13-1662-cv(XAP)

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

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

Plaintiffs-Appellees-Cross-Appellants,

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

Plaintiffs-Appellees,

v.

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

Defendants-Appellants-Cross-Appellees,

(Additional Caption On the Reverse)

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

BRIEF FOR DEFENDANT-APPELLANT MICHAEL ZENK

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Defendants-Cross-Appellees,

and

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

Intervenors.

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PRELIMINARY STATEMENT

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

Plaintiffs have failed utterly to adequately plead any of their claims as to Zenk. All of Plaintiffs' claims are based upon the alleged conditions of their confinement in the Administrative Maximum Special Housing Unit ("ADMAX SHU") of the Metropolitan Detention Center ("MDC") following the terrorist attacks of September 11, 2001. However, unlike the other Defendants, Zenk was not employed in any capacity at the MDC until April 22, 2002 -- at which point six of the eight Plaintiffs were no longer incarcerated in the ADMAX SHU. The claims of the remaining two Plaintiffs -- one of whom was released a mere eight days after Zenk's arrival at the MDC and the other, a month and a half later -- must be dismissed because Plaintiffs do not plead any specific factual allegations arising after April 22, 2002 that implicate Zenk in the alleged constitutional violations.

In denying in part Zenk's motion to dismiss, the District Court failed to

[1] Citations in the form of SPA-__ refer to pages in Defendants-Appellants' Special Appendix, filed separately. Citations in the form of A-__ refer to the Joint Appendix.

consider the sufficiency of the allegations in the Complaint as to Zenk in his individual capacity -- instead improperly grouping Zenk with the other, differently-situated "MDC Defendants." However, properly analyzed, the claims against Zenk fall woefully short of satisfying the pleading standards enunciated by the Supreme Court in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). Accordingly, this Court should reverse the District Court's order denying Zenk's motion to dismiss and should dismiss Plaintiffs' claims against Zenk in their entirety.

JURISDICTIONAL STATEMENT

The District Court had jurisdiction over this action pursuant to 28 U.S.C. §§ 1331 and 1346(b). On January 15, 2013, the District Court granted in part and denied in part Zenk's motion to dismiss Plaintiffs' Fourth Amended Complaint.[2] Zenk timely noticed his appeal, on March 15, 2013, as to those portions of the District Court's order denying in part Zenk's motion to dismiss. *See* Fed. R. App. P. 4(a)(1)(B). This Court has jurisdiction over this appeal pursuant to 28 U.S.C. § 1291, under the collateral order doctrine, because Zenk's appeal is based on the District Court's denial of qualified immunity as a matter of law. *See Ashcroft v. Iqbal*, 556 U.S. 662, 671-72 (2009) (holding that "a district court's order rejecting qualified immunity at the motion-to-dismiss stage of a proceeding is a 'final

[2] Plaintiffs' Fourth Amended Complaint (hereinafter the "Complaint" or "Compl."), dated September 13, 2010, may be found in the Joint Appendix at A-__-__ and in the District Court record at ECF No. 726.

decision' within the meaning of § 1291") (citing *Behrens v. Pelletier*, 516 U.S. 299, 307 (1996)).

ISSUES PRESENTED FOR REVIEW[3]

1. Whether the District Court erred in denying Zenk's motion to dismiss claims interposed by Plaintiffs who were not incarcerated in the ADMAX SHU of the MDC as of April 22, 2002, when Zenk first became Warden of the MDC.

2. Whether the District Court erred in denying Zenk's motion to dismiss each of Plaintiffs' claims against Zenk in the absence of any specific factual allegations in the Complaint regarding Zenk.

3. Whether the District Court erred in holding that Plaintiffs have sufficiently alleged Zenk's personal involvement for each of their *Bivens*-based claims.

4. Whether the District Court erred in denying Zenk qualified immunity with respect to each of Plaintiffs' claims, where the Complaint fails to allege the violation by Zenk of any clearly established constitutional right.

[3] Zenk also adopts and incorporates by reference the issues presented in the appellate briefs of Defendants Sherman and Hasty.

STATEMENT OF THE CASE[4]

Defendant Zenk, a former Warden of the MDC, appeals the decision of the United States District Court for the Eastern District of New York (Gleeson, J.) denying his motion to dismiss the first, second, third, sixth, and seventh claims asserted in the Complaint. *See* SPA-1-62.

The Complaint[5] consists of seven claims, all generally based on allegations that Plaintiffs were detained in harsh conditions, either in the ADMAX SHU at the MDC or in the Passaic County Jail, on the basis of their status as Muslim and/or Arab men (or Defendants' perception of them as such), after being identified by the Federal Bureau of Investigation ("FBI") as persons "of high interest" in the investigation of the September 11, 2001 terrorist attacks. Defendants -- high-level officials at the Department of Justice ("DOJ"), the Immigration and Naturalization Service ("INS"), the FBI, and the MDC -- all moved to dismiss the Complaint.

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[4] The procedural posture of this case is extensive, spanning over a decade and involving multiple iterations of both plaintiffs and defendants. In the interest of brevity, Zenk provides only an abridged version adequate for consideration of the present appeal. For a more thorough discussion of the procedural history of the case, Zenk respectfully refers the Court to the District Court's opinion at SPA-16-18, and to the appellate briefs of Defendants Sherman and Hasty.

[5] The original complaint in this action was filed on April 17, 2002 -- five days before Zenk became employed at the MDC in any capacity. *See* SPA-16. Zenk was later added as a defendant in subsequent amendments to that complaint, by virtue of having replaced his predecessor, defendant Dennis Hasty ("Hasty"), who had served as Warden of the MDC during the seven-month period from the September 11, 2001 attacks until April 22, 2002. A-__ (Compl. ¶ 24).

The District Court dismissed Plaintiffs' fourth and fifth claims as to all Defendants on the basis of qualified immunity.[6] SPA-41-49. However, the District Court dismissed the remaining claims only as to the DOJ, FBI, and INS Defendants (John Ashcroft ("Ashcroft"), Robert Mueller ("Mueller"), and James Ziglar ("Ziglar")), denying the balance of Zenk's and the other MDC Defendants' motions to dismiss.

Zenk now appeals the District Court's denial of his motion to dismiss as to the remaining five claims. The other MDC Defendants also appealed the District Court's partial denial of their motions to dismiss, and Plaintiffs separately appealed the District Court's dismissal of Ashcroft, Mueller, and Ziglar. This Court subsequently consolidated all of those appeals into the instant action.

STATEMENT OF FACTS

Zenk became Warden of the MDC on April 22, 2002,[7] at which point only two of the named Plaintiffs in this action -- Benamar Benatta ("Benatta") and Saeed Hammouda ("Hammouda") -- remained confined in the ADMAX SHU. *See* A-__ (Compl. ¶¶ 152, 170, 212, 244, 264, 274) (alleging release dates of other Plaintiffs prior to April 22, 2002). Eight days later, Benatta was released from the

[6] Those claims asserted First and Fifth Amendment violations based on an alleged communications blackout policy. Plaintiffs do not appeal that portion of the District Court's ruling, and those claims accordingly are not at issue in this appeal.

