UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ADRIANA AGUILAR, *et al.*,

Plaintiffs,

- against -

IMMIGRATION AND CUSTOMS ENFORCEMENT DIVISION OF THE UNITED STATES DEPARTMENT OF HOMELAND SECURITY, *et al.*,

Defendants.

ECF Case
07 Civ. 8224 (JGK) (FM)

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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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases: page

Federal Statute and Federal Rules of Civil Procedure:

PRELIMINARY STATEMENT

Defendants Michael Chertoff, the former Secretary of the United States Department of Homeland Security ("DHS"); Julie Myers, the former Assistant Secretary of Immigration and Customs Enforcement ("ICE"); John Torres, the former Director of ICE's Office of Detention and Removal Operations ("DRO"); and Marcy Forman, the former Director of ICE's Office of Investigations ("OI") (collectively, the "High-Ranking Officials"), respectfully submit this memorandum of law in support of their motion to dismiss the Fourth Amended Complaint, dated December 21, 2009 ("Cmplt."), as against them in accordance with Rule 12(b)(6) of the Federal Rules of Civil Procedure and the Supreme Court's construction of that rule in Ashcroft v. Iqbal, 129 S. Ct. 1937 (2009).

This action arises from the efforts of DHS and ICE to remove illegal aliens from the United States—in particular, gang members and aliens who illegally remained in the country after disregarding removal orders. Plaintiffs, 25 individuals who lived in Suffolk, Nassau, and Westchester counties, contend that ICE officers and agents entered their residences without consent in violation of the Fourth Amendment and that ICE unconstitutionally targets Latinos in violation of the Equal Protection Clause of the Fifth Amendment. Plaintiffs seek equitable relief, damages from the United States under the Federal Tort Claims Act, and damages from 68 individual defendants under Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388 (1971).

As this Court has noted, the "fundamental question" posed in this case is "whether [plaintiffs'] constitutional rights were violated because the ICE agents did not seek their consent before entering their homes." Aguilar v. Immigration & Customs Enforcement, 255 F.R.D. 350, 361 (S.D.N.Y. 2008). And yet, more than two years after filing their initial complaint, plaintiffs filed a fourth amended complaint to assert Bivens claims against the High-Ranking Officials,

none of whom was present during the actual operations. For several reasons, the complaint should be dismissed as against them.

First, as to the alleged Fourth Amendment violations, a Bivens cause of action against supervisors cannot succeed based merely on the defendant's position of authority. Rather, the law requires supervisory defendants to have had direct, personal involvement in the alleged constitutional deprivations. Here, plaintiffs do not allege that the High-Ranking Officials were present during the incidents or that they ordered the alleged violations. Instead, they assert three theories of liability against them: (i) that the High-Ranking Officials created and implemented policies under which alleged constitutional violations occurred; (ii) that they failed to adequately respond to complaints of alleged constitutional violations; and (iii) with respect to defendants Torres and Forman, that they implemented certain nationwide programs under which the specific operations took place. Each of these theories must be rejected.

Plaintiffs' first theory must fail because it was rejected by the Supreme Court in Iqbal, where the plaintiff alleged that John Ashcroft was the "principal architect" of the challenged detention policy and that Robert Mueller was "instrumental in [its] adoption, promulgation, and implementation." Iqbal, 129 S. Ct. 1944 (quoting complaint). The complaint here is no different, alleging that Chertoff was DHS's "ultimate decision maker," and that he "created, approved, and implemented official policies" that were "intended to violate constitutional rights." Cmplt. ¶ 73. Moreover, even if creating an unconstitutional policy were a basis for post-Iqbal liability, plaintiffs have not identified any policy requiring, or even permitting, ICE agents to enter homes without consent.

Plaintiffs' second theory—failure to adequately respond—must also be rejected. First, because many of the complaints that plaintiffs allege were ignored post-date the incidents

detailed in the complaint, the High-Ranking Officials could not have responded before the events at issue, even if they had an obligation to do so. Second, even if supervisory liability could be based on a supervisor's failure to intervene, plaintiffs do not meet that standard here. Being placed "on notice"—through newspaper articles and the like—of alleged misconduct by low-level, non-policy-making individuals within a large federal agency does not trigger personal liability on the part of high-level supervisors for all future misconduct. This is especially so absent any allegation that the High-Ranking Officials issued a policy, or implemented a practice, requiring or authorizing employees to violate constitutional rights.

