IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

IBRAHIM TURKMEN, AKHIL SACHDEVA, AHMER IQBAL ABBASI, ANSER MEHMOOD, BENAMAR BENATTA, AHMED KHALIFA, SAEED HAMMOUDA, and PURNA RAJ BAJRACHARYA on behalf of themselves and all others similarly situated, Plaintiffs, v. JOHN ASHCROFT, former Attorney General of the United States, ROBERT MUELLER, Director of the Federal Bureau of Investigation, JAMES W. ZIGLAR, former Commissioner of the Immigration and Naturalization Service, DENNIS HASTY, former Warden of the Metropolitan Detention Center (MDC), MICHAEL ZENK, former Warden of the MDC, JAMES SHERMAN, former MDC Associate Warden for Custody, SALVATORE LOPRESTI, former MDC Captain, and JOSEPH CUCITI, former MDC Lieutenant, Defendants.	Case No. CV-02-2307 (JG)(SMG)

REPLY MEMORANDUM IN SUPPORT OF DEFENDANT DENNIS HASTY'S MOTION TO DISMISS THE FOURTH AMENDED COMPLAINT

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Plaintiffs' claims can be divided into two categories: (1) claims based on policies created by high-ranking officials outside of the Metropolitan Detention Center ("MDC") and (2) claims based on individual acts by low-level personnel at the MDC. The pleadings in this case – which consist of Plaintiffs' voluminous Fourth Amended Complaint and the exhaustive findings by the Department of Justice's Office of Inspector General incorporated into the Complaint by the Plaintiffs – establish that neither category of claims is sufficiently attributable to former-warden Dennis Hasty to permit a *Bivens* claim for damages.

As to the first category of claims, Hasty was responsible for *implementing* the policies at issue at the MDC; yet any alleged unconstitutionality in such policies could not have been known to him at that time. The June 2003 OIG Report[1] – which Plaintiffs incorporate into their Complaint but ignore where inconvenient – demonstrates that senior Bureau of Prisons ("BOP") officials directed Hasty to implement these policies under a cloak of legitimacy – *i.e.*, that the 9/11 detainees were probably connected to terrorism and could be dangerous. Hasty had no reasonable basis to question the validity of these policy determinations, particularly in the aftermath of a wide-scale terrorist attack, which was declared a national emergency. Thus, even were this Court to determine now that these policies violated the Plaintiffs' constitutional rights in some fashion, Hasty is entitled to qualified immunity because his actions in following "facially valid" orders were objectively reasonable under the circumstances.

The second category of Plaintiffs' claims should be dismissed because there is no basis for imputing individual liability against Hasty for allegedly abusive acts by low-ranking MDC personnel. Knowing that they cannot connect Hasty to such conduct by direct participation,

[1] "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" (June 2003) ("OIG Report" hereinafter).

Plaintiffs attempt to impute liability in other ways that do not stand up under scrutiny. Plaintiffs allege various types of *passive supervisory* conduct by Hasty. Under the Supreme Court's teachings in *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009), and cases from courts in this Circuit interpreting *Iqbal*, none of these allegations are sufficient to state a claim for *Bivens* relief. Therefore, Hasty is entitled to dismissal on these claims as well.

ARGUMENT

I. Plaintiffs' Claims That Rely on Policies Created by Hasty's Superiors Should be Dismissed Because His Actions Were Objectively Reasonable.

As explained in his Memorandum of Law in Support of his Motion to Dismiss ("MTD"), Hasty is entitled to qualified immunity for claims that arise from policies and directives set at levels above Hasty. These policies include the "communications blackout" (Claims 4 and 5) and the highly restrictive (but not abusive) conditions related to detention in the ADMAX SHU (which constitute parts of the due process and equal protection allegations in Claims 1 & 2).

A natural outgrowth of the objectively reasonable prong of the Supreme Court's qualified immunity jurisprudence is the rule – well-established in this Circuit – that a subordinate official is entitled to qualified immunity if he or she acts pursuant to "facially valid" orders of his or her superiors. *See* MTD at 5-14. Here, as demonstrated by Plaintiffs' Fourth Amended Complaint ("Complaint" or "Compl."), which includes the incorporated OIG Report, these claims are based entirely on policies created by Hasty's superiors at the BOP. Hasty's only "involvement" in the actions and policies underlying these claims was – and could only be – to perform the orders of his superiors. *Id.* at 7-14. The OIG Report further establishes that in the specific context of the events at issue – namely, in the immediate aftermath of the September 11 attacks – plausible, indeed compelling, grounds for the policies at issue existed. Thus, even at the pleadings stage, it

is clear that Hasty was objectively reasonable in his belief that the challenged policies were facially valid, and he is entitled to qualified immunity as a matter of law for these claims. *Id.*

A. Hasty's Only Role in the Events Related to These Claims Was to Follow the Orders of His Superiors.

1. The OIG Report's Findings Contradict Plaintiffs' Assertions.

The OIG Report establishes that the decision to house the 9/11 detainees in the ADMAX SHU, with its inherently restrictive conditions, and to institute a communications blackout were made by BOP officials at levels above Hasty. *See* OIG Report at 19 ("the BOP made several decisions regarding the detention conditions . . . includ[ing] housing the detainees in the [ADMAX SHU], implementing a communications blackout, and classifying the detainees as Witness Security (WITSEC) inmates."). As such, Hasty's MTD correctly stated that "the BOP" made these decisions. MTD at 7-8.

