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UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

MARIA ARGUETA, et al.,	)	
	)	Hon. Peter G. Sheridan
Plaintiffs,	)	
	)	Civil Action No. 08-1652-PGS-ES
v.	)	
	)	
UNITED STATES IMMIGRATION	)	**Individual Federal Defendants**
AND CUSTOMS ENFORCEMENT,	)	**Myers, Torres, Weber and**
et al.,	)	**Rodriguez's Motion to Dismiss**
	)	**Plaintiffs' Second Amended**
	)	**Complaint**
Defendants.	)	
	)	Return Date/Motion Day:
	)	July 20, 2009

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I. INTRODUCTION

Defendants Julie Myers, John Torres, Scott Weber and Bartolome Rodriguez ("Individual Federal Defendants") respectfully submit this motion to dismiss the Second Amended Complaint pursuant to Federal Rules of Civil Procedure 12(b)(1), 12(b)(2) and 12(b)(6) and 15. Individual Federal Defendants have moved to dismiss the Second Amended Complaint for two primary reasons: (1) because the Second Amended Complaint ("SAC") suffers from the same defects as the First Amended Complaint; and most importantly (2) because the filing of an amended Complaint moots the pleading it amended, making the First Amended Complaint ("FAC") now a legal nullity. Under Third Circuit law, it is unclear whether the amendment to the pleading similarly moots the pending Motion for Reconsideration that Individual Federal Defendants filed on May 20, 2009. Dkt. No. 99. Therefore, in order to protect Individual Federal Defendants' interests by ensuring that this Court considers the guidance provided by the Supreme Court in *Ashcroft v. Iqbal*, an intervening change in controlling law since the issuance of this Court's May 6, 2009 Order and Opinion (Dkt. Nos. 94 and 95), Individual Federal Defendants hereby move to dismiss the SAC's identical individual capacity claims against them in their entirety. In the alternative, Individual Federal Defendants respectfully request that the Court explicitly apply the pending Motion for Reconsideration and any subsequent briefing on and adjudication of that motion to the legally operative document in this case, the

Second Amended Complaint.[1] Because the arguments raised herein and in Individual Federal Defendants' Motion for Reconsideration are fatal to the SAC's individual capacity claims against them, under either approach, the individual capacity claims against Defendants Myers, Torres, Weber and Rodriguez should be dismissed.

This Court should dismiss plaintiffs' claims against Myers, Torres, Weber and Rodriguez for the following reasons:

1. Because plaintiffs fail to allege that any of the four of them were personally involved in any alleged violation of plaintiffs' constitutional rights, qualified immunity bars all of plaintiffs' individual capacity claims against them.

2. The Court lacks personal jurisdiction over the two Washington, D.C. based defendants, Myers and Torres, because they lack the required minimum contacts with New Jersey and may not be subject to this court's jurisdiction based on mere supervision over a national agency.

3. The Immigration and Nationality Act, specifically, 8 U.S.C. §§ 1252(b)(9) and 1252(g), divests this particular court of jurisdiction to hear constitutional tort claims relating to Immigration and Customs Enforcement law

[1] It certainly cannot be that by amending a pleading while a Motion for Reconsideration is pending, a party can deprive a court of the opportunity to address the implications on the claims presented in that pleading of a controlling Supreme Court case, especially a case in which the Supreme Court defines the pleading standards for the very type of claim plaintiffs pursue here.

enforcement actions taken for the purposes of removing illegal aliens, raised by alien plaintiffs who may be subject to removal.

4. Special factors, including Congress' comprehensive regulation through the INA and the plenary power of the political branches over immigration and national security matters, preclude plaintiffs believed to be unlawful aliens from seeking damages directly under the Constitution.

II. PROCEDURAL BACKGROUND

On May 22, 2008, eight named plaintiffs and five anonymous plaintiffs filed their First Amended Complaint. Defendants Myers, Torres, Weber and Rodriguez moved to dismiss the FAC because the court lacked jurisdiction over the anonymous plaintiffs, the court lacked subject matter jurisdiction over the claims of some of the plaintiffs, special factors precluded some of the plaintiffs from seeking money damages directly under the Constitution, the court lacked personal jurisdiction over the two D.C.-based officials, and the FAC's allegations were insufficient to overcome the four defendants' qualified immunity defense. On May 6, 2009, following briefing and oral argument, this court entered an opinion and order dismissing the claims of the anonymous plaintiffs, but providing them leave to amend the Complaint to provide their identities. *See* Opinion ("Op."), Dkt. No. 94 at 19. The court denied the Individual Federal Defendants' remaining arguments for dismissal. As to the four defendants' entitlement to qualified immunity, the court held that plaintiffs had

adequately provided fair notice and the grounds on which the claims rest, concluding that was sufficient at the motion to dismiss stage. *Id*. at 42. The court determined that it needed more evidence to assess whether defendants were personally involved in any unconstitutional conduct, however, and thus ordered 60 days of limited discovery, including interrogatories and depositions of the four Individual Federal Defendants. *Id.* at 42-3.