The Court also should reject plaintiffs' third theory, that defendants Torres and Forman are liable because they implemented programs under which the specific operations took place. Although plaintiffs allege that Torres was an "approving official" and was involved in "operational planning and execution," Cmplt. ¶ 86, they never identify anything within these plans requiring or permitting ICE officers to enter homes without consent. Similarly, plaintiffs allege that Forman "was in charge of overseeing training," id. ¶ 90, but they never allege that ICE agents are trained to enter homes without consent; nor do they identify training deficiencies for which Forman would be responsible.

Nor can plaintiffs proceed on their theory that the High-Ranking Officials violated the Equal Protection Clause because they allegedly created a policy or custom of selectively enforcing the immigration laws against Latinos. To prevail on such a claim, plaintiffs must plead non-conclusory factual allegations showing that the defendants "acted with discriminatory purpose," Iqbal, 129 S. Ct. at 1948, and undertook a course of action "because of, not merely in spite of, the action's adverse effects upon an identifiable group." Id. Plaintiffs have not done this; rather, they allege that the High-Ranking Officials must have intentionally discriminated

against Latinos because their agencies' enforcement operations affected Latino communities. But the Supreme Court rejected precisely this legal theory in Iqbal, when it concluded that claims against high-level supervisors could not proceed when the plaintiffs asked the Court to infer discrimination against Arab Muslims from post-September 11 operations that, unsurprisingly, impacted Arab Muslims. Here, that the operations at issue—targeting members of gangs and other alien absconders—affected Latinos is unsurprising, and cannot plausibly lead to the conclusion that the High-Ranking Officials (or anyone at ICE) intentionally discriminated against Latinos.

Finally, plaintiffs fail to state a claim for injunctive relief against the High-Ranking Officials. First, they cannot meet the irreparable-injury requirement because (i) they have not identified a policy requiring agents to enter homes without consent; (ii) more than three years, in some cases, have passed without incident since the operations occurred; and (iii) a Bivens claim for damages is available to remedy any future violations by ICE agents. Second, because the High-Ranking Officials no longer hold the positions they did in 2007, an injunction against them, as individuals, would not redress the policies about which plaintiffs complain. And because plaintiffs seek an injunction altering ICE's enforcement activities, to the extent an injunction should issue, ICE (or an official-capacity defendant), rather than any individual-capacity defendant, would be the proper party to implement the terms of such an injunction.

THE ALLEGATIONS OF THE COMPLAINT

A. Complaint Locations

Plaintiffs, who live or lived in Suffolk, Nassau, and Westchester counties, are persons of unspecified status, lawful permanent residents, and United States citizens. The complaint alleges that in eight separate incidents—four that were conducted by ICE's Office of Detention and Removal Operations in February, March, and April of 2007, and four that were conducted by

ICE's Office of Investigations during the week of September 24, 2007—ICE officers and agents violated the Fourth Amendment by entering plaintiffs' residences without consent or other legal justification. Plaintiffs also claim that ICE unconstitutionally targets Latinos in violation of the Equal Protection Clause of the Fifth Amendment. According to the complaint, the alleged illegal entries were "part of a broad pattern and practice, if not official policy, of ICE." Cmplt. ¶ 426.

The complaint alleges the following about the operations:

On the morning of February 20, 2007, several ICE officers arrived at the East Hampton home of five plaintiffs. Id. ¶¶ 191-93. Someone answered the door, but ICE officers entered without consent, searched without permission, and detained family members living there. Id. ¶¶ 23, 190-241. On the same morning, ICE officers went to the East Hampton home of another plaintiff, forcibly entered her home, and while arresting her, exacerbated a pre-existing injury to her arm. Id. ¶¶ 25, 242-85.

On March 19, 2007, ICE officers "burst into" several rooms within a large boarding house in Mount Kisco, New York, id. ¶¶ 311, 313, then arrested many individuals who were living there, including three plaintiffs, id. ¶¶ 29, 307-23. A similar incident occurred on April 18, 2007, at a rooming house in Riverhead, New York, when ICE officers "burst into" five plaintiffs' bedrooms and later arrested them. Id. ¶¶ 27, 286-306.

On the morning of September 24, 2007, ICE agents arrived at the Westbury home of three plaintiffs and entered when a minor opened the door. Id. ¶¶ 31, 324-42. The agents entered another Westbury home the same morning, and one agent pointed a gun at a plaintiff's chest. Id. ¶¶ 33, 343-53.

