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)

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

CROWELL & MORING LLP
Michael L. Martinez (MM 8267)
David E. Bell (DB 4684)
1001 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
(202) 624-2500

Attorneys for Defendant Dennis Hasty

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INTRODUCTION

This case arises from the terrorist attacks against the United States on September 11, 2001, in which thousands of people were killed and injured. Faced with responding to these unprecedented events, our country's federal officials were called upon to make complex and sensitive judgments with limited guidance from past practice and legal precedent.

The named Plaintiffs,[1] eight male, non U.S.-citizens, assert that they were arrested on immigration violations following September 11, 2001 and held in custody at either the Metropolitan Detention Center in Brooklyn, New York ("MDC") or the Passaic County Jail in New Jersey for periods ranging from three to eight months. Plaintiffs do not dispute that they were in the United States illegally. Instead, Plaintiffs have filed this putative class action as a *Bivens* suit against eight individual defendants, including Dennis Hasty, the former MDC Warden, to challenge the procedures and conditions under which they were detained.

Hasty now moves to dismiss this suit under Federal Rule of Civil Procedure 12(b) on qualified immunity grounds. The claims against him are not viable because: (1) he acted in an objectively reasonable manner pursuant to the facially valid orders of his superiors; and (2) Plaintiffs have not adequately alleged his personal involvement in the violations at issue.

PROCEDURAL HISTORY

The first complaint in this case was filed on April 17, 2002, and after it was amended in July 2002, the United States moved to dismiss on behalf of all defendants. Before there was a ruling on the motion, however, the Department of Justice's Office of the Inspector General released, in April 2003, a report entitled "The September 11 Detainees: A Review of the

[1] Ibrahim Turkmen, Akhil Sachdeva, Ahmer Iqbal Abbasi, Anser Mehmood, Benamar Benatta, Ahmed Khalifa, Saeed Hammouda, and Purna Raj Bajracharya. Because Turkmen and Sachdeva were detained at the Passaic County Jail, they assert no claims against Hasty and, thus, this brief will only address allegations made by the other six plaintiffs. The term "Plaintiffs" will hereinafter refer to the six plaintiffs held at the Metropolitan Detention Center.

Treatment of Aliens Held on Immigration Charges in Connection with the Investigation of the September 11 Attacks" ("OIG Report"). As a result, the plaintiffs filed a Second Amended Complaint in June 2003, which attached and incorporated the OIG Report. After the OIG released a supplemental report in December 2003, entitled "Supplemental Report on September 11 Detainees' Allegations of Abuse at the Metropolitan Detention Center in Brooklyn, New York" ("Supp. OIG Report"), the Third Amended Complaint ("TAC") was filed in September 2004, which attached and incorporated both the original and Supplemental OIG Report.

The TAC alleged claims against the United States and 32 named defendants, including Hasty, and 20 "John Doe MDC Correctional Officers" in their individual capacities. Several of the defendants, including Hasty, filed a consolidated motion to dismiss the TAC, asserting, *inter alia*, their entitlement to qualified immunity. In the meantime, discovery commenced against the numerous defendants who filed an Answer in response to the TAC, while discovery was stayed as to those defendants who asserted qualified immunity. The plaintiffs deposed dozens of defendants and third-party witnesses and received thousands of pages of discovery documents.

In June 2006, this Court granted in part and denied in part the consolidated motion to dismiss, *Turkmen v. Ashcroft*, 2006 WL 1662663 (E.D.N.Y. June 14, 2006), and several of the individual defendants, including Hasty, filed interlocutory appeals to the Second Circuit. While the appeal was pending, the Second Circuit affirmed in part and vacated in part this Court's ruling in the closely related case, *Iqbal v. Ashcroft*, 490 F.3d 143 (2d Cir. 2007), which involved virtually all of the same defendants as *Turkmen* and very similar allegations related to the same events. Several of the defendants in *Iqbal*, including Hasty, appealed to the Supreme Court, which granted review. On May 18, 2009, the Supreme Court issued its ruling in *Ashcroft v. Iqbal*, 129 S. Ct. 1937, *reversing* the Second Circuit's decision and held, *inter alia*, that the complaint in *Iqbal* failed to plead facts sufficient to state a claim.

Shortly thereafter, the United States, on behalf of all Defendants settled the *Iqbal* case, and settled with six of the *Turkmen* plaintiffs. Plaintiffs' counsel then sought leave to amend the TAC, and Plaintiffs were allowed to file a Fourth Amended Complaint (hereinafter "Complaint" or "Compl.") that added six new plaintiffs.

FOURTH AMENDED COMPLAINT ALLEGATIONS

While this latest iteration of the Complaint adds six new plaintiffs, it eliminates the United States as a defendant, as well as several dozen lower-level and "John Doe" defendants. It also reduces the number of asserted claims from 31 (in the TAC) to seven.

The Complaint alleges that Plaintiffs were arrested following the September 11, 2001 terrorist attacks, treated as "of interest" to the government's terrorism investigation and placed in detention at the MDC where they were housed in the ADMAX SHU. Compl. ¶¶ 1, 4. Plaintiffs assert that in the ADMAX SHU, they were subjected to a variety of abuses that amounted to violations of their constitutional rights. The seven causes of action asserted are: restrictive and harsh conditions of confinement (Claims 1 and 2); interference with their free exercise of religion (Claim 3); interference with their right to counsel and the courts (Claims 4 and 5); unreasonable strip searches (Claim 6); and conspiracy to violate their civil rights (Claim 7). As with previous iterations of the Complaint, Plaintiffs seek to hold Hasty personally liable for actions he allegedly took within the scope of his authority as the MDC Warden.

ARGUMENT

HASTY IS ENTITLED TO QUALIFIED IMMUNITY

I. The Law of Qualified Immunity

Qualified immunity reconciles two important but countervailing interests: (1) providing a damages remedy to vindicate constitutional guarantees; and (2) minimizing the heavy social costs imposed by litigation against federal officials in their individual capacities. *Harlow v.*

Fitzgerald, 457 U.S. 800, 814 (1982) (citations omitted). The Supreme Court has repeatedly balanced these concerns by recognizing that qualified immunity protects officials from suit unless their actions violated "clearly established statutory or constitutional rights of which a reasonable person would have known." *Behrens v. Pelletier*, 516 U.S. 299, 305 (1996) (citation omitted). To plead "a violation of a clearly established right to overcome qualified immunity," a complaint must plausibly allege that a defendant has violated the constitution "through the official's *own individual actions*." *Iqbal*, 129 S. Ct at 1948, 1949 (emphasis added). Where there is a "legitimate question" as to the standards governing conduct in particular circumstances, "it cannot be said" that "clearly established" rights were violated. *Mitchell v. Forsyth*, 472 U.S. 511, 535, n.12 (1985).

