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Re: *Arar v. Ashcroft et al., 06-4216-cv*

Dear Ms. Wolfe:

We represent Robert S. Mueller III, a defendant/appellee in the above-captioned appeal. Pursuant to this Court's *in banc* Order, dated August 12, 2008, we respectfully submit this supplemental letter brief, along with 24 copies, and would be grateful if you would distribute them to the judges participating in this Court's *in banc* review. The briefs submitted by Mr. Mueller and the other defendants fully address the issues raised in the district court and in appellant's opening brief.¹ This supplemental letter brief responds to the panel's erroneous application of the Supreme Court's decision in *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955 (2007), and this Court's decision in *Iqbal v. Hasty*, 490 F.3d 143 (2d Cir. 2007), *cert. granted*, 128 S. Ct. 2931 (2008).

Since his first filings in the district court, Mr. Mueller has sought dismissal of the complaint on the grounds that it does not plead facts sufficient to establish his personal involvement in the events underlying plaintiff's claims, and for this reason also fails to establish that the district court may exercise personal jurisdiction. On November 2, 2007, in response to a question posed by the panel, we filed a supplemental letter brief, arguing that, under the pleading standards set forth in *Twombly* and *Iqbal*, Mr. Arar's complaint does not allege sufficient personal involvement by Mr. Mueller to state a claim against him or to overcome the defense of qualified immunity. (Letter Brief of Defendant-Appellee Robert S. Mueller III, *Arar v. Ashcroft*, No. 06-4216-cv (2d Cir. Nov. 2, 2007).) As explained in that letter, Mr. Arar's allegations concerning Mr. Mueller's role in the alleged violations do not satisfy the "flexible plausibility"

¹ Mr. Mueller also joins the briefs, replacement briefs, and supplemental letter briefs of the other defendants, including factual and procedural recitations as well as the arguments.

standard elaborated in *Iqbal*, where the challenged complaint provided somewhat more detail. For the reasons set forth below, the panel's application of *Iqbal* was inconsistent with *Twombly*, as well as with other opinions of this Court and other federal courts of appeals. This Court therefore can and should affirm the dismissal of the claims against Mr. Mueller for failing adequately to allege his personal involvement.²

A. The *Twombly* Pleading Standard

In *Twombly*, 127 S. Ct. at 1969, the Supreme Court clarified the pleading standards under Rule 8 of the Federal Rules of Civil Procedure. In doing so, it repudiated the "no set of facts" formulation from *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957), which had long provided the governing standard, and on which Mr. Arar's initial brief relied (Brief for Plaintiff-Appellant at 18, 50). Instead, the Court clarified that plaintiffs must allege "enough facts to state a claim . . . that is plausible on its face" and specifically discounted the viability of a "conclusory allegation of agreement at some unidentified point." *Twombly*, 127 S. Ct. at 1966, 1974. Interpreting *Twombly*, this Court has elaborated a "flexible 'plausibility standard,' which obliges a pleader to amplify a claim with some factual allegations in those contexts where such amplification is needed to render the claim *plausible*." *Iqbal*, 490 F.3d at 157-58. Or, in other words, plaintiffs must now "allege facts that are not *merely consistent* with the conclusion that the defendant violated the law, *but which actively and plausibly suggest* that conclusion." *Port Dock & Stone Corp. v. Oldcastle Northeast, Inc.*, 507 F.3d 117, 121 (2d Cir. 2007) (emphases added).

Twombly emphasizes that this approach is necessary to protect parties from the costs and burdens of modern civil litigation when there is "no 'reasonably founded hope that the [discovery] process will reveal relevant evidence' to support . . . a claim." *Twombly*, 127 S. Ct. at 1967 (quoting *Dura Pharms., Inc. v. Broudo*, 544 U.S. 336, 347 (2005) (alteration in *Dura*)); see also *Iqbal*, 490 F.3d at 156-57 ("[T]he Court placed heavy emphasis on the 'sprawling, costly, and hugely time-consuming' discovery that would ensue in permitting a bare allegation of antitrust conspiracy to survive a motion to dismiss." (citation omitted)). This Court in *Iqbal* further underscored that these concerns are particularly relevant in the context of a claim for qualified immunity. 490 F.3d at 158. This case implicates precisely these problems. Relying only on generalized allegations of supervisory involvement and conclusory allegations of conspiracy, Mr. Arar attempts to hold senior government officials liable for events, but alleges

