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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

MARIA ARGUETA, et al., Plaintiffs, -vs- UNITED STATES IMMIGRATION AND CUSTOMS ENFORCEMENT ("ICE"), et al., Defendants.	Honorable Peter G. Sheridan, U.S.D.J. Honorable Esther Salas, U.S.M.J. Civil Action No: 2:08-cv-1652

PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO INDIVIDUAL DEFENDANTS' MOTION TO DISMISS THE SECOND AMENDED COMPLAINT

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Plaintiffs, by their undersigned counsel, respectfully submit this Memorandum of Law in Opposition to the Motion to Dismiss the Second Amended Complaint (the "Motion") filed by defendants' Myers, Torres, Weber and Rodriguez (the "Individual Defendants").

PRELIMINARY STATEMENT

The Individual Defendants' Motion duplicates in nearly every respect the arguments raised in their Motion to Dismiss the First Amended Complaint. This Court rejected all of these arguments in its May 7, 2009 Opinion and Order. Because the material allegations in Plaintiffs' Second Amended Complaint are substantively identical to those in the First Amended Complaint, and because Defendants cannot re-litigate issues it already lost, the Motion should be summarily denied.

The only arguable variation between the two motions to dismiss is Individual Defendants' reliance on the intervening Supreme Court decision in *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009). In the Individual Defendants' view – one that is completely unmoored from the legal and factual context in which the case was actually decided – *Iqbal* categorically eliminated the well-established "knowledge and acquiescence" standard of supervisory liability for all *Bivens* causes of action. However, because *Iqbal* in no way changed the standards governing pleading or qualified immunity for the types of *Bivens* claims asserted

here, it provides no basis for this Court to revisit the conclusions it reached in its May 7, 2009 decision.

First, *Iqbal*'s dicta regarding supervisory liability standards applies only to intentional discrimination claims (e.g., claims under the First Amendment or Equal Protection Clause), not to claims where a supervisor's state of mind is irrelevant to the cause of action (e.g., Fourth Amendment claims, like those pled here). *See Iqbal*, 129 S. Ct. at 1948-49. For the *Iqbal* Court, it thus followed that a supervisor's "mere knowledge" of a subordinate's unlawful conduct – without plausible allegations regarding that supervisor's discriminatory state of mind – could never be enough to prove the elements of an intentional discrimination claim against a supervisor. *Id.* For claims not premised on discrimination, such as the ones asserted here, governing Third Circuit law has not changed: liability is imposed on supervisors with "knowledge and acquiescence" of subordinates' unlawful conduct. *See Argueta v. ICE*, No. 08-1652 [dkt #94], 2009 WL 1307236, *22 (D.N.J. May 7, 2009). Scores of post-*Iqbal* cases confirm this elementary understanding.

Second, *Iqbal* itself merely applies – and does not change – the pleading standard set forth in *Bell Atlantic v. Twombly*, 550 U.S. 544 (2007). *Iqbal*, therefore, provides no basis for revisiting this Court's prior conclusion that Plaintiffs' allegations are sufficient under *Twombly*. Finally, *Iqbal* must ultimately

be understood in light of the unique factual context in which the case arose. It does not, as the Individual Defendants would have it, broadly permit supervisors to act with reckless disregard for individuals' rights in a manner at odds with decades of established constitutional tradition.

Defendants' remaining arguments – that the court lacks subject matter jurisdiction over claims raised by removable aliens or personal jurisdiction over supervisory defendants headquartered in Washington D.C., and that "special factors" preclude a *Bivens* remedy in the immigration context – are styled as little more than "disagreement" with this Court's prior judgments on these issues. No facts material to those arguments have changed. Litigants are not entitled to a second bite of the apple in the trial court. "Law of the case" bars all of these arguments.

PROCEDURAL HISTORY

On July 8, 2008, the Individual Defendants filed a motion to dismiss the Plaintiffs' First Amended Complaint. As part of this Motion, the Individual Defendants argued that: (1) certain Plaintiffs should not be able to proceed pseudonymously; (2) the court lacked subject matter jurisdiction over claims brought by aliens potentially removable under the Immigration and Nationality Act; (3) the Court should not recognize a remedy under *Bivens v. Six Unknown Federal Agents*, because of the federal government's plenary authority over

immigration and national security; (4) the court lacked personal jurisdiction over defendants Myers and Torres; and (5) all of the Individual Defendants were entitled to qualified immunity because Plaintiffs had not sufficiently alleged their personal involvement in the unconstitutional conduct at issue.

In its May 7, 2009 decision and order, this Court denied the Plaintiffs leave to proceed pseudonymously and ordered those Plaintiffs to be identified in an amended complaint or face dismissal. *Argueta*, 2009 WL 1307236, at *11. In that decision the Court also specifically rejected each of the Individual Defendant's remaining arguments. *See id*. at *12-17 (subject matter jurisdiction); *id*. at *17-19 (availability of *Bivens* remedy); *id*. at *20-22 (personal jurisdiction). Further, recognizing that notice pleading standards embodied in the Federal Rules of Civil Procedure and governing case law entitle plaintiffs to develop well-plead allegations in discovery, the Court ordered limited discovery of the Individual Defendants. *Id*. at 22-24.

On May 20, 2009, the Individual Defendants moved this Court to reconsider its ruling on their claim of qualified immunity in light of the Supreme Court's recent decision in *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009). On June 8, 2009, Plaintiffs filed the Second Amended Complaint ("SAC"), which identified one of the Carla Roes by name and removed several other pseudonymous plaintiffs who chose not to proceed if they would be publicly identified. In every other respect,

the Second Amended Complaint is identical to the First Amended Complaint. On June 18, 2009 – just two business days before Plaintiffs' opposition to the motion to reconsider was due – the Individual Defendants filed the instant Motion, arguing that Plaintiffs' amendment mooted the First Amended Complaint in all respects and therefore also mooted their Motion to Reconsider.

