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January 4, 2019

Via ECF

The Honorable Dora L. Irizarry
United States District Court
Eastern District of New York
225 Cadman Plaza East
Brooklyn, NY 11201

Re: *Turkmen, et al., v. Ashcroft, et al*., No. 02CV2307 (DLI)(SMG)

Dear Chief Judge Irizarry:

I write to bring to the Court's attention a recent decision from the Third Circuit Court of Appeals that is relevant to the pending Objections to Magistrate Judge Gold's Report and Recommendation (*see* ECF Nos. 838-844): *Bistrian v. Levi*, No. 18-1967, 2018 WL 6816924 (3d Cir. Dec. 28, 2019) (affirming in part the denial of summary judgment, and finding a *Bivens* cause of action for a Fifth Amendment failure-to-protect claim).

In *Bistrian,* a federal pre-trial detainee brought a *Bivens* Fifth Amendment claim against prison officials who failed to protect him from an attack by other prisoners. 2018 WL 6816924 at *2. The Court held that Bistrian's claim did not present a new *Bivens* context, given controlling Third Circuit precedent and the Supreme Court's decision in *Farmer v. Brennan*, 511 U.S. 825 (1994). 2018 WL 6816924 at *7-*8. But the Court also considered, as an alternative ground for its holding, whether any special factors counsel against *Bivens* relief, and concluded that none do. Most importantly for the pending motion, the Court squarely rejected the Federal Tort Claims Act as an adequate alternate remedy, relying on the Supreme Court's explicit rejection of that argument in *Carlson v. Green*, 446 U.S. 14 (1980) and the FTCA's own recognition of the "complementary existence of *Bivens* actions." 2018 WL 6816924 at *8 (concluding "the prospect of relief under the FTCA is plainly not a special factor counseling hesitation in allowing a *Bivens* remedy").

Like Magistrate Judge Gold, the *Bistrian* Court also considered the impact of the claim on prison policies regarding inmate safety and security. *See* 2018 WL 6816924 at *9. But the Third Circuit concluded that practically *any* claim arising in a prison could have some impact on prison policies, and therefor this cannot be a barrier to *Bivens* liability. *Id.* The Court reasoned that Bistrian's claim "fits squarely within *Bivens'* purpose of deterring misconduct by prison officials" and "since failure-to-protect claims have been allowed for many years, there is no good reason to fear that allowing Bistrian's claim will unduly affect the independence of the executive branch in setting and administering prison policies." *Id.*

Bistrian can be distinguished from the pending case in one regard: it involved failure to protect a detainee from attack by other prisoners, not guards. But this distinction makes no legal

difference. *See* 2018 WL 6816924 at *7 (describing Bistrian's claim as one of "failure to protect [a detainee] against a known risk of substantial harm"). The *Farmer v. Brennan* deliberate indifference failure-to-protect standard applies to attacks by other prisoners and prison guards alike. *See Ziglar v. Abbasi*, 137 S. Ct. 1843, 1864 (2017) (declining to reconsider the Court of Appeals' application of the "deliberate indifference" standard to Plaintiffs' claim).

Finally, Defendants here argue that this Court should not extend *Bivens* for several additional reasons, including congressional silence when passing the Prison Litigation Reform Act and the existence of equitable relief and administrative remedies. ECF No. 839. Magistrate Judge Gold squarely rejected these arguments, and the Third Circuit concurred. 2018 WL 6816924 at *8-*9.

Respectfully submitted,

s/Rachel Meeropol
Rachel Meeropol

cc: All Counsel by ECF