UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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| IBRAHIM TURKMEN; ASIF-UR-REHMAN SAFFI; SAED AMJAD ALI JAFFRI, YASSER EBRAHIM; HANY IBRAHIM; SHAKIR BALOCH; and AKIL SACHVEDA on behalf of themselves and all others similarly situated,<br><br>Plaintiffs,<br><br>v.<br><br>JOHN ASHCROFT, Attorney General of the United States; ROBERT MUELLER, Director Federal Bureau of Investigations; JAMES W. ZIGLAR, Commissioner, Immigration and Naturalization Service; DENNIS HASTY, former Warden, Metropolitan Detention Center; MICHAEL ZENK, Warden of the Metropolitan Detention Center; JOHN DOES 1-20, Metropolitan Detention Center Corrections Officers, and JOHN ROES 1-20, Federal Bureau of Investigation and / or Immigration and Naturalization Service Agents,<br><br>Defendants. | ) | Civil Action<br>No. 02 CV 2307<br><br>(Gleeson, J.) |

DEFENDANT MUELLER'S SUPPLEMENTAL MEMORANDUM
IN SUPPORT OF MOTION TO DISMISS

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## I. Introduction

Plaintiffs, illegal aliens no longer residing in this country, filed this action making a variety of challenges to the length of their detention, the conditions of their detention, and other claims arising from the investigation of the terrorist attacks on September 11, 2001. They named as defendants Attorney General John Ashcroft, Director of the FBI Robert Mueller, former INS Director James Ziglar, and Michael Zenk and Dennis Hasty, the present and former Wardens of the Metropolitan Detention Center, Brooklyn, New York. Each was named in his official and individual capacities. After plaintiffs had amended their complaint, the defendants moved to dismiss the amended complaint; the motion was fully briefed and pending decision.

In June 2003, six months after this Court heard argument on defendants' motion, the Department of Justice Inspector General issued his report entitled "The September 11 Detainees: A Review of the Treatment of Aliens Held on Immigration Charges in Connection with the Investigation of the September 11 Attacks" (hereafter "IG Report"). Following an exchange of letters among counsel, this Court held a hearing by conference call, and by order permitted plaintiffs to file a Second Amended Complaint and directed supplemental briefing. The Court allowed plaintiffs to raise three new claims in the Second Amended Complaint, based on the IG Report. They are: (1) a due process claim based on defendants' "no bond" policy; (2) a due process claim arising from plaintiffs' placement the maximum security Special Housing Unit; and (3) a First Amendment claim based on the "communication blackout" imposed by defendants

during plaintiffs' detention. June 12, 2003 Order at 2.

Plaintiffs duly filed their Second Amended Complaint on June 18, 2003. As authorized by the Court's June 12 Order, that Complaint contains voluminous quotations from the IG Report, complete with page references. Yet for all its additional volume, the Second Amended Complaint adds nothing of legal significance or weight to the previous Complaint's skeletal allegations against defendant Mueller in his individual capacity. Like its predecessor, the Second Amended Complaint fails to articulate any clearly established constitutional rights of plaintiffs that were violated by any alleged action, statement or putative omission on the part of Director Mueller. The Second Amended Complaint, in short, suffers from the same deficiencies that the briefing exposed in the First Amended Complaint.

Mindful of this Court's directive that defendants "need only supplement their pending motion to address the new claims" and that "they should not reargue claims not impacted by the changes to the complaint," June 12 Order at 2, this memorandum sets out the reasons why the new allegations - in reality nothing more than a recasting of the previous, deficient claims - are inadequate to maintain this action against Director Mueller in his individual capacity. For reasons akin to those set forth in the memoranda already filed, this Court should dismiss this action as to Director Mueller because he is protected by qualified immunity.