² In *Iqbal*, this Court addressed the standard for determining whether a *Bivens* plaintiff has adequately pleaded a defendant's personal involvement. Defendants in that case, including Mr. Mueller, sought Supreme Court review, arguing that this Court's standard, and the application of that standard, subjected high-ranking government officials to personal capacity lawsuits "based on bare and conclusory allegations that they knew about and condoned the allegedly discriminatory actions" of lower-level officials. See Cert. Pet. at 9, *Ashcroft v. Iqbal*, No. 07-1015 (Feb. 6, 2008). The Supreme Court granted the writ and, in resolving that case, is likely to clarify the pleading standards applicable here. Accordingly, this Court may wish to wait for the Supreme Court's ruling in *Iqbal* if it concludes it must resolve the personal involvement questions presented in this case.

no facts plausibly linking them to those events. Proper application of *Twombly*'s pleading standards and the qualified immunity doctrine should spare government officials from the burdens of litigation based on such flimsy allegations.

The panel correctly recognized that this case could impose significant discovery burdens and that *Twombly*'s plausibility standard applies.³ For the reasons discussed below, however, the panel erred in its application of this standard, incorrectly concluding that Mr. Arar sufficiently alleged Mr. Mueller's personal involvement in the events underlying the claim. *Arar v. Ashcroft*, 532 F.3d 157, 173-75 (2d Cir. 2007); *see also id.* at 201 (Sack, J., concurring in this portion of the majority's decision).

B. The Panel's Discussion of Personal Involvement

Although the panel mentioned *Twombly* and its plausibility standard, it discussed it only briefly by reference to the *Iqbal* decision. Specifically, the panel focused on similarities between Mr. Arar's and Mr. Iqbal's complaints, noting that both "state[] the time frame and place of the acts alleged to have violated [the plaintiff's] rights," and that both allege that violations arose from governmental "policies." *Id.* at 174-75. Furthermore, the panel found that, in both cases, the plaintiffs alleged generally that "defendants directed, ordered, confirmed, [or] acquiesced" in their treatment under the alleged policies. *Id.* at 175 (internal quotation marks and citation omitted; alteration in original). Without further comparison between the complaints, the panel deemed Mr. Arar's complaint sufficient "to make a *prima facie* showing that personal jurisdiction over those defendants exists under New York's long-arm statute" and to survive a motion to dismiss for failure to state a claim. *Id.* As discussed more fully in Part C, *infra*, this was an improper application of the *Twombly* plausibility standard.

Because the panel correctly dismissed the complaint on other grounds, it did not need to focus on the personal involvement question. Accordingly, there was no reason to conduct an in-depth analysis of the allegations as to the personal involvement of each defendant. Moreover, the panel limited its analysis of personal involvement to the issue of personal jurisdiction, perhaps because Mr. Arar's panel brief did not focus on this matter. For the reasons set forth below, a complete analysis of the pleadings demonstrates that plaintiff asserts only a vague conspiracy and makes no allegations of personal involvement by Mr. Mueller.

C. Mr. Arar's Complaint Does Not Satisfy The *Twombly* Plausibility Standard

All of Mr. Arar's allegations regarding Mr. Mueller's involvement appear in essentially one paragraph of the complaint, and boil down to speculation based on his position as FBI

³ This Court has already held that *Twombly* applies outside the Sherman Act context in which its analysis arose. *Id.* at 157; *see also In re Elevator Antitrust Litig.*, 502 F.3d 47, 50 n.3 (2d Cir. 2007) (citing *Iqbal* for the proposition that this Court has "concluded that *Twombly* affects pleading standards somewhat more broadly").