The Supreme Court has recognized that *Bivens* suits "frequently run against the innocent," and impose a heavy cost "not only to the defendant officials, but to society as a whole," including "the expenses of litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office." *Harlow*, 457 U.S. at 814. Thus, qualified immunity should apply "at the earliest possible stage in litigation." *Hunter v. Bryant*, 502 U.S. 224, 227 (1991). Indeed, the "essence" of qualified immunity is its possessor's "entitlement not to stand trial or face the other burdens of litigation," *Mitchell*, 472 U.S. at 526, including the "broad-ranging discovery" that can be "peculiarly disruptive of effective government." *Harlow*, 457 U.S. at 817; *Anderson v. Creighton*, 483 U.S. 635, 646, n.6 (1987).

In examining an official's entitlement to qualified immunity, courts traditionally first consider the threshold question of whether a violation of a constitutional right is alleged, and if not, the inquiry ends there. *Saucier v. Katz*, 533 U.S. 194, 201 (2001). However, under *Pearson v. Callahan*, 129 S. Ct. 808, 818 (2009), courts may now elect to go straight to the question of

whether the right was clearly established. This inquiry must be made within "*the specific context of the case*, not as a broad general proposition," and the relevant test of "whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Saucier*, 533 U.S. at 201-02 (emphasis added).

II. Plaintiffs' Claims That Rely On Policies Created by Hasty's Superiors Should Be Dismissed Because His Actions Were Objectively Reasonable.

A. Subordinate Officials Acting Pursuant to the Facially Valid Orders of Their Superiors are Entitled to Qualified Immunity Because Their Conduct is Objectively Reasonable.

The Second Circuit has made clear that a subordinate official is not liable for constitutional violations that occur while following his superior's orders unless the order was "facially invalid." *Varrone v. Bilotti*, 123 F.3d 75, 81-82 (2d Cir. 1997); *see also Anthony v. City of New York*, 339 F.3d 129, 138 (2d Cir. 2003); *Lauro v. Charles*, 219 F.3d 202, 216 n.10 (2d Cir. 2000); *Washington Square Post #1212 Am. Legion v. Maduro*, 907 F.2d 1288, 1293 (2d Cir. 1990). *Cf. Diamondstone v. Macaluso*, 148 F.3d 113, 126 (2d Cir. 1998) (same). As stated in *Anthony*, "[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 . . . ." 339 F.3d at 138 (quotation marks and citations omitted).

To be clear, this is not a "just following orders" defense. Rather, federal officials are entitled only to follow those orders that are plausible, a principle properly grounded in the "objectively reasonable" prong of the qualified immunity test.[2] *See Anthony*, 339 F.3d at 138.

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[2] There is no question that a court can decide the objective reasonableness prong of the qualified immunity test on a motion to dismiss. Although "disputes over reasonableness are usually fact questions for juries," in the qualified immunity context, the court is "not concerned with the correctness of the defendants' conduct, but rather the 'objective reasonableness' of their chosen course of action given the circumstances

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An official's entitlement to qualified immunity hinges on whether "it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Saucier*, 533 U.S. at 202. Subordinate officials acting pursuant to orders that they reasonably believe in good faith are valid – in the context of the particular circumstances – have no reason to think that their actions are unlawful or could violate another person's legal rights. Thus, such officials' actions are "objectively reasonable," and the doctrine of qualified immunity shields them from claims for damages. *Anthony*, 339 F.3d at 138; *see also Sec. & Law Enforcement Employees v. Carey*, 737 F.2d 187, 211 (2d Cir. 1984) ("prison officials have a right to qualified immunity for actions taken in their official capacity if they act in good faith and on the basis of a reasonable belief that their actions were lawful") (quotation marks and citation omitted).

For example, in *Williams v. Goord*, 142 F. Supp. 2d 416, 421 (S.D.N.Y. 2001), a SHU inmate, after verbally harassing correctional officers, had mechanical restraints placed on his hands and waist for 28 days when he was outside his cell. The inmate sued several prison employees under, *inter alia*, the Eighth Amendment, claiming that the mechanical restraints prohibited him from having "meaningful" opportunities to exercise. *Id.* The court held that the highest-level officials who constructed the policy were not entitled to qualified immunity, but dismissed the case against the subordinate officers because they "had no input into the

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confronting them at the scene." *Lennon v. Miller*, 66 F.3d 416, 421 (2d Cir. 1995). Thus, when the facts are undisputed, as they are here when considering a motion to dismiss, "the question of whether it was objectively reasonable for the officers to believe that they did not violate the plaintiff's rights is a purely legal determination for the court to make." *Id.* at 422.

Indeed, the Second Circuit has reached the "reasonableness" prong of the qualified immunity inquiry during interlocutory appeals from motions to dismiss. *See e.g.*, *McEvoy v. Spencer*, 124 F.3d 92, 105 (2d Cir. 1997) (reversing denial of motion to dismiss because "it was objectively reasonable for defendants Spencer and Christopher to believe that McEvoy was still a policymaker" and, thus, there was no violation of a clearly established right); *Sound Aircraft Services, Inc. v. Town of East Hampton*, 192 F.3d 329, 334 (2d Cir. 1999) (consideration of objective reasonableness prong at motion to dismiss stage deemed appropriate); *see also Hodorowski v. Ray*, 844 F.2d 1210, 1217 (5th Cir. 1988) (reversing denial of motion to dismiss because defendant's conduct was "objectively reasonable, and as a matter of law violated no clearly established right").

development and implementation of the restraint policy and were merely following what they believed to be lawful orders." *Id.* at 430 (citing, *inter alia*, *Varrone,* 123 F.3d at 81).

B. Hasty's Objectively Reasonable Conduct Requires Dismissal of Plaintiffs' Communications Blackout Claim and Portions of the Conditions of Confinement Claims.

Here, some of Plaintiffs' claims concern the creation and implementation of specific policies that were clearly set at levels above Hasty: (a) the "communications blackout" (Claims 4 & 5) and (b) restrictive conditions and harsh treatment related to detention in the ADMAX SHU (*parts* of the due process and equal protection allegations in Claims 1 & 2).[3] To the extent that Plaintiffs have plausibly alleged Hasty's involvement in these claims, they should still be dismissed against Hasty because it was objectively reasonable – considering all of the circumstances – for him to follow facially valid directives from his superiors.

1. The Policies in Question Were Created at Levels Above Hasty, and It Was Objectively Reasonable for Him to Follow Them.