On May 18, 2009, the Supreme Court decided *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009), a case in which the Court evaluated the sufficiency of a complaint against two high-ranking government officials sued in their individual capacities under *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971). In reversing the denial of the officials' motion to dismiss for failure to sufficiently allege their personal involvement in clearly established unconstitutional conduct, the Court explained how the *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), pleading standard applies to a *Bivens* supervisory liability claim. In so doing, the Court made clear that vicarious liability does not apply in a *Bivens* action and conclusory allegations of misconduct will not suffice. *Iqbal*, 129 S. Ct. at 1947-53. The Supreme Court also rejected the notion that the motion to dismiss analysis for officials who have raised qualified immunity should be influenced by whether limited discovery might weed out groundless claims. *Id*. at 1953-54. In light of the Court's intervening and controlling decision in *Iqbal* and its impact on the May 6 Opinion,

the Individual Federal Defendants requested this court to reconsider its May 6 Opinion and dismiss the individual capacity claims against them. Dkt. No. 99. While the Motion for Reconsideration was pending and before plaintiffs had even responded to the motion, plaintiffs amended their First Amended Complaint.

Plaintiffs filed their Second Amended Complaint on June 8, 2009. The Second Amended Complaint retains the individual capacity claims against the Individual Federal Defendants and identifies one of the Roe Plaintiffs as Yesica Guzman. *See* SAC, ¶17, Dkt. No. 106. The SAC removes the claims of the dismissed anonymous plaintiffs and identifies Guzman as a lawful permanent resident. *Id*. The SAC contains no allegation regarding Guzman's status at the time of the events of which she complains in the SAC. Otherwise, the SAC presents the same underlying facts and claims as the First Amended Complaint.

III. FACTS[2]

A. Operation Return to Sender

Immigration and Customs Enforcement ("ICE") was formed pursuant to the Homeland Security Act of 2002 and is charged by Congress with enforcing the nation's customs and immigration laws. ICE is the largest investigative branch within

[2] The facts in this section are taken from the SAC and the exhibits attached thereto and are assumed to be true only for the limited purpose of this motion. *See Twombly,* 550 U.S. at 556.

the Department of Homeland Security and as of March 2007, was comprised of four divisions: the Office of Detention and Removal Operations, the Office of Investigations, the Office of Intelligence and the Office of Federal Protective Service. SAC, Ex. C at 2. As of March 2007, ICE "ha[d] more than 15,000 employees working in offices nationally and around the world, and its fiscal year (FY) 2006 budget was $ 3.1 billion." *Id*.

The Office of Detention and Removal Operations ("DRO") is responsible "for promoting public safety and national security by making certain, through the enforcement of national immigration laws, that all removable aliens depart the United States." *Id*. For fiscal year 2006, DRO had a $1 billion budget and as of June 2006, had 4,170 full-time staff members working in 23 field offices thought the United States. *Id*.

Part of ICE's mission requires ICE to arrest immigration law violators found within the United States. SAC, Ex. D at 1. Fugitive Operations Teams ("FOTs") are an integral part of this mission. *Id*. FOTs use leads and other intelligence to find, arrest and place into removal proceedings aliens who have been previously ordered to leave the country, but failed to comply. *Id*. ICE defines these fugitives as aliens who have "failed to depart the United States pursuant to a final order of removal, deportation or exclusion, or have failed to report to a DRO officer after receiving notice to do so." SAC, Ex. C at 2.

Operation Return to Sender ("ORTS"), which commenced in May of 2006, is a nationwide enforcement initiative to arrest ICE fugitive aliens found within the United States. SAC, Ex. D at 1. ORTS combines ICE's National Fugitive Operations program resources with those of other federal, state and local law enforcement entities "to eliminate the backlog of ICE fugitive cases." *Id.* ICE policy indicates that FOTs may only enter private dwellings after obtaining consent from a person authorized to give consent. *Id.* at 2. If consent to enter is granted, the FOT may, if necessary for officer safety, search the immediate area and the occupant may be asked if there are other people in the house. *Id.* If others are present, they are asked to come into a common area. *Id.* FOTs focus their efforts on specific fugitive aliens at specific locations. *Id.* If, in the course of searching for targeted fugitives, ICE officers encounter others deemed to be aliens in the United States illegally and found to be amenable to removal, they may arrest these persons, without a warrant, and process them for removal. *Id.*

B. Plaintiffs' Allegations

This lawsuit arises from actions allegedly taken by ICE agents and local police officers during the course of immigration enforcement operations. Nine plaintiffs allege that "federal agents" gained unlawful entry into their homes and detained some of the occupants without legal justification. SAC at ¶2. In the immigration enforcement operations outlined in the SAC, which allegedly occurred between

August 2006 and April 2008, plaintiffs allege as follows:

1. Maria Argueta claims to have had "Temporary Protection Status" when unknown ICE agents entered her home looking for a "male criminal." *Id*. ¶¶49, 53. She claims that this target was a ruse, and therefore the consent she gave to enter the home was invalid. *Id*. ¶¶55-57. She further states that the ICE agents searched the apartment and asked her about her immigration status. *Id*. ¶¶57, 59. Argueta claims that she told the agents that she was waiting to receive her "TSP card in the mail," and provided the agents with documentation of her status. *Id*. ¶¶59, 60. Argueta claims that she was then arrested and detained for almost 36 hours. *Id*. ¶¶63 and 69.

2. Walter Chavez and Ana Galindo claim to be lawful permanent residents, and their son a United States citizen. They claim that unknown ICE agents' threats caused Chavez to open his door, and the agents asked for the location of Galindo's sisters. *Id*. at ¶¶74 and 77. Plaintiffs claim that one of the unknown ICE agents pointed his gun at Galindo and her child. *Id*. ¶79. There is no allegation that anyone was arrested or detained during this operation.