[7] *See* SPA-32 n.12 (taking judicial notice that Zenk became Warden on April 22, 2002). Though not alleged in the Complaint, it is undisputed that, prior to becoming Warden on April 22, 2002, Zenk was employed at a federal prison in Pennsylvania, which is not alleged to have any relation to this action.

ADMAX SHU. A-__ (Compl. ¶ 188) (Benatta released on April 30, 2002). Less than two months later, Hammouda -- the last remaining Plaintiff in the ADMAX SHU -- was released and deported. A-__ (Compl. ¶ 227) (Hammouda deported on June 14, 2002).

In the Complaint, Plaintiffs style themselves as "a class of male non-citizens from the Middle East, South Asia, and elsewhere who are Arab, South Asian or Muslim or were perceived by Defendants to be Arab, South Asian or Muslim, and were arrested on minor immigration violations following the September 11, 2001 terrorist attacks on the United States." A-__ (Compl. ¶ 1). The Complaint names as defendants a number of high-level officials in the United States government and at the MDC. Defendants Ashcroft, Mueller, and Ziglar are high-level officials at the DOJ, FBI, and INS alleged to have been responsible for the national security investigation of the September 11, 2001 attacks that led to Plaintiffs' arrest and designation as "of high interest" to that investigation, and for instituting a policy requiring such "of high interest" designees to be detained in restrictive conditions of confinement until cleared by the FBI. A-__ (Compl. ¶¶ 21-23). All of the remaining Defendants -- except Zenk -- were employed at the MDC in September 2001 and in the months immediately following, during which the ADMAX SHU itself and the "harsh conditions of confinement" complained of were allegedly designed, created, and implemented. *See* A-__ (Compl. ¶¶ 24, 26-

28).

Unlike any of the other Defendants, Zenk was not employed at the MDC in any capacity until April 22, 2002. Accordingly, Zenk is not alleged to have any connection whatsoever to six of the eight Plaintiffs. *See* A-__ (Compl. ¶¶ 152, 170, 212, 244, 264, 274) (alleging release dates from the ADMAX SHU prior to April 22, 2002 for Plaintiffs Ahmer Abbasi ("Abassi"), Anser Mehmood ("Mehmood"), Ahmed Khalifa ("Khalifa"), Purna Bajracharya ("Bajracharya"), Ibrahim Turkmen ("Turkmen"), and Akhil Sachdeva ("Sachdeva")). Neither is Zenk alleged to have played any role in designing or creating the alleged policies, nor to have any other relation whatsoever to the events alleged in the Complaint until becoming Warden on April 22, 2002.

Notwithstanding the admittedly circumscribed period of Zenk's tenure as Warden of the MDC, the five remaining claims in the Complaint (after the dismissal of claims four and five) are alleged against Zenk and all other Defendants without distinction. The first and second claims allege that Defendants subjected Plaintiffs to harsh conditions of confinement violative of their Fifth Amendment substantive due process and equal protection rights, respectively. A-__ (Compl. ¶¶ 276-83). The third claim alleges that Defendants infringed upon Plaintiffs' First Amendment rights by impairing their "ability to practice and observe their religion." A-__ (Compl. ¶¶ 284-87). The sixth claim alleges that

Defendants infringed upon Plaintiffs' Fourth and Fifth Amendment rights by subjecting them to excessive and unreasonable strip-searches during their confinement. A-__ (Compl. ¶¶ 297-302). Finally, the seventh claim alleges a conspiracy among all of the Defendants to deprive Plaintiffs of their rights to equal protection under the law in violation of 42 U.S.C. § 1985(3). A-__ (Compl. ¶¶ 303-06).

SUMMARY OF THE ARGUMENT

Plaintiffs' failure to particularize any factual allegations regarding Zenk or the ADMAX SHU after April 22, 2002 -- the acknowledged date Zenk assumed his role as Warden of the MDC -- is fatal to the viability of each of their claims against Zenk. Indeed, Plaintiffs' 86-page, 306-paragraph Complaint mentions Zenk by name in only eight paragraphs -- all of which are demonstrably conclusory and not entitled to a presumption of truth. However, in erroneously considering the sufficiency of Plaintiffs' claims only as to an undifferentiated group of "MDC Defendants," the District Court failed to dismiss even the most patently unfounded claims against Zenk.

Thus, as a threshold matter, the claims asserted against Zenk by six of the eight Plaintiffs fail for the simple reason that those Plaintiffs were either released from the ADMAX SHU prior to Zenk's arrival or were never housed at the MDC at all.

With respect to the two Plaintiffs who were briefly housed in the ADMAX SHU during Zenk's tenure, each claim asserted against Zenk by those Plaintiffs must also be dismissed because the Complaint does not contain any specific factual allegations arising after April 22, 2002 that implicate Zenk in any wrongdoing. Zenk is mentioned in the Complaint, when at all, exclusively in the context of conclusory allegations. Further, the remaining allegations in the Complaint provide no support for those conclusory allegations because they either specifically exculpate Zenk (for example, by specifically alleging as a relevant time period dates prior to April 22, 2002) or fail to specify any time period or defendant at all.

In addition to the complete absence of particularized allegations as to Zenk, Plaintiffs' failure to allege any mental state as to Zenk -- a required element of each of Plaintiffs' claims -- separately mandates dismissal of those claims. The Supreme Court made clear in *Iqbal* that, particularly where a defendant may be entitled to qualified immunity, a complaint must adequately allege each of the requisite elements of the underlying claim -- including a personal mental state adequate to establish liability -- as to each individual defendant.

Lastly, even assuming the truth of whatever sparse conclusions the Complaint attempts to draw with respect to Zenk, those allegations do not establish that Zenk personally violated any constitutional right that was clearly established at that time. The District Court did not particularize its qualified immunity analysis

to Zenk's alleged conduct, and instead considered the "MDC Defendants" as an undifferentiated group. Consequently, the District Court failed to recognize that Zenk's alleged conduct, to the extent discernible from the Complaint at all, involves significantly less culpable behavior, resulting in less egregious conditions, imposed for a shorter duration of time than that of any of the other MDC Defendants. Accordingly, that conduct poses a closer constitutional question, which, properly analyzed, permits precisely the sort of reasonable dispute that entitles Zenk to qualified immunity.

For all of the above reasons, as well as the additional reasons set forth in the appellate briefs of Defendants Sherman and Hasty, Zenk is entitled to the dismissal of Plaintiffs' Complaint in its entirety.[8]

STANDARD OF REVIEW

This Court reviews a district court's denial of a motion to dismiss on the grounds of qualified immunity *de novo*, without deference to its findings. *Iqbal v. Hasty*, 490 F.3d 143, 152 (2d Cir. 2007), *rev'd on other grounds sub nom. Ashcroft v. Iqbal*, 556 U.S. 662 (2009).