The Complaint acknowledges that Defendants Ashcroft, Mueller and Ziglar created the policies in question here, *see*, *e.g.*, Compl. ¶¶ 6, 21, 22, 23, 61, 67, 68, 79, and the OIG Report confirms this (*see* discussion below). Moreover The OIG Report demonstrates that Hasty followed facially valid orders.[4] For instance, it states that it was the BOP who determined early-

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[3] Plaintiffs' general assertion that they suffered "harsh treatment" can be divided into two categories: (1) alleged harsh treatment based on the restrictive conditions established in the ADMAX SHU, and (2) alleged "outrageous" and "inhumane" conditions resulting from acts of correctional officers and other low-level MDC staff, which included physical and verbal abuse. *See* Compl. ¶¶ 5, 278. This section of the brief addresses only the first category – restrictive conditions at the ADMAX SHU. The second category of conduct is discussed in Section III.C.4 below.

[4] This Court may properly consider the OIG Report because, on a motion to dismiss, courts should consider documents outside the pleadings if they are "appended to the complaint or incorporated in the complaint by reference." *See Allen v. WestPoint-Pepperell, Inc.*, 945 F.2d 40, 44 (2d Cir. 1991). Here, Plaintiffs' expressly incorporate both OIG Reports into the Complaint. *See* Compl. ¶¶ 3 n.1, 5 n.2.

The last version of the complaint (the TAC) not only "incorporated" the OIG Reports, it cited and referenced them *extensively*. Indeed, the TAC is littered with *over 100* references and cites to the OIG Reports. This Court, of course, is well aware of that because it too relied on the facts portrayed in the OIG

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on to impose special conditions on the 9/11 detainees. OIG Report at 19-20. These conditions "included housing the detainees in the administrative maximum ('ADMAX') Special Housing Unit ('SHU'), implementing a communications blackout, and classifying the detainees as Witness Security ("WITSEC") inmates." *Id.* at 19. The detainees were "subjected to the most restrictive conditions of confinement authorized by BOP policy, including a 'lockdown' for 23 hours a day, restrictive escort procedures for all movement outside of the ADMAX SHU cells, and tight limits on the frequency and duration of legal telephone calls." *Id.* at 112.

The BOP was concerned about the potential security risk of the 9/11 detainees, and "the FBI provided so little information about the detainees" that the BOP "did not really know whom the detainees were." *Id.* at 19. Thus, it was BOP officials – and not Hasty – who decided to "err on the side of caution and treat the September 11 detainees as high-security detainees." *Id.* Based on the "of high interest" designation by the FBI – a classification reserved for those believed to have the greatest likelihood of being connected to terrorism – BOP officials had to consider potential security risks. *Id.* at 17-19, 112, 115 n.91. The BOP believed the 9/11

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Report and cited to it numerous times throughout its 2006 ruling on the joint motion to dismiss. *See Turkmen*, 2006 WL 1662663 at *4 ("The Third Amended Complaint, by itself and by incorporating the two OIG reports annexed thereto, alleges the following facts.").

It is noteworthy, therefore, that Plaintiffs now try to *distance* themselves from the OIG Reports – *i.e.*, the current Complaint contains a grand total of two cites to the OIG Reports. Perhaps Plaintiffs have realized that the OIG Reports *contradict* many of their allegations just as much as they support others. Plaintiffs essentially acknowledge as much by making the remarkable assertion that the OIG Reports should be "incorporated by reference ***except where contradicted by the allegations of this Fourth Amended Complaint.***" ¶ 3 n.1, ¶ 5 n.2 (emphasis added).

This Court should reject plaintiffs' opportunism. They cannot be permitted to choose and reject what they please from the OIG Reports as if they are at a buffet. Stated another way, the OIG Reports cannot be used as both a sword and a shield. Because the plaintiffs have chosen to incorporate the OIG Reports into their Complaint, they must accept the reports, warts and all. Hence this Court should not credit Plaintiffs' allegations "that are contradicted either by statements in the complaint itself or by documents upon which its pleadings rely." *In re Livent, Inc. Noteholders Sec. Litig.*, 151 F. Supp. 2d 371, 405-06 (S.D.N.Y. 2001) (collecting cases); *see also Barberan v. Nationpoint*, 706 F. Supp. 2d 408, 424 (S.D.N.Y. 2010) (same).

detainees were associated with terrorist activity against the United States and, therefore, considered them a danger to prison employees.[5] *Id.* at 112. And it was BOP officials – and not Hasty – who decided to implement a communications blackout based on concerns about the 9/11 detainees' ability to communicate both with other inmates and persons outside the MDC. *Id.* at 112-13. Thus, the OIG unequivocally concluded that the decision to hold the 9/11 detainees in the ADMAX SHU (with its associated restrictive and harsh conditions) and to block the detainees' communications was made by high-level FBI, BOP and INS officials at the regional or national headquarters, and *not* by Hasty. *Id.* at 19, 112-13.

Upon receiving the "of high interest" 9/11 detainees, MDC officials, including Hasty, received and complied with BOP orders to place them in the ADMAX SHU and initiated a communications blackout. *Id.* at 112-13. Thereafter, BOP officials repeatedly instructed the MDC, including Hasty, to keep the 9/11 detainees in the ADMAX SHU until they were cleared of any connection with terrorist activities by the FBI. *Id.* at 113, 116. The BOP also instructed the MDC, including Hasty, when the communications blackout could be lifted. *Id.* at 114, 116. As to Hasty, the OIG Report did not find that he had *any* involvement in the decision-making process for any of these directives. Instead, it makes it clear that Hasty was to carry out the policies created by high-level BOP officials. *See id.* at 112-14, 116, 126-28. And given the circumstances of the time, in the immediate aftermath of the unprecedented terrorist attacks, Hasty reasonably did so. In sum, Hasty reasonably relied on the notion that his superiors – or others upon whom he could appropriately rely, such as the FBI – had properly determined that

[5] This danger was readily apparent because a convicted terrorist housed at Metropolitan Correctional Center in Manhattan ("MCC") previously had gravely injured a correctional officer, which prompted the establishment of an ADMAX SHU at the MCC. *See* OIG Report at 119 n.99.

these individuals were connected in some way with terrorism and, thus, were deserving of a level of confinement appropriate to that determination.

2. Hasty Cannot Be Held Liable for Policy-Driven Conduct.

Plaintiffs first seek to impute liability against Hasty for this policy-based conduct by mislabeling his role in the detention process. For instance, even though superior BOP officials ordered that the 9/11 detainees be housed in an ADMAX SHU under restrictive conditions, Plaintiffs paint Hasty as the official who "ordered *the creation* of the ADMAX SHU . . . ." Compl. ¶ 24 (emphasis added). Other allegations, however, acknowledge Hasty's subordinate role. *See, e.g.*, Compl. ¶ 75 ("Hasty ordered Lopresti and Cuciti to design extremely restrictive conditions of confinement" in order to "carry out" Ashcroft, Mueller and Ziglar's policy). With regard to the communications blackout at the MDC, Plaintiffs are reduced to alleging that Hasty "implemented Ashcroft, Mueller' and Ziglar's explicit policy to limit MDC Plaintiffs and class members access to the outside world . . ." and "approved" a written policy drafted by subordinates. Compl. ¶ 79.