Director. (See Brief for Defendant-Appellee Robert S. Mueller III (hereinafter "Mueller Br.") at 4-12 (citing Joint Appendix ("JA") at A-26, ¶ 21).)⁴ The allegations in this paragraph are conclusory; they claim, without providing specific allegations, that Mr. Mueller "conspire[ed] with and/or aided and abetted" the other defendants in removing Mr. Arar to Syria. Although Mr. Arar notes dates and times relevant to his removal, he presents only high-level conclusions, and provides no allegations of *any* action by Mr. Mueller. Indeed, no such allegations are possible—let alone plausible—as the FBI Director is not responsible for immigration matters.⁵

At the end of the day, the complaint offers only one allegation that even remotely links Mr. Muller to the alleged conduct—the assertion that unnamed "Federal officials" created a policy of "extraordinary renditions." (See, e.g., JA at A-28, ¶ 24.) This allegation is legally insufficient to sustain a claim against Mr. Mueller. That paragraph provides a conclusory allegation of an agreement at an unspecified time, and does not even mention Mr. Mueller. It simply states, without naming any defendants, that "Federal officials" created this policy. (*Id.*) Despite the vague and conclusory nature of this allegation, the panel relied on this paragraph to support its decision that Mr. Arar adequately alleged the personal involvement of the defendants. Precedent from this Court and the Tenth Circuit shows that such allegations are insufficient.

⁴ Mr. Arar's replacement brief confirms that Mr. Arar's allegations as to Mr. Mueller are general, conclusory, and legally insufficient. The brief summarizes all the allegations against Mr. Mueller in just two sentences: "Robert Mueller, the Director of the FBI, supervised FBI agents interrogating Arar in New York and, like Ashcroft, was intimately involved in overseeing investigation of Al Qaeda suspects in the United States. J.A.29-30, 34. It is evident that this was a high-level decision in which the most senior levels of the Justice Department were intimately involved." (Replacement Opening Brief For Plaintiff-Appellant For Rehearing *En Banc* at 15.)

⁵ Indeed, the only specific acts Mr. Arar attributes to any of the defendants are within the exclusive jurisdiction of immigration officials. Specifically, Mr. Arar alleged that during his removal Mr. McElroy (an immigration official) left a voice mail for Mr. Arar's attorney (JA at A-32, ¶ 43), Mr. Blackman (an immigration official) decided to remove Mr. Arar to Syria and that this decision was consistent with CAT (*id.* at A-33, ¶ 47), and that Mr. Thompson (a DOJ official acting in an immigration capacity) signed the removal order (*id.* at ¶ 48). As the alleged actions are among the lawful duties of immigration officials, they do not, without more, support an inference of unlawful conspiracy. See, e.g., *Twombly*, 127 S. Ct. at 1966; *Robbins v. Okla. ex rel. Dep't of Human Servs.*, 519 F.3d 1242, 1247 (10th Cir. 2008) (McConnell, J.) ("[I]f [plaintiffs' allegations] are so general that they encompass a wide swath of conduct, much of it innocent, then the plaintiffs 'have not nudged their claims across the line from conceivable to plausible.'" (quoting *Twombly*, 127 S. Ct. at 1974)).

1. *This Court's Recent Precedent Demonstrates The Insufficiencies Of Mr. Arar's Complaint*

Applying the *Twombly* plausibility standard, this Court recently dismissed a *Bivens* complaint more detailed than Mr. Arar's for failure to allege sufficient facts to defeat qualified immunity. In *Benzman v. Whitman*, 523 F.3d 119, 129 (2d Cir. 2008), the plaintiffs sought damages from Christine Todd Whitman ("Whitman"), the former Administrator of the Environmental Protection Agency ("EPA"), alleging that she knowingly issued false press releases regarding the safety of the air in lower Manhattan and Brooklyn after the terrorist attacks on September 11, 2001. *Id.* at 123.