On a motion to dismiss, a court must accept the well-pleaded factual allegations in the complaint as true and draw all reasonable inferences in favor of

[8] Zenk hereby incorporates by reference all of the generally applicable legal arguments set forth in the appellate briefs of Defendants Sherman and Hasty.

the plaintiff. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (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.* 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.* By contrast, "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice" and a court is "not bound to accept as true a legal conclusion couched as a factual allegation." *Id.*

ARGUMENT

I. THE DISTRICT COURT ERRED IN FAILING TO DISMISS EACH OF THE CLAIMS ASSERTED AGAINST ZENK BY THE SIX PLAINTIFFS WHO WERE NOT HELD IN THE ADMAX SHU AFTER APRIL 22, 2002

All of the claims asserted by Plaintiffs Abbasi, Mehmood, Khalifa, Bajracharya, Turkmen, Sachdeva, and all similarly situated class members against Zenk should be dismissed because these Plaintiffs were not incarcerated at the ADMAX SHU when Zenk assumed his role as Warden of the MDC on April 22, 2002.

Specifically, Abbasi was transferred out of the ADMAX SHU on February 14, 2002. A-__ (Compl. ¶ 152). Mehmood was transferred out of the ADMAX SHU on February 6, 2002 and to the Passaic County Jail on April 4, 2002. A-__ (Compl. ¶ 170). Khalifa was deported to Egypt on January 13, 2002. A-__ (Compl. ¶¶ 212, 213). Barjracharya was deported to Nepal on January 13, 2002. A-__ (Compl. ¶ 237). Turkmen and Sachdeva were never housed at the MDC, but rather spent their entire detention in the Passaic County Jail. A-__ (Compl. ¶¶ 255, 272, 274).

As the District Court has previously recognized, "Zenk cannot, of course, be held liable for acts that occurred prior to his becoming warden." *Elmaghraby v. Ashcroft*, No. 04 CV 1809 (JG)(SMG), 2005 U.S. Dist. LEXIS 21434, at *53 n.15 (E.D.N.Y. Sept. 27, 2005); *see also Turkmen v. Ashcroft*, No. 02 CV 2307 (JG), 2006 U.S. Dist. LEXIS 39170, at *73 n.25 (E.D.N.Y. June 14, 2006) (dismissing claim against Zenk because "Zenk did not become Warden until after [plaintiff] was deported"). Nor can Zenk be held responsible for injuries alleged by Plaintiffs held only at the Passaic County Jail, where Zenk is not alleged ever to have been employed in any capacity.

Despite acknowledging that Zenk cannot be held liable for acts that purportedly occurred prior to his becoming Warden, the District Court failed to dismiss each of the claims asserted by these six Plaintiffs as to Zenk. Accordingly,

each of the remaining claims asserted by Plaintiffs Abbasi, Mehmood, Khalifa, Bajracharya, Turkmen, and Sachdeva against Zenk should be dismissed.

II. THE CLAIMS ASSERTED BY THE TWO REMAINING PLAINTIFFS MUST BE DISMISSED BECAUSE THEY RELY ENTIRELY ON CONCLUSORY ALLEGATIONS

Following the Supreme Court's holding in *Iqbal*, it is well settled that conclusory allegations are insufficient to withstand a motion to dismiss unless supported by specific factual allegations. *Iqbal*, 556 U.S. at 678-79. Yet here, the Complaint mentions Zenk only in the context of conclusory allegations, and contains no specific factual allegations applicable to Zenk. Rather than properly considering the sufficiency of the allegations as to Zenk individually, the District Court instead analyzed the allegations as to the collective group of "MDC Defendants." However, Zenk is differently situated than any of the other Defendants in this case and may not be held to answer for acts allegedly committed by others. *Id.* at 677 (noting that a *Bivens* defendant "is only liable for his or her own misconduct"). Because the Complaint does not contain a single factual allegation reasonably attributable to Zenk, Plaintiffs' claims fall woefully short of satisfying the bedrock pleading standards set forth in *Iqbal* necessary to survive a motion to dismiss.

A. The Eight Paragraphs that Refer to Zenk by Name Are Entirely Conclusory and Therefore Not Presumed to Be True

Plaintiffs' 306-paragraph, 86-page Complaint contains only eight paragraphs that mention Zenk by name -- each of which contain nothing more than a legal conclusion reciting as fact the raw elements of one of Plaintiffs' claims. *See* A-__ (Compl. ¶¶ 6, 7, 25, 68, 75, 76, 97, 305) (quoted in relevant part below). *Iqbal* makes clear that such "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements," "naked assertion[s]," and "unadorned, the-defendant-unlawfully-harmed-me accusation[s]" do not suffice to withstand a motion to dismiss. 556 U.S. at 678.

Four of the eight paragraphs that refer to Zenk by name -- paragraphs 6, 25, 75, and 76 -- merely announce Plaintiffs' legal conclusion that Zenk violated Plaintiffs' constitutional rights either by approving a policy or being aware of and disregarding wrongs committed by others:

- "By detaining Plaintiffs and class members in these conditions and ordering or condoning their abuse, Defendants Hasty, Zenk, Sherman, Lopresti, and Cuciti also violated Plaintiffs' and class members' rights under the First, Fourth and Fifth Amendments to the United States Constitution." A-__ (Compl. ¶ 6).
- "Defendant MICHAEL ZENK was the Warden of the MDC in the Spring of 2002 and after. As Warden, Zenk had immediate responsibility for the conditions under which MDC Plaintiffs and other class members were confined at the MDC. He ordered that MDC Plaintiffs and other class members be confined in the ADMAX SHU of the MDC under unreasonable and excessively harsh conditions in violation of the Constitution. He also allowed his

subordinates to abuse MDC Plaintiffs and class members with impunity. He made rounds on the ADMAX and was aware of conditions there." A-__ (Compl. ¶ 25).

- "To carry out Ashcroft, Mueller and Ziglar's unwritten policy to subject the 9/11 detainees to harsh treatment designed to obtain their cooperation, Hasty ordered Lopresti and Cuciti to design extremely restrictive conditions of confinement. These conditions were then approved and implemented by Hasty and Sherman, and, later, by Zenk." A-__ (Compl. ¶ 75).

- "MDC Plaintiffs and class members were subjected to these restrictive conditions in the ADMAX SHU for between three and eight months pursuant to a written policy drafted by Cuciti, signed by Lopresti, and approved by Sherman and Hasty, and subsequently by Zenk." A-__ (Compl. ¶ 76).