On September 27, 2007, ICE agents went to two homes in Huntington Station, New York. At one home, a team of ICE agents and assisting police officers intimidated a plaintiff,

who was outside near his vehicle, then "slipped past" another plaintiff and searched the inside of the house. Id. ¶¶ 35, 354-376. At the other house, ICE agents "pushed past" a plaintiff, detained other plaintiffs and their relatives, and entered another plaintiff's room without waking her. Id. ¶¶ 412, 418. According to the complaint, ICE agents had been to the same location, looking for the same person, in August 2006. Id. ¶¶ 37-38, 377-418.

B. Allegations Against Former High-Ranking Officials

The complaint alleges the following with respect to the High-Ranking Officials:

1. Michael Chertoff

Michael Chertoff, the former Secretary of Homeland Security, is sued in his individual capacity. Id. ¶ 72. Chertoff was charged with "implementation of the Immigration and Nationality Act," and supervising other high-ranking officials. Id. As the "ultimate decision maker," Chertoff "created, approved, and implemented official policies and strategies." Id. ¶ 73. As Secretary of Homeland Security, Chertoff had ultimate supervisory responsibility for more than 200,000 employees and a budget of approximately $40 billion.[1]

In late 2005 and early 2006, Chertoff and Myers "conceived and announced the Secure Border Initiative ('SBI'), which was a comprehensive and aggressive immigration enforcement strategy for the United States." Id. According to the complaint, "Operations Cross Check, Return to Sender and Community Shield were conducted under the SBI," and "Defendant Chertoff intended to violate constitutional rights by, *inter alia*, implementing these policies." Id.

[1] See, e.g., http://www.dhs.gov/xabout/. The Department of Homeland Security includes, among other agencies, the Transportation Security Administration, United States Customs and Border Protection, United States Citizenship and Immigration Services, ICE, the United States Secret Service, the Federal Emergency Management Agency, and the United States Coast Guard. See http://www.dhs.gov/xlibrary/photos/orgchart-web.png.

Chertoff, "as a result of being the Secretary of DHS, was involved in the planning and/or investigation of ICE agents' conduct during raids." Id.

One of Chertoff's "overarching goals" was to expand the alien apprehension programs. Id. ¶ 74. Thus, he "approved an 800 percent increase in the goal for arrests per team, which led to ICE customs and policies that regularly ran afoul of constitutional rights." Id. Plaintiffs allege that "Chertoff encouraged, endorsed, and thus intended the unconstitutional conduct by ICE during home raids." Id. ¶ 75. This is demonstrated by "Chertoff's response (or lack thereof)" to newspaper articles and letters. Id. On May 23, 2007, Chertoff received a letter from counsel to a non-party in this action "detailing the ICE Agents' warrantless, nonconsensual entry into 165 Main Street, Mt. Kisco, New York." Id. ¶ 75(a). The letter alleged that a man living at that address was restrained until he produced proof of legal status. Id. The complaint does not state whether Chertoff responded.

In June 2007, Senators Dodd and Lieberman sent Chertoff a joint letter requesting that he respond to allegations that ICE agents unlawfully entered homes in New Haven, Connecticut. Id. ¶ 75(b). Chertoff responded—his letter is Exhibit 6 to the complaint—"without adequate investigation or basis." Id. Chertoff's response "was made either with actual knowledge of falsity or with reckless disregard as to truth or falsity" because the statements in the letter were, two years later, refuted by an immigration judge. Id.

Citing a newspaper article dated October 3, 2007 (Ex. 11), the complaint recounts how Thomas Suozzi, the former Nassau County Executive, alleged "numerous deficiencies" with ICE operations that occurred during the week of September 24, 2007. Id. ¶ 75(c). Chertoff drafted a response "a mere two days" after receiving Suozzi's letter, but then asked Myers, then the head of ICE, to respond on his behalf. Id. Because Myers' response, sent a "full seventeen days"

after Chertoff received Suozzi's letter, was "substantially the same" as Chertoff's initial draft, plaintiffs conclude that Chertoff and Myers "did not plan to conduct an investigation into the matter, and instead planned on blindly defending ICE from all allegations of misconduct." Id.

The complaint alleges that Chertoff later received various letters concerning allocation of ICE resources (Ex. 12), handling of children who participate in federally assisted programs (Ex. 13), and medication of detainees (Ex. 14), id. ¶ 75(d), but does not state whether Chertoff responded. Id.