On June 22, 2009 Plaintiffs filed their opposition to the Motion to Reconsider, arguing that the Supreme Court's decision in *Iqbal* in no way changed the governing legal standards this Court already applied in denying the Individual Defendants qualified immunity.[1]

FACTUAL BACKGROUND

Aside from identifying one pseudonymous plaintiff and dropping several others who wished not to be identified, the Plaintiffs' Second Amended Complaint contains allegations that are identical to those presented in Plaintiff's First Amended Complaint. Because Plaintiffs already fully set forth the factual allegations relevant to the Defendants' second motion to dismiss fully in their opposition to Defendants first motion to dismiss, and because most of the

[1] In correspondence with this Court, counsel indicated it could take no position on whether the filing of Defendants' second Motion to Dismiss displaced the Motion to Reconsider and that it was filing its opposition to the Motion to Reconsider should the court wish to dispose of the renewed qualified immunity arguments in the context of that motion. Accordingly, Plaintiffs re-assert the arguments raised in its opposition to the motion to reconsider in this brief as they are equally applicable here.

Defendants' arguments can be disposed of by operation of law, Plaintiffs do not restate them in full here. While we do detail the facts in the Second Amended Complaint relevant to adequacy of the pleadings, see infra pages 18-20, we respectfully refer the court to the full statement of facts contained in Plaintiffs' brief in opposition to the motion to dismiss the First Amended Complaint at pages 4 through 9 (which the Court discussed in its May 7, 2009 Opinion and Order at pages 3 through 15).

ARGUMENT

I. *IQBAL* PROVIDES NO BASIS TO RECONSIDER THIS COURT'S DECISION DENYING THE DEFENDANTS QUALIFIED IMMUNITY.

A. *Iqbal* Does Not Change the Standard of Supervisory Liability for Claims Not Based on Allegations of Discrimination.

Iqbal says little new that is of consequence to cases, like this one, which allege misconduct that does not require proof of discriminatory intent. First, the Court confirmed what Plaintiffs have readily conceded: that there can be no *Bivens* or Section 1983 liability based on a theory of *respondeat superior* or vicarious liability – that is, a form of strict liability imposed on officials exclusively by virtue of their supervisory title. *See Iqbal*, 129 S. Ct. at 1948 (citing *Monell v. N.Y. City Dep't of Soc. Servs.*, 436 U.S. 658, 691 (1978)). At the same time, the *Iqbal* Court confirmed that a government official will still be liable for personal conduct which violates that official's constitutional duty to others. *See id*. (citing *Dunlop v.*

Monroe, 7 Cranch 242, 269 (1812) (noting supervisor's duty to "properly superintend[]" subordinate's conduct)).

Second, *Iqbal* emphasized that the nature of a supervisor's duty for purposes of ascertaining *Bivens* liability "will vary with the constitutional provision at issue." *Id*.[2] It is hornbook law that a plaintiff must plead and prove that the relevant decision-maker discriminated specifically on the basis of race or religion – *i.e*. with an invidious purpose or mindset – in order to state a claim for racial discrimination under the Fifth Amendment's Due Process Clause or religious discrimination under the First Amendment. *Washington v. Davis*, 426 U.S. 229, 240 (1976); *see also Iqbal*, 129 S. Ct. at 1948 (citing cases). As the *Iqbal* Court explained, where a specific claim asserts "invidious discrimination under the First and Fifth Amendments," a plaintiff must "plead sufficient factual matter to show that petitioners adopted and implemented the detention policies at issue not for a

[2] *See also id*. at 1947 ("[W]e begin by taking note of the elements a plaintiff must plead to state a claim"); *id*. at 1950 (viability of a claim is a "context-specific"). This is by no means a new rule. In the § 1983 context, the liability of a supervisor or municipality has *always* depended upon the nature of the constitutional violation – and pre-existing constitutional duty – alleged. *See, e.g*., Sheldon Nahmoud, Civil Rights and Civil Liberties Litigation: The Law of Section 1983 § 3.2 (2008) ("Different Fourteenth Amendment violations (and hence Bill of Rights violations) require different states of mind. . . . [E]qual protection violations require purposeful discrimination, Eighth Amendment violations require deliberate indifference, and due process violations require more than mere negligence").

neutral investigative reason, but for the purpose of discriminating on account of race, religion, or national origin." 129 S. Ct. at 1948-49.

The *Iqbal* Court concluded, therefore, that "a supervisor's mere knowledge of his subordinate's discriminatory purpose" does not demonstrate that the supervisor himself violated his limited duty under the First or Fifth Amendment. *Id*. at 1949. This principle makes obvious sense. Purposeful discrimination under Supreme Court precedent "requires *more than* intent as volition or intent as an *awareness of consequences*." *Id*. at 1948 (quoting *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979)) (emphasis added). It thus follows that "mere knowledge" that someone *else* is acting discriminatorily does not demonstrate that a supervisor himself has a discriminatory state of mind. *See Iqbal*, 129 S. Ct. at 1949 ("In the context of determining whether there is a violation of clearly established right to overcome qualified immunity, purpose rather than knowledge is required to impose *Bivens* liability on the subordinate for unconstitutional discrimination").[3]

Accordingly, the Individual Defendants are simply wrong when they contend that (i) *Iqbal* eliminated "knowledge and acquiescence" as a basis for