Those allegations are all quintessential "conclusory legal allegations" not entitled to an assumption of truth. *See Iqbal*, 556 U.S. at 680-81 (allegations that defendant "was the 'principal architect' of [an] invidious policy" or "was 'instrumental' in adopting and executing it . . . . amount to nothing more than a 'formulaic recitation of the elements' of a constitutional discrimination claim"); *LaMagna v. Brown*, 474 Fed. App'x 788, 790 (2d Cir. 2012) (allegation that the defendant caused the plaintiff's injuries "by deliberate indifference" "lacks a factual foundation and therefore is a conclusory allegation 'masquerading as [a] factual conclusion[],' which is insufficient to defeat a motion to dismiss") (citation omitted) (alterations in original).

Similarly, paragraph 7 of the Complaint does no more than conclusorily recite the necessary elements for Plaintiffs' equal protection claim:

- "By arresting Plaintiffs and class members, [and] detaining them under unreasonable and excessively harsh conditions Defendants Ashcroft, Mueller, Ziglar, Hasty, Zenk, Lopresti, and Cuciti also engaged in racial, religious, ethnic, and national origin profiling." A-__ (Compl. ¶ 7).[9]

Likewise, paragraph 305 of the Complaint is nothing but a formulaic recitation of the elements of Plaintiffs' conspiracy claim:

- "Defendants Ashcroft, Mueller, Ziglar, Hasty, Zenk, Sherman, Lopresti and Cuciti, by agreeing to implement a policy and practice whereby Plaintiffs [were subjected to the alleged harsh conditions of confinement], conspired to deprive Plaintiffs of the equal protection of the law and of equal privileges and immunities of the laws of the United States, resulting in injury to Plaintiffs' person and property, in violation of 42 U.S.C. § 1985(3)." A-__ (Compl. ¶ 305).

Finally, paragraphs 68 and 97 of the Complaint, though no less conclusory than the foregoing paragraphs, relate solely to claims no longer alleged against Zenk in the Complaint. Specifically, paragraph 68 appears to be a remnant from the Third Amended Complaint, which contained a procedural due process claim based on Plaintiffs' confinement in special administrative housing without an appropriate review process.[10] *See* A-__ (Third Amended Complaint, ¶ 80, ECF

[9] *Compare* A-__ (Compl. ¶ 7), *with Iqbal*, 556 U.S. at 680 (nearly identical allegation, that defendants "'knew of, condoned, and willfully and maliciously agreed to subject [petitioner]' to harsh conditions of confinement 'as a matter of policy, solely on account of [his] religion race, and/or national origin and for no legitimate penological interest,'" was "not entitled to the assumption of truth").

[10] Paragraph 68 of the Complaint alleges that, "[t]o implement Ashcroft, Mueller and Ziglar's policy, Wardens Hasty and Zenk ordered their subordinates to ignore BOP regulations . . . . limit[ing] the circumstances in which detainees may be

No. 109 (Sept. 13, 2004)) (containing allegations substantially similar to paragraph 68 of the Fourth Amended Complaint), *Id.* at ¶¶ 389-93 (alleging as the "Twentieth Claim for Relief" a procedural due process claim based on Plaintiffs' assignment to the ADMAX SHU). The Fourth Amended Complaint contains no such claim. Similarly, paragraph 97 relates solely to Plaintiffs' communications blackout claims, which have been dismissed in their entirety.[11] *See* A-__ (Compl. ¶¶ 83-97) (alleged under heading "Post-Blackout Restriction on Communication and Access to Counsel"); SPA-41-49 (dismissing those claims against all Defendants). Plaintiffs have not appealed the dismissal of those claims as to Zenk.

The eight paragraphs cited above are the only allegations in the entire Complaint that refer to Zenk by name. Because those allegations amount to nothing more than conclusory legal assertions, they are insufficient to support any claim under the pleading standard enunciated in *Iqbal*. *See Iqbal*, 556 U.S. at 679.

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placed in the SHU and requir[ing] . . . a weekly review of the status of each inmate housed in the SHU . . . . Instead, Wardens Hasty and Zenk ordered prolonged placement of [Plaintiffs] in the ADMAX SHU without following the processes they knew the law required for such deprivation." A-__ (Compl. ¶ 68).

[11] Paragraph 97 of the Complaint alleges that the "unnecessary restrictions [on Plaintiffs' communications] led to repeated complaints by 9/11 detainees, some of which were brought to the attention of Hasty, Zenk, Sherman, Lopresti, and Cuciti. The interference was also documented in legal call and social call logs prepared by MDC staff for review by Hasty, Zenk, Sherman, and Lopresti." A-__ (Compl. ¶ 97).

B. Any Specific Factual Allegations in the Complaint Either Explicitly Exculpate or Do Not Apply to Zenk

Conclusory legal allegations may "provide the framework of a complaint," but they are insufficient in themselves to withstand a motion to dismiss unless supported by "well-pleaded factual allegations." *Iqbal*, 556 U.S. at 679. Here, not a single specific factual allegation in the Complaint is fairly attributable to Zenk. While all of Plaintiffs' claims against Zenk are premised on the alleged "harsh conditions" of their confinement in the ADMAX SHU, the specific factual allegations surrounding those conditions consistently refer to incidents that allegedly occurred months before Zenk became Warden. Indeed, in many cases those allegations even affirmatively assert that the conditions to which they relate had been remedied prior to Zenk's arrival at the MDC on April 22, 2002:[12]

Physical Restraints: The Complaint refers to occurrences allegedly affecting Abassi (who was released from the ADMAX SHU on February 14, 2002), but notes that those problems "lessened" after "early October" 2001. A-__ (Compl. ¶ 147).

Constructive Denial of Recreation: The Complaint alleges that this condition was caused by cold temperatures and inclement weather occurring "during the fall and winter months." A-__ (Compl. ¶ 122-23). The Complaint

[12] For clarity, the portions of the quoted allegations identifying an ascertainable time period prior to April 22, 2002 or otherwise exculpating Zenk are underlined.

alleges specific instances relevant to this condition occurring on November 8, November 10, November 13, November 27, December 28, and as to Plaintiff Khalifa (who was released from the ADMAX SHU on January 13, 2002). A-__ (Compl. ¶¶ 123-25, 181).

Sleep Deprivation: The Complaint alleges that this condition persisted only until "March 2002," A-__ (Compl. ¶ 119), and refers to specific instances pertaining to this condition occurring on "November 27, 2001" and "[i]n the winter months." A-__ (Compl. ¶¶ 181, 223).