At the end of the Complaint where "claims for relief" are listed, Plaintiffs attempt to lump Hasty in with all of the other defendants as being responsible for these alleged violations based on high-level policies. *See* Compl. ¶¶ 278, 282, 290, 294. But as stated in note 4 above, this Court should not credit allegations "that are contradicted . . . by documents upon which [the] pleadings rely." *In re Livent, Inc.*, 151 F. Supp. 2d at 405-06. Instead, this Court must read Plaintiffs' general allegations in light of the specific and contradictory findings in the OIG Reports, which Plaintiffs have incorporated into their Complaint. These findings demonstrate that the decisions to detain Plaintiffs in the ADMAX SHU under restrictive and harsh conditions of confinement and to initiate a communications blackout were made by high-level agency officials – and *not* made by Hasty.

Because Hasty's superiors' orders were *not* "facially invalid," his actions were objectively reasonable when he relied on these directives. In the wake of the 9/11 attacks, Hasty was faced with a unique group of detainees that raised a variety of security risks, and he had no reasonable basis on which to question the legality of the BOP's orders. *See* OIG Report at 19-20, 112-113. Indeed, the BOP had many legitimate reasons for deciding to place the 9/11 detainees in the ADMAX SHU, and Hasty had no reason – and, importantly, no authority – to dispute the legitimacy of this decision, or the FBI's classification of the 9/11 detainees as potentially connected to the 9/11 terrorist attacks. Considering the limited information the FBI gave the BOP about the detainees, *id.* at 19, it was legitimate for the BOP – and certainly Hasty – to rely on that assessment.

In short, Hasty reasonably relied on the FBI's determination that these individuals were potentially dangerous, which justified the strict security measures implemented at the MDC. *See* OIG Report at 126 ("MDC officials relied on the FBI's assessment . . .") and 127 ("BOP accepted [the FBI's] assessment, since the BOP normally takes 'at face value' FBI determinations that detainees . . . were 'high-risk.'"). Given the facts known to Hasty at the time, it was reasonable to rely on his superiors' decision to "err on the side of caution." *Id.* at 19.

In fact, under a range of scenarios – all of them plausible – these policies were reasonable. Similarly, the applicable law at that time did not provide any reasonable basis to question this policy. BOP procedures permitted administrative detention for inmates that posed security threats similar to those described above during an investigation against them. *See* 28 C.F.R. § 541.22(a). Moreover, the 9/11 detainees posed exactly the type of "exceptional circumstances, ordinarily tied to security or complex investigative concerns" that allowed for prolonged custody in administrative detention. 28 C.F.R. § 541.22(c)(1). Therefore, it was

reasonable for Hasty to believe that the order to place Plaintiffs under restrictive conditions of confinement in the ADMAX SHU was facially valid.

Plaintiffs' equal protection claim for "harsh treatment" based on race, religion, and/or national origin (Claim 2) should also be dismissed for another reason. The fact that Hasty did not control the decision to place the Plaintiffs under restrictive conditions in the ADMAX SHU – s*ee* OIG Report at 19, 112-13 – means that it would have been impossible for him to cause such placement with *discriminatory animus*. Instead, it was reasonable for him to believe that the assignment decision was for the security reasons noted *supra*, based on the FBI's determination that the 9/11 detainees were potentially connected to terrorist attacks against the United States.[6]

The "communications blackout" assertions (Claims 4 & 5) suffer the same fatal defect. The communications blackout was ordered by high-level BOP officials, not Hasty. *See* OIG Report at 112-13. These orders were followed by the MDC staff, including Hasty, *id.*, but he should not be held liable for any alleged constitutional violations resulting from this policy. Based on the circumstances known to Hasty at the time, it was objectively reasonable for him to accept the validity of this order, particularly given that the government had critical security

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[6] That Hasty's involvement was limited to following his superiors' orders demonstrates that Plaintiffs have failed to state a claim against Hasty for violation of their equal protection rights. An essential element to an equal protection claim is that the "defendant acted with discriminatory purpose." *Iqbal*, 129 S. Ct. at 1948. The *only* times Plaintiffs even attempt to link Hasty to discrimination based on race, religion, and/or national origin are in generic sections at the beginning of the Complaint and the "Second Claim for Relief" at the end of the Complaint. Compl. ¶¶ 7, 282. In both instances Plaintiffs lump Hasty with all of the other defendants with no details or specifics (*see* Section III.C.1, *infra*, regarding why group allegations are inadequate).

Despite these conclusory allegations, Hasty *could not* have acted with the required discriminatory intent because the decisions regarding their confinement and restrictive conditions in the ADMAX SHU were made exclusively by BOP in reliance on assessments made the FBI. *See* OIG Report at 19, 112-13. The only parties who could have acted with discriminatory animus were the individuals who made the decision to institute this policy; Hasty could not have acted with discriminatory animus while simply carrying out the orders of his superiors. *See Gomez v. Rivera-Rodriguez*, 344 F.3d 103, 122 (1st Cir. 2003) (granting qualified immunity as to discrimination claim because the subordinate "had no hand in the relevant decisionmaking" and thus, "there is no way that the plaintiffs can carry their burden of showing that she was motivated by a constitutionally impermissible animus").

concerns that illegal aliens with possible terrorist ties might reveal information vital to national security.[7] Because, under these circumstances, there was no legitimate reason to question their validity, Hasty's actions in following the orders of his superiors could not have been unreasonable.