Unable to avoid these OIG findings, Plaintiffs are forced to advance the implausible idea that the BOP officials making these decisions may have actually been Hasty and Associate Warden, James Sherman.[2] *See* Opp. at 47 ("the OIG report neither affirms nor denies . . . Hasty

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[2] Although Plaintiffs now ask the Court to ignore the OIG Report where it undermines their claims, Opp. at 32 n.11, the Seventh Circuit explains that plaintiffs cannot instruct the court to ignore a document they attached to the pleadings just because it hurts their claims: "A plaintiff may plead himself out of court by attaching documents to the complaint that indicate that he or she is not entitled to judgment." *Thompson v. Ill. Dep't of Prof'l Regulation*, 300 F.3d 750, 754 (7th Cir. 2002) (quotation and citation omitted). Moreover, "when a written instrument contradicts allegations in a complaint to which it is attached, *the exhibit trumps the allegations.*" *Id.* (quotation and citation omitted) (emphasis in original). *See also Koncelik v. Savient Pharm., Inc.*, No. 08-cv-10262, 2010 WL 3910307, at *5 (S.D.N.Y. Sept. 29, 2010) (plaintiffs "cannot premise their claims on allegations flatly contradicted by [ ] incorporated documents.") (citing *Gant v. Wallingford Bd. of Educ.*, 69 F.3d 669, 674 (2d Cir. 1995)).

Plaintiffs' citation to *Gant* and *In re Rickel & Assocs.* (citing *Gant*) is inapposite. In *Gant*, the Second Circuit held that where a plaintiff claiming discrimination attached to the complaint a report, written by the defendants, allegedly containing false statements evidencing discriminatory intent, the court would not consider the allegedly false statements as having been incorporated for their truth. In doing so, the court cited the example of a plaintiff claiming libel, who may attach the allegedly libelous writing without the risk that the court will deem true all libels in it. *See Gant*, 69 F.3d at 674. Thus, "[a]n appended document will be read to evidence what it incontestably shows *once one assumes that it is what the complaint says it is* (or, in the absence of a descriptive allegation, that it is what it appears to be)." *Id.*

(continued…)

and Sherman's role in setting policy . . . ."). Hasty and Sherman *do* work for the BOP, but the OIG Report makes clear that these decisions were made at the *highest levels* of the BOP – *i.e.*, BOP Director Kathleen Hawk Sawyer, Assistant Director for Correctional Programs Michael Cooksey, and Northeast Region Director David Rardin – and in conjunction with FBI direction.

For example, Hawk Sawyer explained that the "detainees were held under these restrictive detention conditions, in part because the BOP did not know who the detainees were or what security risks they might present to BOP staff and facilities." OIG Report at 112. In fact, these were "not new policies created specially for the detainees. Rather, the policies were longstanding BOP practices for housing inmates who presented special security concerns." *Id.*

The OIG Report also explains that Cooksey's "October 1 memorandum directed all BOP staff, including staff at the MDC, to continue holding September 11 detainees in the *most restrictive conditions of confinement possible* . . . ." *Id.* at 116 (emphasis added). According to Cooksey, "the BOP decisions were based on the BOP's concerns about potential security risks posed by the September 11 detainees." *Id.* at 19. He also noted that "the BOP made the decision to impose strict security conditions in part because the FBI provided so little information about the detainees and because the BOP did not really know whom the detainees were." *Id.* The BOP, therefore, reasonably decided "to err on the side of caution and treat the September 11 detainees as high-security detainees." *Id.* Similarly, Rardin "directed wardens in his region [which included the MDC] not to release inmates classified by the BOP as 'terrorist related' from restrictive detention in SHUs 'until further notice.' *Rardin also ordered a communications*

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(emphasis added). Here, Plaintiffs append the OIG Report as an exhibit to provide the "well-documented" factual basis for their claims (Compl. ¶ 3 n. 1) – and the court should interpret it as such. Plaintiffs cannot simultaneously instruct the court to ignore the document where it undermines their allegations.

blackout for September 11 detainees . . . ." *Id.* at 113 (emphasis added). Finally, Hawk Sawyer explained that the practice of "MDC officials plac[ing] all incoming September 11 detainees in the ADMAX SHU without conducting [a] routine individualized assessment . . . resulted from the FBI's assessment and was not the BOP's 'call.'" OIG Report at 112. Certainly, then, none of this was *Hasty's* "call" either.

Given the wealth of factual details in the OIG Report, the most Plaintiffs can say is that the OIG Report does not address Hasty's role and, "[s]ilence in the OIG report . . . does not contradict Plaintiffs express allegations." Opp. at 47. Yet Plaintiffs cannot deny that the OIG Report unequivocally attributes the formation of these policies to government officials above Hasty. The OIG conducted an exhaustive investigation to determine the reasons for the 9/11 detainees' confinement and treatment at the MDC. The investigation "focused on the treatment of aliens who were held on federal immigration charges in connection with the September 11 investigation," which included a detailed investigation into issues relating to (a) the alleged violations based on the policy decisions concerning Plaintiffs' assignment to the ADMAX SHU, (b) the conditions of confinement they experienced during their incarceration, (c) the length of their detention, and (d) the "communications blackout." *See* OIG Report at 4. For each of these challenged policies, the OIG made explicit findings as to how – and by whom – the policy was created. *See* MTD at 7-14. Indeed, the scope of this investigation included the role of supervisory officials at the MDC, such as the wardens.[3]

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[3] The OIG "conducted more than *50* interviews of officials at the FBI, INS, BOP, and the Department of Justice regarding their involvement in developing and implementing the policies concerning the apprehension, detainment, investigation, and adjudication of September 11 detainee cases. * * * During our fieldwork at the MDC and Passaic, *we interviewed the wardens, supervisors, correctional officers, medical staff, and other employees who had contact with or oversight of September 11 detainees*." OIG Report at 7 (emphasis added).

