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November 3, 2008

**BY UPS – NEXT DAY DELIVERY**

Catherine O'Hagan Wolfe, Esquire  
Clerk Of The Court  
United States Court Of Appeals  
For The Second Circuit  
Daniel Patrick Moynihan United  
States Courthouse  
500 Pearl Street  
New York, New York 10007

**Re: *Arar v. Ashcroft, et al.*  
Case No. 06-4216-cv (C.A. 2) (in banc)**

Dear Ms. Wolfe:

This firm represents James Ziglar, appellee in this Court, defendant in the District Court, in this appeal. Pursuant to this Court's in banc Order, dated August 12, 2008, Mr. Ziglar respectfully submits this supplemental letter brief, along with 9 copies. Please distribute them to the judges participating in this Court's in banc review.

The briefs, replacement briefs (if any), and the supplemental letter briefs submitted by all the other defendants and by Mr. Ziglar fully address the issues raised in the district court and in appellant's opening brief. Mr. Ziglar expressly adopts all the arguments made by those other defendants in those papers, including all legal arguments and factual and procedural presentations.

Specifically, Mr. Ziglar wishes to note his agreement with and express adoption of the supplemental letter brief submitted by defendant Mueller that addressed the panel's erroneous application of the Supreme Court's decision in *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955 (2007), and this Court's decision in *Iqbal v. Hasty*, 490 F.3d 143 (2d Cir. 2007). In briefing before the panel, Mr. Ziglar filed a supplemental letter brief addressing this issue and

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establishing that plaintiff had failed to allege sufficient involvement by Mr. Ziglar to overcome the qualified immunity defense that Mr. Ziglar had raised in the District Court.

Mr. Ziglar served as Commissioner of the Immigration And Naturalization Service ("INS") at the time the events alleged in plaintiff's Complaint occurred. The Complaint contained ninety-five numbered paragraphs of factual averments. Ninety-three of them did not mention Mr. Ziglar by name at all. One of the remaining two paragraphs of the Complaint that did, ¶ 17, J.A. 24-25, accused Mr. Ziglar in the most general and conclusional terms of "[c]onspiring with and/or aiding and abetting" the other individuals defendants "as well as Syrian government" officials to remove plaintiff to Syria "so that Syrian authorities would interrogate [plaintiff] in ways that [defendants] believed themselves unable to do directly, including the use of torture [*sic*]." Complaint ¶ 17, J.A. 24-25. In the alternative, ¶ 17 alleged that Mr. Ziglar "removed Mr. Arar to Syria knowing that Mr. Arar would be in danger of being subjected to torture there," J.A. 25, and in doing so, failed to consider the provisions of Art. 3 of the United Nations Convention Against Torture, as federal law required him to do. *Ibid*. The only other paragraph that specifically referred to Mr. Ziglar, ¶ 74, J.A. 38, listed Mr. Ziglar with the other individually-named defendants and alleged generally that this group had "conspired in and/or aided and abetted in bringing about the violations of Plaintiff's right not to be tortured under color of Syrian law."<sup>1</sup>

In his opening Brief in this Court, plaintiff exaggerated the allegations he had made in the District Court regarding Mr. Ziglar. In that Brief, plaintiff claimed, without citation to the Complaint or any other part of the record, that "Ziglar and [defendant] Blackman were senior Immigration and Naturalization Service ('INS') Officials responsible for Arar's detention in New York." *Brief For Plaintiff-Appellant*, at 2. The Complaint had made no such allegation, neither directly nor by inference. He also stated that Mr. Ziglar, along with defendant Blackman, bore responsibility for determining that plaintiff was "inadmissible in the US." Plaintiff here, again, did not bother to cite to the record, but did in support of this allegation refer to the INS Final Notice Of Admissibility, which he had attached as Exhibit D to the Complaint. Complaint ¶ 47, J.A. 43. As that document demonstrates on its face, however, only Mr. Blackman had signed that Final Notice: Mr. Ziglar had not. Nothing in the record supports any inference that Mr. Ziglar had anything to do with the issuance of this Final Notice. Indeed, in the Complaint

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<sup>1</sup> Throughout the Complaint, plaintiff referred to "Defendants" as though that was a defined term in the Complaint. The Complaint did not, however, at any point define who it meant to include in the term "Defendants." At various points, the Complaint did refer to "Defendants John Ashcroft, Larry D. Thompson, J. Scott Blackman, Edward J. McElroy, Robert Mueller, and others," *e.g.*, Complaint ¶ 4, J.A. 21: plaintiff never included Mr. Ziglar by name in those lists of "Defendants," except in ¶ 74, J.A. 38, addressed above, which made a general allegation of group liability.

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plaintiff himself had alleged that *only* Mr. Blackman “had decided to remove Mr. Arar to Syria,” at which point plaintiff referred to Exhibit D, the Final Notice. Complaint ¶ 47, J.A. 33. Nothing in this paragraph of the Complaint or the other allegations relevant to the Final Notice or the decision to remove plaintiff so much as mentioned Mr. Ziglar.

