UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ADRIANA AGUILAR, *et al.*,	:	
Plaintiffs,	:	
v.	:	07 Civ. 8224 (JGK) (FM)
IMMIGRATION AND CUSTOMS ENFORCEMENT DIVISION OF THE DEPARTMENT OF HOMELAND SECURITY, *et al.*,	:	
Defendants.	:	

REPLY MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS THE COMPLAINT AGAINST DEFENDANTS MICHAEL CHERTOFF, JULIE MYERS, JOHN TORRES, AND MARCY FORMAN

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Preliminary Statement

In their Opening Brief, the High-Ranking Officials argued that Ashcroft v. Iqbal, 129 S. Ct. 1937 (2009), changed the pleading requirement for all cases — and, in particular, Bivens cases — by introducing plausibility analysis and a heightened pleading standard, and that under the new standard, the fourth amended complaint ("FAC") fails to state a claim against them. Plaintiffs respond in three ways. First, they argue that Iqbal changed nothing. See, e.g., Pl. Opp. Br. at 24 (Iqbal did not "alter the basic tenet of Rule 8").[1] Second, they argue that, even if Iqbal did heighten the pleading standard, their claims under the Fourth Amendment should still be allowed to proceed, because even after Iqbal they need not allege that high-level government officials acted with intent to violate Fourth Amendment rights. See Pl. Opp. Br. at 31-38, 43-48. Third, plaintiffs claim that they have adequately alleged intent because intent can be inferred from the allegation that the High-Ranking Officials did not respond to complaints, and from the allegation that ICE agents would arrest individuals they encountered whom they believed were in the country illegally, even if those individuals were not the targets of their operations. See Pl. Opp. Br. at 45-48.

The Court should reject each of these strained attempts to plead around Iqbal. Iqbal of course changed the relevant pleading standard, and plaintiffs simply fail to meet it.

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[1] References to "Opening Brief" or "Opening Br." are to the Memorandum of Law in Support of Motion to Dismiss the Complaint Against Defendants Michael Chertoff, Julie Myers, John Torres, and Marcy Forman, dated March 11, 2010 (Docket No. 221). References to "Pl. Opp. Br." are to Plaintiffs' Memorandum of Law in Opposition to Defendants Chertoff, Myers, Torres, and Forman's Motion to Dismiss, dated May 6, 2010.

A. *Iqbal* Created a Heightened Pleading Standard for *Bivens* Claims Against High-Level Government Officials

Plaintiffs claim that Iqbal changed nothing with respect to Rule 8 pleading. According to plaintiffs, Iqbal did not "alter the basic tenet of Rule 8," Pl. Opp. Br. at 24, "did not alter the well-settled law of supervisory liability," id. at 26, "nothing in Iqbal is to the contrary" of pre-existing law in this Circuit, id. at 27, and "Iqbal did not alter the relevant standard for Fourth Amendment claims," id. at 29. But if Iqbal is inconsequential, it is difficult to understand why it has been cited in more than 22,000 decisions in less than a year, and why courts have repeatedly found, as one court in this district put it, that Iqbal "ushered in" a "radical change in the standard for pleading a viable claim for relief under Rule 8." Amorosa v. Ernst & Young LLP, 682 F. Supp. 2d 351, 372 n.1 (S.D.N.Y. 2010); see also Sharrat v. Murtha, Civ. No. 3:2008-229, 2010 WL 1212563, at *2 (W.D. Pa. Mar. 26, 2010) (Iqbal "represent[s] a radical change in federal pleading standards"); Arar v. Ashcroft, 585 F.3d 559, 591 (2d Cir. 2009) (en banc) ("To be sure, the Supreme Court has recently set a strict pleading standard for supervisory liability claims under Bivens.") (Sack, J., dissenting) (citing Iqbal); Fowler v. UPMC Shadyside, 578 F.3d 203, 210 (3d Cir. 2009) ("Iqbal additionally provides the final nail-in-the-coffin for the 'no set of facts' standard that applied to federal complaints before Twombly.").