Thus, the OIG Report's "silence" on Hasty's role means much more than Plaintiffs allow. Far from being merely inconclusive – these OIG findings affirmatively demonstrate that Hasty had no involvement in the creation of these policies, but instead was only following his superiors' orders. As such, the OIG Report fatally contradicts Plaintiffs' claims for individual liability and monetary damages against Hasty.

2. Plaintiffs' Allegations Fail to Establish a Policy-Setting Role For Hasty.

Even beyond the OIG Report-component of Plaintiffs' Complaint, allegations in the body of the Complaint also fail to establish Hasty's role in setting the challenged policies. First, the only true policy-setting conduct in the Complaint is ascribed to the executive-level officials in Washington. For example, Plaintiffs allege that former Attorney General Ashcroft was "the principal architect of the policies and practices challenged" in this case, and "[a]long with a small group of high-level government employees [which included FBI Director Mueller and INS Commissioner Ziglar], Ashcroft created the hold-until cleared policy . . . [and] many of the unreasonable and excessively harsh conditions under which Plaintiffs and other class members were detained . . . ." Compl. ¶¶ 21-23. Plaintiffs also allege that Ashcroft and Mueller met regularly with a small group "and mapped out ways to exert maximum pressure on the individuals arrested in connection with the terrorism investigation, including Plaintiffs and class members." *Id.* ¶ 61. In fact, Plaintiffs contend, "[t]he punitive conditions in which MDC Plaintiffs and class members were placed were the *direct result* of the strategy mapped out by Ashcroft and Mueller's small working group." *Id.* ¶ 65 (emphasis added). In addition, Plaintiffs allege that "Mueller ordered that MDC Plaintiffs and class members be kept on the INS Custody list (and thus in the ADMAX SHU) even after local FBI offices reported that there was no reason to suspect them of terrorism." *Id.* ¶ 67.

Second, even Plaintiffs' allegations that relate specifically to Hasty fall short in establishing his policy-setting role. Plaintiffs' brief asserts that "Hasty and Sherman participated in creating the policies that resulted in Plaintiffs' prolonged detention in the ADMAX SHU, the communications blackout, and other restrictions," Opp. at 46-47, but the citations to various paragraphs of the Complaint are unpersuasive. For instance, Hasty may have given the literal "order" for the "*creation* of the ADMAX SHU," Compl. ¶ 24 (emphasis added), but as discussed above, it was the BOP management that decided to house the 9/11 detainees in the ADMAX SHU and to "treat the September 11 detainees as high-security detainees," with the resultant restrictive conditions. OIG Report at 19. Many of the other sections of the Complaint that Plaintiffs cite merely state that Hasty was "implement[ing]" and "carry[ing] out" "Ashcroft, Mueller, and Ziglar's policy" (Compl. ¶¶ 68, 75, 76, 79). And other allegations about Hasty's role are contradicted directly by the OIG Report's findings, as noted above in Section I.A.1, and should not be credited.[4] *See* note 2, *supra*.

One other issue that bears mentioning is the dynamic that Plaintiffs have created by failing to include the senior BOP officials in this lawsuit. Hawk Sawyer, Cooksey, and Rardin played critical *policy-setting* roles in the detention of the 9/11 detainees, which the OIG Report

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[4] Furthermore, Plaintiffs' assertions that the Complaint and OIG Report allege practices that extended beyond those authorized by BOP are not persuasive. First, Plaintiffs claim there is "evidence cited by the OIG, along with Plaintiffs' allegations, that the communications restrictions at MDC lasted longer and were more extensive than those ordered by BOP supervisors." Opp. at 47. As the OIG Report further explains, however, this evidence concerned only specific acts by subordinate MDC employees. *See* OIG Report at 131-34 ("MDC unit managers and counselors controlled the process for placing legal telephone calls," and citing specific instances where counselors and unit managers failed to appropriately carry out their duties). Second, Plaintiffs claim that Hasty was responsible for detaining Plaintiffs "in the ADMAX long past the time that they were cleared of any connection to terrorism." Opp. at 48. However, the OIG Report makes clear that "the process for transferring the detainees from the ADMAX SHU to the general population was centralized to BOP Headquarters in Washington, D.C.," and further delays occurred only as a result of the time it took to follow this process, or in some cases, due to administrative errors. OIG Report at 127-129 & n.109.

makes clear, but Plaintiffs have not sued these officials.[5] Plaintiffs try to find fault with Hasty because "[w]hile [the] Washington D.C. Defendants insist on the distance between themselves in Washington and everything that happened at MDC in Brooklyn, Defendants Hasty and Sherman insist that what happened in Brooklyn was dictated from Washington . . . ." Opp. at 45. But, as discussed at length in the MTD and above, Hasty has not asserted that all policies were dictated by the "Washington D.C. Defendants" (*i.e.*, Ashcroft, Mueller and Ziglar). Instead, most of the policies at the MDC were dictated by the senior BOP officials that Plaintiffs chose not to sue. To the extent that there is a missing link in the chain between the executive-level defendants and the MDC-defendants, that is Plaintiffs' fault.