3. Arturo Flores and his stepdaughter Bybyana Arias claim to be United States citizens. *Id*. ¶89. Plaintiffs allege that unknown ICE agents forced open the door, searched their residence, and arrested and detained Flores' wife and brother. *Id*. ¶¶ 93, 96 and 102.

4. Juan Ontaneda alleges unknown ICE agents knocked on his door looking

for a man named "Elias." *Id*. ¶108. After Ontaneda denied knowing the target, the ICE agents allegedly arrested and transported him to a detention center in Elizabeth, New Jersey. *Id*. ¶¶116 and 118.

5. Veronica Covias claims to have been a lawful permanent resident when unknown ICE agents allegedly pushed her door open and searched her residence without consent. *Id*. ¶¶ 119, 121 and 123. The agents then allegedly arrested Covias' son, who was later removed from the United States. *Id.* at ¶¶125-26.

6. Yesica Guzman claims that she is a lawful permanent resident. *Id*. at ¶17. She alleges that unknown ICE agents and members of the Penns Grove Police Department knocked on her door and asked for the location of her brother. *Id*. ¶¶129, 131. The SAC alleges that the law enforcement officers then entered and searched the home with their guns drawn and without consent. *Id*. ¶¶131, 135. The agents allegedly arrested her husband and two other occupants of the house who were subsequently removed, and told Guzman that she had to report to "the Office." *Id*. at ¶139. The SAC does not state whether Guzman was lawfully present in the United States at the time of the enforcement operation.

Based on these alleged events, plaintiffs claim that in the six incidents arising from immigration enforcement initiatives, ICE agents entered and searched their residences without consent or other legal justification, in violation of the Fourth Amendment. SAC, Claims 1 and 2. In addition, plaintiffs allege that they were

seized and the Chavez family and Guzman contend that excessive force was used in violation of the Fourth Amendment. SAC, Claims 3 and 4. The Chavez family and Guzman also allege violations of their Fifth Amendment substantiative due process rights. SAC, Claim 5. Finally, Ontaneda claims a violation of his equal protection rights under the Fifth Amendment. SAC, Claim 6.

The SAC seeks individual capacity damages on a constitutional tort theory of recovery under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), against four individual federal defendants, including the two highest federal officials at ICE, former Assistant Secretary of Homeland Security for ICE, Julie L. Myers, and the Deputy Assistant Secretary for Operations, John P. Torres. SAC ¶¶ 19-20. Also named in their individual capacity are Newark ICE Field Office Director, Scott A. Weber, and Deputy Field Office Director, Bartolome Rodriguez. *Id*. at 21-22. Finally, the SAC names DOE ICE agents, supervisors and local police.[3]

IV. ARGUMENT

A. The Second Amended Complaint is the Legally Operative Document.

The Third Circuit has observed that an "amended complaint supercedes the

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[3] Any unnamed federal defendants are not parties or represented herein. In addition, there are claims for injunctive relief against ICE that were previously addressed by the United States and are not addressed by this motion in any manner.

original version in providing the blueprint for the future course of a lawsuit." *See, e.g., Snyder v. Pascack Valley Hospital*, 303 F.3d 271, 276 (3d Cir. 2002); *see also* 6 Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 1476 (2d ed. 1990 & 2009 Supp.) ("Once an amended pleading is interposed, the original pleading no longer performs any function in the case..."). Accordingly, district courts in this Circuit have considered pending motions on the original complaint to be mooted by the filing of an amended complaint. *See, e.g., United States v. Aegis Insurance Co.*, No. 08-1728, 2009 WL 577286, at *1-2 (M.D. Pa. Mar. 5, 2009) (rendering motion for default moot upon filing of amended complaint); *Hailstalk v. Antique Auto Classic Car Storage,* No. 07-5195, 2008 WL 4192275, at *2 n.2 (D.N.J. Sep. 9, 2008) (denying as moot motion to dismiss original complaint because amended complaint superceded the original complaint); *Walthour v. Tennis*, No. 06-0086, 2007 WL 517812, at *1-3 (M.D. Pa. Feb. 12, 2007) (observing that the filing of an amended complaint rendered moot the motions to dismiss the complaint); *Standard Chlorine of Delaware, Inc. v. Sinibaldi*, 821 F. Supp. 232, 240 (D. Del. 1992) (same).[4] Because Plaintiffs have filed a Second

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[4] Some courts have permitted the parties to incorporate arguments made in the prior motion into their new motion. *E.g., Atlantic City Associates LLC v. Carter & Burgess Consultants, Inc.*, No. 05-3227, 2007 WL 2705149, at *3 (D.N.J. Sep. 14, 2007); *United States v. Snyder*, No. 06-0141, 2007 WL 1029781 (W.D. Pa. Apr. 2, 2007) (deeming motions to be addressed to amended complaint); *see also* Wright, Miller & Kane, §1476 (noting that courts should not require defendant to

Amended Complaint, it is now the legally operative document and shall provide the "blueprint for the future course of [this] lawsuit." *Snyder*, 303 F.3d at 276. Accordingly, Individual Federal Defendants now move to dismiss the SAC pursuant to Federal Rules of Civil Procedure 12 and 15.

B. Qualified Immunity Bars All Plaintiffs' Individual Capacity Claims Against Defendants Myers, Torres, Weber and Rodriguez.