The Reply Brief was worse. There, at *Reply Brief For Plaintiff-Appellant*, at 65, plaintiff made a number of allegations about Mr. Ziglar that he failed to make in the District Court. The *Reply Brief* argued that Mr. Ziglar “purported to determine” that plaintiff’s removal was consistent with CAT, citing to ¶ 17 of the Complaint, which had not made that allegation (but had made the opposite allegation, as discussed below). Plaintiff’s Reply Brief then argued that Mr. Ziglar “oversaw INS officials who interrogated Arar during his detention in the U.S. and asked Arar to ‘volunteer’ to be sent to Syria.” Plaintiff cited to ¶¶ 31 & 35 of the Complaint, J.A. 30-31, in support of those new arguments: but those paragraphs alleged nothing, absolutely nothing, about Mr. Ziglar; they only alleged that various INS employees had interrogated plaintiff.

This Court’s decision in *Iqbal, supra*, read the Supreme Court’s recent decisions in this area of the law as “requiring a flexible ‘plausibility standard,’ which obliges a pleader to amplify a claim with some factual allegations in those contexts where such amplification is needed to render the claim *plausible*.” *Iqbal, supra*, 490 F.3d at 157-158 (emphasis in original). Under this standard, pleadings “must allege facts that are not merely consistent with the conclusion that the defendant violated the law, but which actively and plausibly suggest that conclusion.” *Port Dock & Stone Corporation v. Oldcastle Northeast, Inc.*, 507 F.3d 117, 121 (C.A. 2 2007).

Plaintiff failed here to allege enough facts regarding Mr. Ziglar’s personal involvement to state plausible claims against him. None of the allegations suggest a “plausible” claim that Mr. Ziglar played any personal role—that is, any role apart from his general supervisory role as head of the INS—in the determination to issue the Final Notice of Admissibility, Exhibit D to the Complaint. Nor are there any plausible allegations of fact tending to show that Mr. Ziglar had any personal involvement in any of the violations alleged in Counts I, II, III and IV of the Complaint: stretched to their limits, the allegations of Mr. Ziglar’s general supervisory involvement and his vague and conclusional participation in a conspiracy— itself only pleaded in the barest outline—does not cross the line into the realm of plausibility. The problem is the more acute with regard to Count IV: When the District Court invited plaintiff to make his allegations in support of Count IV more specific, he refused to do so.

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Plaintiff's Complaint failed the test of *Iqbal*: it did not "allege facts that are not merely consistent with the conclusion that the defendant violated the law, but which actively and plausibly suggest that conclusion." *Port Dock & Stone Corporation v. Oldcastle Northeast, Inc.*, *supra*, 507 F.3d at 121.

The panel, however, did not in any meaningful way come to grips with this argument, as demonstrated in Mr. Mueller's supplemental letter brief to this court in banc. To do so, as this court did in *Benzman v. Whitman*, 523 F.3d 119 (2d Cir. 2008), compels the conclusion that the Complaint here failed to meet the *Twombly* standard as far as Mr. Ziglar is concerned. Plaintiff's Replacement Brief to this court in banc makes this clear. At page 15 of that Replacement Brief, plaintiff points to two—and two only—averments in the Complaint that relate to Mr. Ziglar. The first, ¶ 17 of the Complaint, J.A. 24-25, is devoid of any particularity regarding what Mr. Ziglar did: it simply alleges that he "removed" plaintiff in conspiracy with the other defendants. (In this regard, it contradicts the averment of ¶ 47, J.A. 33, which averred that defendant Blackmun "had decided to remove Mr. Arar to Syria.") For some reason not apparent, plaintiff's Replacement Brief argues that ¶ 17 alleges that Mr. Ziglar "determined that Arar's removal to Syria was consistent with CAT," the Convention Against Torture. Plaintiff's Replacement Brief at 15. But ¶ 17 alleges just the opposite: that in removing plaintiff to Syria, Mr. Ziglar "failed to consider the provisions of Article 3 of CAT." J.A. 25. These vague pleadings, and plaintiff's inside-out interpretation of them, do not meet the test of *Twombly*.

Worse is the second part of the Complaint that plaintiff cites as a basis for imposing liability on Mr. Ziglar, ¶ 35 of the Complaint. J.A. 30. That paragraph pleads nothing about Mr. Ziglar: it only pleads that "an immigration officer" interrogated plaintiff and had him sign a form. This is a naked allegation of *respondeat superior* liability and as such must fail.

Plaintiff's Complaint fails the pleading test of *Twombly*, at least as regards the personal involvement of defendant James Ziglar in the wrongs asserted by the Complaint.

The panel opinion, at Part B, slip op. at 359302597, seemed to take the view that only defendants Ashcroft, Thompson, and Mueller had raised the issue whether the Complaint pleaded sufficient facts regarding his personal involvement or to establish personal jurisdiction. The panel opinion simply left Mr. Ziglar out of their analysis of those two issues. Mr. Ziglar's

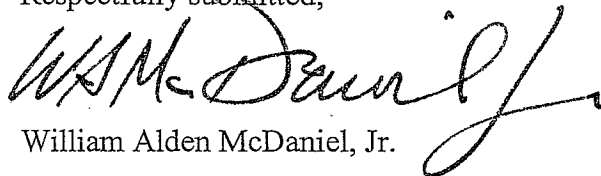
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brief to the panel clearly raised both issues: Arguments I, II, and III of Mr. Ziglar's brief addressed these issues specifically. And Mr. Ziglar filed a supplemental letter brief on the *Iqbal* pleading issue as well.

For these reasons, and for the reasons set forth by all the other defendants in their filings, the judgment of the District Court should be affirmed.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "WAMcDaniel, Jr.", written in a cursive style.

William Alden McDaniel, Jr.

WAM/mmi

cc: All Counsel Of Record (via electronic transmission)  
Clerk L5.doc