Apart from the courts, many commentators, legal observers, politicians, and even newspaper editorial boards have recognized that Iqbal is a game-changer. The *New York Times*, for example, lamented that Iqbal "altered the procedural rules for initiating a lawsuit," and made it "significantly harder" to pursue claims in federal court.[2] The Senate Judiciary Committee held

[2] See http://www.nytimes.com/2009/ 12/22/opinion/22tue3.html?_r=1.

a hearing entitled "Has the Supreme Court Limited Americans' Access to the Courts?" at which scholars and practitioners, including the former Solicitor General of the United States (who argued Iqbal in the Supreme Court), testified about the impact of Iqbal.[3] Senator Patrick Leahy said that Iqbal "changed pleading standards."[4] Senators Arlen Specter and Russ Feingold introduced legislation — the Notice Pleading Restoration Act — intended to overturn Iqbal, noting that Iqbal "further heightened the pleading standard."[5]

Legal scholars and commentators agree. See, e.g., Robert L. Rothman, Twombly and Iqbal: A License to Dismiss, 35 No. 3 LITIGATION 1, 2 (2009) ("Iqbal drastically changed the landscape for Rule 12(b)(6) motions."); Robert G. Bone, Plausibility Pleading Revisited and Revised: A Comment on Ashcroft v. Iqbal, 85 NOTRE DAME L. REV. 849 (2010) (Iqbal "signals an even stricter approach to pleading requirements"); Edward Hartnett, Taming Twombly, Even After Iqbal, 158 U. PENN. LAW REV. 473, 474 (2010) (the "scholarly reaction" to Iqbal and Twombly was that the "Court imposed a heightened specificity standard of pleading"; critics have "called for a legislative restoration" of previous pleading standard). The American Association for Justice argued that Iqbal "overturned 50 years of precedent" by "changing what [plaintiffs] are required to plead." AAJ Calls on Congress to Restore Access to Courts by Restoring Pre-Iqbal Pleading Standard, 46 TRIAL 11 (March 2010).

Thus, the question is not *whether* Iqbal heightened the pleading standard for high-level government officials, but *how much*, and how the new standard should apply to the allegations

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[3] See http://judiciary.senate.gov/hearings/ hearing.cfm?id=4189.

[4] See http://judiciary.senate.gov/hearings/ testimony.cfm?id=4189&wit_ id=2629.

[5] See http://judiciary.senate.gov/hearings/testimony.cfm?id= 4189&wit_ id=4083.

against the High-Ranking Officials. After all, although Iqbal changed the pleading standard for all complaints, its strict application is particularly appropriate in the context in which it was decided — Bivens litigation against officials at the highest levels of government — because relaxing Iqbal's standards would be especially harmful to government officials who face potential liability for the myriad actions they undertake in their official capacities. Indeed, in rejecting the Iqbal plaintiffs' complaint against the Attorney General and the Director of the FBI, the Supreme Court recognized that strict pleading requirements are particularly important in Bivens cases because "[i]f a Government official is to devote time to his or her duties, and to the formulation of sound and responsible policies, it is counterproductive to require the substantial diversion that is attendant to participating in litigation and making informed decisions as to how it should proceed." 129 S. Ct. at 1953. "Litigation . . . exacts heavy costs in terms of efficiency and expenditure of valuable time and resources that might otherwise be directed to the proper execution of the work of the Government." Id.

These concerns are particularly acute for high-ranking officials like the defendants here because the far-reaching policies that they implement affect so many people. For government to function efficiently, high-ranking officials must have the ability to "perform their sensitive duties with decisiveness and without potentially ruinous hesitation." Mitchell v. Forsythe, 472 U.S. 511, 541 (1985) (Stevens, J., concurring). Otherwise, "[p]ersons of wisdom and honor will hesitate to answer the President's call to serve in these vital positions if they fear that vexatious and politically motivated litigation associated with their public decisions will squander their time and reputation, and sap their personal financial resources when they leave office." Id.