In conclusion, the Complaint and OIG Report demonstrate that Hasty was following the orders of his superiors with regard to Plaintiffs' Claims 4 & 5 and parts of Claims 1 & 2.[6]

B. The Orders from Hasty's Superiors Were Facially Valid.

1. The Complaint and OIG Report Show That Hasty Acted Reasonably.

As demonstrated in the MTD, Hasty had reasonable grounds to believe that the policies created by his superiors were legally valid based on the totality of the circumstances and facts known at the time. *See* pp. 7-14. Plaintiffs retort that the orders by Hasty's superiors were facially invalid and unreasonable, Opp. at 48-51, but Plaintiffs are mistaken. In support of their

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[5] These officials *were* sued in the parallel *Elmaghraby*/*Iqbal* case, 1:04-cv-01809-JG-SMG.

[6] Of note, Plaintiffs' assertion that qualified immunity is rarely granted on a motion to dismiss has no impact here. Opp. at 45-46. The cases cited by Plaintiffs merely reaffirm the well-established standard applicable at the motion to dismiss stage, and *all* of the cases acknowledge that a complaint should be dismissed if the defendant's entitlement to qualified immunity is apparent on the face of the complaint and any attachments thereto. *See id*. Indeed, federal appellate courts, including the Second Circuit, have not hesitated to apply the qualified immunity doctrine on a motion to dismiss when the complaint (and any attachments thereto) establish the defendant's actions were objectively reasonable. *See* MTD at 5 n.2. Moreover, Plaintiffs' assertions are contrary to the well-established principle that qualified immunity should be resolved at the earliest possible time in a case. *See Hunter v. Bryant*, 502 U.S. 224, 227 (1991).

position, Plaintiffs quote the OIG Report and state that "the FBI's interest designation was based on 'little or no concrete information' tying the detainees to terrorism and the BOP's housing determinations were based on ignorance: 'the BOP did not know who the detainees were or what security risk they might present.'" Opp. at 49 (quoting OIG Report at 18, 112). But this argument fails to recognize that the objective reasonableness test focuses *only* on the circumstances reasonably known to Hasty at the time he received the orders, not on hindsight or facts that he could not reasonably have known. *See Anthony v. City of New York*, 339 F.3d 129, 138 (2d Cir. 2003) ("[p]lausible instructions from a superior or fellow officer support qualified immunity where, *viewed objectively in light of the surrounding circumstances*, they could lead a reasonable officer to conclude that the necessary legal justification for his actions exists") (citations omitted, emphasis added).

None of the OIG's findings quoted by Plaintiffs concern information that Hasty knew or reasonably should have known at the time. That the FBI may have lacked "concrete information" regarding the detainees has no bearing on whether Hasty was reasonable in his belief at the time that the orders regarding these "of high interest" detainees were facially valid. Such findings are based on the OIG's hindsight in evaluating information that was only known to the FBI during the relevant time. OIG Report at 18. In fact, the OIG Report acknowledges that, *at the time at issue*, the FBI provided "so little information about the detainees" to Hasty's superiors at BOP. *Id.* at 19. Thus, the OIG Report establishes that Hasty could not reasonably have known that the FBI's determination of the detainees' status was unfounded, if indeed that was the case.

Plaintiffs also misconstrue the OIG Report in suggesting that the BOP officials did not have a belief that "the detainees were associated with terrorism or dangerous in any way." Opp. at 49. The OIG Report makes clear that the BOP *did* believe that the 9/11 detainees were

suspected terrorists because they took the FBI's "of high interest" designation at face value. OIG Report at 126-27. Although the OIG Report may have subsequently found that the FBI's determination was based on incomplete or false information, the critical fact for the qualified immunity analysis is that *at that time* both the BOP and Hasty had a reasonable basis to believe that the 9/11 detainees *could* have had terrorist connections *because the lead investigative unit of the federal government, the FBI, had made precisely that determination*. Hasty could not have reasonably known about flaws in the U.S. government's investigation at that time, and his reliance on the FBI's assessment was objectively reasonable under the circumstances.[7]

Finally, Plaintiffs advance the faulty notion that Hasty should not have relied on the FBI's assessment because he "knew that the FBI had no information linking Plaintiffs to terrorism" because "[a]n MDC intelligence officer updated Hasty and Sherman regularly about the FBI's investigation . . . ." Opp. at 50 (citing Compl. ¶ 69). A review of the Complaint, however, reveals the flaw in this argument. The Complaint merely alleges that these purported updates "demonstrated the *dearth of information* connecting MDC Plaintiffs and class members to terrorism." Compl. ¶ 70 (emphasis added). Yet, as the OIG Report makes clear, this lack of information about the detainees meant it was impossible to know "what security risks they might present" and was exactly why senior BOP officials like Cooksey decided to treat Plaintiffs as "high-security detainees." Moreover, according to the Complaint, one of the "updates" stated that "the 'FBI may have an interest' in [Ahmed Khalifa]. No other information was provided." *Id.* Given the circumstances, this is hardly the type of information under which Hasty reasonably should have been expected to *unilaterally override* the orders of his BOP superiors and the FBI.