Accordingly, this Court should dismiss Claims 4 & 5 and portions of Claims 1 & 2 (related to restrictive conditions of confinement)[8] because Hasty acted pursuant to his superiors' facially valid orders, viewed in the context of the information reasonably known to him at that time. *See Anthony*, 339 F.3d at 138 (finding that lower-ranking officers were entitled to qualified immunity because they were following the orders of their superiors, and the orders were valid in light of the circumstances reasonably known to the subordinates). Indeed, a court may only deny qualified immunity if it determines that "no officer of reasonable competence could have made the same choice in similar circumstances." *Anthony*, 339 F.3d at 138 (quoting *Lennon*, 66 F.3d at 420-21); *see also Groh v. Ramirez*, 540 U.S. 551, 564-65 (2004) (denying qualified immunity because "no reasonable officer" could have believed the actions at issue were lawful). It cannot be said in this case that Hasty made unreasonable decisions – that no competent official in his

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[7] Indeed, several courts have held that national security concerns surrounding September 11th justified restrictions on information. *See Ctr. of Nat'l Sec. Studies v. DOJ*, 331 F.3d 918, 928, 932 (D.C. Cir. 2003) (upholding, on national security grounds, government's right to, *inter alia*, withhold names of persons detained for immigration violations in wake of September 11th, and finding that the possibilities that one terrorist might tell another "which of their members were compromised by the investigation, and which were not," or might convey "the substantive and geographic focus of the investigation" were dangers that the government had an obligation to prevent); *N. Jersey Media Group, Inc. v. Ashcroft*, 308 F.3d 198, 217-18 (3d Cir. 2002) (rejecting First Amendment challenge to closure of "special interest" deportation hearings involving INS detainees with alleged connections to terrorism); *ACLU v. DOJ*, 265 F. Supp. 2d 20, 31 (D.D.C. 2003) (upholding government's right to withhold statistics regarding number of times government had utilized information-gathering powers under Patriot Act, including roving surveillance, pen registers, trap devices, demand for tangible things, and sneak-and-peek warrants, on ground that nondisclosure was reasonably connected to protection of national security)

[8] The remaining portions of Claims 1 & 2 for allegations of "outrageous" and "abusive" treatment should be dismissed for reasons discussed below.

position would have made – to follow these orders in light of the apparently sound bases for BOP's decisions. He is therefore entitled to qualified immunity as to these claims.

3. *Iqbal* Also Mandates Dismissal of These Claims.

The Supreme Court's explication of the minimum pleading standard confirms that nothing in the Complaint and incorporated OIG Reports permits Plaintiffs' claims against Hasty to withstand a motion to dismiss. *Iqbal* explained that "[a] claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." 129 S. Ct. at 1949 (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 556 (2007)).

The Court noted in *Iqbal* that "all [the complaint] plausibly suggests is that the Nation's top law enforcement officers, in the aftermath of a devastating terrorist attack, sought to keep suspected terrorists in the most secure conditions available until the suspects could be cleared of terrorist activity." 129 S. Ct. at 1952. The Court explained that Iqbal's allegation that the policy was created for discriminatory reasons was "not a plausible conclusion" because there was a *more likely* "obvious alternative explanation" – *i.e.*, that the defendants created policies for legitimate reasons that may have had an incidental disparate impact on Arab Muslims. *Id.* at 1951. As for the "of high interest" designation – which was at the heart of Iqbal's claim – the Supreme Court observed that the complaint established that "various other defendants" created this designation, and because "purpose rather than knowledge" must be alleged to demonstrate unlawful discrimination, any misconduct resulting from that determination could not be attributed to the petitioners. *Id.* at 1949.

Plaintiffs' Claims 1, 2, 4 and 5 here are similarly based on the decision to detain them in the ADMAX SHU with restrictive conditions and a communications blackout, and they should suffer a similar fate. As in *Iqbal*, the OIG Report notes these decisions were made by high-level

BOP officials based on FBI designations. OIG Report at 19-20, 112-13. Moreover, with respect to these claims, Hasty's liability is even less plausible than the defendants in *Iqbal* because Hasty had no involvement in creating the policy to detain suspected terrorists in the ADMAX SHU, but merely implemented policies set by his superiors as part of his law enforcement duties. This precludes any inference that Hasty had the "purpose" to violate Plaintiffs' rights. Rather, as in *Iqbal*, the Complaint here provides an "obvious alternative explanation" for Hasty's conduct: he oversaw the placement of Plaintiffs in the ADMAX SHU because of his superiors' directives that were based on legitimate purposes. *See id.* Thus, these allegations are, at best, like those in *Iqbal* that the Supreme Court deemed "well-pled" but insufficient to "nudge" the claims from the realm of "possibility" to "plausibility," 129 S. Ct. at 1950-51, and they should be dismissed.

III. Plaintiffs Do Not Adequately Allege Hasty's Personal Involvement As To Plaintiffs' Remaining Claims.

A. The Personal Involvement Standard and *Iqbal*

In order to state a claim against a government official in his or her individual capacity, a plaintiff must establish that the official was *personally involved* in the alleged violation of law – an essential component of the qualified immunity standard. *Poe v. Leonard*, 282 F.3d 123, 140 (2d Cir. 2002). In *Iqbal*, the Supreme Court held that supervisory officials sued in the *Bivens* context cannot be held liable for the acts of their subordinates. The Court explained that, because vicarious liability is inapplicable in *Bivens* cases, "a plaintiff must plead that each Government-official defendant, through the official's *own individual actions*, has violated the Constitution." *Iqbal*, 129 S. Ct. at 1948 (emphasis added). That is, "each Government official, his or her title notwithstanding, is only liable for his or her own misconduct," and "knowledge [of] and acquiescence in" unconstitutional conduct is insufficient to impose supervisory liability in the *Bivens* context. *Id.* at 1949. This means that plaintiffs can no longer circumvent the ban

on vicarious liability under *Bivens* merely by recasting the theory as one of supervisory liability and coupling it with allegations of knowledge of, or even acquiescence in, the allegedly Constitution-offending acts. *Id.*; *see also id.* at 1957 ("Lest there be any mistake, in these words the majority is not narrowing the scope of supervisory liability; *it is eliminating Bivens supervisory liability entirely*.") (Souter, J., dissenting) (emphasis added).

Rather, to state a claim against a supervisory official, a plaintiff must allege that the supervisor's *direct personal acts* violated the plaintiff's constitutional rights. Such allegations are completely missing from the Complaint here with respect to Hasty for Claim 3 (interference with religious rights), Claim 6 (unreasonable strip searches), Claim 7 (conspiracy) and Claims 1 and 2 (conditions of confinement – to the extent they relate to assertions of "outrageous" and "abusive" treatment).

B. *Iqbal* Abrogated the Second Circuit's Personal Involvement Standard.

A number of district court rulings in the Second Circuit have discussed how *Iqbal* impacts the five-part personal involvement test set forth in *Colon v. Coughlin*, 58 F.3d 865, 873 (2d Cir. 1995),[9] and multiple cases have held that all of the *Colon* categories based on *passive* supervisory conduct have been abrogated by *Iqbal*. This means that under "*Iqbal's active conduct* standard . . . [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-civ-1801, 2009 WL 1835939, *6 (S.D.N.Y. June

[9] *Colon* held that a supervisory official can be considered "personally involved" if he "(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, *2 (S.D.N.Y. July 20, 2009).