In short, under Iqbal, a plaintiff who alleges that he was subjected to unconstitutional treatment at the hands of a rank-and-file field agent cannot subject high-ranking government officials to the burdens of litigation and the possibility of personal liability merely because the unconstitutional conduct is alleged to have occurred during their tenure, or because they failed to respond to various complaints. Rather, a plaintiff must plausibly allege that the high-level officials enacted policies not for the purpose of carrying out their duties or enforcing the country's immigration laws, but for the purpose of violating plaintiffs' constitutional rights. See Iqbal, 129 S. Ct. at 1952 (plaintiffs required to plausibly allege that Ashcroft and Mueller "purposefully adopted a policy" to discriminate against them "because of their race"). Plaintiffs offer no plausible, non-conclusory allegations that this occurred here.

B. Plaintiffs Cannot Proceed Under the Theory that the High-Ranking Officials Created a Policy Under Which Unconstitutional Practices Occurred

Plaintiffs claim that the High-Ranking Officials "created and perpetuated policies under which unconstitutional practices occurred." Pl. Opp. Br. at 32; see also id. at 33 ("The FAC contains plausible allegations that the ICE Officials adopted and endorsed policies that foreseeably led to a pattern of constitutional violations."). But this is precisely the theory that Iqbal rejected, where the plaintiffs alleged that Ashcroft and Mueller "approved" a policy of "holding post-September-11th detainees in highly restrictive conditions," and that the plaintiffs were subjected to the restrictive conditions "solely on account of [their] race." Iqbal, 129 S. Ct. at 1944.

Indeed, even pre-Iqbal, courts were reluctant to allow plaintiffs to proceed against high-ranking government officials on such a theory. The Sixth Circuit explained, twenty years before Iqbal, that "[i]f a mere assertion that a former cabinet officer and two other officials 'acted to

implement, approve, carry out, and otherwise facilitate' alleged unlawful policies were sufficient to state a claim, any suit against a federal agency could be turned into a Bivens action by adding a claim for damages against the agency head and could needlessly subject him to the burdens of discovery and trial." Nuclear Transp. & Storage, Inc. v. United States, 890 F.2d 1348, 1355 (6th Cir. 1989). District courts within this Circuit put it another way: "A rule that would allow plaintiffs to sufficiently state a claim against a department head merely by making a conclusory statement that the allegedly unconstitutional action perpetrated by subordinates was the result of a policy instituted by the department head would allow plaintiffs to engage in fishing expeditions into the affairs of high-level government officials every time a member of their department is accused of committing a violation under § 1983." Tricoles v. Bumpus, No. 05 Civ. 3728, 2006 WL 767897, at *4 (E.D.N.Y. Mar. 23, 2006); see also Elmaghraby v. Ashcroft, No. 04 Civ. 1809 (JG), 2005 WL 2375202, at *20 (E.D.N.Y. Sept. 27, 2005) ("Generally, the assertion that high-level executive branch members created an unconstitutional policy, without more, would be insufficient to state a claim.").

But despite the fact that their claims mirror the claims Iqbal rejected, plaintiffs argue that Iqbal does not bar their Fourth Amendment claims because the plaintiffs in Iqbal alleged racial discrimination, which requires plausible allegations of discriminatory intent, whereas "state of mind is irrelevant" to plaintiffs' Fourth Amendment claims. Pl. Opp. Br. at 29. That argument is wrong. The High-Ranking Officials' "state of mind" is an essential element because plaintiffs' claims against the High-Ranking Officials are, and necessarily must be, based on allegedly intentional violations of the Constitution.

To be sure, the Supreme Court recognized in Iqbal that "the factors necessary to establish a Bivens violation will vary with the constitutional provision at issue." 129 S. Ct. at 1948. And plaintiffs are correct that, in the context of a criminal suppression hearing, the state of mind of the law enforcement officer who performed the search is irrelevant to whether the search violated the Fourth Amendment. See Pl. Opp. Br. at 29 (citing United States v. Klump, 536 F.3d 113, 118 (2d Cir. 2008)). But plaintiffs err when they assume that the standard that establishes a Fourth Amendment violation at a suppression hearing is sufficient to state a Bivens claim against a high-ranking government official who was not present at the search and who had no involvement in the day-to-day planning of the operation itself. As to those officials, plaintiffs must allege, plausibly, that they were personally involved in the search, i.e., that the constitutional violations occurred at the direction of high-ranking government officials, and with their intent. Otherwise, the claim against the government official would be nothing more than *respondeat superior* — i.e., a claim that the high-ranking official is liable, based on his managerial status alone, for the unintended unconstitutional actions of a subordinate — and *respondeat superior* claims, of course, do not exist in Bivens litigation. Iqbal, 129 S. Ct. at 1948 ("Government officials may not be held liable for the unconstitutional conduct of their subordinates under a theory of *respondeat superior*.").