Unlike Mr. Arar, the plaintiffs in *Benzman* alleged specific, identifiable acts taken by Whitman in connection with specific press releases. *Id.* According to the plaintiffs, Whitman not only approved specific statements of her subordinates, she also *made statements herself*. *Id.* at 125 (describing the plaintiffs' allegations that Whitman "issued and approved a series of press releases"). Notwithstanding these allegations of Whitman's personal involvement, far exceeding anything in Mr. Arar's complaint, this Court reversed the district court and remanded with instructions to dismiss the complaint. The Court concluded that "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." *Id.* at 129. The Court refused to presume that because "various employees within EPA were aware of data indicating health risks" that "Whitman . . . was herself aware of such information." *Id.* Indeed, even if "as a competent administrator she *should have* been aware of significant information known to her subordinates," the Court would not assume even for purposes of a motion to dismiss that she actually was aware of that information: "arguably inadequate management of a vast agency of 17,000 employees is not a basis for *constitutional* tort liability." *Id.* (first emphasis added).

To sustain Mr. Arar's complaint would require this Court to make inferences and assumptions far more substantial than those rejected in *Benzman*. Mr. Arar alleges not a single personal act by Mr. Mueller; rather, the complaint includes only conclusory allegations that he participated in removing Mr. Arar from the United States and that, as Director of the FBI, Mr. Mueller "is responsible for law enforcement operations in the United States, including counter-terrorism operations." (JA at A-26, ¶ 21.) Similarly, paragraph 71 of the complaint reads: "Defendants are liable for the acts . . . described herein in that Defendants directed, ordered, confirmed, acquiesced or conspired and/or aided and abetted in bringing them about." (JA at A-38, ¶ 71.) Though such statements are insufficient under *Benzman*, the panel relied on this paragraph, along with the similarly deficient paragraph 24, to find that Mr. Arar alleged sufficient personal involvement by Mr. Mueller and the other defendants.

The few specific allegations involving individuals associated with the FBI all concern agents and other subordinate employees, as to whom it is not plausible to infer any direct connection with Mr. Mueller. As of September 30, 2008, Mr. Mueller and the FBI had 31,244 employees (12,851 special agents and 18,393 support professionals), *14,244 more* than Whitman had at EPA. See Federal Bureau of Investigation: About Us—Quick Facts, Our People,

<http://www.fbi.gov/quickfacts.htm> (last visited Oct. 29, 2008). Nor is it plausible to infer from the fact that FBI agents participated in questioning Mr. Arar that the FBI Director played a role in ordering his removal from the country. Yet, based only on his position as FBI Director, Mr. Arar infers that Mr. Mueller must have played a direct role in the events underlying his complaint. Under *Benzman*, that reasoning is insupportable. If *Benzman* and the qualified immunity defense mean anything, it is that Mr. Mueller should not face liability and discovery in his personal capacity based on unsupported allegations as to his management of a large department. If this Court could not infer knowing falsity from allegations that the EPA Administrator personally issued statements, and that her staff allegedly knew they were false, it is hard to see how the allegation that the FBI participated in the interrogation of al Qaeda detainees, and that Mr. Mueller generally oversaw the FBI role, can support the inference that Mr. Mueller was personally involved in Mr. Arar's case. Such a conclusion would drain all meaning from the plausibility standard.

Accordingly, in the face of pleadings even less specific and factual than those in *Benzman*, Mr. Mueller should not be required to defend a personal capacity lawsuit where the claims against him rest entirely on the actions of lower-level employees in an agency even larger than the EPA. This Court should therefore affirm the dismissal of Mr. Arar's complaint.

2. *Precedent From The Tenth Circuit Also Demonstrates The Insufficiencies Of Mr. Arar's Complaint*

A recent Tenth Circuit case interpreting *Twombly* further confirms that Mr. Arar's allegations concerning Mr. Mueller cannot withstand scrutiny under the proper standard. In *Robbins*, the plaintiffs filed a 42 U.S.C. § 1983 claim, alleging that employees of the Oklahoma Department of Human Services ("DHS") violated the Due Process Clause by recommending a childcare provider who killed their infant daughter. 519 F.3d at 1245-46 (McConnell, J.). Like Mr. Arar's allegations against the individual defendants in this case, the complaint in *Robbins* routinely grouped the defendants together without differentiating them. *Id.* at 1250 (citing allegations that "Defendants," generally, instructed the plaintiffs to take the baby to a specific daycare, asserted control over the daycare, and failed to protect and supervise the baby). After the district court denied the defendants' motion to dismiss, the Tenth Circuit reversed, holding that the complaint did not satisfy the *Twombly* pleading standard because it did not allege facts sufficient to make the claim plausible and to provide notice of the allegedly wrongful conduct. *Id.* at 1246, 1250.