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[7] Similarly, Plaintiffs' reliance on a statement in the OIG Report "by one government official" regarding problems with the FBI's investigation suffers the same flaw – the opinion of one DOJ attorney about the FBI's investigation could not reasonably have been known to Hasty at the time he was implementing the BOP's directives. Opp. at 50 (citing OIG Report at 65 n.50).

2. Hasty Acted Lawfully.

Plaintiffs also assert that Hasty's conduct was objectively unreasonable because he willfully disregarded agency regulations. Again, Plaintiffs are incorrect. First, it is important to note that Plaintiffs do not – and cannot – challenge the *initial* decision to assign Plaintiffs to the ADMAX SHU as authorized by 28 C.F.R. § 541.22.[8] The only issue that remains, therefore, is whether Hasty should have known that the review procedures in place at the time, based on the circumstances reasonably known to him, were facially invalid. To be legally valid, Plaintiffs' procedural protections need only be reasonable in light of the particular circumstances. *See Magluta v. Samples*, 375 F.3d 1269, 1279 n.7 (11th Cir. 2004) (rejecting the proposition that all of the procedures mandated by the BOP regulations were constitutionally required). Indeed, there is no reason why *Tellier* and the applicable BOP regulations should have led Hasty to question the validity of the BOP's orders to hold the Plaintiffs in the ADMAX SHU until cleared by the FBI. Here – unlike in *Tellier* – Plaintiffs' confinement and continued detention in the ADMAX SHU was based on an assessment made by the FBI, which was the appropriate agency to make this determination because of the unique circumstances. Thus, if the MDC officials "did not receive notification from BOP Headquarters that the FBI had cleared a September 11 detainee, the detainee's monthly report was automatically annotated with the phrase 'continue high security,' without a hearing being conducted." OIG Report at 118.[9]

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[8] *See Elmaghraby v. Ashcroft*, No. 04-cv-1809(JG)(SMG), 2005 WL 2375202 (E.D.N.Y. Sept. 27, 2005) *aff'd in part, rev'd in part and remanded sub nom. Iqbal v. Hasty*, 490 F.3d 143 (2d Cir. 2007) *cert. granted, rev'd and remanded sub nom. Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009) ("The initial decision to place a prisoner in a SHU is discretionary under BOP regulations, and thus there is no protected liberty interest associated with that decision. To the extent that plaintiffs here are alleging a denial of due process based upon their initial assignment to the ADMAX SHU, that portion of the claim is dismissed.") (citing *Tellier v. Fields*, 280 F.3d 69, 82 (2d Cir. 2000)).

[9] BOP officials were not in a position to question the FBI's initial "of high interest" determination – a determination that was driven by exceptional national security concerns within the FBI's province.

(continued…)

Even if Plaintiffs could show that the policy violated their constitutional rights, the critical issue *here* is whether it was reasonable for Hasty to accept the policy dictated at that time as facially valid. As demonstrated above, Plaintiffs overstate both the law and facts applicable to this claim. Viewed in this light, it cannot be said that Hasty's actions in direct reliance on his superiors' facially valid directives were unreasonable.

The same is true as to Plaintiffs' argument regarding the communications blackout. It was not unreasonable for Hasty to believe that the directive to institute a temporary communications blackout was lawful in light of the unparalleled security concerns created by the MDC's housing of potentially dangerous individuals who were believed to have ties to the 9/11 terrorist attacks. Again, regardless of whether Plaintiffs are correct that this policy ultimately resulted in a violation of constitutional rights, this Court may only consider the information available to Hasty at that time in determining whether his actions were reasonable. *See, e.g.*, *Anthony*, 339 F.3d at 138 (finding that qualified immunity should only be denied if "no officer of reasonable competence could have made the same choice in similar circumstances"). The September 11 detainees presented unique security concerns in extraordinary circumstances, and these circumstances provided reasonable grounds on which to restrict *temporarily* these detainees' communications with the outside word. Thus, this restriction was facially valid.

(continued…)
Nor would it have been appropriate for the BOP to require the FBI to produce – in a BOP hearing – evidence supporting the continued detention of the 9/11 detainees. Disclosing such evidence to Plaintiffs could have compromised the FBI's ongoing investigation, as well as the broader response to the 9/11 attacks. Thus, a BOP hearing would have been necessarily limited to inquiring as to whether or not a detainee had been cleared by the assigned FBI agents. As such, it would have been a formality and a waste of government resources. In this unique context, any alleged violation of the BOP's regulations by the failure to provide such a formal hearing caused no real injury, and thus did not, by itself, violate Plaintiffs' due process rights.

In light of the above, Hasty's role in these challenged policies becomes clear: Hasty was ordered by his superiors to institute certain policies at the MDC to handle the unprecedented, exigent circumstances caused by the September 11 attacks on the United States. He was informed by his BOP superiors – who presumably were in a position to judge – that Plaintiffs were high-security detainees suspected of having terrorist ties to these devastating attacks. Based on these unique and unprecedented circumstances, it was reasonable for Hasty to believe those orders were valid, and he acted reasonably in implementing them at the MDC. It cannot be said that "no officer of reasonable competence could have made the same choice in similar circumstances," and, therefore, Hasty is entitled to qualified immunity. *Anthony*, 339 F.3d at 138 (citations omitted).