[3] That the Court was concerned only with discrimination claims cannot be seriously doubted. The Court specifies no less than nine times that it is dealing with the particular elements of a discrimination claim, including the requirement of proof of invidious purpose or intent. *See, e.g.*, *Iqbal*, 129 S. Ct. at 1942, 1944, 1947, 1948, 1949, 1951, 1952.

supervisory liability for all *Bivens* claims, and (ii) such a theory of liability is categorically "inconsistent with the premise that supervisors may not be held accountable for the misdeeds of their agents." *See* Gov't MTD at 14.[4] First, even for the discrimination claims under review in *Iqbal*, the Court did not – as the government repeatedly asserts – preclude supervisory liability under a theory of knowledge *and* acquiescence. The Court rejected supervisory liability in the discrimination context premised on a supervisor's "mere knowledge." *Iqbal*, 129 S. Ct. at 1949 ("respondent believes a supervisor's mere knowledge of his subordinate's discriminatory purpose amounts to the supervisor's violating the Constitution. We reject this argument"). As described *infra*, "acquiescence" in known, unlawful activity heightens the supervisor's culpability.

Second, *Iqbal* plainly did not eliminate supervisory liability for all *Bivens* causes of action. Indeed, the *Iqbal* decision confirmed that a supervisor is liable for his "own misconduct" if that supervisor violates a legal duty to act. *See Iqbal*, 129 S. Ct. at 1948 (explaining that a government official will be liable for "his own neglect in not properly superintending the discharge of his subordinate's duties") (quoting *Dunlop*, 7 Cranch at 269). For claims under the Fourth Amendment and the Fifth Amendment's excessive force prohibition – which are the principle

[4] Plaintiffs do concede that *Iqbal*'s holding is relevant to their supervisory liability claims brought against the Individual Defendants alleging violation of the Equal Protection guarantees of the Fifth Amendment. *See* SAC. ¶¶ 196-203.

causes of action in this litigation – an official may be liable regardless of his subjective state of mind at the time of the constitutional violation. *See Herring v. U.S.*, 129 S.Ct. 695, 703 (2009) (Fourth Amendment "looks to an officer's knowledge and experience . . . but not his subjective intent") (internal citations omitted).[5] Thus, as Judge Gertner explained for non-discrimination claims "the state of mind required to make out a supervisory liability [claim]. . . requires less than the discriminatory purpose or intent that Iqbal was required to allege in his suit against Ashcroft and Mueller." *Chao v. Ballista*, No. 07-cv-10934, 2009 WL 1910954, at *5 n.2 (D. Mass. July 1, 2009).

Accordingly, courts reviewing supervisory liability claims after *Iqbal*, while citing for *Iqbal* for pleading standards, have continued to apply "deliberate indifference," "knowledge or acquiescence," and "failure to train" supervisory liability standards in deciding non-discrimination claims under *Bivens* and the analogous Section 1983.[6] Within the Third Circuit, courts have applied *Iqbal*

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[5] *See also Mo. v. Seibert*, 542 U.S. 600, 625 (2004) (noting general "refus[al] to consider intent in Fourth Amendment challenges generally"); *cf. Whren v. U.S.*, 517 U.S. 806, 813 (1996) ("[T]he constitutional basis for objecting to intentionally discriminatory application of laws is the Equal Protection Clause, not the Fourth Amendment. Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis.").

[6] *See, e.g., Banks v. Montgomery*, No. 3:09-cv-56-TS, 2009 WL 1657465 (N.D. Ind., June 11, 2009) (Eighth Amendment); *Preyer v. McNesby*, No. 3:08-cv-247, 2009 WL 1605537, *5 (N.D. Fla. June 05, 2009) (Fourteenth Amendment excessive force claim); *Williams v. Hull*, No. 08-135, 2009 WL 1586832, at *2

supervisory liability standards only when evaluating intent-based discrimination claims against supervisory officials. *Compare Innis v. Wilson*, No. 08-4909, 2009 WL 1608502 (3d. Cir. June 10, 2009) (applying the long-standing "deliberate indifference" standard for supervisory liability claims under Eighth Amendment) *with Lopez v. Beard*, No. 08-3099, 2009 WL 1705674 (3d. Cir. June 18, 2009) (applying *Iqbal* to analyze plaintiffs' claims that supervisors intentionally discriminated against her for her HIV+ status and noting different supervisory liability standards relevant to different causes of action). In *Hagan v. Rogers*, No. 06-4491, 2009 WL 1851039, at *5 (D.N.J. June 24, 2009), for example, Judge Greenaway held that supervisory liability for an Eighth Amendment violation could be established based upon either a: "(i) showing that the supervisor failed to adequately respond to a pattern of past occurrences of injuries like the plaintiff's, or (ii) showing that the risk of constitutionally cognizable harm was so great and so obvious that the risk and the failure of supervisory officials to respond" (quoting *Boyd v. Bergen County Jail*, No. 07-769, 2007 WL 1695736, at *2 (D.N.J. June 7, 2007)); *see also Hankins v. Beard*, No. 08-219, 2009 WL 1935872, at *6 (W.D.

(W.D. Pa. June 04, 2009) (Eighth Amendment); *Swagler v. Harford County*, No. RDB 08-2289, 2009 WL 1575326 (D. Md. June 02, 2009) (Fourth Amendment unreasonable search and seizure); *see also Levy v. Holinka*, No. 09-cv-279, 2009 WL 1649660 (W.D. Wis. June 11, 2009) (applying *Iqbal* to deny supervisors' qualified immunity on discrimination claims under the Fifth Amendment); *McReaken v. Schriro*, No. 09-327-PHX-DGC, 2009 WL 1458912, *1 (D. Ariz. May 26, 2009) (same under Fourteenth Amendment).