In defining the term "plausible" under *Twombly*, the *Robbins* court explained that a plaintiff's "allegations must be enough that, if assumed to be true, the plaintiff plausibly (*not just speculatively*) has a claim for relief." *Id.* at 1247 (emphasis added). The court noted that the plausibility requirement serves two purposes: (1) "to weed out claims that do not (in the absence of additional allegations) have a reasonable prospect of success;" and (2) "to inform the defendants of the actual grounds of the claim against them." *Id.* at 1248. It also explained that the degree of specificity required to establish plausibility and fair notice depends upon the context of the case. *Id.* at 1248 (citing *Phillips v. County of Allegheny*, 515 F.3d 224, 231-32 (3d

Cir. 2008)). Thus, while the allegations required in a simple automobile accident case are minimal, a complex antitrust claim like the one in *Twombly* requires more specificity. *Id.* In the latter context, a bare allegation of parallel conduct, even if true, does not require a finding of liability. As in *Twombly*, the conduct could be explained as “identical but independent action” just as easily as it could demonstrate a “contract, combination . . . or conspiracy, in restraint of trade.” *Id.* As *Robbins* explained, “[t]o allow such a complaint to proceed would impose the cost of discovery on the defendants for no plausible basis.” *Id.*

Using this “contextual” framework for pleading, the court concluded that complaints against individual government actors are more like complex antitrust cases than simple negligence actions because they tend to present complicated fact patterns with multiple parties, and involve qualified immunity, which “exists to protect public officials from the broad-ranging discovery that can be peculiarly disruptive of effective government.” *See id.* at 1248-49 (quoting *Anderson v. Creighton*, 483 U.S. 635, 646 n.6 (1987) (internal quotation marks omitted)). Accordingly, under *Robbins*, plaintiffs asserting § 1983 claims must “allege facts sufficient to show (assuming they are true) that the defendants plausibly violated their constitutional rights, and that those rights were clearly established at the time.” *Id.* at 1249. It also “requires enough allegations to give the defendants notice of the theory under which their claim is made.” *Id.*

The Tenth Circuit noted a special need for concrete allegations in § 1983 claims because, as in *Bivens* actions, “cases against individual government actors pose a greater likelihood of failures in notice and plausibility because they typically include complex claims against multiple defendants.” *Id.* at 1249. In fact, the court indicated that the *Twombly* plausibility standard may have even “greater bite” in § 1983 cases because of the “special interest in resolving the affirmative defense of qualified immunity.” *Id.* For this reason, the court held that it was “particularly important” for the complaint to “make clear exactly *who* is alleged to have done *what* to *whom*, to provide each individual with fair notice as the basis of the claims against him or her, as distinguished from collective allegations against the state.” *Id.* at 1250.

Ultimately, the Tenth Circuit found the plaintiffs’ allegations implausible because, “[g]iven that the preponderance of the imaginable circumstances encompassed by the complaint would be subject to [an applicable] bar to liability . . . , [the] claim fail[ed] to satisfy the *Twombly* plausibility standard absent specific factual allegations of additional affirmative acts by the individual defendants.” *Id.* at 1252. It also deemed the complaint insufficient under *Twombly* because the lack of specificity as to individual defendants made “it impossible for any of these individuals to ascertain what particular unconstitutional acts they”—as opposed to other defendants—were “alleged to have committed.” *Id.* at 1250. Indeed, the court focused particularly on the “complaint’s use of either the collective term ‘Defendants’ or a list of the defendants named individually with no distinction as to what acts are attributable to whom.” *Id.*

Like the complaint rejected by the Tenth Circuit in *Robbins*, Mr. Arar’s complaint makes only conclusory allegations and routinely groups the defendants together (either in a string of names or by labeling them generically as defendants) without linking the alleged conduct—or the alleged knowledge—to the individual defendants. (*See, e.g.*, JA at A-23-A-26, ¶¶ 14-21; A-

28, ¶ 24; A-34-A-35, ¶55; A-35, ¶ 57; and A-37-A-38, ¶¶ 69-70.) As a result, without additional allegations as to the individual defendants, the complaint neither alleges a plausible conspiracy (or any other violation), nor informs Mr. Mueller of the specific conduct for which he personally is being called to answer.