Although they now attempt to retreat from the requirement that they plead intent, plaintiffs seem to have been aware of this requirement when they drafted their complaint. They allege, for example, that Chertoff "intended to violate constitutional rights" by implementing the Secure Border Initiative (FAC ¶ 73), that he "intended the unconstitutional conduct" by the ICE field agents (id. ¶ 75), and that he "encouraged ICE's custom or practice of violating

constitutional rights during home raids." Id. ¶ 76. They make similar allegations against the other three High-Ranking Officials. See FAC ¶ 80 ("Myers intended to violate constitutional rights" by implementing policies calling for increased arrest goal); id. ¶ 84 (same as to Torres); id. ¶ 90 (same as to Forman). But, as explained in our Opening Brief (Opening Br. at 14, 29), bare assertions that high-ranking officials intended to violate constitutional rights "amount to nothing more than a formulaic recitation of the elements of a constitutional claim," Hayden v. Paterson, 594 F.3d 150, 162 (2d Cir. 2010), and must be disregarded. Stripped of these allegations, the complaint — and plaintiffs' opposition brief — contains nothing against the High-Ranking Officials other than they implemented or approved facially neutral immigration enforcement policies under which constitutional violations allegedly occurred. These allegations simply do not establish adequate personal involvement with respect to the alleged violations at plaintiffs' homes.

C. High-Ranking Supervisors Cannot Be Personally Liable for Not Responding to Complaints

Plaintiffs argue that the High-Ranking Officials can be liable because they allegedly received complaints about the home operations and did not adequately investigate allegations of misconduct. See Pl. Opp. Br. at 38 ("The ICE Officials can and should be held liable for their inadequate response to countless complaints."); id. at 39 ("The ICE Officials had numerous warnings of the ongoing pattern unconstitutional practices from credible sources."); id. at 41 ("Chertoff was the direct recipient of high-level complaints about the Operations" and failed to "direct[] any remedial action"); id. ("Forman . . . had notice of many of the public complaints"); id. at 22 ("Chertoff and Myers continued to receive high-profile complaints of ICE misconduct.").

But the authorities plaintiffs cite — most of which were decided pre-Iqbal and none of which actually cites Iqbal — are easily distinguishable, and actually support defendants' argument that high-ranking government officials cannot be held liable for not responding to complaints. For example, Amnesty America v. Town of West Hartford, 361 F.3d 113 (2d Cir. 2004) (Pl. Opp. Br. at 38), involved an attempt to impose Monell liability against a municipality; the decision did not address personal-liability claims under Bivens or § 1983. Further, the supervisor there — a municipal police chief, not a high-level government official — was allegedly present during the alleged constitutional violations, where he "witnessed the violence" and "heard the screams." Id. at 128. The officials in the other cases plaintiffs cite (Pl. Opp. Br. at 38-39) are similar low-ranking supervisors. See Kellogg v. N.Y. State Dept. of Corr. Servs., No. 07 Civ. 2804 (BSJ), 2009 WL 2058560, at *6 (S.D.N.Y. Jul. 15, 2009) (superintendent of Bedford Hills Correctional Facility; case does not cite Iqbal); Walker v. Pataro, No. 99 Civ. 4607 (GBD) (AJP), 2002 WL 664040 (S.D.N.Y. Apr. 23, 2002) (deputy superintendent and superintendent of Fishkill Correctional Facility; case decided pre-Iqbal). Indeed, plaintiffs do not cite a single case where officials even approaching the rank of Torres or Forman — let alone Myers and Chertoff — are held accountable for not responding to complaints about the actions of employees far below them.