The complaint concludes that "[a]s the ultimate decision-maker and final policy-maker for ICE, Defendant Chertoff had a duty to fully investigate the above allegations and immediately take corrective measures." Id. ¶ 76. Instead, Chertoff "allowed, condoned, and actively defended and encouraged ICE's custom or practice of violating constitutional rights during home raids." Id.

2. Julie Myers

Julie Myers, who was "during at least part of the relevant time" the Assistant Secretary of ICE, is also sued individually. Id. ¶ 78. Myers was charged with implementing immigration law, she worked "hand-in-hand" with Chertoff, and she "supervised all aspects of ICE." Id. As Assistant Secretary of ICE, which is the largest investigative branch within DHS, Myers had ultimate supervisory responsibility for more than 15,000 employees and a budget exceeding $3 billion. Id. Ex. 1 at 29 & Ex. 16 at 2.

Myers "was closely involved in numerous aspects of the raids at issue." Id. ¶ 79. She and Chertoff were responsible for "creating and implementing ICE's overall comprehensive immigration enforcement strategy," and "conceiv[ing] and promulgat[ing] the SBI." Id. "Upon information and belief, Defendant Myers approved Defendant Torres's astounding 800% goal

increase of target apprehensions for each fugitive operations team, as well as his policy guidance that allowed each team to count 'collateral' arrests for purposes of achieving that goal." Id. ¶ 80.

Second, Myers "coordinated ICE's response to the Nassau County allegations" and oversaw an "inadequate investigation into internal allegations of racial profiling." Id. "Upon information and belief, Defendant Myers received regular briefings on newspaper articles concerning ICE's unconstitutional conduct and was therefore fully aware of the contents of all articles discussed above." Id. ¶ 81. Myers had a "duty to take corrective measures when faced with this knowledge," but instead "condoned and endorsed this unconstitutional conduct." Id.

3. John Torres

John Torres, the former Director of DRO, is also sued individually. Id. ¶ 83. As director, Torres "worked closely with his supervisors, Defendants Chertoff and Myers in setting ICE DRO policies and practices." Id. Torres "was responsible for the apprehension, detention and removal of foreign nationals charged with violation of immigration law and the supervision of sworn law enforcement officers assigned to [DRO] field offices, including the field office" in New York. Id. As the Director of DRO, Torres had supervisory responsibility for more than 4,000 employees working in 23 field offices, and a budget exceeding $1 billion. Id. Ex. 1 at 29 & Ex. 16 at 2.

Torres created, and later defended, "a new goal of 1,000 arrests per year for fugitive operations teams." Id. ¶ 84. Torres stated that collateral arrests would count towards that goal, "knowing and intending that this would lead ICE to design operations to maximize the number of collateral arrests." Id. In so doing, "Torres intended to violate constitutional rights." Id.

Torres also "issued memoranda" concerning (i) "protocols . . . , case management, procedures for keeping records, and dispute resolution," and the use of ruses; and (ii) "objectives, target priorities, and reporting requirements for Operation Cross Check." Id.

¶¶ 85-86. Torres "was the approving official for the operational plans for Return to Sender and Cross Check." Id. ¶ 86. Finally, Torres was involved in "coordinating, editing, and ultimately approving" a response to DHS's report concerning fugitive operations teams. Id. ¶ 87. By "minimiz[ing] the effects" of the report, Torres "actively defended ICE's custom or policy of unconstitutional conduct." Id.

4. Marcy Forman

Marcy Forman, the director of ICE's Office of Investigations in 2006 and 2007, is also sued individually. Id. ¶ 89. As the Director of OI, "Defendant Forman worked closely with her supervisors, Defendants Chertoff and Myers, in setting ICE OI policies and customs." Id. As director of ICE's Office of Investigations, Forman supervised approximately 8,000 employees and administered a budget of approximately $1.6 billion.[2]

Forman "played a significant role in the planning of the ICE raids in Nassau County in September 2007." Cmplt. ¶ 90. "Upon information and belief, Defendant Forman was in charge of overseeing training and setting policy regarding ICE agent conduct during home raids." Id. By "implementing these policies," Forman "intended to violate constitutional rights." Id.

Forman issued the same kinds of policy memoranda that Torres did. Id. ¶ 91. "Upon information and belief," Forman continued to authorize operations "after becoming aware of concerns about the constitutionality of ICE agents' conduct through press reports and internal investigations." Id. ¶ 92. Also, "[u]pon information and belief, Defendant Forman did not address lapses in training or otherwise change the instructions that agents under her supervision were expected to obey." Id.