26, 2009), *aff'd*, 09-3312-PR, 2010 WL 2838534 (2d Cir. July 21, 2010) (emphasis added). Indeed, these "*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.* The *Bellamy* court concluded that "conclusory allegations that [the defendant] *must have known* about Bellamy's plight is not enough to impute [ ] liability." *Id.* (emphasis added).

Similarly, in *Joseph v. Fischer*, 08-civ-2824, 2009 WL 3321011, *16 (S.D.N.Y. Oct. 8, 2009), the court held that a supervisory "defendant is not liable under section 1983 if the defendant's *failure to act* deprived the plaintiff of his or her constitutional right." (emphasis added). The court concluded that that the plaintiff's claims based on the defendant's "failure to take corrective measures," and "fail[ure] to intervene to correct the errors" are "precisely the type of claim *Iqbal* eliminated." *Id.* at *15, 16.[10]

Granted, not every district court in the Second Circuit that has reviewed this issue has reached the same conclusion about the meaning of *Iqbal – see, e.g.*, *Sash v. United States*, 674 F. Supp. 2d 531, 544 (S.D.N.Y. 2009) ("These decisions may overstate *Iqbal's* impact on supervisory liability") – but Hasty submits that *Bellamy*, *which has been affirmed by the Second Circuit*, and other cases like it, interpret *Iqbal* correctly and should be followed by this Court.

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

1. Alleged Interference with Religious Rights (Claim 3)

Plaintiffs allege that certain conduct at the MDC interfered with their ability to practice

[10] *See also Newton v. City of New York*, 640 F. Supp. 2d 426, 448 (S.D.N.Y. 2009) ("passive failure to train claims pursuant to section 1983 have not survived" *Iqbal*); *Spear*, 2009 WL 2176725, at *2 ("each Government official, his or her title notwithstanding, is only liable for his or her own misconduct. Accordingly, only the first and third *Colon* factors have survived . . . *Iqbal*.") (quotation marks omitted)).

their religion, including, *inter alia*, they were denied copies of the Koran and Halal food; they were not given the time and date; and their prayers were interrupted. Compl. ¶¶ 132-36, 286. Assuming *arguendo* that these allegations amount to constitutional violations,[11] Plaintiffs have not adequately alleged Hasty's personal involvement in this conduct. The Complaint describes the role of lower-level "MDC staff" in multiple instances, *see id.*, but the *only* allegations specifically about Hasty with regard to Claim 3 are that (a) he "approved" a policy created by one his subordinates that delayed the delivery of Korans to Plaintiffs (Compl. ¶ 132); and (b) "[e]vidence and complaints about [Plaintiffs' prayers being interrupted by MDC guards] were brought to the attention of MDC management, including Hasty." Compl. ¶ 137. Under *Iqbal* and recent cases within the Second Circuit, these allegations are clearly insufficient. At most, they are the prototypical *passive-conduct*, "failure-to-act" allegations that did not survive *Iqbal*. *See Bellamy*, 2009 WL 1835939, at *6 (to be held liable, supervisors must "participate directly" or "*create*[] a policy" under which unconstitutional conduct occurred)(emphasis added)).

Nor are Plaintiffs' generic and conclusory *group*-allegations sufficient to state a claim against Hasty. *See* Compl. ¶¶ 146, 165, 176, 204, 220 ("MDC Defendants . . . interfered with [their] religious practice"); Compl. ¶ 286 (*all* "Defendants . . . have violated Plaintiffs' and class members' right to free exercise of religion"). This tactic of lumping Defendants together, which Plaintiffs use throughout the Complaint, has been rejected routinely. For example, in *Atuahene v. City of Hartford*, this Court held that when a complaint "fail[s] to differentiate among the defendants, alleging instead violations by '*the defendants*,' and fail[s] to identify any factual

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[11] Nothing in the Complaint and OIG Reports reflects that Hasty violated clearly established statutory or constitutional rights of which a reasonable person would have known. *See Lennon*, 66 F.3d at 421 (in the qualified immunity context, the court is "not concerned with the correctness of the defendants' conduct, but rather the 'objective reasonableness' of their chosen course of action given the circumstances"). Thus, even if the Court disagrees as to whether Plaintiffs have adequately alleged Hasty's personal involvement, Hasty is nonetheless entitled to qualified immunity as to each of these claims.

basis for the legal claims made," the complaint must be dismissed. No. 00-7711, 2001 WL 604902, at *1 (2d Cir. May 31, 2001) (emphasis added). Indeed, where the complaint "accuses all of the defendants of having violated all of the listed constitutional and statutory provisions" defendants are entitled to dismissal. *Wynder v. McMahon*, 360 F.3d 73, 80 (2d Cir. 2004).

Moreover, the Supreme Court observed in *Iqbal* that "[t]wo working principles underlie" the *Twombly* pleading standard. 129 S. Ct. at 1949. First, the call for "factual content" requires a plaintiff to plead *facts*, not "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements . . . ." *Id.* Such allegations are "not entitled to the assumption of truth" and are discarded. *Id.* at 1950. Second, if well-pled factual allegations remain, they must render the claim *plausible*, which occurs when the facts alleged "permit the court to infer more than the mere *possibility* of misconduct . . . ." *Id.* (emphasis added). Plaintiffs' non-specific group-allegations throughout the brief offer only "labels and conclusions or a formulaic recitation of the elements of a cause of action [and thus] will not do." *Id.* at 1949 (quotation marks and citation omitted). Thus, they are not entitled to the presumption of truth, and the remaining factual allegations – *or lack thereof* – do not render it *plausible* that Hasty was personally involved in the conduct alleged in Claim 3 or any of the other claims.[12] Thus, Hasty is entitled to qualified immunity. [13]

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[12] This conclusion is supported by the OIG Reports, which document a total lack of involvement by Hasty in the alleged conduct.

[13] This claim should also be dismissed because courts have not recognized a *Bivens* claim in this context. *See Iqbal*, 129 S. Ct. at 1948 ("we have not found an implied damages remedy under the Free Exercise Clause."). In addition, "the Supreme Court has warned that the *Bivens* remedy is an extraordinary thing that should rarely if ever be applied in new contexts." *Arar v. Ashcroft*, 585 F.3d 559, 571 (2d Cir. 2009) (quotation marks and citation omitted) (collecting cases). Indeed, in the 39 years since *Bivens*, the remedy has been extended only twice, and neither instance sounded in the First Amendment. *See id. at* 571-72. And the Supreme Court has expressly declined to extend *Bivens* remedies in the First Amendment context. *See Iqbal*, 129 S. Ct. at 1948 (citing *Bush v. Lucas*, 462 U.S. 367 (1983)). Therefore, Claim 3 must be dismissed.