Pa. July 2, 2009) (to establish supervisory liability under the Eighth Amendment, "[p]ersonal involvement [of a supervisor] can be shown through allegations of personal direction or of actual knowledge and acquiescence" of the violation) (*quoting Evancho v. Fisher*, 423 F.3d 347, 353 (3d Cir. 2005)) (internal quotations omitted); *Marten v. Hunt*, No. 08-77, 2009 WL 1858257, at *8 (W.D. Pa. June 29, 2009) (same).[7]

Moreover, post-*Iqbal* courts have consistently continued to evaluate supervisors' liability under the well-established "knowledge and acquiescence" standards for claims brought under the Fourth Amendment, Fifth and Fourteenth Amendment guarantees against unreasonable seizures and excessive force and the right to due process. *See, e.g., Hernandez v. Foster*, No. 09-cv-2461, 2009 WL 1952777, at *9 (N.D. Ill. July 6, 2009) (supervisors are liable for Fourth Amendment violations where plaintiffs "allege that the conduct causing the constitutional deprivation occurred at their direction *or* with their knowledge and

[7] *See also Brookins v. Gee*, No. 8:08-cv-01429, 2009 WL 1748520, at *2 (M.D. Fla. June 19, 2009) (supervisory liability is established where plaintiff alleges "history of widespread abuse puts the responsible supervisor on notice of the need to correct the alleged deprivation, and he fails to do so"); *Nieves v. Patrick*, No. 1:07-cv-01813, 2009 WL 1953505, at *2 (E.D. Cal. 2009) ("To state a claim for relief under section 1983 for supervisory liability, plaintiff must allege some facts indicating that the defendant either: . . . knew of the violations and failed to act to prevent them; or promulgated or implemented a policy so deficient that the policy itself is a repudiation of constitutional rights and is the moving force of the constitutional violation.") (internal quotations and citations omitted).

consent") (emphasis added); *Williams v. Fort Wayne Police Dep't*, No. 1:08-cv-152, 2009 WL 1616749, at *4 (N.D. Ind. June 9, 2009) (supervisors are liable for Fourth Amendment violations when they "know about the conduct and facilitate it, approve it, condone it, or turn a blind eye for fear of what they might see.") (internal citation omitted).

In short, the constitutional duty of the supervisory officials involved in this case is precisely as it was before *Iqbal* was decided: a supervisor will be liable for: (i) creating or implementing a policy or practice that is a "moving force" or otherwise contributes to alleged unlawful conduct by subordinates, *see Sanford v. Stiles*, 456 F. 3d 298, 314 (3d Cir. 2006) (citing *Bd. of County Comm'rs of Bryan County, Okl. v. Brown*, 520 U.S. 397, 400 (1997));[8] (ii) a failure to adequately train his subordinates appropriately when carrying out the supervisor's policies, *see City of Canton v. Harris*, 489 U.S. 378, 388 (1989); or (iii) failure to take action to stop or remediate unconstitutional conduct by subordinates when the supervisor is put on notice of the conduct, *see Baker v. Monroe Twp.*, 50 F.3d 1186, 1190-91 (3d. Cir. 1995).

These various and independent sources of a supervisor's liability, as this Court explained, are characterized in shorthand as "knowledge and acquiescence."

[8] By focusing formulaically on the "mere knowledge" analysis in *Iqbal*, the Individual Defendants disregard this independent and sufficient basis for finding supervisory liability in the Fourth Amendment context.

Argueta, 2009 WL 1307236, at *22 (summarizing theories of supervisory liability in Third Circuit); *see also Hagan*, 2009 WL 1851039; *Hankins*, 2009 WL 1935872. In the context of claims not involving discrimination, supervisors are liable for their "knowledge and acquiescence" because "it is logical to assume that continued official tolerance of repeated misconduct facilitates similar unlawful actions in the future." *Bielevicz v. Dubinon*, 915 F.2d 845, 851 (3d Cir. 1990). Such dereliction of supervisory responsibility rises to an independent constitutional wrong.

For these reasons, the government is as wrong today as it was pre-*Iqbal* in arguing that the Individual Defendants, to be liable, must themselves have directly undertaken the unconstitutional and excessively forceful searches of Plaintiffs' homes. *See Padilla v. Yoo*, No. C-08-00035, 2009 WL 1651273, at *23-24 (N.D. Cal. June 12, 2009) (denying motion to dismiss for qualified immunity where DOJ attorney wrote legal memoranda that plausibly "set in motion a series of events that resulted in the deprivation of [plaintiff's] constitutional rights") (*citing Iqbal*, 127 S. Ct. at 1951); *Beilevicz*, 915 F.2d at 851-52 (allegations that municipality "knew that people were being arrested for public intoxication without probable cause yet did not remedy the problem" stated a Fourth Amendment claim); *Hagan*, 2009 WL 1851039 (a "showing that the risk of constitutionally cognizable harm was so great

and so obvious that the risk and the failure of supervisory officials to respond" is sufficient to establish supervisor liability).[9]

B. Because *Iqbal* Did Not Change the *Twombly* Pleading Already Applied by This Court, There is No Basis to Reconsider This Court's Decision.

The Court's *Iqbal* decision merely applies the pleading standards set forth in *Twombly*; it does not change them in any way. *Iqbal*, 129 S. Ct. at 1949-53. Because this Court already found Plaintiffs' allegations sufficient under *Twombly*, *Iqbal* provides no basis to reconsider that judgment. Indeed, because the *Twombly* pleading standards have not changed since this Court rendered its decision, the Defendants' arguments are barred under the doctrine of "law of the case." *See infra* Section III.