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[2] See http://www.ice.gov/about/ leadership/invest_bio/marcy_forman.htm.

C. Causes of Action

The complaint seeks three types of relief from all of the individual defendants, including the High-Ranking Officials: equitable relief arising from alleged Fourth Amendment violations, id. ¶¶ 454-69 (first claim); equitable relief arising from alleged Fifth Amendment violations, id. ¶¶ 470-83 (second claim); and Bivens damages for alleged violations of the Fourth and Fifth Amendments, id. ¶¶ 484-89 (third claim).

1. Equitable Relief Arising from Alleged Fourth Amendment Violations

Plaintiffs' first claim seeks injunctive and declaratory relief against all defendants "to redress continuing and likely future violations of the Fourth Amendment." Id. ¶ 455. Plaintiffs allege that defendants have "officially implemented, enforced, encouraged and/or sanctioned a policy, practice and/or custom of" unconstitutionally searching and entering homes and unconstitutionally searching and seizing persons. Id. ¶ 456. The complaint alleges that plaintiffs and the proposed class—Latinos who reside in the New York metropolitan area—"are entitled to the issuance of a permanent injunction prohibiting Defendants from engaging in the unlawful and abusive practices alleged herein." Id. ¶ 466.

2. Equitable Relief Arising from Alleged Fifth Amendment Violations

Plaintiffs' second claim seeks injunctive and declaratory relief against all defendants "to redress continuing and likely future violations of the Equal Protection Clause of the Fifth Amendment." Id. ¶ 471. Plaintiffs allege that defendants unconstitutionally enter homes where Latinos are believed to reside. Id. ¶ 474.

3. Bivens Claims for Alleged Fourth and Fifth Amendment Violations

Plaintiffs' third claim seeks money damages against the Bivens defendants. Plaintiffs claim that the High-Ranking Officials "failed to intervene to protect Plaintiffs' constitutional rights from infringement, were grossly negligent in supervising subordinates who committed the

wrongful acts, and/or aided and abetted and/or conspired to deprive, participated in depriving, and/or did deprive Plaintiffs of certain constitutionally protected rights." Id. ¶ 485. The complaint alleges that the individual defendants violated their rights under both the Fourth and Fifth Amendments. Id.

PROCEDURAL HISTORY

Plaintiffs filed this action on September 20, 2007. The first complaint concerned only DRO operations, but plaintiffs amended their complaint on October 4, 2007, to incorporate allegations concerning OI operations conducted on Long Island during the week of September 24, 2007. An equal protection claim was added in the third amended complaint, filed on March 6, 2009.

On May 18, 2009, the Supreme Court decided Iqbal, and on July 10, 2009, defendants advised plaintiffs that they would be seeking dismissal of (i) all claims against the supervisors on the basis that the Supreme Court had rejected the "knowledge and acquiescence" theory of Bivens liability; and (ii) plaintiffs' equal protection claim because the complaint contained no plausible factual allegations concerning any defendant's intentional discrimination on the basis of race or national origin.[3]

Plaintiffs subsequently sought leave to amend their complaint a fourth time, adding as Bivens defendants four additional ICE agents, two additional supervisors, two high-level former directors (John Torres and Marcy Forman), and two former agency heads (Michael Chertoff and Julie Myers). According to a September 10, 2009, letter to Judge Maas, although plaintiffs

[3] Subject to the Court's permission, and in an attempt to limit motion practice and expenditure of judicial resources, defendants propose to file their motion to dismiss the equal protection claim in conjunction with renewing their motion to dismiss plaintiffs' injunction claim for lack of standing.

disagreed with defendants' position that the third amended complaint failed to meet Iqbal's pleading standards, plaintiffs "determined that the best way to avoid burdening the Court with unnecessary motion practice was to file a comprehensive complaint that included information learned during discovery or from recently released, publicly available information." See Sept. 10, 2009, letter from Donna Gordon to Magistrate Judge Maas, at 2. Plaintiffs stated that the proposed fourth amended complaint "names Mr. Chertoff and Ms. Myers in their individual capacities based upon information learned during discovery." Id.