## II. PLAINTIFFS' ADDITIONAL CLAIMS FAIL TO ADD ANY LEGALLY SIGNIFICANT SUBSTANCE TO THEIR PREVIOUS ALLEGATIONS

The "new" allegations set out in plaintiffs' Second Amended Complaint fail to

improve upon the insubstantial claims of the prior complaint.[1] Perhaps the most prominent aspect of the new complaint is what it fails to do: It adds nothing to the allegations regarding any of the named plaintiffs. For example, no named plaintiff claims to have been held longer than six months, nor have there been any material changes in named plaintiffs' claims about their conditions of confinement, including claims regarding bond, communications, assignment to the Special Housing Unit (SHU), or delays in receipt of their charging documents (Notices to Appear). Second Amended Complaint, ¶¶ 72-195.

For purposes of defendant Mueller's pending motion to dismiss, these characteristics of the Second Amended Complaint are important in two crucial respects. First, as class representatives, plaintiffs cannot represent the absent class members who fail to share their salient characteristics. East Texas Motor Freight Sys., Inc. v. Rodriguez, 431 U.S. 395, 403 (1977)("[a] class representative must be part of the class and *'possess the same interest and suffer the same injury'*"as the class members they seek to represent (quoting Schlesinger v. Reservists Committee to Stop the War, 418 U.S. 208, 216 (1974)(emphasis added). Second, the insubstantiality of the Second Amended Complaint underscores the fact that briefing is complete regarding the qualified immunity allegations.

As noted in defendants' Reply Memorandum filed November 25, 2002, it

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[1] Plaintiffs do drop their prior Seventh Claim for Relief, the Right to Counsel Claim.

remains undisputed that each named plaintiff violated the immigration laws and was subject to arrest and detention for that reason. Reply Memorandum at 1. Nor is it disputed that there was ample statutory authority to detain the named plaintiffs once their removal orders became final, or that each of the class representatives was in fact removed within the "presumptively reasonable" six-month period articulated in Zadvydas v. Davis, 533 U.S. 678, 701 (2001). See Reply Memorandum at 1-2.

What the Second Amended Complaint does add is some additional factual detail that is largely, if not entirely, unrelated to the named putative class representatives. These new additional details relate generally to the claims authorized by the Court's June 12 Order, though none connect Director Mueller to any purported violation of named plaintiffs' constitutional or statutory rights. First, some post-September 11 detainees were not served with a timely "Notice to Appear" (notice of the charges on which they were being held). E.g., Second Amended Complaint ¶¶ 31 (a); 61. Second, some of the detainees were treated as "of interest" and subjected to a no bond policy. ¶¶31(b); 63. Third, some of the detainees were classified as "high interest" and placed in the Metropolitan Detention Center's Administrative Maximum Special Housing Unit in Brooklyn. ¶¶31 (b); 66. Fourth, some were subjected to a communications blackout and other actions that interfered with their access to counsel. ¶ 31(c); 68. Finally, some of the post-September 11 detainees were held beyond the period necessary to secure their removal or voluntary departure. ¶ 31(d); 70.

The Second Amended Complaint also adds six purportedly new claims for relief.

In fact, however, the "new" claims relate to the timing of receipt of the charges, assignment to the Special Housing Unit, and the difficulty in communicating with counsel and others, all matters that have already been addressed in prior briefing. The new Complaint asserts that the delays in serving the Notices to Appear violated the detainees' Fifth Amendment due process rights. ¶¶ 292-296. It also alleges that the "No Bond" policy denied the detainees due process and equal protection under the Fifth Amendment. ¶¶297-302; 303-308. The Second Amended Complaint adds a claim that by assigning detainees to the Special Housing Unit, they were denied due process under the Fifth Amendment because the classifications such as "of high interest" were arbitrary. ¶¶309-313. And the new Complaint adds two claims that the "Communications Blackout" the detainees allegedly suffered in the SHU violated their First Amendment and Fifth Amendment due process rights to have access to their lawyers and the courts. ¶¶314-318; 319-323.