Deprivation of Hygienic Implements: The Complaint alleges that this condition persisted only "for the first several months of [Plaintiffs'] detention." A-__ (Compl. ¶ 130).[13]

Interference with Religious Rights: The Complaint refers to incidents occurring during the first several "weeks" or "months" after Plaintiffs' arrival at the MDC, A-__ (Compl. ¶ 132), and specifically affecting Abbasi (who was released from the ADMAX SHU on February 14, 2002), A-__ (Compl. ¶ 133), and the Plaintiffs detained at "Passaic," A-__ (Compl. ¶ 139). However, the Complaint

[13] *See also* A-__ (U.S. Dep't of Justice, Office of the Inspector General, *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* 155-56 (April 2003)) (noting that policy regarding hygiene items was modified on October 15, 2001 to permit detainees to keep basic hygiene items in their cells, and reporting specific complaints by detainees that they were deprived of hygiene items during the first month and first three weeks of their detention).

also alleges that certain of those alleged deprivations were remedied as to at least one Plaintiff by "February 26, 2002." A-__ (Compl. ¶ 133). Additional allegations refer to "MDC staff" and Defendant "Hasty," but contain no mention of Zenk. A-__ (Compl. ¶¶ 134, 137).

Strip Searches: The Complaint alleges that Defendant "Cuciti" was responsible for developing a policy regarding this condition, but never did so. A-__ (Compl. ¶ 111). Accordingly, "searches were conducted inconsistently." *Id.*[14] Specific instances of conduct pertaining to this condition are alleged to have occurred on "September 23, 24, and 26 of 2001," on "October 25, 2001," and in either October or November of 2001.[15] A-__ (Compl. ¶¶ 112, 113).

As demonstrated by the allegations above, the few conclusory allegations in the Complaint that do refer to Zenk are more often belied than supported by the specific factual allegations in the Complaint. Those allegations establish that, despite Plaintiffs' conclusory allegations of Zenk's liability for the "harsh

[14] This allegation tends to exculpate Zenk from liability for approving or implementing any policy relating to strip-searching (as there was no written policy to "approve," and searches conducted "inconsistently" necessarily are not conducted pursuant to policy). Nowhere is Zenk alleged to have been involved with the searches other than in a policy-making capacity.

[15] The Complaint alleges a specific incident relevant to this condition occurring to Benatta on a day on which he was interviewed by the FBI. A-__ (Compl. 112). As the FBI closed its investigation of Benatta on November 5, 2001, A-__ (Compl. ¶ 188), it is reasonable to infer that any FBI interviews of Benatta were conducted before that time.

conditions" of confinement, in fact, by the time Zenk arrived at the MDC on April 22, 2002, Plaintiffs had received copies of the Koran (with the exception of Benatta, who is not alleged to have requested one during Zenk's tenure), A-__ (Compl. ¶ 132); were in some instances being provided with Halal meals, A-__ (Compl. ¶ 133); had been issued essential hygiene items and were permitted to retain them in their cells, A-__ (Compl. ¶ 130); were regularly permitted meaningful outdoor recreation, A-__ (Compl. ¶¶ 122-23); and were not subjected to bright lights during the night, A-__ (Compl. ¶ 119). Those allegations all affirmatively negate Plaintiffs' conclusory allegations against Zenk.

The remaining allegations listed above (in addition to others too numerous to list) relate expressly to other Defendants or time periods. Accordingly, they also provide no support for Plaintiffs' conclusory allegations against Zenk. *See, e.g.*, *Iqbal*, 556 U.S. at 683 (allegations of "discrete wrongs" committed by others insufficient to plausibly suggest that defendants "themselves acted" improperly).

C. The Remaining Allegations in the Complaint Are Insufficient to Plausibly Allege Any Claim Against Zenk Because they Fail to Identify Any Act, Plaintiff, or Time Period Relevant to Zenk

The remaining allegations in the Complaint fail to specify when or to whom the alleged acts occurred, or which Defendants were involved. To support a claim, factual allegations not only must be specific, they must also provide a basis for the court to "draw [a] reasonable inference that the defendant is liable for the

misconduct alleged." *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 556). Consequently, as this Court has held in a similar context, "undifferentiated" references to "'Defendants,'" without any ascertainable "link . . . to any defendant, named or unnamed," are insufficient to support a claim. *Arar v. Ashcroft*, 585 F.3d 559, 569 (2d Cir. 2009) (dismissing similar conditions of confinement claim as insufficiently pleaded, where the plaintiff "fail[ed] to specify any culpable action taken by any single defendant" or otherwise "link [his allegations] to any defendant, named or unnamed," but rather merely phrased his allegations "in passive voice" or referred to "'Defendants' -- undifferentiated"). Particularly in the qualified immunity context, Plaintiffs' factual allegations must be not merely specific, but specific as to Zenk in order to overcome his individual right to qualified immunity. *See, e.g.*, *Pearce v. Labella*, 473 Fed. App'x 16, 20 (2d Cir. 2012) (dismissing claims against supervisory defendant on the grounds that "allegations against 'the defendants' collectively that do not distinguish between the individual defendants" "do not suffice to overcome [the individual defendant's] individual qualified immunity").

Here, Plaintiffs rely exclusively on such undifferentiated group allegations to plead their claims against Zenk. *See, e.g.*, A-__ (Compl. ¶ 70) (alleging indiscriminately that the "MDC defendants were informed" of the circumstances of Khalifa's arrest -- notwithstanding that Khalifa had been deported more than three

months before Zenk arrived at the MDC); A-__ (Compl. ¶ 71) (same, as to Mehmood, who was transferred to the Passaic County Jail on April 4, 2002); A-__ (Compl. ¶ 72) (same, as to Abbasi, who was transferred out of the ADMAX SHU on February 14, 2002); A-__ (Compl. ¶ 146) (alleging that "the MDC Defendants" interfered with Abbasi's religious practice -- notwithstanding that Abbasi was never held in the ADMAX SHU during Zenk's tenure); A-__ (Compl. ¶ 165) (same, as to Mehmood); A-__ (Compl. ¶ 204) (same, as to Khalifa). Particularly given Zenk's limited temporal role in the events alleged -- unique among the Defendants -- the vague and general group allegations that form the remainder of the Complaint are insufficient to support Plaintiffs' claims against Zenk. *See, e.g.*, *Bertuglia v. City of N.Y.*, 839 F. Supp. 2d 703, 723 n.4 (S.D.N.Y. 2012) ("It is insufficient for the plaintiffs to rely on group pleading against all the . . . defendants without making specific factual allegations against the individual defendants, particularly where the [defendants] are not similarly situated.") (emphasis added).

Accordingly, Plaintiffs' allegations regarding the "MDC Defendants" as an undifferentiated group are insufficient to support any "reasonable inference" that Zenk is "liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678. As Plaintiffs have utterly failed to plead any specific fact reasonably attributable to Zenk, their claims against him must be dismissed.

III. THE COMPLAINT FAILS TO ALLEGE THE REQUISITE ELEMENTS OF EACH OF PLAINTIFFS' CLAIMS AGAINST ZENK

A. Plaintiffs Fail to Sufficiently Allege Zenk's Personal Involvement With Regard to Any of Their *Bivens* Claims

For the reasons stated in Defendant Sherman's brief, which Zenk adopts and incorporates by reference, Plaintiffs' *Bivens* claims should all be dismissed because the District Court erred in extending a *Bivens* cause of action to the new context presented by each of those claims. However, even assuming that Plaintiffs' *Bivens* claims are legally cognizable, Plaintiffs have nonetheless failed to adequately plead Zenk's personal involvement -- an essential element of each of those claims.