Remarkably, another of plaintiffs' authorities — Joseph v. Fischer, No. 08 Civ. 2824 (PKC), 2009 WL 3321011 (S.D.N.Y. Oct. 8, 2009) — is squarely against them. In that case, the plaintiff alleged that a prison superintendent "had full knowledge of all that was [taking] place through letters that were submitted to him," and "had a full opportunity to go over all of the evidence and take the correct[ive] actions . . . but failed to do so." Id. at *16 (alteration in

original). This is exactly what plaintiffs argue here. See, e.g., Pl. Opp. Br. at 39 ("The ICE Officials had numerous warnings of the ongoing pattern of unconstitutional practices from credible sources."). But the court held that defendant was entitled to summary judgment because "this allegation . . . is insufficient under Iqbal." Joseph, 2009 WL 3321011, at *16.

And the Walker case, which plaintiffs also rely on, see Pl. Opp. Br. at 39, contains a similar conclusion. There, the court dismissed claims against supervisors who, the plaintiffs alleged, responded inadequately after receiving complaints. The court explained that "where a supervisory official like the Commissioner of Corrections or a prison Superintendent receives letters or similar complaints . . . and does not personally respond, the supervisor is not personally involved and hence not liable." Walker, 2002 WL 664040, at *12. This is consistent with what other district courts in this Circuit have held. See, e.g., Garcia v. Watts, No. 08 Civ. 7778 (JSR), 2009 WL 2777085, at *14 (S.D.N.Y. Sept. 1, 2009) ("[I]f mere receipt of a letter or similar complaint were enough, without more, to constitute personal involvement, it would result in liability merely for being a supervisor, which is contrary to the black-letter law that § 1983 does not impose respondeat superior liability."); Rahman v. Fischer, No. 08 Civ. 4368 (DLC), 2010 WL 1063835, at *5 (S.D.N.Y. Mar. 22, 2010) (dismissing § 1983 claim against prison supervisor, finding that even if supervisor had received "several complaints of staff assaulting prisoners," "this is an insufficient allegation of notice of any policy or custom") (internal quotations omitted); Sash v. United States, 674 F. Supp. 2d 531, 543 (S.D.N.Y. 2009) ("[P]urpose rather than knowledge is required to impose Bivens liability.").

Further, Walker explained that the higher the position of authority, the more that is required to establish personal involvement:

> It would appear to this Court that implicit (but not articulated as such) in the decisional law in this Circuit is that the more senior the defendant DOCS official, more will be needed in order to find personal involvement. This Court also believes that officials are more likely to be held personally involved where the inmate's complaint is about an ongoing problem that the official's action could eliminate (e.g., prison housing assignments) than about a concluded action (e.g., a corrections officer's use of excessive force).

Walker, 2009 WL 664040, at *12 n.21.

This logic applies with even greater force here. The High-Ranking Officials are not the direct supervisors — or even the direct supervisors of the direct supervisors — of the agents and officers who participated in the operations at issue. (The direct supervisors are also defendants, and they have not moved under Iqbal.) There are multiple levels of supervision between agents in the field, who were knocking on doors, and the director of a branch of an agency, like John Torres, who was responsible for overseeing thousands of employees, two dozen field offices, detention facilities housing over thirty thousand detainees, and a budget in the billions. See Opening Br. at 9. Higher still is a presidentially appointed agency head, like Julie Myers, who ran an agency with tens of thousands of employees, dozens of field offices, and a budget exceeding $3 billion. See Opening Br. at 8. And there are more levels between agency heads and cabinet-level appointees like Michael Chertoff, the former Secretary of the Department of Homeland Security, a behemoth department with 200,000 employees, a $40 billion budget, and numerous large sub-agencies including ICE, Citizenship and Immigration Services, United States Customs and Border Protection, the Secret Service, FEMA, TSA, and the Coast Guard. See Opening Br. at 6. Indeed, although plaintiffs inaccurately use the shorthand "ICE Officials" to group Chertoff in with the other High-Ranking Officials, Chertoff was not even an ICE

employee; he is no more personally liable for the conduct of an ICE field agent than he would be for an illegal search by a TSA officer at an airport, a CBP agent at a border crossing, or a Coast Guard officer during an offshore operation. Under plaintiffs' theory, Chertoff's Bivens liability would be virtually limitless because almost anyone could claim to have been affected by DHS policies that were promulgated or enforced during his tenure. In short, plaintiffs have not alleged, because they cannot allege, any facts to establish that these such high-ranking officials were personally involved in alleged constitutional violations that occurred during localized operations in Long Island in 2007.