On a constitutional tort theory of recovery under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), plaintiffs seek damages from the personal resources of four supervisory federal government officials: the former Assistant Secretary of Homeland Security for ICE, the former Director for DRO, and the Field Office Director and the Deputy Field Office Director for ICE/DRO in Newark. "The purpose of *Bivens* is to deter individual federal officers from committing constitutional violations" and thus federal officers may only be subject to suit for constitutional violations if they are "directly responsible" for them. *Correctional Serv. Corp. v. Malesko*, 534 U.S. 61, 70-71 (2001). Qualified immunity shields government officials sued in their individual capacity from the litigation

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file a new motion if some of the defects raised in the original motion remain in the new pleading; instead, the court may consider the motion as being addressed to the amended pleading). To the extent this court does not consider the pending Motion for Reconsideration to be rendered moot by the filing of the Second Amended Complaint, Individual Federal Defendants respectfully request that the briefing on the Motion for Reconsideration be completed and any decision on the Motion for Reconsideration be deemed to apply to the SAC.

process, however, so long as "their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982) (emphasis added). The qualified immunity doctrine enunciated in *Harlow* was formulated precisely to allow government officials, such as these, the necessary latitude to vigorously exercise their authority without the chill and distraction of damages suits, by ensuring that only personal conduct that unquestionably violates the Constitution will subject an official to individual liability.

Individual Federal Defendants moved to dismiss the individual capacity claims against them based on qualified immunity because plaintiffs failed to provide anything but conclusory assertions that the four defendants were personally involved in the alleged violations of plaintiffs' constitutional rights. *See* Dkt. No. 35 at 36-40; Dkt. No. 66, at 20-25. In its May 6, 2009 opinion, the court determined that the First Amended Complaint "sufficiently asserts the claim." Op. at 42. The court explained that plaintiffs must demonstrate that the four Supervisory Defendants "had knowledge and acquiesced to the searches of the homes," *id*. at 41, and so long as a complaint provides fair notice and grounds on which the claims rest, a complaint will defeat a motion to dismiss. *Id.* at 42. The court observed that the allegations as outlined in the FAC were based on inadmissible hearsay, but more evidence was needed to determine whether the Individual Federal Defendants were personally involved. *Id.*

at 41-42.

Since the issuance of this Court's decision, the Supreme Court rendered its decision in *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009). Individual Federal Defendants moved this court to reconsider its May 6, 2009 opinion on qualified immunity. Dkt. No. 99. The reasons for dismissal of the FAC presented in their Motion for Reconsideration apply with equal force to the recently-filed SAC. Notably, *Iqbal* made clear that vicarious liability does not apply in a *Bivens* action. *Id*. at 1948-49 (supervisors "may not be held accountable for the misdeeds of their agents"). Rather, a plaintiff must plead that each Government-official defendant, "through the official's own individual actions, has violated the Constitution." *Id.* at 1948; *see also id*. at 1949 (each Government official "is only liable for his or her own misconduct"). Even a supervisor's knowledge of and acquiescence in a subordinate's wrongful conduct is not sufficient to hold a supervisor liable in a *Bivens* action. *Id.* The concept of "supervisory liability" based simply on knowledge and acquiescence, the Court explained, is inconsistent with the premise that supervisors "may not be held accountable for the misdeeds of their agents." *Id.* at 1949.

Iqbal compels dismissal of the individual capacity claims against Myers, Torres, Weber and Rodriguez because <u>their particular actions</u>, as alleged in the SAC, do not establish a violation of clearly established law. In the SAC, plaintiffs do not contend that any one of the defendants promulgated an unconstitutional policy.

Instead, Plaintiffs complain of the manner in which certain enforcement operations in New Jersey were conducted by ICE agents. Plaintiffs do not allege that Myers, Torres, Weber or Rodriguez searched or seized them. Nor do Plaintiffs allege that Myers or Torres were in New Jersey at the time of the events in question, or that any of the four personally planned or participated in any of the specific operations in New Jersey of which plaintiffs complain.

Instead plaintiffs pursue a theory of supervisory liability against the four Individual Federal Defendants.[5] Under the standards enunciated in *Iqbal*, the allegations in the SAC are insufficient to hold any one of the four of these defendants personally liable to plaintiffs here. The *Iqbal* Court engaged in a two-pronged approach for evaluating a complaint: first, identifying the conclusions that are not entitled to the assumption of truth; and second, evaluating the factual allegations to determine if they plausibly suggest an entitlement to relief. *Id.* at 1949-52. Applying that analysis here, the plaintiffs' SAC fails to satisfy the threshold personal involvement requirement of alleging a claim against the senior federal officials sufficient to overcome their qualified immunity defense.

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[5] There is no mention of Myers, Torres, Weber or Rodriguez in the section of the SAC that contains the allegations of plaintiffs' specific encounters with unknown immigration officers. SAC ¶¶49-139. Instead, the sole allegations against the four individual federal defendants are included in a separate section entitled "Defendants' Supervisory Responsibility." SAC ¶¶144-152.