The *Iqbal* Court reiterated that, at the pleading stage, a plaintiff must "plead[] factual content that allows the court to draw the reasonable inference that

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[9] Moreover, there is certainly nothing in *Iqbal* itself that could be read to suggest that plaintiffs must allege that supervisors made individualized decisions affecting each particular plaintiff. If the Court had intended to take that extraordinary step, the Court would not have bothered to examine the specificity or plausibility of Iqbal's allegations because Iqbal never alleged that Ashcroft and Mueller made individualized decisions regarding prison administration or that they otherwise themselves directed that Iqbal specifically be abused. Indeed, to accept the government's categorical view, one must assume the *Iqbal* Court *sub silentio* overturned decades of its own precedent recognizing municipal and supervisory liability for "knowledge and acquiescence," dating from the Court's landmark decision in *Monell*. If the Supreme Court sought to overrule *Monell* and its decades-long progeny, it would have stated so expressly.

the defendant is liable for the misconduct alleged." 129 S. Ct. at 1949 (citing *Twombly*, 550 U.S. at 556). By contrast, a complaint is insufficiently pled if "it tenders 'naked assertion[s]' devoid of 'further factual enhancement.'" *Id*. (quoting *Twombly*, 550 U.S. at 557). In order to demonstrate that the supervisors were liable under the Fifth and First Amendments, Iqbal had to demonstrate that the United States Attorney General John Ashcroft and FBI Director William Mueller possessed a discriminatory state of mind – *i.e.*, that they acted "because of, not merely in spite of, the action's adverse action against an identifiable group." *Iqbal*, at *11 (citing *Feeney*, 442 U.S. at 279) (internal quotations omitted). Yet all that Iqbal alleged against them was that each, respectively, was a "principal architect" and an "instrumental" force in developing a policy that caused "high interest" detainees to be housed in harsh, segregated prison conditions while awaiting trial. *Id*. at 1951. While Iqbal also asserted that Ashcroft and Mueller adopted this policy "on account of his religion, race and/or national interest," the Court concluded that this bald statement – without further factual content substantiating the official's alleged discriminatory purpose – constituted little "more than a 'formulaic recitation of the elements' of a constitutional discrimination claim." *Id.* (quoting *Twombly*, 550 U.S. at 555). *Iqbal*'s did "not show, or *even intimate* that petitioners purposefully housed detainees in [harsh conditions]" specifically because of impermissible racial considerations. *Id*. at 1952 (emphasis added); *see*

also id. (Iqbal's complaint "does not contain any factual allegation sufficient to plausibly suggest petitioners' discriminatory state of mind").

According to the Court, as between the "threadbare" and "formulaic" assertion that Iqbal's detention and treatment were motivated by the high-ranking officials' racial animus and the "obvious alternative explanation" of a legitimate law enforcement need for the detention, "discrimination is not a plausible explanation." *Id*. at 15; *see also Twombly*, 550 U.S. at 567 (concluding that parallel conduct did not plausibly suggest an unlawful agreement in violation of antitrust law because such conduct was more likely explained by lawful, unsynchronized free market behavior). Thus, Iqbal would have had to plead more specific facts to "'nudge' his claim of purposeful discrimination 'across the line from conceivable to plausible'." *Id*. at 15 (quoting *Twombly*, 550 U.S. at 570).[10]

[10] As with any discrimination case under the Constitution or Title VII (or like the conspiracy to engage in anticompetitive conduct cause of action considered in *Twombly*), divining a decisionmaker's subjective intent is central; yet one cannot always tell from the actions taken whether the decision-maker acted with invidious or discriminatory intent (which is actionable), or if the racially disparate impact of the decision happened despite race neutral reasons for the decisionmaker's actions (which is usually not actionable). *See Washington v. Davis*, 426 U.S. at 242. Thus, in *Iqbal* the Court believed that, in light of the ethnic and religious identity of the September 11 attackers, "it should come as no surprise that a legitimate policy directing law enforcement to arrest and detain individuals because of their suspected link to the attacks would produce a disparate, incidental impact on Arab Muslims, even though the purpose of the policy was to target neither Arabs nor Muslims." *Id*. at 15. Iqbal was lawfully arrested for a crime of credit card fraud – a basis for detention that reveals a "nondiscriminatory intent." *Id*.; *see also Chao*, 2009 WL 1910954, at *4

In obvious contrast, Plaintiffs do not need to demonstrate that the Individual Defendants possessed a discriminatory state of mind. And as this Court has already held, Plaintiffs do not conclusorily proffer a legal conclusion that Defendants had "knowledge and acquiescence" of their subordinates' conduct. Rather, they specify the factual bases supporting their liability and thus provide the requisite "factual content" to render plausible Plaintiffs' assertion that the Individual Defendants failed in their constitutional duty under still-governing Third Circuit law to adequately supervise the actions of subordinates. *See supra* at IA. (summarizing standards of supervisory liability in Third Circuit). Specifically, plaintiffs make the following relevant allegations:

> Custom and Policy Contributing to or a Moving Force Behind Subordinates' Constitutional Violations
>
> - Defendants Myers and Torres implemented relevant portions of the federal government's "Operation Return to Sender" program (*see* SAC ¶¶ 4-5; 19-20) – a fact that establishes their supervisory authority.
> - Between 2005-2007, Myers and Torres oversaw a five-fold increase in Fugitive Operations Teams ("FOT") and an incredible 800% increase in arrest quotas for each FOT (SAC ¶¶ 30, 144). These facts plausibly explain the dramatic number of hurried and unlawful conduct associated with the home raids policy Myers and Torres "set in motion."
> - Defendant Weber is Director of the DRO Field Office in New Jersey and was responsible for the implementation of Operation Return to Sender by FOTs in New Jersey. (SAC ¶ 21.) Defendant Rodriguez held that same

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(explaining that the *Iqbal* "majority found Iqbal's claims drowned out by the 'obvious alternative explanation' – namely, that Iqbal's arrest was justified by a 'nondiscriminatory intent to detain aliens . . . who had potential connections to those who committed terrorist acts'.") (quoting *Iqbal*, 129 S. Ct. at 1951).

position from February to May 2007. (SAC ¶ 22.) Each was thus responsible for carrying out the policy developed by Myers and Torres in New Jersey where these constitutional violations allegedly occurred.