Predictably, plaintiffs attempt to avoid dismissal of their claims against the High-Ranking Officials by urging the Court to follow a case from the District of New Jersey, Argueta v. ICE, No. 08-1652, 2010 WL 398839 (D.N.J. Jan. 27, 2010), in which the court denied a motion to dismiss filed by certain high-ranking ICE officials, including Julie Myers and John Torres. Defendants respectfully submit that Argueta was wrongly decided for the reasons stated in our opening memorandum (Opening Brief at 18). We will not repeat that discussion here, but one point plaintiffs overlook merits emphasis.

Even the plaintiffs in Argueta did not assert claims against the Secretary of DHS, a point that was not lost on the Argueta court, which noted that Iqbal "cautioned" plaintiffs against suing the "highest level of the federal law enforcement hierarchy." Argueta, 2010 WL 398839, at *7. And even as to Torres and Myers, the court was concerned that forcing "such high-level officials" to expend time on Bivens litigation "may undermine national policy." Id. at *8. Ultimately, however, the court denied the motion as to Myers and Torres based on its erroneous belief, unanchored to any specific allegations in the complaint, that they had sufficient personal

involvement in the "everyday" planning of the operations in question. Id. at *8 ("Myers and Torres worked on these issues every day."). But, as discussed in the Opening Brief (Opening Br. at 7-9), the assumption that officials as high-ranking as Myers and Torres had day-to-day involvement in local operations is simply not correct; more important, plaintiffs do not even allege that was the case.

For all its bluster, the complaint contains remarkably few allegations specific to any involvement by Myers and Torres. Instead, the allegations are rote statements searching for a theory of liability; i.e., that they had supervisory responsibility over the field employees; that they implemented or approved facially neutral policies under which constitutional violations allegedly occurred; and that they did not adequately respond to complaints. See Opening Br. 7-9; FAC ¶ 78 (Myers "supervised all aspects of ICE"); ¶ 79 (Myers "creat[ed]," "implement[ed]," or "approved" various policies); ¶¶ 80-81 (Myers performed "inadequate investigation" into allegations of racial profiling and "received regular briefings on newspaper articles" about complaints against ICE); ¶ 83 (Torres was responsible "for the apprehension, detention and removal of foreign nationals" and the "supervision of sworn law enforcement officers"); ¶ 84-86 (in implementing or approving arrest goals and other policies Torres "intended to violate constitutional rights"). As discussed above, these allegations are simply insufficient under Iqbal to establish personal involvement by high-ranking officials.

D. Plaintiffs Cannot Proceed on Their Equal Protection Claim Because They Have Failed to Plausibly Allege That the High-Ranking Officials Acted with Discriminatory Intent

The Court should reject plaintiffs' contention that because they have alleged they were victims of racial targeting, they "need not show an intent to discriminate." Pl. Opp. Br. at 43. That argument flies in the face of Iqbal, which explicitly stated that a plaintiff who alleges unconstitutional treatment "on account of his race" must plausibly allege that the defendants acted with discriminatory intent: "Where the claim is invidious discrimination in contravention of the First and Fifth Amendments, our decisions make clear that the plaintiff must plead and prove that the defendant acted with discriminatory purpose." Iqbal, 129 S. Ct. at 1948. The Second Circuit reiterated this recently in Hayden v. Paterson, explaining that "[p]roof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause. Although disproportionate impact is not irrelevant, to violate the Fourteenth Amendment the disproportionate impact must be traced to a *purpose* to discriminate on the basis of race." 594 F.3d 150, 162-63 (2d Cir. 2010) (citations and internal quotation marks omitted) (emphasis and alterations in original); see also, e.g., United States v. City of New York, 683 F. Supp. 2d 225, 270 (E.D.N.Y. 2010) ("In order to hold a supervisory official liable for violating . . . the Equal Protection Clause, a plaintiff must prove that the defendant acted with discriminatory purpose.") (citing Iqbal). Even plaintiffs' authorities agree. See T.E. v. Grindle, 599 F.3d 583, 588 (7th Cir. 2010) (Pl. Opp. Br. at 46) ("An equal protection claim against a supervisor requires a showing of intentional discrimination.") (citing Iqbal). Accordingly, the Court should reject the contention that plaintiffs need not plausibly allege that high-ranking government officials acted with discriminatory intent.