Following pre-motion letters and a conference, Magistrate Judge Maas permitted full briefing concerning plaintiffs' motion for leave to amend, and the new agents, directors, and agency heads opposed amendment. See Docket No. 174. On December 14, 2009, the Court granted leave to amend, see Docket No. 199, and plaintiffs filed the fourth amended complaint on December 21, 2009, see Docket No. 202.

Defendants made a first production of documents—nearly 1,000 pages of policy materials—on November 9, 2007, in connection with their motion to dismiss plaintiffs' injunction claim for lack of standing. Defendants produced additional documents starting in June 2008, and as of December 21, 2009, the date the fourth amended complaint was filed, defendants had produced more than 40,000 pages of documents, including all relevant policies and approximately 12,000 pages of training materials. At the time, plaintiffs had taken 31 defendant depositions and 10 third-party depositions, including the depositions of Nassau and Suffolk police officers who assisted with the September 2007 operations.

ARGUMENT

THE COMPLAINT SHOULD BE DISMISSED AS AGAINST THE HIGH-RANKING OFFICIALS

A. Applicable Legal Principles

1. Standard of Review

Under Rule 8, a complaint must include a "statement of the claim showing that the pleader is entitled to relief," see Fed. R. Civ. Proc. 8(a)(2); and under Rule 12, a defendant may assert that the complaint "fail[s] to state a claim upon which relief may be granted," see Fed. R. Civ. Proc. 12(b)(6). In Iqbal, the Supreme Court articulated and clarified two important principles concerning the construction of Rules 8 and 12. See 129 S. Ct. at 1944.

First, the Court held that Twombly's heightened pleading standard, which incorporates "plausibility" analysis, applies to all federal civil cases, not just those involving conspiracy or other claims requiring "amplification." Iqbal, 129 S. Ct. at 1949 (relying on Bell Atlantic Corp v. Twombly, 550 U.S. 544, 555-57 (2007)). Conclusory allegations, including the "formulaic recitation of the elements of a cause of action," are not entitled to a presumption of truth. Iqbal, 129 S. Ct. at 1949-50 (internal quotations omitted). Thus, when considering a motion to dismiss, the court must first disregard "'naked assertion[s]' devoid of 'further factual enhancement.'" Id. at 1949 (quoting Twombly, 550 U.S. at 557). Then, when considering the factual (i.e., non-conclusory) allegations that remain, the court must assess whether they "plausibly give rise to an entitlement to relief" by presenting "sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face,' in that 'the court [can] draw the reasonable inference that the defendant is liable for the misconduct alleged.'" Id. at 1949-50 (quoting Twombly, 550 U.S. at 570). Merely pleading facts "consistent with a defendant's liability . . . stops short of the line between possibility and plausibility." Id. at 1949. Thus, instead of accepting Iqbal's claim that

Ashcroft and Mueller implemented a discriminatory policy, the Supreme Court found it more plausible that the arrest of Arab Muslim men was justified by a nondiscriminatory purpose—namely, detaining illegal aliens with potential ties to Islamic terrorists. Id. at 1951.

Second, the Supreme Court rejected the notion that a plaintiff may file a conclusory complaint, then use civil discovery to augment the allegations to withstand a motion to dismiss. Id. at 1950 (Rule 8 "does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions."). Thus, the Supreme Court explicitly rejected the Second Circuit's "careful-case-management approach," namely, that a court may postpone deciding a motion to dismiss pending tightly controlled discovery. Id. at 1954 ("Because respondent's complaint is deficient under Rule 8, he is not entitled to discovery, cabined or otherwise.").

2. Post-Iqbal Supervisory Liability

The Bivens cause of action "is the federal analog to suits brought against state officials under . . . 42 U.S.C. § 1983." Iqbal, 129 S. Ct. at 1948 (internal quotation omitted). To be liable, a Bivens defendant must have been "personally involved in the claimed constitutional violation." Arar v. Ashcroft, 585 F.3d 559, 569 (2d Cir. 2009). Because the doctrine of respondeat superior does not apply, see Iqbal, 129 S. Ct. at 1948, "[a] supervisory official cannot be liable solely on account of the acts or omissions of his or her subordinates," Bellamy v. Mount Vernon Hosp., No. 07 Civ. 1801 (SAS), 2009 WL 1835939, at *4 (S.D.N.Y. June 26, 2009) (citation omitted). Thus, as the Second Circuit has long recognized, a Bivens complaint that does not allege the personal involvement of each defendant is "fatally defective on its face." Alfaro Motors, Inc. v. Ward, 814 F.2d 883, 886 (2d Cir. 1987) (internal quotations and citations omitted).