- There is a remarkable similarity to the home raids described in the Second Amended Complaint, especially as to the similar constitutional violations that occurred – *i.e*. warrantless, forced entry, violence and intimidation. (*See* SAC ¶¶ 33-45, 49-142, 143, 146.) These alleged similarities suggest an unlawful pattern and practice of warrantless and abusive home raids, which was plausibly "set in motion" by each of the Individual Defendants.
- Documents discovered after the filing of the initial complaint include memos authored by Defendant Torres (produced in a Freedom of Information Act litigation) which unambiguously confirm the direct relationship between ICE policy in Washington, D.C. and field operations in New Jersey and demonstrate that Torres "set in motion" unconstitutional practices that occurred in New Jersey. *See* Letter to Hon. Judge Peter G. Sheridan, Feb. 6, 2009, Exs. B and C, (Dkt # 91).[11] The Memos, dated January 31, 2006 and September 29, 2006, demonstrate, among other relevant facts, that Torres raised arrest quotas by 800% and allowed non-targets to count towards the quotas, thus encouraging ICE teams to conduct raids circumventing the Fourth Amendment in order to meet their quotas. The Memos also demonstrate that ICE headquarters directed fugitive operations in New Jersey and establish that most fugitive operations would need to be "approved" by "DRO headquarters." *Id*.

Knowledge and Acquiescence of Unconstitutional Activity

- Myers and Torres were put repeatedly on notice of the unconstitutional conduct of their subordinates. Plaintiffs specifically cite to the numerous media reports that put them on notice, (SAC ¶¶ 41, 143); the numerous

[11] As this Court already held, the Second Amended Complaint's allegations are by themselves sufficient under *Twombly* (and therefore under *Iqbal*). Nevertheless, Plaintiffs reiterate their request that the Court take judicial notice of such "public records" in evaluating defendants' personal involvement. *Anspach v. City of Phil. Dep't of Pub. Health*, 503 F. 3d 256, 273 n.11 (3d Cir. 2007). If nothing else, this newly obtained evidence underscores why courts are reluctant to dismiss well-pled complaints before even nominal discovery occurs. *See Evancho v. Fisher*, 423 F. 3d 347, 352 (3d Cir. 2007).

lawsuits instituted since 2006 that also put the Defendants on notice, (SAC ¶ 145); and to specific communications and warnings issued by members of congress and advocacy groups (SAC ¶¶ 46, 141, 142, 146).[12]

- Despite their knowledge, Myers and Torres took no corrective action and at times deflected rather than investigated criticism of their policies. (SAC ¶¶ 146-148); *see also* Elizabeth Llorente, *Menendez denounces raids on migrants*, Bergen Record, June 13, 2008. These facts permit the reasonable inference that the Defendants acquiesced in and "tolerated" ongoing constitutional violations.
- Plaintiffs further specifically allege that Myers and Torres actually *boasted* about the success of the raids their subordinates initiated in New Jersey. (SAC ¶¶ 148). These facts go beyond even the "knowledge and acquiescence" standard or constructive ratification to plausibly suggest active implicit encouragement of unconstitutional behavior by subordinates.
- Plaintiffs make similar, specific allegations that Defendants Weber and Rodriguez were aware of specific instances of unconstitutional conduct by their subordinates and were in some cases warned by public officials; yet, they not only acquiesced in this unconstitutional behavior, they boasted of and encouraged it. (SAC ¶ 152).

Inadequate Training

- Plaintiffs specifically allege that all the Individual Defendants failed to adequately train the individual officers, even after being put on notice of persistent constitutional violations by subordinates. (SAC ¶¶ 144, 151).

Under *Iqbal* and *Twombly*, these allegations are sufficiently detailed and plausible to demonstrate that the Individual Defendants breached their duty of

[12] Plaintiffs respectfully submit that the Court's stated concern that certain of Plaintiffs' allegations could be considered hearsay, *Argueta*, slip op. at 41, is actually misplaced. The general prohibition on hearsay is an evidentiary requirement, which emerges at the trial stage when a fact finder must evaluate the truth value of any given statement. *See* Fed. R. Evid. 803. There is no corresponding prohibition or even limitation on the use of hearsay at the *pleading* stage, when the Court is obligated to assume all facts alleged in the complaint are true.

supervisory care. Put differently, these details "nudge[]" Plaintiffs' allegations "across the line from conceivable to plausible." *Iqbal*, 129 S. Ct. at 1951 (internal quotations omitted); s*ee also Chao*, 2009 WL 1910954, at *5 (finding plaintiff adequately pled officials' supervisory liability for failing to "adequately train, supervise, or investigate" sexual abuse of an inmate by a prison guard, based on allegations that guard had relationship "with at least one other female inmate" and that "rumors repeatedly circulated" around the prison about the guards actions); *Williams v. Fort Wayne Police Dep't*, 2009 WL 1616749, at *4-5 (N.D. Ind. June 9, 2009) (denying supervisory defendants' motion to dismiss excessive force and unreasonable seizure claims because prior lawsuits and incidents had put the supervisory officials on notice of the alleged violation); *Selinger v. City of New York*, No. 08-cv-2096, 2009 WL 1883782, *7 (S.D.N.Y. June 30, 2009) (finding plaintiffs allegations sufficient under *Twombly-Iqbal* pleading standards where plaintiff alleged municipality "systematically failed to identify the improper abuse, misuse and violative acts by police officers").