II. Plaintiffs Have Not Met Their Burden of Alleging Hasty's Personal Involvement as to the Remaining Claims.

A. The Personal Involvement Standard for Supervisory Liability Under *Iqbal*.

Plaintiffs seem to assert that *Iqbal* did not alter the pleading requirement for alleging personal involvement by supervisory officials, but this is simply not the case. The Supreme Court held explicitly that a *Bivens* plaintiff "must plead that each Government-official defendant, through the official's *own individual actions*, has violated the Constitution," and that "knowledge [of] or acquiescence in" unconstitutional conduct is not enough to impose supervisory liability. 129 S. Ct. at 1948, 1949 (emphasis added).

Before *Iqbal*, the Second Circuit rule was that a supervisory official could be considered "personally involved" – and, thus, held liable – for a subordinate's unconstitutional conduct if the supervisor's conduct fell into one of five categories set forth in *Colon v. Coughlin*, 58 F.3d

865 (2d Cir. 1995).[10] However, because three of the *Colon* categories, and part of a fourth, indisputably involve *passive* supervisory conduct, "[o]nly the first and part of the third *Colon* categories pass *Iqbal'* s muster – a supervisor is only held liable if that supervisor participates directly in the alleged constitutional violation or if that supervisor *creates* a policy or custom under which unconstitutional practices occurred." *Bellamy v. Mount Vernon Hosp.*, 07-cv-1801, 2009 WL 1835939, at *6 (S.D.N.Y. June 26, 2009), *aff'd*, 387 Fed. Appx. 55 (2d Cir. 2010) (emphasis added).

Although there has been some disagreement among district courts in the Second Circuit on how *Iqbal* impacts the *Colon* factors, the *Bellamy* ruling is hardly alone in reaching this outcome. In addition to the series of cases cited in Hasty's MTD, *see* pp. 16-17, more decisions have recently followed *Bellamy's* lead. In *Rivera v. Metro. Transit Auth.*, __ F. Supp. 2d __, 09-cv-5879, 2010 WL 4545579 (S.D.N.Y. Nov. 11, 2010) – a § 1983 action based on excessive force and false arrest claims against police officers – the court quoted *Bellamy* where it states that the passive-conduct "*Colon* categories impose the exact types of supervisory liability that *Iqbal* eliminated – situations where the supervisor *knew of* and *acquiesced* to a constitutional violation committed by a subordinate." *Id.* at *4 (emphasis added). The *Rivera* court gave its full endorsement of *Bellamy* in stating: "That view is persuasive." *Id.* The court concluded that

[10] Under *Colon*, a supervisory official can be considered "personally involved" if he or she "(1) participates directly in the alleged constitutional violation; (2) fails to remedy the violation after being informed of the violation through a report or appeal; (3) creates or allows the continuation of a policy or custom under which unconstitutional practices occurred; (4) acts with gross negligence in supervising subordinates who commit the wrongful acts; or (5) exhibits deliberate indifference to the rights of inmates by failing to act on information indicating that unconstitutional acts were occurring." *Spear v. Hugles*, 08-civ-4026, 2009 WL 2176725, at *2 (S.D.N.Y. July 20, 2009).

even if the defendant-officials "thought that violations occurred but looked the other way . . . that would not be sufficient. " *Id.*[11]

B. Plaintiffs' Objections to *Bellamy* Are Fundamentally Flawed.

In objecting to these courts' interpretation of *Iqbal*, Plaintiffs assert that eliminating some of the *Colon* categories for establishing supervisory liability would run afoul of existing Supreme Court precedent. Citing *Farmer v. Brennan*, 511 U.S. 825 (1994), Plaintiffs contend that the current standard for liability in an Eighth Amendment claim is the same as the fifth *Colon* category that is eliminated under *Bellamy*: "exhibit[ing] deliberate indifference to the rights of inmates by failing to act on information indicating that unconstitutional acts were occurring." Plaintiffs are correct that "deliberate indifference" is the applicable standard for *direct liability* in *Farmer*, but what they critically fail to acknowledge is that *Farmer* has *nothing to do with* ***supervisory liability***.

As this Court undoubtedly knows, "supervisory liability" is not about liability for inadequate "supervision" in the generic sense of the word – *e.g.*, it is *not* applicable to a prison guard's failure to "supervise" inmates in a prison yard. Rather, "supervisory liability" is a term of art that only applies to scenarios where a supervisor is held liable for the improper conduct of his or her *subordinate*.

In *Farmer*, the plaintiff brought a *Bivens* action against prison officials for their failure to protect him from violence *at the hands of other prisoners*, and the Supreme Court held that a

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[11] *See also McNair v. Kirby Forensic Psychiatric Ctr.*, 09-cv-6660, 2010 WL 4446772, at *6 (S.D.N.Y. Nov. 5, 2010) ("The *Iqbal* decision abrogates several of the categories of supervisory liability enumerated in *Colon v. Coughlin.*"); *Mitchell v. City of New York*, 09-cv-3623, 2010 WL 3734098, at *6 (S.D.N.Y. Sept. 23, 2010) (only first and part of third *Colon* categories survive *Iqbal*); *Kleehammer v. Monroe Cnty.*, 09-cv-6177, 2010 WL 4053943, at *8 (W.D.N.Y. Sept. 8, 2010) ("Plaintiff must allege either that [defendant] had a hand in the alleged constitutional violation, or created a policy or custom under which the unconstitutional practices occurred.").