In 1995, the Second Circuit held that personal involvement of supervisory defendants may be shown by evidence that they: (i) directly participated in the infraction; (ii) failed to

remedy the wrong even after learning of a violation through a report or appeal; (iii) created a policy or custom under which unconstitutional practices occurred, or allowed such a policy or custom to continue; (iv) acted in a grossly negligent manner in managing subordinates who caused the unlawful condition or event; or (v) demonstrated deliberate indifference to the constitutional rights of the plaintiff by failing to act on information demonstrating that unconstitutional practices were taking place. See Colon v. Coughlin, 58 F.3d 865, 873 (2d Cir. 1995). Thereafter, courts in this Circuit applied these categories to determine if complaints adequately alleged Bivens defendants' personal involvement. See, e.g., Ajaj v. MacKechnie, No. 07 Civ. 5959 (PKC) (DCF), 2008 WL 3166659, at *5 (S.D.N.Y. Aug. 4, 2008).

But in 2009, the Supreme Court decided Iqbal, and courts in this district have found that Iqbal "abrogate[d] several of the categories of supervisory liability enumerated in Colon." Bellamy, 2009 WL 1835939, at *6; see also Joseph v. Fischer, No. 08 Civ. 2824 (PKC) (AJP), 2009 WL 3321011, at *14 n.6 (S.D.N.Y. Oct. 8, 2009) ("[U]nder Iqbal, a defendant can be liable under section 1983 only if that defendant took an action that deprived the plaintiff of his or her constitutional rights. A defendant is not liable under section 1983 if the defendant's failure to act deprived the plaintiff of his or her constitutional right.") (citing Bellamy, 2009 WL 1835939, at *6); Newton v. City of New York, 640 F. Supp. 2d 426, 448 (S.D.N.Y. Jul. 31, 2009) (citing Bellamy and holding that "passive failure to train claims . . . have not survived" Iqbal); Spear v. Hugles, No. 08 Civ. 4026 (SAS), 2009 WL 2176725, at *2 (S.D.N.Y. Jul. 20, 2009) ("[O]nly the first and third Colon factors have survived the Supreme Court's decision in Iqbal.").

Under Iqbal's "active conduct" standard, a Bivens claim exists against a supervisor only "if that supervisor actively had a hand in the alleged constitutional violation." Bellamy, 2009 WL 1835939, at *6. Thus, only the first and third Colon categories have survived because the

other categories "impose the exact types of supervisory liability that Iqbal eliminated—situations where the supervisor knew of and acquiesced to a constitutional violation committed by a subordinate." Bellamy, 2009 WL 1835939, at *6; but see Sash v. United States, No. 08 Civ. 8332 (AJP), 2009 WL 4824669, at *11 (S.D.N.Y. Dec. 15, 2009) (stating in dicta that the Bellamy line of cases "may overstate Iqbal's impact on supervisory liability.").

This Court should follow the Bellamy line of cases. Iqbal did not, as the Sash decision suggests, limit its holding to constitutional claims brought under the Equal Protection Clause.[4] Rather, it explained that the term "supervisory liability" is a misnomer in Bivens actions, and that 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] . . . an official charged with violations arising from his or her superintendent responsibilities." Iqbal, 129 S. Ct. at 1949. Indeed, even the Iqbal dissent acknowledged this point, explaining that the Iqbal majority was "do[ing] away with supervisory liability under Bivens." Id. at 1954-55; see also id. at 1957 ("[T]he majority is not narrowing the scope of supervisory liability; it is eliminating Bivens supervisory liability entirely."). Given the broad

[4] Although some courts—see, e.g., Vera v. New York State Dept. of Correctional Servs., No. 08 Civ. 9636 (DC), 2009 WL 4928054, at *3 (S.D.N.Y. Dec. 21, 2009), and Gonzalez v. Wright, No. 07 Civ. 2898 (CM) (MHD), __ F. Supp. 2d __, 2009 WL 3149448, at *22 (S.D.N.Y. Sept. 30, 2009)—have applied all five Colon categories post-Iqbal, they did so without considering Iqbal's effect on Colon.

language of Iqbal, the Court should reject any argument that Iqbal did not change the liability standards set forth in Colon.[5]

B. Plaintiffs Fail to State a Plausible Claim of Fourth Amendment Bivens Violations by the High-Ranking Officials

Plaintiffs' Fourth Amendment claims against the High-Ranking Officials should be dismissed because the complaint fails to assert any non-conclusory, plausible allegations that they were personally involved in the alleged constitutional violations, which occurred at plaintiffs' homes. Plaintiffs do not claim that the High-Ranking Officials entered their homes without consent or even that they ordered their employees to do so. Rather, the complaint seeks to impose liability based on (i) the High-Ranking Officials' creation and implementation of official policy; (ii) their failure to adequately respond to complaints; and (iii) with respect to defendants Torres and Forman, their purported role in implementing the nationwide programs under which the specific operations took place. Each of these theories must be rejected.