2. Alleged Unreasonable Strip Searches (Claim 6)

Claim 6 alleges "excessive and unreasonable strip-searches," and assuming *arguendo* that Plaintiffs have alleged a constitutional violation of a clearly established right,[14] they still fail to allege Hasty's personal involvement. Compl. ¶ 299. In fact, Plaintiffs *acknowledge* that they are not asserting that Hasty personally participated in any strip searches. Instead, this claim is brought against all of the "MDC Defendants" on the grounds that they "were grossly negligent and/or deliberately indifferent in their *supervision of the MDC staff* who subjected MDC Plaintiffs" to strip searches. Compl. ¶ 300 (emphasis added). The Complaint states that it was Lieutenant Cuciti who "developed the policy for strip-searches on the ADMAX Unit," *id.* ¶ 28, and the only reference to Hasty is that the "strip searches were documented in a 'visual search log' created by MDC staff for review by MDC management, including Hasty." *Id.* ¶ 114.

These allegations as to Hasty are clearly insufficient under *Iqbal* and *Bellamy* because they only describe *passive* supervisory conduct. And like so many of Plaintiffs' other allegations, they would not meet the personal involvement requirements even if all five of the *Colon* categories remained intact. This is because Plaintiffs are merely parroting the old *Colon* legal standard by alleging "gross negligence" and "deliberate indifference," and without more factual detail, this is merely a "formulaic recitation of the elements of a cause of action." *Iqbal*, 129 S. Ct. at 1949 (quotation marks and citation omitted).[15] Therefore, Hasty is entitled to qualified immunity, and Claim 6 should be dismissed.

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[14] Cases like *Covino v. Patrissi*, 967 F.2d 73 (2d Cir. 1992), raise doubt about whether a clearly established constitutional right was ever violated with regard to Plaintiffs' strip-search claim.

[15] In fact, conclusory allegations like these were insufficient even *before Iqbal*. *See Patterson v. Travis*, No. 02-civ-6444, 2004 WL 2851803, at *4 (E.D.N.Y. Dec. 9, 2004) (citation omitted) (a complaint must "allege personal involvement of defendants in a manner that goes beyond restating the legal standard for liability in conclusory terms.")

3. Alleged Conspiracy to Violate Civil Rights (Claim 7)

Plaintiffs' allegations fall far short of the pleading requirements for conspiracy. Plaintiffs' *first and only* attempt to describe the alleged conspiracy (among all eight defendants) comes in the next-to-last paragraph of their prolix 306-paragraph complaint. *See* Compl. ¶ 305. There, Plaintiffs assert a conclusory allegation that all of the defendants "agree[d]" and "conspired" to deprive Plaintiffs of equal protection of the law . . ." based on "their race, ethnicity and national origin." During the other 85 pages of their complaint, Plaintiffs do not allege *any* details of this alleged agreement among the eight defendants.

In order to state a conspiracy claim under 42 U.S.C. §1985(3), a plaintiff must show, *inter alia*, that defendants agreed to act with "the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws." *Cine SK8, Inc. v. Town of Henrietta*, 507 F.3d 778, 791 (2d Cir. 2007). The plaintiff must also plead facts demonstrating that the defendants who allegedly conspired did so with discriminatory intent. *Spencer v. Casavilla*, 903 F.2d 171, 174 (2d Cir. 1990).[16]

But courts in the Second Circuit – even before *Iqbal* – have consistently held that "[b]road allegations of conspiracy are insufficient; the plaintiff 'must provide some factual basis supporting a meeting of the minds . . . .'" *Russell v. Cnty. of Nassau*, 696 F. Supp. 2d 213, 243-44 (E.D.N.Y. 2010) (quoting *Webb v. Goord*, 340 F.3d 105, 110 (2d Cir. 2003), *cert. denied*, 540 U.S. 1110 (2004). *See also Ciambriello v. Cnty. of Nassau*, 292 F.3d 307, 325 (2d Cir. 2002) (conspiracy allegations deemed conclusory and insufficient because they did "not provide[] any details of time and place") (internal quotation marks and citation omitted)).

[16] Since discriminatory intent is a required element here, Plaintiffs' failure to allege this factor adequately – *see* Section III.C.4 below – is *another* reason why Claim 7 claim should be dismissed as to Hasty.

Moreover, that Plaintiffs have alleged that there was an "agreement" changes nothing – the mere use of that word is not enough. In *Russell*, the complaint in a §1985(3) action "allege[d] in conclusory fashion, that . . . the Defendants *agreed and conspired* with each other to deprive Plaintiff of [equal protection] rights.'" 696 F. Supp. 2d at 244 (emphasis added). Yet the court held that because these allegations "fail[ed] to provide any 'factual basis to support a meeting of the minds,'" the claim must be dismissed. *Id.* (quoting *Arar v. Ashcroft*, 585 F.3d 559, 569 (2d Cir. 2009)). Similarly, in *Twombly*, the Supreme Court held that for a conspiracy claim to survive a motion to dismiss, it must contain "enough factual matter (taken as true) to suggest that an agreement was made." 550 U.S. at 556. Baldly asserting that there was "an agreement" without any supporting "factual matter" is insufficient.[17]

Plaintiffs do not even *attempt* to give details on how, where, or when there was a "meeting of the minds" – they simply state that there was an unlawful agreement. 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). Without this presumption, plaintiffs must present enough factual detail to render the claim *plausible*, which occurs when the facts alleged "permit the court to infer more than the mere possibility of misconduct . . . ." *Id.* at 1950. Plaintiffs have failed to do so. Even putting aside the sheer implausibility of an agreement between the eight defendants, from the Attorney General of the United States down to a First Lieutenant Correctional Officer at the MDC – plaintiffs simply

[17] *See also In re Elevator Antitrust Litig.*, 502 F.3d 47, 50 (2d Cir. 2007) ("averments of agreements made at some unidentified place and time . . . are insufficient to establish a plausible inference of agreement, and therefore to state a claim."); *Wellnx Life Sciences, Inc. v. Iovate Health Sciences Research, Inc.*, 516 F. Supp. 2d 270, 290 (S.D.N.Y. 2007) ("Plaintiff must 'allege facts that would provide plausible grounds to infer an agreement,' *and may not rest on conclusory statements that the defendants 'agreed.'*" (emphasis added, internal quotation marks omitted)).

have not alleged *any* details about such an agreement. If *Iqbal* is to mean anything, claims such as this cannot survive a motion to dismiss. Claim 7 should be dismissed.[18]

4. Alleged "Outrageous and Inhumane" Conditions of Confinement (Parts of Claims 1 & 2)

As noted in Section II.B above, the "restrictive conditions" portion of Plaintiffs' due process and equal protection claims (parts of Claims 1 & 2) resulted from BOP-directed policies regarding the establishment of the ADMAX SHU and should be dismissed because Hasty was following facially valid orders. The remainder of Plaintiffs' conditions of confinement claims center on the allegations that Plaintiffs were subjected to "outrageous" and "inhumane" conditions at the MDC[19] and subjected to physical and verbal abuse by the low-level MDC staff – in violation of their due process rights (Claim 1), and *because of* their race, religion and/or national origin, in violation of their equal protection rights (claim 2).