C. Iqbal Is Factually Distinguishable in Important Respects

Iqbal sued nineteen individual officers and thirty-four supervisory officials, including Attorney General Ashcroft and FBI Director Mueller – officers the *Iqbal* Court stressed were at the "highest level of the federal law enforcement hierarchy," *Iqbal*, 129 S. Ct. at 1943. By contrast, Plaintiffs here sued only those government

officials who directly set (*i.e.*, Myers and Torres) and/or implemented (*i.e.*, Weber and Rodriguez) the unconstitutional home raids policies and practices at issue. Plaintiffs did not sue the Attorney General or former DHS Secretary Chertoff.

Further, Ashcroft and Mueller were forced to make quick, discretionary policy decisions during "a national and international security emergency unprecedented in the history of the American Republic." *See* 129 S. Ct. at 1945, 1953 (internal quotations omitted); *see also Chao*, 2009 WL 1910954, at *4 ("Ever-present in the majority's opinion was the fact that these high-ranking officials faced an unprecedented attack on American soil"). By contrast, the Individual Defendants here methodically set and maintained their unconstitutional policies over a course of years, with ample time to evaluate and remedy the widespread constitutional violations of which they were aware. This factual distinction affects the scope of a government official's legal obligation. As the Supreme Court explained, where government officials have "time to make unhurried judgments," and "extended opportunities to do better are teamed with protracted failure even to care, indifference [to rights of individuals] is truly shocking." *County of Sacramento v. Lewis*, 523 U.S. 833, 853-54 (1998). But, "when unforeseen circumstances demand [an officer's] instant judgment," the courts are less likely to view the officer's conduct as unlawful. *Id.*

Finally, to grant immunity to officers like Myers, Torres, Weber and Rodriguez--without any discovery – would effectively immunize supervisors' reckless disregard for constitutional rights, no matter how outrageous and widespread the behavior of their subordinates, or how frequently supervisors were put on notice of it. Such a ruling would only encourage supervisors to ignore their long-standing duty to ensure that subordinates do not misbehave.

II. BECAUSE DEFENDANTS ARE NOT ENTITLED TO QUALIFIED IMMUNITY, DISCOVERY AGAINST THEM SHOULD PROCEED.

A. Because Plaintiffs Have Stated a Claim for Relief, They Are Entitled to Discovery.

It is true, as the Individual Defendants suggest, that *Iqbal* rejected an "incremental" approach to the discovery ordered by the district court related to defendants Ashcroft and Mueller. But that particular ruling necessarily followed from the *Iqbal* Court's predicate that the complaint's allegations were insufficient to state a claim under the First and Fifth Amendments. Where, as here, a motion to dismiss has been properly denied based on sufficient factual allegations, *Iqbal* does not prevent or alter the orderly processing of litigation under the Federal Rules of Civil Procedure. Well-settled Supreme Court precedent, which remains unaffected by *Iqbal*, makes that clear. *See Swierkiewicz v. Soreman N.A.*, 534 U.S. 506, 512 (2002) (explaining that Rule 8(a)'s "notice pleading standard relies on liberal discovery rules and summary judgment motions to define disputed facts and issues

and to dispose of unmeritorious claims."); *Morgan v. Hubert*, No. 08-30388, 2009 WL 1884605, at *6 (5th Cir. July 1, 2009) (remanding for discovery because key "facts are solely within [the defendants'] possession" and because "at this stage of the litigation, crucial facts necessary to resolve the issue of qualified immunity are unknown"); *Hernandez v. Foster*, No. 09-cv-2461, 2009 WL 1952777, at *8, 10 (N.D. Ill. July 6, 2009) (denying qualified immunity and ordering supervisory discovery, without prejudice to defendants' opportunity to raise defense again at summary judgment). Indeed, evidence regarding the Individual Defendants' personal involvement in home raids practices that has emerged subsequent to the filing of Plaintiffs' Amended Complaint, *see supra* at pp. 18-20, demonstrates why a court should hesitate to dismiss an otherwise well-pled complaint prior to discovery.

At a minimum, should this Court grant the Defendants' Motion, Plaintiffs request an opportunity to re-plead the complaint to include newly-discovered facts.

B. The Court Should Clarify Its Ruling to Permit Document Requests Pursuant to Fed. R. Civ. P. 34.

In its opinion and order, the Court permitted the Plaintiffs to "interrogatories and one deposition of each supervisor." *Argueta*, 2009 WL 1307236, at *24. The Court did not indicate whether Plaintiffs would be entitled to serve document requests upon those supervisory defendants. Documents are obviously a core component of discovery; they are a pre-requisite to a meaningful deposition and

routinely form a basis for litigating summary judgment motions. *See* Fed. R. Civ. P. 56(c). Plaintiffs should be able to serve document requests as a matter of course. *See* Fed. R. Civ. P. 30(b)(2) ("The notice to a party deponent may be accompanied by a request under Rule 34 to produce documents and tangible things at the deposition"). Yet, in order to avoid any confusion that might arise among the parties, Plaintiffs respectfully request that this Court clarify its order regarding discovery to make clear Plaintiffs' entitlement to serve document requests upon the Defendants pursuant to Fed. R. Civ. P. 34.