"prison official's 'deliberate indifference' to a substantial risk of serious harm to an inmate violates the Eighth Amendment." 511 U.S. at 828. It is notable that *Farmer* repeatedly refers to the defendants only as "prison officials" and not "supervisory officials" – even though the defendants were indeed in supervisory positions. This is because, despite their "supervisory" titles, their conduct in question was not supervisory in nature. The Court's choice of words makes sense, therefore, because liability based on deliberate indifference applies to *any* prison official, even the lowest-ranking guard who has no supervisory authority over any subordinate. Thus, in deciding that the defendants may be held liable, the *Farmer* Court did not invoke their inadequate "supervisory" conduct (in the supervisor-subordinate sense); it simply cited the defendants' failure to protect the plaintiff from other inmates.

On the other hand, it is clear that in *Colon*, the Second Circuit was referring only to types of true "supervisory" conduct. Although *Colon* Categories 2 and 5 do not explicitly reference supervisory conduct, the meaning of the court is clear because before setting out the five categories, it refers to establishing the "personal involvement of a *supervisory* defendant . . . ." 58 F.3d. at 873.[12] Indeed, *Colon* involved a suit by an inmate against numerous prison officials – including high ranking officials – for their failure to supervise adequately the conduct of a subordinate employee (a corrections officer). The court's objective was to establish the instances where supervisory officials may be held liable for the act of a subordinate, even when the supervisor was not a direct participant in the challenged conduct.

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[12] This reading is confirmed by Category 4, which applies to a defendant who is "grossly negligent in supervising subordinates who committed ***the*** wrongful acts." *Colon*, 58 F.3d at 873 (emphasis added). Not only is this category explicitly in the supervisory context, but the use of the word "the" before "wrongful acts" demonstrates that Categories 2 and 5 are referring to conduct *by subordinates* – not merely unconstitutional acts by random actors.

Thus, *Colon* Category 5 regarding "deliberate indifference" was not talking about just any official's deliberate indifference to the risk of an inmate in the generic sense (*e.g.*, a risk from another inmate). Rather, it was referring to a *supervisory* official's deliberate indifference to the risk of inmates posed by *subordinate prison officials*. This contextual difference in "deliberate indifference" between *Farmer* and *Colon* is precisely why *Iqbal* can abrogate the fifth *Colon* factor that is based on deliberate indifference in the *supervisory* sense without disturbing the standard for direct liability set forth in *Farmer*. Thus, Plaintiffs' attack on *Bellamy* falls short.[13] It also bears noting that the Second Circuit recently had an opportunity to vacate *Bellamy*, but it chose to affirm the ruling. Hasty submits that *Bellamy*, and the growing list of cases that apply the same approach, employ the correct interpretation of *Iqbal*, and this Court should do the same. Under *Bellamy*, therefore, the only categories that survive *Iqbal* are Category 1 (direct participation) and the first part of Category 3 (*creation* of a policy or custom). This means that Hasty cannot be held personally liable in the *Bivens* context for passive supervisory conduct.[14]

C. Under *Iqbal*, Plaintiffs Have Not Adequately Alleged Hasty's Personal Involvement in Claims 3, 6 and 7 and Parts of Claims 1 and 2.

As discussed in detail in Hasty's MTD, Plaintiffs have not adequately alleged Hasty's personal involvement in Claims 3, 6, and 7 and parts of Claims 1 and 2. *See* MTD at 17-25. Knowing that Hasty had no direct participation in the alleged conduct, Plaintiffs instead have

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[13] On a related note, Plaintiffs' contention that "[e]ven *Bellamy* . . . allows liability for a supervisor who personally exhibits deliberate indifference to a challenged practice" is unsupported by *Bellamy*. While a "supervisor" – just like a subordinate – may be subject to *direct* liability for exhibiting deliberate indifference, *Bellamy* explicitly holds that a supervisor cannot be subject to *supervisory* liability for deliberate indifference toward misconduct by a *subordinate*. 2009 WL 1835939 at *6.

[14] Plaintiffs' claim that six rulings from other circuits support their view that *Iqbal* did not change the personal involvement standard for supervisory liability is misleading. *See* Opp. at 19. A close reading of those cases reveals that *five* of the cases either do not cite *Iqbal* at all or simply ignore it in reaching their ultimate ruling.

alleged a litany of *passive* acts, which are no longer adequate to establish supervisory liability under *Iqbal*. For example, Plaintiffs allege that Hasty "allowed" improper treatment by "ignoring," "avoiding," "neglecting," "remain[ing] blind," "not tak[ing] any action," "fail[ing] to investigate . . . [or] train his staff," and "approv[ing]" policies created by others. *See* Compl. ¶¶ 24, 74-76, 79, 107, 129, 130, 132. Other sections of the Complaint allege that problems were "brought to the attention of," "reported to," and logged for "review by" Hasty. *See* Compl. ¶¶ 97, 110, 114. Even in the rare instances where Plaintiffs allege that Hasty "ordered" certain conduct, it is typically in furtherance of "implement[ing]" or "carry[ing] out" "Ashcroft, Mueller, and Ziglar's policy." *Id.* ¶¶ 68, 75. Because these allegations essentially amount to "knowledge, "acquiescence," and "deliberate indifference," they are insufficient to state a claim.