1. The Individual Capacity Claims Against Weber and Rodriguez Should Be Dismissed.

In the four paragraphs dedicated to defendants Weber and Rodriguez's purported "supervisory liability," plaintiffs offer only conclusory allegations wholly devoid of factual support. Other than a description of their positions, SAC ¶¶21-22, Plaintiffs allege that "[u]pon information and belief" Rodriguez and Weber "knew that ICE agents were entering and searching homes in New Jersey without search warrants and without obtaining" consent, SAC ¶150, that they "did not implement any guidelines, protocols, training, oversight, or record-keeping requirements that would ensure that officers under their supervision conducted home entries and searches within constitutional limits," SAC ¶151, they have "not conducted any substantial investigations ... or meaningfully disciplined any officer responsible for such unconstitutional conduct", SAC ¶152, they have allowed "the unconstitutional means for many of the arrests to continue unchecked", *id.*, and they "at best acquiesced in, and at worst, encouraged such behavior." SAC ¶149. Plaintiffs offer no factual support whatsoever for any of these conclusions. As *Iqbal* teaches, a complaint does not "suffice if it tenders 'naked assertion[s]' devoid of 'further factual enhancement.'" *Iqbal*, 129 S. Ct. at 1949 (alterations in original), quoting *Twombly*, 550 U.S. at 557. *Iqbal*, which rejected as "bare assertions" the allegations that Ashcroft and Mueller "knew of" and "condoned" allegedly unconstitutional conduct, *id.* at 1951, requires

that plaintiffs' similarly conclusory assertions about Rodriguez and Weber's purported knowledge and failure to act not be entitled to any presumption of truth. *E.g., id.* ("It is the conclusory nature of [Iqbal's] allegations, rather than their extravagantly fanciful nature, that disentitles them to the presumption of truth."); *Twombly*, 550 U.S. at 554-555.

The remaining allegations against Rodriguez and Weber report that they "publicize[d] ICE's 'successful' increase in New Jersey immigration arrests over the past two years," SAC ¶152, and each "makes frequent reports and comments on the number of arrests made by ICE agents, and speaks publicly on behalf of ICE about the implementation of [ORTS]." SAC ¶149. These allegations are entirely consistent with lawful conduct. *See, e.g., Twombly*, 550 U.S. at 557 n.5 (explaining that a plaintiff must cross the line from factually neutral to factually suggestive to "enter the realm of plausible liability"). Finally, plaintiffs contend that comments made by "each of them regarding allegations of inappropriate action by their fugitive operations personnel, including unconstitutional home raids, suggest that defendants Rodriguez and Weber at best acquiesced in, and at worst, encouraged such behavior." SAC ¶149. Plaintiffs offer nothing to suggest or identify any comments made by Rodriguez let alone comments that could fall into that category. Plaintiffs do identify a news report from 2008 in which Weber is quoted as stating, "I don't see it as storming a home .... We see it as trying to locate someone." SAC ¶149. The fact that

an official disputes unsubstantiated claims of conduct by subordinates does nothing to plausibly suggest an entitlement to relief. In contrast, it is fully consistent with an official lawfully carrying out his duties. *Cf., Iqbal*, 129 S. Ct. at 1950-51; *Twombly*, 550 U.S. at 567 (concluding that although conduct was consistent with unlawful behavior, allegations did not suggest illicit accord because it was not only compatible with, but indeed more likely explained by lawful behavior). There certainly is no reasonable or plausible inference to be drawn that his own actions amount to a constitutional violation.

At bottom, in the SAC, plaintiffs seek to hold Weber and Rodriguez personally liable on a *respondeat superior* theory. Even a cursory review of the SAC reveals that they are included in the SAC only by virtue of the positions they hold rather than because "they themselves" violated the Constitution. *Iqbal,* 129 S. Ct. at 1948 (stating that a plaintiff must plead that each official, "through the official's <u>own</u> <u>individual</u> <u>actions</u>, has violated the Constitution."); *id.* at 1952 (emphasis added) ("petitioners cannot be held liable unless <u>they</u> <u>themselves</u> acted on account of a constitutionally protected characteristic"). Rather, like the plaintiff in *Iqbal*, plaintiffs offer only "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements," without pleading "sufficient factual matter" to show that either of them personally violated plaintiffs' constitutional rights. *See id.* at 1949, 1952.

2. The Individual Capacity Claims Against Myers and Torres Should Be Dismissed.

Plaintiffs' allegations against Myers and Torres similarly fail under the *Iqbal* two-pronged analysis for pleading sufficiency in *Bivens* actions. Conclusory allegations in the SAC not entitled to the assumption of truth include allegations that Myers and Torres "facilitated the creation of a culture of lawlessness and lack of accountability within an agency they supervise," they failed to conduct investigations, provide specific guidelines or training to fugitive operations agents, or meaningfully discipline any officer responsible for unconstitutional conduct. SAC ¶¶144, 148. Such boilerplate assertions about failing to act – without any factual "enhancement" about what should have been done, but was not – could be made against any high-ranking government official in any agency. Under *Iqbal, Twombly*, and qualified immunity jurisprudence, such conclusory, unsupported allegations are insufficient to hold high-ranking federal officials subject to personal liability. *See Iqbal,* 129 S. Ct. at 1949-50; *Twombly*, 550 U.S. at 553-54 ("Factual allegations must be enough to raise a right to relief above the speculative level..."); *cf., Benzman v. Whitman*, 523 F.3d 119, 129 (2d Cir. 2007) ("a bare allegation that the head of a Government agency ... knew that her statements were false and 'knowingly' issued false press releases is not plausible in the absence of some supporting facts").