III. "LAW OF THE CASE" DOCTRINE MANDATES REJECTION OF DEFENDANTS' RENEWED ARGUMENTS REGARDING LACK OF PERSONAL JURISDICTION, LACK OF SUBJECT MATTER JURISDICTION, LACK OF A *BIVENS* REMEDY AND PLAINTIFFS' INSUFFICIENT PLEADINGS.

Defendants' four previously-rejected arguments – *i.e.*, (i) lack of subject matter jurisdiction, (ii) lack of a *Bivens* remedy, (iii) lack of personal jurisdiction over Myers and Torres, and (iv) failure to meet the pleading requirements of *Twombly-Iqbal* (*see* Gov't Mot. at 15, 21, 22-27, 27-29, & 29-30) – should all be summarily rejected (again). This Court's prior rulings constitute the "law of the case" on all four issues. *See Argueta v. ICE*, 2009 WL 1307236, at *12-17 (finding Court has subject matter jurisdiction), *17-19 (finding *Bivens* remedy is available), *20-22 (finding Court has personal jurisdiction over Myers and Torres), and *22-24 (finding allegations regarding supervisory liability sufficient under

Twombly).[13] Accordingly, the Defendants cannot use the filing of the Second Amended Complaint (which is substantively identical to the First Amended Complaint) to re-litigate issues they raised and lost previously.

Under the "law of the case" doctrine, "when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case." *SEC v. Lucent Techs.*, No. 04-cv-2315, 2006 WL 2168789, at *4-5 (D.N.J. June 20, 2006) (citing *Ariz. v. Cal.*, 460 U.S. 605, 618 (1983)); *see also In re Resyn Corp.*, 945 F.2d 1279, 1281 (3d Cir. 1991)). Law of the case doctrine promotes the finality and efficiency of the judicial process by "protecting against the agitation of settled issues." *Christianson v. Colt Operating Corp.*, 486 U.S. 800, 815-16 (1988). Prejudgment decisions by a district court, such as this Court's decision to deny the Defendants' first Motion to Dismiss, constitute "law of the case." *See generally* 18-134 Moore's Fed. Practice - Civil § 134.22.

While it is true that "an amended complaint ordinarily supersedes a prior complaint, and renders it of no legal effect," the amendment does not allow the defendant to "challenge the sufficiency of the amended complaint with arguments that were previously considered and decided by the court in the first motion to dismiss." *SEC v. Lucent*, 2006 WL 2168789, at *4-5 (citing *Sears Petroleum &*

[13] This Court's conclusion that Plaintiff's allegations were sufficient under *Twombly* is necessarily still binding as a matter of law and logic because, as fully described, *supra*, *Iqbal* merely applies – and in no way changes – the *Twombly* pleading standard.

Transp. Corp. v. Ice Ban Am., Inc., 217 F.R.D. 305, 307 (N.D.N.Y. 2003)). Accordingly, where, as here, a defendant's motion to dismiss is denied, and that defendant subsequently moves to dismiss an Amended Complaint on the same grounds, the Court's prior denial constitutes "law of the case" and precludes those grounds from being re-litigated. *SEC v. Lucent*, 2006 WL 2168789, at *4-5 (rejecting renewed motion to dismiss where "none of the amendments in the Amended Complaint specifically relate to [defendant].").

Here, because no material facts relevant to the Individual Defendants' four previously-rejected arguments have changed, those arguments should again be rejected. Plaintiffs have amended their Complaint only to remove the allegations relevant to four Roe Plaintiffs who have dropped out of the litigation, and to identify Plaintiff Carla Roe 3 as Yesica Guzman. Otherwise, the Amended Complaint remains unchanged as it relates to the Individual Defendants' arguments that the court lacks subject matter jurisdiction and personal jurisdiction over Myers and Torres, or that the court should not recognize a *Bivens* remedy for these plaintiffs. The Defendants in fact concede that no supervening case law on these issues exists. Essentially, the Individual Defendants "disagree" with the Court's prior ruling.[14] But disagreement with a court's judgment, particularly where no

[14] Indeed, facts that have come to light since this Court's opinion have only strengthened Plaintiffs' arguments. For example, Defendant Torres wrote two memoranda that raised quotas 800 percent and allowed non-targets to count

factual allegations have changed, is obviously not sufficient to disturb its binding effect on the litigants. *SEC v. Lucent*, 2006 WL 2168789, at *4-5; *Compare Brown v. E.F. Hutton & Co., Inc.*, 610 F. Supp. 76, 78-9 (S.D. Fla. 1985) (allowing Defendant "fresh start" in answering where amended complaint "greatly expanded" the relevant factual allegations).

Similarly, because this Court found the allegations of the First Amended Complaint sufficient under *Twombly* and because the Supreme Court's intervening decision in *Iqbal* merely applies, and in no way changes, the *Twombly* standard (*see supra* at 6 to 15), the identical allegations regarding the Defendants' supervisory liability contained in the Second Amended Complaint necessarily remain sufficient. Accordingly, arguments renewed in the Motion should be summarily rejected.

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towards those quotas – actions that Torres should or must have known would inevitably lead to widespread Constitutional violations against non-targets. *See* Letter of Scott Walker, Feb. 6, 2009. Those Memoranda were also issued to Newark Field Officers, instructing them to seek "approv[al]" from DRO headquarters prior to undertaking certain raids; as previously described these Memos highlight Myers and Torres' his connections to this forum that this Court already found sufficient to assert personal jurisdiction over him.

CONCLUSION

For the foregoing reasons the Court should deny the Individual Defendants' Motion to Dismiss the Second Amended Complaint.

Roseland, New Jersey
Dated: July 20, 2009

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