Yet, even assuming that some of the more extreme conditions of confinement allegations rise to a level of violating a clearly established constitutional right, the Complaint lacks specific allegations that Hasty personally participated in *any* of these alleged abuses. Instead, Plaintiffs

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[18] In addition, the *intracorporate conspiracy doctrine* bars Plaintiffs' 42 U.S.C. §1985(3) conspiracy claim. "'Under the intracorporate conspiracy doctrine, officers, agents and employees of a single corporate entity are legally incapable of conspiring together.'" *Castanza v. Town of Brookhaven*, 700 F. Supp. 2d 277, 291-92 (E.D.N.Y. 2010) (quoting *Quinn v. Nassau Cnty. Police Dep't*, 53 F. Supp. 2d 347, 359 (E.D.N.Y. 1999). Although the doctrine originated with regard to private corporations, it "has been extended to allegations of conspiratorial conduct between *a public entity* and its employees." *Id.* at 292. Indeed, "numerous courts, including this Court, have applied the doctrine to public entities." *Everson v. New York City Transit Auth.*, 216 F. Supp. 2d 71, 76 (E.D.N.Y. 2002) (collecting cases).

In *Hartline v. Gallo*, for example, the Second Circuit affirmed a decision by a court in this district to apply the intracorporate conspiracy doctrine to a claim against a police department and individual police officers. 546 F.3d 95, 99 n.3 (2d Cir. 2008) ("Plaintiff failed to allege a conspiracy involving two more legal entities"). *See also Quinn*, 53 F. Supp. 2d at 359. Here, it is undisputed that during the relevant time period every defendant was an employee of the U.S. Department of Justice. Because all of the defendants were agents and employees of a single governmental entity, it was legally impossible for them to enter into a conspiracy together. Therefore, plaintiffs' §1985 conspiracy claim must be dismissed as a matter of law.

[19] These allegations include, *inter alia*, denial of recreation and adequate hygiene supplies, sleep deprivation, extremes of temperature, and failure to provide handbooks.

rely on allegations that he "implemented" policies directed by his superiors (Compl. ¶¶ 68, 75 and 79); "approved" policies created by his subordinates (¶¶ 74, 75, 76, 79, 129, 130 and 132); or he was *passively* involved with alleged misconduct in that he "allowed" abuse by his subordinates and "ignored," "avoided" or "failed to investigate" complaints by the detainees of alleged abuse (¶¶ 24, 77, 107, 110, 121 and 126).[20] Once again, these allegations of passive conduct do not adequately allege Hasty's personal involvement under *Iqbal* and *Bellamy*.

Plaintiffs have *also* failed to allege that Hasty committed the alleged abuses against them *because of* their race, religion or national origin. In its simplest form, this portion of Plaintiffs' equal protection claim consists of allegations that all of the conditions of confinement, which form the bases for separate claims, were imposed specifically and intentionally because of Plaintiffs' race, religion or national origin. But to plead a valid equal protection claim against Hasty, Plaintiffs must allege that he committed the alleged abuses against them with a discriminatory *purpose*. *See Iqbal*, 129 S. Ct. 149. There is no allegation in the Complaint specific to Hasty, nor anything in the OIG Reports, to support the allegation that Hasty himself created a policy to impose these alleged unconstitutional abuses *because of* Plaintiffs' race, religion or national origin.[21]

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[20] Of note, although the current Complaint has omitted all allegations about the alleged actual abusers, Plaintiffs have previously demonstrated their ability to make *specific* claims. The TAC was strewn with references to *specific* defendants and acts of abuse: Lt. Beck, ¶¶ 154, 216, 232, 239; Lt. Barrere, ¶¶ 195, 205; Lt. Pray, ¶¶ 153, 194; Lt. Torres, ¶ 158; CO Barnes, ¶ 241; CO Chase, ¶¶ 154, 195, 197, 232; CO DeFrancisco, ¶¶ 154, 214; CO Diaz, ¶¶ 154, 195, 197, 214, 216; CO Gussak, ¶ 215; CO Lopez, ¶¶ 205, 214; CO Machado, ¶¶ 154, 214, 216; CO McCabe, ¶¶ 205, 214; CO Mundo, ¶ 215; CO Osteen, ¶¶ 205, 214; CO Rodriguez, ¶ 214; CO Rosebery, ¶ 186; and Defendant Shacks, ¶ 198. Similarly, the Supp. OIG Report concluded that "approximately 16 to 20 MDC staff members" engaged in physical and verbal abuse, yet it made *no* findings that could even remotely connect Hasty to these acts. *See* Supp. OIG Report at 8.

[21] There are two general allegations that *all* of the Defendants "engaged in racial, religious, ethnic, and national origin profiling" and "singled out Plaintiffs and class member based on their race, religion, and/or ethnic or national origin." Compl. ¶¶ 7, 284. As noted above, however, this type of conclusory group-allegation is, at best, like those in *Iqbal* that the Supreme Court deemed "well-pled" but insufficient to "nudge" the claims from the realm of "possibility" to "plausibility," 129 S. Ct. at 1950-51.

Moreover, any attempt by Plaintiffs to rely on *passive-conduct* supervisory allegations for the equal protection claim – *e.g.*, Hasty "knew of and failed to remedy" discriminatory conduct – should be rejected out of hand. This is because *Iqbal* very clearly established that "knowledge and acquiescence" in a subordinates' discriminatory conduct is *not* sufficient to impute liability. *Id.* at 1949. *See also id.* ("purpose rather than knowledge is required to impose *Bivens* liability" for supervisory conduct). Therefore, Hasty is entitled to qualified immunity for Claims 1 and 2.

IV. Plaintiffs' Claims Should Further Be Dismissed For The Reasons Set Forth In Other Defendants' Motions to Dismiss.

Hasty incorporates by reference the arguments made by the other Defendants in their motions to dismiss.

CONCLUSION

For each of the foregoing reasons, Hasty should be afforded qualified immunity as to all claims against him, and the claims against him should be dismissed.

Respectfully submitted,

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/s/

Michael L. Martinez (MM 8267)
David E. Bell (DB 4684)
CROWELL & MORING LLP
1001 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
(202) 624-2500

Attorneys for Appellant Dennis Hasty