The remaining allegations against Myers and Torres, while containing factual

content, all describe constitutional conduct. For instance, Myers and Torres are alleged to have overseen the implementation of a five-fold increase in FOTs and an increase in arrest goals, SAC ¶144. Moreover, plaintiffs allege that press releases indicate that arrests were made "pursuant to the nationwide interior immigration enforcement strategy announced by defendant Myers and Secretary Chertoff," SAC ¶148 (emphasis added), and Torres had "direct responsibility for the execution of fugitive operations" within ORTS, SAC ¶147. Additionally, plaintiffs aver that Myers and Torres allegedly lauded as successful an increase in arrests. SAC ¶148. In contrast to some of the allegations in *Iqbal* that the Court observed, if true, could be considered consistent with unconstitutional conduct (but were deemed by the Court to be implausible given "more likely [lawful] explanations"), *Iqbal*, 129 S. Ct. at 1951, these actions attributed to Myers and Torres are plainly constitutional. Indeed, these actions were lawful and appropriate steps taken to further the government's interests.

Finally, plaintiffs contend that Myers and Torres were placed on notice of alleged unconstitutional activities of ICE agents through media reports, lawsuits, and other sources. SAC ¶¶145-147. An allegation of "mere knowledge," however, is not enough to hold a supervisor personally liable in a *Bivens* action. *Iqbal*, 129 S. Ct. at 1949. Moreover, the indicia of past conduct plaintiffs cite is simply insufficient to demonstrate that Myers or Torres even had personal knowledge of subordinates'

alleged conduct in this case. *E.g., Rode v. Dellarciprete*, 845 F.2d 1195, 1208 (3d Cir. 1988) (explaining that numerous articles, the introduction of a legislative resolution seeking an investigation into retaliation, the filing of grievances in the Governor's office of administration, and telephone calls and correspondence with the Lieutenant Governor's office are insufficient to show that the Governor had actual knowledge of the alleged misconduct). First, the alleged "repeated unlawful conduct" of which plaintiffs contend Myers and Torres had notice has nothing to do with any alleged past conduct of the agents whose actions are at issue in this lawsuit. Plaintiffs do not allege that any of the complaints were directed at the New Jersey Fugitive Operative Teams or any of the ICE officers allegedly involved in plaintiffs' SAC. Second, simply because someone claims that ICE agents acted unconstitutionally and, in turn, passes that claim on to a reporter or law maker – or includes the claim in a lawsuit – does not make it so. It certainly does not put Myers and Torres on notice that ICE agents nationwide are actually violating both the agency's policy and an individual's constitutional rights. Notably, of the lawsuits cited by plaintiffs, no court has determined that any ICE agent acted unconstitutionally – nor do Plaintiffs point to any investigative body that has found the conduct unconstitutional. Finally, even if Myers or Torres were actually aware of the lawsuits or media coverage identified in the SAC, unsubstantiated claims of a handful of alleged violations occurring over the course of several years in an agency of over 15,000 employees does not trigger

particular actions mandated by the Constitution. Under plaintiffs' theory, Myers, who oversees an agency comprised of thousands of employees and of which DRO is only one of several divisions, could be subject to personal liability each time some ICE agent somewhere in the United States is alleged to have acted unconstitutionally during her tenure as Assistant Secretary of Homeland Security simply because she was sued in a handful of other lawsuits. That cannot be the law and it is not: *Iqbal* confirms that each Government official "is only liable for his or her own misconduct." *Iqbal*, 129 S. Ct. at 1949. Because the SAC fails to allege that any of the four Individual Federal Defendants violated clearly established law, all individual capacity claims against Defendants Myers, Torres, Weber and Rodriguez must be dismissed.

C. Defendants Myers and Torres Should Be Dismissed for Lack of Personal Jurisdiction.

Defendants Myers and Torres are not residents or domiciliaries of New Jersey, and they do not consent to the jurisdiction of this court.[6] Accordingly, pursuant to

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[6] Defendants Myers and Torres recognize that the court has rejected their personal jurisdiction argument and there is not the sort of intervening and controlling precedent like *Iqbal* that compels reconsideration of that conclusion. Nonetheless, that conclusion is inconsistent with ample case law directly on point. Thus, the issue of personal jurisdiction is addressed here at some length rather than merely incorporating by reference arguments previously made. Moreover, personal jurisdiction is a defense that is controlled by the stringent waiver provision of Federal Rule of Civil Procedure 12(h) and defendants wish to preserve that defense as to the operative pleading, the SAC.

Rule 12(b)(2), these senior federal officials previously sought dismissal from this action because they lack the contacts with New Jersey that must exist in order for this court to assert jurisdiction over them. Dkt. No. 35 at 29-34. On May 6, 2009, this court determined that plaintiffs had alleged sufficient facts in the FAC to subject Myers and Torres to the personal jurisdiction of the court based upon the specific acts and omissions alleged with regard to ORTS. *See* Op. at 37. The court noted that plaintiffs had "at the very least" stated a basis upon which the court may exercise personal jurisdiction over Myers and Torres "in their capacities as supervisors." *Id.* at 38.