## III. PLAINTIFFS' ADDITIONAL CLAIMS SHOULD BE DISMISSED BECAUSE THEY STILL FAIL TO OVERCOME DIRECTOR MUELLER'S QUALIFIED IMMUNITY

In the initial round of briefing defendants showed that Director Mueller and the other individual defendants were protected by qualified immunity. Memorandum In Support of Defendants' Motion To Dismiss, filed August 26, 2002, at 8-46; Reply Memorandum at 3-19. Defendants established the detention of individuals in plaintiffs' status is, under Zadvydas, presumptively reasonable for up to six months, and that aliens have no constitutional right to release on bond. Carlson v. Landon, 342

U.S. 524, 539- 340 (1952); accord Demore v. Kim, 123 S. Ct. 1708, 1720-1722 (2003). Defendants also showed that plaintiffs' equal protection claims failed because in dealing with aliens the Executive Branch has wide latitude, E.g., Reno v. American-Arab Anti-Discrimination Comm., 525 U.S. 471 (1999), and because plaintiffs failed to identify a similarly-situated group of aliens that was treated differently. Defendants further established that plaintiffs had failed to allege involvement of the individual defendants in the conduct complained of. Ford v. Moore, 237 F.3d 156, 162-163 (2d Cir. 2001). Defendants also demonstrated that assignment to the Special Housing Unit and subjection to the conditions there violated no clearly established constitutional rights. Bell v. Wolfish, 441 U.S. 520 (1979).

The Second Amended Complaint does nothing to alter the legal analysis as it relates to claims against Director Mueller in his individual capacity. As a threshold matter in considering plaintiffs' claims against Mr. Mueller, it is important to heed the mandate of the Immigration and Nationality Act (INA) that complaints "arising from any action taken or proceeding brought to remove an alien from the United States . . . shall be available only in judicial review of a final order under this section." 8 U.S.C. § 1252(b)(9). It would be strange indeed if the strict constraint on judicial review embodied in this provision could be circumvented by the simple expedient of suing federal officials in their personal capacities. Cf. Merritt v. Shuttle, Inc., 187 F.3d 263, 270-71 (2d Cir. 1999)(allowing Bivens claim to proceed would disrupt judicial review structure of Federal Aviation Act, which authorized review of agency actions only in

Circuit Courts); Spagnola v. Mathis, 859 F.2d 223, 229-30 (D.C. Cir. 1988)(en banc)(Civil Service Reform Act is a "special factor counseling hesitation" in allowing Bivens claims against federal supervisors for alleged constitutional torts in workplace).

Insofar as plaintiffs may seek to argue the scope of the INA's reference to claims "arising from" detention proceedings, however, this Court need not allow such arguments to delay a prompt dismissal of the claims against Mr. Mueller, for official immunity shields him so long as his conduct did not violate any clearly established constitutional or statutory rights of which a reasonable person would have known. Wilson v. Layne, 526 U.S. 603, 609 (1999); Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). The Supreme Court has emphasized that analysis of a constitutional tort claim must begin by determining whether the conduct alleged by plaintiffs even violates any constitutional right; only if that inquiry is answered in the affirmative does the analysis then proceed to the clearly-established question. Conn v. Gabbert, 526 U.S. 286, 290 (1999); see also Siegert v. Gilley, 500 U.S. 226 , 233 (1991).

The Second Amended Complaint fails at the first stage. Even after the amendments, evaluating the substance of plaintiffs' claims compels the conclusion that, to borrow Gertrude Stein's unflattering description of Oakland, California: "There is no there, there." Association for Regulatory Reform v. Pierce, 849 F.2d 649, 651 (D.C. Cir. 1988). The Zadvidas decision makes clear that detention is presumptively lawful for up to six months, and none of the plaintiffs were detained more than six months. Thus, an alien has no constitutional right, let alone a clearly established one, to release on

bond within a specified time period. There is likewise no constitutional right, much less a clearly established one, for aliens not to be detained in a Special Housing Unit or made subject to its restrictions. Notable in this regard is the absence of any contention in the Second Amended Complaint that plaintiffs have been treated differently from other non-post September 11 detainees held in the SHU regarding communication with attorneys or others, or other conditions of detention.