For the conspiracy claim (Claim 7), in particular, Plaintiffs do not even *attempt* to give details on how, where, or when there was a "meeting of the minds" between all eight defendants in this case – they simply state that there was an unlawful agreement. *See also* MTD at 21-23. Such an allegation is precisely the type of unsupported "legal conclusion" that is "not entitled to the assumption of truth." *Iqbal*, 129 S. Ct. at 1950 (quotation marks and citation omitted).[15]

Indeed, Plaintiffs essentially acknowledge that the alleged conspiracy among *all eight* defendants never happened. *See* Opp. at 74. Instead, they cite to facts that supposedly show one agreement between the three Washington-based defendants and a separate agreement between the five MDC-defendants. Plaintiffs cite no support at all for the notion that the Attorney General actually reached any sort of agreement – implicit or otherwise – with staff at the MDC.

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[15] Moreover, since *discriminatory intent* is a required element for the conspiracy claim, Plaintiffs' failure to allege Hasty's discriminatory intent elsewhere is another reason why Claim 7 fails. Plaintiffs try to demonstrate Hasty's discriminatory intent by arguing that he "singled out Plaintiffs and class members for restrictive confinement without the individualized assessment the BOP requires . . ." Opp. at 43. However, as discussed above, Hasty role in placing Plaintiffs in restrictive confinement was based entirely on facially valid orders he received from senior BOP officials and designations made by the FBI.

Moreover, the intracorporate conspiracy doctrine bars Plaintiffs' conspiracy claim because all of the defendants are employees of the DOJ. *See* MTD at 23 n.18. Plaintiffs contend that this doctrine does not apply here because the challenged conduct was not a "single official act directed at Plaintiffs," but "a pattern of activity by the various Defendants." Opp. at 76. Yet, the doctrine is often applied to broad governmental entities and should apply here.

In *Dunlop v. City of New York*, No. 06-cv-0433, 2008 WL 1970002 (S.D.N.Y. May 6, 2008), for example, the court applied the intracorporate conspiracy doctrine to bar a claim that alleged a conspiracy between the New York City Police Department, the City of New York, and the Mayor – all disparate parts of the massive New York City municipal entity. And that the defendants "work for different departments of the City . . . is of no more moment in the municipal context than it would be if the individual defendants worked for the Mainframe and Personnel Divisions of IBM and were accused of conspiring with their employer corporation . . . . Such a claim cannot, as a matter of law, be sustained." *McEvoy v. Spencer*, 49 F. Supp. 2d 224, 226 (S.D.N.Y. 1999). The alleged conspiracies discussed in these cases are clearly more amorphous than the conspiracy alleged here between eight DOJ employees.

Furthermore, Plaintiffs' contention that the DOJ is a not a "single entity" because of its large size is directly contradicted by case law. In fact, the intracorporate conspiracy doctrine has been applied to bar conspiracy claims against employees of the U.S. Postal Service – a governmental entity with *596,000* employees (*see* http://www.usps.com/communications/newsroom/postalfacts.htm). *See Suttles v. U.S. Postal Serv.*, 927 F. Supp. 990, 1002 (S.D. Tex. 1996); *Perrott v. United States*, 96-C-4347, 2001 WL 40799, at *3 (N.D. Ill. Jan. 17, 2001).

Moreover, if, as it seems, Plaintiffs are now contending that the alleged conspiracy that Hasty was *actually* part of was a smaller conspiracy between the MDC-defendants, this claim would indisputably be barred by the intracorporate conspiracy doctrine (even under Plaintiffs'

erroneously narrow reading of that doctrine). The MDC-defendants worked together every day (except for Zenk, who replaced Hasty) at the same prison with a relatively limited number of co-workers. This type of alleged conspiracy falls squarely within even a constrained reading of the intracorporate conspiracy doctrine, and, thus, it clearly bars a claim for conspiracy among these defendants. As such, the conspiracy claim against Hasty must be dismissed.

CONCLUSION

For each of the foregoing reasons, and those stated in the MTD, Hasty should be afforded qualified immunity as to all claims against him, and the claims against him should be dismissed. In addition, Hasty incorporates by reference the arguments made by the other defendants in their motions to dismiss and reply memoranda.

Respectfully submitted,

Dated: January 12, 2011

/s/

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CERTIFICATE OF SERVICE

I hereby certify that on this date, I electronically filed the foregoing Reply Memorandum in Support of Defendant Hasty's Motion to Dismiss the Fourth Amended Complaint with the Clerk of Court using the CM/ECF system, which will send a notification of such filing to all counsel of record in the case as follows:

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I also certify that on this date, I sent by U.S. Mail a copy of the foregoing Reply Memorandum in Support of Defendant Hasty's Motion to Dismiss the Fourth Amended Complaint to *pro se* Defendant Joseph Cuciti at his home address, which was privately circulated by his former counsel so as not to publish it on court filings.

Dated: January 12, 2011

/s/
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