A "plaintiff in a *Bivens* action is required to allege facts indicating that the defendant[was] personally involved in the claimed constitutional violation." *Arar*, 585 F.3d at 569. Furthermore, "[b]ecause vicarious liability is inapplicable to *Bivens* [actions], a plaintiff must plead that each Government-official defendant, through the official's own individual actions, has violated the Constitution." *Iqbal*, 556 U.S. at 676 (emphasis added); *see also* SPA-22 (acknowledging that, after *Iqbal*, "only direct liability remains for *Bivens* claims").

Although the "factors necessary to establish a *Bivens* violation will vary with the constitutional provision at issue," *Iqbal*, 556 U.S. at 676, each of Plaintiffs' *Bivens* claims here alleges underlying constitutional violations that require some element of intent. Accordingly, Plaintiffs must plead a sufficient factual basis to

plausibly allege that Zenk, by his own individual misconduct, violated each of the constitutional rights underlying their claims -- and that he personally had the requisite intent to do so.

As the District Court noted, the Complaint appears to assert two potential theories as to Zenk's personal involvement. *See, e.g.*, SPA-32. First, it alleges that, as to conditions resulting from official MDC policies, Zenk caused Plaintiffs' injuries by permitting those preexisting policies to continue in force after his appointment as Warden. A-__ (Compl. ¶¶ 6, 25, 75-76). Second, as to conditions resulting from unofficial acts by subordinate corrections officers, it alleges that Zenk was aware of those conditions and did not act to remedy them. A-__ (Compl. ¶ 25, 97). The District Court also correctly noted that, to establish either of those theories of liability, Plaintiffs were required to allege that each "defendant's conduct satisfies each of the elements of the tort alleged." SPA-24.

However, the District Court failed to correctly apply that analysis to Zenk because it considered the sufficiency of the allegations only as to the "MDC Defendants" as an undifferentiated group. Properly analyzed, the Complaint fails to allege, even conclusorily, the requisite intent on the part of Zenk. Plaintiffs' failure to allege Zenk's intent is fatal to their claims.

1. Plaintiffs' Fifth Amendment Substantive Due Process Claim Must Be Dismissed Because Plaintiffs Fail to Allege Zenk's Punitive Intent

Plaintiffs' first claim, alleging a Fifth Amendment substantive due process violation based on the conditions of Plaintiffs' confinement, requires a showing that the defendant intended to punish the plaintiff. *Bell v. Wolfish*, 441 U.S. 520, 535-38 (1979). In denying Zenk's motion to dismiss this claim, the District Court improperly relied on the outdated reasoning in its prior, pre-*Iqbal* opinion to establish punitive intent, and further improperly applied that reasoning to the "MDC Defendants" as a group, without recognizing the dissimilarity of Plaintiffs' allegations as to Zenk. However, none of the allegations in the Complaint supports any finding that Zenk harbored any punitive intent towards Plaintiffs.

In its prior opinion, the District Court held that punitive intent could be inferred, as to all of the MDC Defendants, from both the allegations of verbal and physical abuse by MDC staff and the character of the conditions themselves. *Turkmen v. Ashcroft*, No. 02 CV 2307 (JG), 2006 U.S. Dist. LEXIS 39170, at *101 (E.D.N.Y. June 14, 2006) ("*Turkmen I*"). As to the former rationale, the Supreme Court in *Iqbal* rejected outright the theory that "a supervisor's mere knowledge of his subordinate's discriminatory purpose amounts to the supervisor's violating the Constitution." 556 U.S. at 677. And though the latter rationale may survive in theory, the District Court failed to recognize -- in either of its opinions -- that it is

not supported by any factual allegations as to Zenk.

Unlike the other "MDC Defendants," Zenk was present in any relevant capacity for only eight days with respect to one Plaintiff and less than two months with respect to another -- and was not present during any period of the other six Plaintiffs' confinement. Furthermore, the Complaint alleges that a number of the conditions specifically relied on by the District Court in support of its holding had been remedied before Zenk arrived at the MDC. *See* Section II.B, *supra* (itemizing allegations tending to exculpate Zenk from liability for, *inter alia*, the alleged conditions of denial of recreation, exposure to freezing temperatures, sleep deprivation, and denial of hygiene items). However, the District Court failed to acknowledge those differences and relied instead on the existence of a number of conditions no longer in effect during Zenk's tenure. *See Turkmen I*, at *103-04 (relying in support of its inference of punitive intent on various cases finding constitutional violations based on conditions of confinement inapplicable to Zenk, including "expos[ure] to bitter cold . . . for substantial period of time," "depriv[ation] of soap and toilet paper," "denial of toilet paper," "insufficient food," "denial of contact with family or attorney," and "constantly illuminated"

cell).[16]

Plaintiffs' alternative theory of liability for their first claim, purportedly based on Zenk's deliberate indifference to his subordinates' unauthorized conduct, is similarly untenable. Even assuming that a *Bivens* claim can be adequately pleaded on a theory of deliberate indifference,[17] Plaintiffs nonetheless fail to do so here as to Zenk.

In particular, Plaintiffs fail to specifically allege any improper acts by MDC staff after April 22, 2002 of which Zenk could have become aware, nor how Zenk might have known of such acts. Except for the unsupported conclusions that Zenk "allowed his subordinates" to abuse Plaintiffs and "made rounds on the ADMAX and was aware of conditions there," A-__ (Compl. ¶ 25), Plaintiffs do not implicate Zenk in the misconduct of his subordinates in any manner. Yet even taken as true, those allegations do not establish that Zenk had actual knowledge of any particular

[16] In concluding that the challenged conditions evince an intent to punish, the District Court suggested that no Defendant had contested the point. *See* SPA-29 & n.11 (stating that "[c]onsistent with my ruling in *Turkmen I*, the defendants do not contest that the purpose of the challenged conditions was to punish . . . . Accordingly, I do not revisit the question of whether the challenged conditions evince an intent to punish") (citation omitted). This fundamentally misreads the nature of Zenk's arguments below. Indeed, Zenk has consistently maintained that the conditions themselves are not alleged to be attributable to Zenk -- and thus such conditions cannot provide any evidence of Zenk's intent.

[17] Zenk adopts and incorporates by reference the arguments in the briefs submitted by Defendants Hasty and Sherman that deliberate indifference is no longer a cognizable form of *Bivens* liability available after *Iqbal*.

condition or instance of MDC staff misconduct. Rather, those allegations are equally consistent with the more likely inference that subordinate MDC staff members engaged in the serious misconduct alleged (if after April 22, 2002 at all) at times other than the minimal duration during which their highest-ranking supervisor was personally present making rounds. Absent specific factual allegations of Zenk's actual knowledge of a particular injury, Plaintiffs' deliberate indifference theory alleges no more than vicarious liability, inapplicable to *Bivens* claims. *See Iqbal*, 556 U.S. at 677-78.