On the issue of intent, although plaintiffs claim intent is not required, they also claim that they have plausibly alleged purposeful discrimination because their complaint alleges "that the ICE Officials affirmatively participated in the decision not to investigate the complaints of widespread abuse." Pl. Opp. Br. at 46. But this is just another way of stating that the High-Ranking Officials did not respond to complaints. In fact, Iqbal explicitly rejected the notion that a high-ranking official, or even a direct supervisor, can be liable for his or her "knowledge and acquiescence" of a subordinate's wrongdoing:

> [Plaintiff] argues that, under a theory of "supervisory liability," [defendants] can be liable for knowledge and acquiescence in their subordinates' use of discriminatory criteria to make classification decisions among detainees. That is to say, [plaintiff] believes a supervisor's mere knowledge of his subordinate's discriminatory purpose amounts to the supervisor's violating the Constitution. We reject this argument.

Iqbal, 129 S. Ct. at 1949 (citations omitted). There is simply no way to reconcile Iqbal's rejection of claims based on "knowledge and acquiescence" with plaintiffs' contention that high-level officials can be liable for not responding to complaints and newspaper accounts. The most that could be said of an official who received a complaint and took no action is that he gained knowledge of unconstitutional conduct (when he received the complaint) and acquiesced (when he did not act in response to the complaint). This is plaintiffs' theory, but Iqbal rejected it.

Plaintiffs also argue that intentional discrimination can be inferred from their allegation that ICE agents would arrest individuals other than targets if, during the course of their field operations, they encountered non-targets whom they suspected of being in the country illegally. This argument fails for several reasons. First, under plaintiffs' theory, ICE field officers — who are charged with enforcing the country's immigration laws, including identifying, apprehending,

and removing individuals who are in the country illegally — would be required to simply ignore so-called "collaterals" they encounter while searching for a fugitive. But such a requirement finds no support in the law. Second, just as in Iqbal, the Court is required to subject plaintiffs' theory — i.e., that the High-Ranking Officials intentionally enacted policies requiring racially discriminatory conduct as a way to increase the number of arrests — to plausibility analysis. And plaintiffs have failed to even respond to defendants' showing of an entirely nondiscriminatory reason for increased enforcement activity, Opening Br. at 31 – that during the period in which plaintiffs allege that ICE used unconstitutional tactics to increase its arrest numbers, funding for ICE's fugitive-operations program increased by 2300%, and the personnel for the program increased 1300%. Id. Accordingly, just as in Iqbal, where the Court found that "it should come as no surprise" that a policy directing law enforcement to arrest and detain September 11 suspects would produce a disparate-but-unintentional impact on Muslims and Arabs, it should come as no surprise that operations targeting illegal aliens, including members of Latino gangs, in areas heavily populated by Latinos would have a disparate, incidental impact on Latinos.

In the end, plaintiffs are left with nothing. If they argue that the High-Ranking Officials can be held personally liable because they implemented or approved facially neutral policies under which unconstitutional acts allegedly occurred, their claim amounts to *respondeat superior* liability, which is not available in Bivens. If they argue that the High-Ranking Officials can be held liable for not responding to or inadequately investigating complaints or newspaper accounts, they fail to adequately allege personal involvement, an essential element of Bivens liability. And if they allege that the High-Ranking Officials enacted policies with the intent to

engage in purposeful discrimination against Latinos, their claim cannot withstand plausibility analysis under Iqbal. Accordingly, the Court should grant the High-Ranking Officials' motion to dismiss the complaint as against them.

Conclusion

For the foregoing reasons, and for the reasons stated in the High-Ranking Officials' Opening Brief, the complaint should be dismissed as against defendants Michael Chertoff, Julie Myers, John Torres, and Marcy Forman.

Dated: New York, NY
May 21, 2010

Respectfully submitted,

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