3. *Mr. Arar Failed To Preserve His Claim That Count IV Sufficiently Identifies Each Individual's Conduct*

In the context of Mr. Arar's domestic detention and right of access claims, the district court dismissed Count IV without prejudice (with permission to replead), expressly finding that Mr. Arar had failed to allege that Mr. Mueller, or any of the defendants in particular, had any awareness of or involvement in the conditions of Mr. Arar's domestic detention.⁶ *Arar*, 414 F. Supp. 2d at 286-88. After declining the invitation to file an amended complaint to correct this deficiency, *Arar*, 532 F.3d at 163, Mr. Arar did not preserve the issue on appeal.⁷ Specifically, he failed to challenge, in the text of his panel brief, the district court's decision to require him to set forth each defendant's personal involvement in the objectionable conditions of his domestic detention. Instead, he asserted in a footnote that the complaint set forth the "personal involvement of supervisory officials" by "alleg[ing] each defendant's respective contributory role in Arar's detention and mistreatment in the U.S." (Arar Panel Br. 46 n.22.)⁸ But "an argument mentioned only in a footnote" is not "adequately raised or preserved for appellate review." *United States v. Restrepo*, 986 F.2d 1462, 1463 (2d Cir. 1993). Nor, having failed to preserve that argument, can Mr. Arar now revive it before this *in banc* Court: "a party who fails to make an argument before . . . the original panel waives it for purposes of *en banc* consideration." *Miller v. Texas Tech Univ. Health Scis. Ctr.*, 421 F.3d 342, 349 (5th Cir. 2005); see *Anderson v. Branen*, 27 F.3d 29, 30 (2d Cir. 1994); cf. *Llanos-Fernandez v. Mukasey*, 535 F.3d 79, 86 n.8 (2d Cir. 2008).

⁶ For the reasons set forth in Mr. Thompson's Replacement Brief, the district court acted within its discretion by requiring more specific pleading in the context of Count IV. (Replacement Brief For Defendant-Appellee Larry D. Thompson For Rehearing En Banc at 50-52.)

⁷ Defendant-appellee Larry Thompson made this argument in his Panel Brief and his Supplemental Letter, dated November 2, 2007. (Brief for Defendant-Appellee Larry D. Thompson at 44; Letter Brief of Defendant-Appellee Larry D. Thompson at 2-3, *Arar v. Ashcroft*, No. 06-4216-cv (2d Cir. Nov. 2, 2007).)

⁸ Even this bare assertion does not identify where the complaint does this or what the allegation says. This failure is not surprising, as the complaint in fact never alleges Mr. Mueller's personal involvement in, or knowledge of, the conditions of plaintiff's domestic confinement.

D. **Conclusion**

Mr. Arar's allegations do not satisfy the plausibility standard required under *Twombly*. Any other conclusion would undermine the doctrine of qualified immunity and offer little protection to government officials. The complaint does not allege any conduct by Mr. Mueller. Rather, it mixes him together with the other defendants in catch-all allegations of conspiracy. Such pleading is not sufficient under *Twombly*, *Iqbal*, *Benzman*, and *Robbins*, because it provides no factual basis from which plausibly to infer that Mr. Mueller was personally involved in the activity underlying Mr. Arar's claims. The dismissal of the complaint may therefore be affirmed on this ground, as well as on the other grounds set forth in the appellees' briefs.

Very truly yours,


Jeremy Maltby

JM:GJB

cc: All counsel *via* First Class Mail

CERTIFICATE OF SERVICE

I, Jeremy Maltby, hereby certify that on November 4, 2008, an original and twenty-four (24) copies of Defendant Robert Mueller's Letter Brief were hand delivered to the following address:

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I further certify that on November 4, 2008, two copies of each of the Letter Brief were mailed via First Class Mail and e-mailed in .pdf format to each of the parties listed on the attached Service List.



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