2. Plaintiffs' Fifth Amendment Equal Protection Claim Must Be Dismissed Because Plaintiffs Fail to Allege the Requisite Mental State of Discriminatory Purpose as to Zenk

Plaintiffs' failure to allege that Zenk possessed the requisite mental state necessary to support his personal involvement is fatal to their equal protection claim. A Fifth Amendment equal protection *Bivens* claim requires a mental state of discriminatory purpose. *Iqbal*, 556 U.S. at 676 ("Where the claim is invidious discrimination in contravention of the First and Fifth Amendments, our decisions make clear that the plaintiff must plead and prove that the defendant acted with discriminatory purpose."). The purposeful discrimination required to state such a claim "requires more than 'intent as volition or intent as awareness of consequences.' It instead 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.* at 676-77 (alteration in original) (internal citation omitted).

The Complaint fails utterly to allege any such purpose with regard to Zenk. It contains no allegations whatsoever regarding Zenk's mental state, personal motivations, or intent. Nor does it contain any allegations from which Zenk's mental state may permissibly be inferred. The only allegations in the Complaint from which any kind of discriminatory purpose could be inferred refer to acts taken by other Defendants or by Zenk's subordinates. *See, e.g.*, A-__ (Compl. ¶ 60(a)-(f)) (alleging specific acts purportedly evidencing Ashcroft, Mueller, and Ziglar's "invidious animus"); A-__ (Compl. ¶¶ 105, 109-10, 120, 136) (alleging specific acts implying discriminatory animus of MDC staff).

However, allegations of the conduct or mental states of others -- even if known to Zenk -- may not be used to impute a mental state to Zenk. In *Iqbal*, the Supreme Court explicitly rejected the plaintiff's argument that "a supervisor's mere knowledge of his subordinate's discriminatory purpose amounts to the supervisor's violating the Constitution." *Iqbal*, 556 U.S. at 677. Rather, the Court held that,

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

Id. (emphasis added). Accordingly, Plaintiffs' failure to allege that Zenk himself

harbored any sort of discriminatory purpose is fatal to their Fifth Amendment equal protection claim.

3. Plaintiffs' First Amendment Free Exercise Claim Must Be Dismissed Because Plaintiffs Fail to Allege that Zenk Either Intended to or Did Suppress Plaintiffs' Religious Practices

A First Amendment free exercise *Bivens* claim requires Plaintiffs to allege that Defendants, (1) with intent to suppress their religious practices; (2) burdened those practices. SPA-55 (citing *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520 (1993)). The Complaint fails to allege either of those elements as to Zenk.

The District Court found as to the "MDC Defendants" generally that, "[w]ith respect to the burdens imposed as a matter of express policy, no question exists that defendants' actions caused the injuries alleged and, as already established, the Complaint adequately pleads intent." SPA-57. However, that determination by the District Court necessarily overlooked the fact that the only policies alleged to have any relation whatsoever to Plaintiffs' religion are affirmatively alleged to have ceased prior to Zenk's arrival at the MDC.

The only allegations in the Complaint that appear to relate to official policies relevant to Plaintiffs' religious practice allege that Plaintiffs were not permitted to keep a copy of the Koran in their cells and were not served Halal food. *See generally* A-__ (Compl. ¶¶ 131-139) (headed "Deliberate Interference with

Religious Rights"). However, the Complaint also indicates that those problems were apparently resolved by the time Zenk arrived at the MDC. *See, e.g.*, A-__ (Compl. ¶ 132) (noting that Plaintiffs received copies of the Koran within weeks or months after their arrival at the MDC); A-__ (Compl. ¶ 133) (noting that at least one Plaintiff had been "cleared for a Halal diet" as early as February, and specifically identifying only Abassi -- who was released from the ADMAX SHU on February 14, 2002 -- and the Passaic Plaintiffs -- who were never held in the ADMAX SHU at all -- as never having received Halal food). Accordingly, in refusing to dismiss this claim as to Zenk, the District Court ignored the fact that Plaintiffs have failed to allege that Zenk was in any way involved in their injuries.

In any event, Plaintiffs have failed to allege that Zenk acted with the requisite discriminatory intent. Plaintiffs not only fail to identify any factual basis at all for their claim that Zenk approved or implemented any policies burdening their free exercise of religion -- but also they fail to allege even conclusorily that he did so with the requisite specific intent.

Plaintiffs' attempt to rely on a theory of liability based on Zenk's purported deliberate indifference to the alleged misconduct of MDC staff members is similarly untenable. Even assuming such a theory of liability is actionable after

Iqbal, Plaintiffs again fail to plead the requisite mental state as to Zenk.[18] Plaintiffs allege that MDC staff interfered with their prayers by refusing to tell Plaintiffs the time or date and generally disrupting, mocking, and inappropriately commenting upon Plaintiffs' attempts to pray. A-__ (Compl. ¶¶ 134, 136). However, the Complaint specifically alleges only that "[e]vidence and complaints about these practices were brought to the attention of MDC management, including Hasty." A-__ (Compl. ¶ 137). In contrast, nowhere does the Complaint allege that Zenk received any evidence or complaints regarding any alleged infringement of Plaintiffs' religious rights by his subordinates. The lack of any specific factual allegations indicating Zenk's knowledge or intent is fatal to Plaintiffs' First Amendment claim.

4. Plaintiffs' Sixth Claim for Relief Alleging Fourth and Fifth Amendment Violations Based on Unreasonable Strip Searches Must Be Dismissed for Failure to Allege Zenk's Personal Involvement

Plaintiffs' allegations regarding the strip searches to which they claim to have been subjected fail to personally implicate Zenk in any way. Plaintiffs' specific factual allegations establish that the strip searches did not occur as a matter of official policy. *See* A-__ (Compl. ¶ 111); *see also* note 14, *supra*. Neither does

[18] As noted in section III.A.1, *supra*, Zenk incorporates by reference the other Defendants' legal arguments regarding the continuing validity of deliberate indifference as an adequate mental state to support a supervisor's direct liability for any constitutional violation after *Iqbal*.

the Complaint allege any specific facts indicating that Zenk personally knew of, condoned, or otherwise played any causal role in the searches whatsoever. Indeed, there is not a single allegation in the entire section of the Complaint entitled "Arbitrary and Abusive Strip-Searches" that specifically mentions Zenk or any date after April 22, 2002. *See* A-__ (Compl. ¶¶ 111-118).