Individual Federal Defendants disagree with the court's personal jurisdiction determination because it overlooked that "[c]ourts across the country have recognized that personal jurisdiction cannot be premised solely on a defendant's supervisory status." *McCabe v. Basham*, 450 F. Supp.2d 916, 926 (N.D. Iowa 2006); *Nwanze v. Philip Morris Inc.*, 100 F. Supp.2d 215, 220 (S.D.N.Y. 2000) (collecting cases) (explaining that mere supervision over a federal agency, "the reach of which extends into every state," does not support personal jurisdiction in an individual capacity suit).[7] For the same reasons that *Iqbal* dictates that Myers and Torres' supervisory

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[7] *See, e.g., Hill v. Pugh*, 75 Fed. Appx. 715, 719 (10th Cir. 2003) (unpublished) ("It is not reasonable to suggest that federal prison officials may be hauled into court simply because they have regional and national supervisory responsibilities over facilities within a forum state."); *Michalik v. Hermann*, No. 99-3496, 2001

responsibilities should not make them personally liable under *Bivens* for the purported conduct of New Jersey ICE employees, the purported actions of New Jersey ICE employees should not allow this court to assert personal jurisdiction over these two DC-based officials. *See McCabe,* 450 F. Supp.2d at 926, quoting *Wag-Aero*, 837 F. Supp. at 1486 ("[i]f a federal agency head could be sued personally in any district within his or her official authority merely for supervising acts of subordinates . . . , the minimum contacts requirement would be rendered meaningless."). For these reasons, when a federal agency head or other senior government official is "not alleged to have been directly and actively involved in activities in the forum state, many courts have refused to exercise personal jurisdiction over them." *Wag-Aero*, 837 F. Supp. at 1485; *Moss v. United States Secret Service*, No. 06-3045, 2007 WL 2915608, *4-6, 18 (D. Or. Oct. 7, 2007), *appeal docketed on other grounds*, No. 07-36018 (9th Cir. 2007) (allegations that agent's actions "were the result of inadequate training, supervision, instruction and discipline" by the Director of the Secret Service

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WL 434489, *3 (E.D. La. Apr. 26, 2001); *James v. Reno*, No. 99-5081, 1999 WL 615084, at *1 (D.C. Cir. July 2, 1999) (unpublished); *Claasen v. Brown*, No. 94-1018, 1996 WL 79490, *2 (D.D.C. Feb. 16, 1996); *Wag-Aero, Inc. v. United States*, 837 F. Supp. 1479, 1486 (E.D. Wis. 1993), *aff'd* No. 93-4028, 1994 WL 485810 (7th Cir. Sept. 1994) (unpublished); *see also Stine v. Lappin*, No. 07-1839, 2009 WL 103659, at *6 (D. Colo. Jan. 14, 2009) (explaining that allegations that non-resident supervisory officials "are responsible for placing" plaintiff at ADX and "enforcing the Step-Down Unit Policy" are insufficient to establish minimum contacts for purposes of an individual capacity suit).

and that "[d]espite numerous episodes and complaints, and several lawsuits concerning the 'officially authorized pattern and practices,' Secret Service Agents ... have not been disciplined or corrected from engaging in such actions" were insufficient to support personal jurisdiction over the D.C.-based Director because plaintiffs had failed to show he purposefully directed his activity towards Oregon).

Likewise, numerous courts have held that allegations which seek to assert personal jurisdiction over high-level federal officials employed outside the forum state based on the enforcement of nationwide policies are insufficient to satisfy personal jurisdiction with a particular state. *E.g., Vu v. Meese*, 755 F. Supp. 1375, 1378 (E.D. La. 1991) ("[T]he fact that federal government officials enforce federal laws and policies on a nationwide basis is not sufficient in and of itself to maintain personal jurisdiction in a lawsuit which seeks money damages against those same governmental officials in their individual capacities."); *Stone v. Derosa*, No. 07-0680, 2009 WL 798930, *1 (D.Ariz. Mar. 25, 2009) (collecting cases) (emphasis added) (explaining that proposal "that the head of a federal agency in Washington, D.C. is subject to suit based upon specific jurisdiction in any judicial district in the country where an agency regulation purportedly caused a constitutionally tortious effect upon plaintiff even though there may be no evidence the federal official had any specific knowledge of or involvement with the plaintiff in any manner ... has been rejected by

courts all over the country.").[8] If it was, high-ranking officials could be required to answer suit in their individual capacity in every forum in the country, without the requisite personal contacts there, based solely on their respective positions. Such a result would not comport with due process.

Plaintiffs' SAC adds no facts to demonstrate that Myers or Torres, two senior Department of Homeland Security officials based in Washington, D.C. have the requisite minimum contacts with the forum such that they reasonably could "anticipate being haled into court" in New Jersey. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980). None of the allegations in the SAC satisfy the high threshold necessary to establish general jurisdiction. Nor can plaintiffs establish specific jurisdiction because not one of the allegations about Myers or Torres in the

[8] *See also Lopez v. Chertoff*, No. 07-1566, 2008 WL 1805779, *1 (E.D. Cal. Apr. 21, 2008); *Mahmud v. Oberman*, 508 F. Supp. 2d 1294, 1301-02 (N.D. Ga. 2007), *aff'd sub nom. Mahmud v. DHS*, 262 Fed. Appx. 935 (11th Cir. 2008), *cert. denied*, 129 S. Ct. 180 (2008); *Rank v. Hamm*, No. 04-0997, 2007 WL 894565, at *11-13 (S.D. W.Va. Mar. 21, 2007); *Moss*, 2007 WL 2915608, at *18-19; *Oksner v. Blakey*, No. 07-2273, 2007 WL 3238659, *9 (N.D. Cal. Oct. 31, 2007) ("while Plaintiffs may find it 'preposterous' that this Court does not automatically have jurisdiction over every federal agency official in the country who participates in implementing nationwide regulations, there mere fact that federal officials enforce federal laws and policies on a nationwide basis is not sufficient in and of itself to confer personal jurisdiction"); *see also Doe v. American Nat'l Red Cross*, 112 F.3d 1048, 1050-51 (9th Cir. 1997) (dismissing FDA official sued on constitutional claim due to lack of contacts with forum, as there was no reason for "a government employee working and living in the Washington, D.C. area" to believe his actions "would expose him to the power of the courts in Arizona").