The generalized claims of a communications blackout, like the no-bond claims, have minimal impact on the named plaintiffs. Plaintiff Turkmen, for example, acknowledges that upon arrival in Passaic County Jail he was given a list of telephone numbers for free legal services and was permitted to make telephone calls. Second Amended Complaint, ¶¶ 63, 68, 76. The same is generally true for the other named plaintiffs. To varying degrees all were permitted communication of some type or alleged no facts regarding any limits they faced: Ebrahim and Ibrahim, like Turkmen, were given a list of numbers for free counsel and allowed to make calls, ¶ 125; Safi, ¶¶ 85, 87, 96; Baloch, ¶¶142, 143; Sachveda fails to allege any limits that he faced except to contact the Canadian Consulate, ¶ 156; the same is true for Jaffri, ¶127. Consequently, the named plaintiffs cannot represent a class of detainees who were subject to a communications blackout. East Texas Motor Freight Sys. Inc., 431 U.S. at 403. The generalized claim that plaintiffs Safi, Jaffri, Ebrahim, Ibrahim, and Baloch were subjected to a blackout ranging from two weeks to two months, ¶68, have no impact on the analysis. Indeed, rather than a blackout, it reflects measured limitations on

communications faced by those assigned to the SHU.

In any event, even if there were a communications blackout, the decision to limit communications during the immediate aftermath of the September 11 attacks for law-enforcement or national security reasons was obviously based on "facially legitimate and bona fide reason[s]" that the Supreme Court has recognized as appropriate. Compare Fiallo v. Bell, 430 U.S. 787, 794 n. 5 (1977); Mathews v. Diaz, 426 U.S. 67, 81-82 (1976). More to the point, the decision certainly cannot be shown to have transgressed a constitutional right of the plaintiffs that was clearly established.

None of the named plaintiffs originally made specific claims of delay in receipt of their Notices to Appear. Plaintiff Turkmen received his shortly after arriving at Passaic County Jail. Second Amended Complaint, ¶83. Mr. Safi made no claims regarding delays in receipt of his Notice to Appear, but he acknowledges that he received a hearing within several weeks after his arrest. Id. ¶115. Although Mr. Jaffri now alleges a delay of five days in receipt of his Notice to Appear, id. ¶ 61, he acknowledges that he received a hearing in December 2002. Id. ¶135. Mr. Ebrahim and Mr. Ibrahim originally made no claims of delay, and their hearing was held in early November 2001. Id. ¶156. They now claim a delay of sixteen days. Id. ¶61. Mr. Baloch has no allegations regarding his Notice to Appear. And Mr. Sachveda received his Notice to Appear within a week of his detention. Id. ¶186, 187.

Nor, importantly, do any of the named plaintiffs claim any prejudice from the timing of receipt of their Notices to Appear. Without a claim of prejudice, the named

plaintiffs have failed to establish a due process violation. E.g., United States v. Fernandez-Antonia, 278 F.3d 150, 157-158 (2d Cir. 2002); Douglas v. INS, 28 F.3d 241, 244, 246 (2d Cir. 1994). Consequently, the delays in receipt of Notices to Appear fail to articulate denial of a clearly established constitutional right of plaintiffs that was violated.

Finally, the Second Amended Complaint perpetuates a defect in its predecessors that is particularly glaring with respect to defendant Mueller by failing to present any allegations that link him to the alleged constitutional wrongs endured by the plaintiffs. They make no allegation, for example, nor could they, that Mr. Mueller as FBI Director personally exercised any dominion or control over the operation of the Metropolitan Detention Center in Brooklyn, a facility controlled by the Federal Bureau of Prisons. They do not suggest, except perhaps in the most generalized manner (Second Amended Complaint, ¶¶2, 4-7), that Mr. Mueller personally had any direct or indirect role in any decisions not to admit plaintiffs to bond. Consequently, because plaintiffs have failed to identify any of their clearly established constitutional rights that Director Mueller allegedly violated, this Court should dismiss this action as against Director Mueller in his individual capacity.

## CONCLUSION

For the above reasons and those set forth in defendants' initial memorandum and reply, defendant Muller requests dismissal under Fed. R. Civ. P. 12(b) (6) of all plaintiffs' claims asserted against him.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Defendant Mueller's Supplemental Motion to Dismiss, Memorandum in Support of Defendant Mueller's Supplemental Motion to Dismiss was served by first class mail, postage prepaid this ____ day of July, 2003, to:

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