However, the District Court, inexplicably and without citation to the Complaint, based its denial of Zenk's motion to dismiss this claim on its apparently mistaken belief that "[a]ccording to the Complaint, Hasty and Zenk ordered the creation of an unreasonable and punitive strip search policy, and Cuciti, with the help of Sherman and Lopresti, developed the specific policy." SPA-59. No such allegation exists. In actuality, the only allegation in the Complaint that makes any attempt to connect the strip searches to any official policy is patently conclusory -- and in direct contradiction to the specific factual allegation in paragraph 111 that the searches were not conducted pursuant to official policy. *Compare* A-__ (Compl. ¶ 301) ("By creating and approving the policy and practice under which MDC Plaintiffs and class members were subjected to these punitive strip-searches MDC Defendants intentionally or recklessly violated MDC Plaintiffs' and class members' right to be free from punishment under the Due Process Clause of the Fifth Amendment to the United States Constitution."), *with* A-__ (Compl. ¶ 111) ("While Defendant Cuciti was given

responsibility for developing the strip-search policy on the ADMAX, that policy was never put in writing, and the searches were conducted inconsistently.").

Accordingly, because the Complaint does not contain a single factual allegation in support of either of the purported theories of Zenk's personal involvement in the alleged violation of Plaintiffs' Fourth and Fifth Amendment rights, this claim must be dismissed.

B. Plaintiffs' Seventh Claim for Relief Should Be Dismissed Because Plaintiffs Have Failed to Allege that Zenk Conspired to Violate Plaintiffs' Rights

Plaintiffs' seventh claim for relief seeks recovery under 42 U.S.C. § 1985(3) because Zenk allegedly entered into an agreement and "conspired" with various other Defendants to deprive Plaintiffs of their constitutional rights. A-__ (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.

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*, 585 F.3d at 569. Rather, 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." *Id.* (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, 518 (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) (emphasis added).

Here, Plaintiffs' conspiracy allegations are based entirely upon a single, conclusory paragraph of their 306-paragraph Complaint. A-__ (Compl. ¶ 305). Plaintiffs do not allege any factual basis to support a meeting of the minds between Zenk and any of the named Defendants. Plaintiffs' unsubstantiated allegation of some undefined agreement is inadequate to demonstrate their entitlement to relief. As the Supreme Court has made clear, bare conclusory allegations of a conspiracy or agreement are not sufficient absent supporting factual allegations plausibly indicating that such a claim existed. *See Twombly*, 550 U.S. at 564-66 (conclusory allegation that the defendants had "entered into a contract, combination or conspiracy to prevent competitive entry . . . and ha[d] agreed not to compete with one another" insufficient to withstand motion to dismiss absent plausible supporting factual allegations).

Moreover, the Complaint simply fails to allege any overt acts by Zenk reasonably related to the promotion of the conspiracy. Instead, Plaintiffs offer a

formulaic recitation of the elements of a § 1985 claim, alleging that Defendants "agree[d]" and "conspired" to deprive Plaintiffs of their constitutional rights. A-__ (Compl. ¶ 305). These types of allegations were specifically rejected as insufficient in *Twombly*. 550 U.S. at 564; *see also Iqbal*, 556 U.S. at 679-80 (discussing *Twombly*).

In denying Zenk's motion to dismiss this claim, the District Court held summarily that "Hasty, Zenk, Sherman, Lopresti, and Cuciti implemented the facially discriminatory harsh confinement policy and the interference with [Plaintiffs'] free exercise of their religion, all as alleged in Claims One, Two, Three, and Six. The same allegations state a claim for a conspiracy motivated by class based animus . . . ." SPA-61. However, as discussed throughout this brief, the Complaint in general fails to adequately allege those other claims as to Zenk, and in particular fails to allege that Zenk harbored any discriminatory purpose against Plaintiffs.

Accordingly, Plaintiffs' conspiracy claim must be dismissed.

IV. ZENK IS ENTITLED TO QUALIFIED IMMUNITY BECAUSE THE COMPLAINT DOES NOT ALLEGE THAT ZENK VIOLATED ANY CLEARLY ESTABLISHED CONSTITUTIONAL RIGHT

Even assuming that Plaintiffs sufficiently allege any misconduct by Zenk, and assuming further that such misconduct is sufficient to give rise to liability, their claims should nonetheless be dismissed on qualified immunity grounds. As a

preliminary matter, Zenk adopts and incorporates the generally applicable qualified immunity arguments made in Defendant Sherman's brief. However, Zenk is also entitled to qualified immunity for the additional reason that it was not clearly established that detaining Plaintiffs under the less egregious conditions of confinement alleged to have existed for the significantly shorter duration of Zenk's tenure violated Plaintiffs' constitutional rights.

In analyzing whether a right is clearly established, the "relevant, dispositive inquiry" is "whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Saucier v. Katz*, 533 U.S. 194, 202 (2001) (emphasis added). Accordingly, a court must consider the conduct alleged "in light of the specific context of the case, not as a broad general proposition." *Doninger v. Niehoff*, 642 F.3d 334, 345 (2d Cir. 2011). Thus, "the qualified immunity analysis must be 'particularized' in the sense that '[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Id.*at 345-46 (emphasis added). Though there need not be a particular case addressing the exact situation at issue, "the unlawfulness" of "the very action in question" must be "apparent." *Id.* at 346 (emphasis added).

The District Court failed to conduct the particularized, fact-specific qualified immunity analysis required by this Court in *Doninger*. *See id.* Instead, it denied

qualified immunity to all of the "MDC Defendants," without differentiation, on the basis of broad generalizations -- for instance, that it "was clearly established in 2001 that punitive conditions of confinement could not be imposed upon unconvicted detainees." SPA-34; *see also* SPA-57 (MDC Defendants not entitled to qualified immunity because the "right to a reasonable opportunity to worship has long been clearly established"). However, the proper, particularized inquiry the District Court should have conducted was whether it was clearly established in 2002 that the particular conduct allegedly engaged in by Zenk violated Plaintiffs' constitutional rights. In failing to particularize its analysis to Zenk, the District Court improperly denied Zenk qualified immunity on the basis of the significantly more severe conditions alleged to have existed in October and November of 2001, and the inaccurate assumption that those conditions persisted for over seven months.

As explained in section II.B, *supra*, the Complaint alleges (if anything) that Zenk was responsible for less objectionable conditions, for a much shorter duration than the other MDC Defendants. Consequently, it is not only less clear -- objectively speaking -- that any condition in place during Zenk's tenure in fact violated any constitutional right; it is also less likely that a reasonable government officer in Zenk's position would have known, without a doubt, that those conditions were unconstitutionally "punitive." Accordingly, the few general

allegations of unexplained inaction by Zenk in the Complaint do not establish beyond any reasonable dispute that Zenk violated any "clearly established" constitutional right, and Zenk is therefore entitled to qualified immunity as to all of Plaintiffs' claims.

CONCLUSION

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

Dated: New York, New York
June 28, 2013

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Rule 32(a)(7)(B) of the Federal Rules of Civil Procedure because this brief contains 9,437 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii).

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