SAC even mentions actions in New Jersey - let alone action deliberately targeted at the forum. *See* SAC ¶¶144-148. The mere fact that Myers and Torres, while working in Washington, D.C., had general supervisory authority over subordinates who may have been in New Jersey cannot subject them to jurisdiction in this forum. Moreover, even assuming being named in a lawsuit could confer jurisdiction, none of the lawsuits identified in the SAC were filed in New Jersey or are about actions in New Jersey. Accordingly, it continues to be Myers' and Torres' position that this court does not have personal jurisdiction over them and that the court erred in concluding otherwise. They hereby raise and preserve all arguments made in their previous Motion to Dismiss and request dismissal here. Dkt. Nos. 35, at 29-34; 66, at 18-20. Because plaintiffs have failed to establish a basis for personal jurisdiction over Myers and Torres, they should be dismissed from this suit pursuant to Rule 12(b)(2).

D. This Court Lacks Subject Matter Jurisdiction Over the Claims of Alien Plaintiffs Who May Be Subject to Removal.

The INA deprives this court of jurisdiction to hear all of the claims of plaintiffs subject to removal proceedings. In their Motion to Dismiss the FAC, Individual Federal Defendants argued that the claims of Carla Roe 1 and 3, Carlos Roe 2 and Juan Ontaneda should be dismissed because the INA divests this particular court of jurisdiction to hear the claims raised by these alien plaintiffs. Dkt. No. 35, at 14-21. Specifically, 8 U.S.C. §1252(b)(9) consolidates in the courts of appeals all legal and

factual questions arising from actions taken to remove an alien, and because the claims of those four plaintiffs arise from ICE's efforts to remove them from the United States, this court lacks subject matter jurisdiction over their claims. Moreover, through 8 U.S.C. §1252(g), Congress has divested courts of jurisdiction over claims "arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien" and thus this court lacks jurisdiction over the claims of the same four plaintiffs. In its May 6, 2009 opinion, this court rejected Individual Federal Defendants' arguments as to Ontaneda. For the reasons stated in their briefing papers submitted in support of their Motion to Dismiss the FAC, Individual Federal Defendants respectfully disagree with the court's ruling and, because their position applies with equal force to the allegations in the Second Amended Complaint, hereby preserve and incorporate by reference their argument that this court lacks subject matter jurisdiction over all the claims that Ontaneda raises in this action.[9] MTD, Dkt. No. 35, at 14-21; Dkt. No. 66, at 6-13. Individual Federal Defendants' position continues to be that Ontaneda's

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[9] Because it is their understanding that there has been no intervening change in controlling law since the court's decision, Individual Federal Defendants do not re-argue this issue here. At this procedural stage, because the court is to assume all well-pled facts in the SAC are true, Individual Federal Defendants do not present arguments as to Guzman, who now claims to be a lawful permanent resident. Individual Federal Defendants note, however, that the SAC is silent as to Guzman's immigration status as of the time of the enforcement operation of which she complains in the SAC.

claims therefore should be dismissed for lack of jurisdiction.

E. Special Factors Counsel Against Creating a Damages Remedy for Plaintiffs Argueta and Ontaneda.

This court should refrain from implying a non-statutory damages remedy for claims arising from the arrest of, or attempt to arrest, individuals believed to be unlawful aliens because the political branches' plenary power over immigration matters and Congress' implementation of a comprehensive statutory scheme regulating immigration are special factors counseling hesitation in doing so. In their Motion to Dismiss, Individual Federal Defendants argued that Plaintiffs Argueta, Ontaneda, Carla Roe 1, Carlos Roe 2, and Carla Roe 3 may not pursue a *Bivens* remedy in light of the special factors presented by the INA and the federal government's exercise of its plenary immigration authority. Dkt. No. 35, at 21-28. In its May 6 opinion, this court rejected the argument that special factors counseled against implying a damages remedy for Argueta and Ontaneda. For the reasons stated in their briefing papers submitted in support of their Motion to Dismiss the FAC, Individual Federal Defendants respectfully disagree with the court's ruling and, because their position applies with equal force to the allegations in the SAC, hereby preserve and incorporate by reference their arguments that this court should refrain from implying a constitutional tort remedy because special factors counsel against

doing so.[10] Dkt. No. 35, at 21-28; Dkt. No. 66, at 13-18. It continues to be their position that this court should decline plaintiffs' invitation to permit removable aliens to pursue monetary damages against federal officers for the claims alleged here by Argueta and Ontaneda.

V. CONCLUSION

For the reasons stated above, this court should dismiss the claims against Defendants Myers, Torres, Weber and Rodriguez.

DATED: June 18, 2009

Respectfully submitted,

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[10] Because it is their understanding that there has been no intervening change in controlling law since the court's decision, Individual Federal Defendants do not re-argue this issue here. At this procedural stage, because the court is to assume all well-pled facts in the SAC are true, Individual Federal Defendants do not present arguments as to Guzman, who now claims to be a lawful permanent resident. Individual Federal Defendants note, however, that the SAC is silent as to Guzman's immigration status as of the time of the enforcement operation of which she complains in the SAC.

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