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[5] In a recent, unpublished decision, Argueta v. U.S. Immigration & Customs Enforcement, No. 08-1652 (PGS), 2010 WL 398839 (D.N.J. Jan. 27, 2010), a New Jersey district court denied a motion to dismiss by, among others, Torres and Myers. But the court made several significant errors, and its reasoning should not be followed here. First, the opinion misapprehends the import of Iqbal, claiming that "[t]he Iqbal Court did not change the pleading standards as applied by the lower courts," id. at *6, and that the defendants' "assertion that Iqbal now stands for the proposition that 'knowledge and acquiescence' are insufficient to allege a Bivens claim is misplaced," id. at *7. Contrast Iqbal, 129 S. Ct. at 1949 (specifically rejecting plaintiff's argument that defendants can be liable for "knowledge and acquiescence in their subordinates' use of discriminatory criteria to make classification decisions among detainees") (quoting Iqbal's brief). Second, the court limited Iqbal's holding to only the highest-level officials, see 2010 WL 398839 at *8 ("Myers and Torres are two or three position levels below the Secretary of Homeland Security"), and cases involving governmental disaster response, see id. at *7 ("[U]nlike in Iqbal, the [defendants] were not urgently reacting in the immediate aftermath of a terrorist attack."). Finally, the court misapplied Iqbal's plausibility analysis because it considered whether it was plausible that constitutional violations occurred, not whether it was plausible that Myers and Torres were personally involved in such violations. See id. at *9 ("In short, it is plausible that an allegedly unreasonable search was conducted as set forth in the Complaint.").

1. Plaintiffs Offer No Plausible Allegations That the High-Ranking Officials Created Unconstitutional Policies

With respect to official policy, the complaint alleges that Chertoff and Myers "conceived and announced" the "comprehensive and aggressive immigration enforcement strategy" known as the SBI, and that various ICE operations were conducted under that initiative. Cmplt. ¶ 73. According to the complaint, Torres created, and Myers and Chertoff approved, an "800 percent increase in the goal for arrests per [fugitive operations] team." Id. ¶¶ 74, 80, 84. The complaint further asserts that Torres issued, and Myers approved, guidance allowing "collateral arrests made as a part of a headquarters sponsored operation [to] count" toward the arrest goal. Id. ¶¶ 80, 84. Finally, the complaint states that Torres and Forman directed OI and DRO to "closely collaborate[ ]" on their enforcement efforts and issued memoranda "stressing the importance of using ruses in operations." Id. ¶¶ 85, 91.

First, Iqbal squarely holds that it is insufficient to allege that a high-level official was the architect (Ashcroft) or implemented facially constitutional policies (Mueller) under which constitutional violations allegedly occurred.[6] Yet plaintiffs make the same claim here, alleging that Chertoff was "the ultimate decision maker," and that he "created, approved, and implemented official policies and strategies." Cmplt. ¶ 73; see also id. ¶¶ 78-79 (Myers "supervised all aspects of ICE" and "was responsible for creating and implementing ICE's overall comprehensive immigration enforcement strategy"). But swapping "architect" for "decision maker" is not sufficient to plead around Iqbal. Either way, plaintiffs ultimately

[6] The complaint in Iqbal challenged the policy of arresting "thousands of Arab Muslim men" following the events of September 11, then detaining them in highly restrictive conditions of confinement until they were "cleared" by the FBI. Iqbal, 129 S. Ct. 1944 (quoting complaint). Plaintiff Iqbal alleged that the policy "was approved by" Ashcroft and Mueller, who allegedly "knew of, condoned, and willfully and maliciously agreed to subject" him to harsh conditions of confinement. Id. (quoting complaint).

advance a respondeat superior theory of liability; that is, because the High-Ranking Officials occupied positions of authority at the time ICE agents allegedly violated the constitution, they must have been involved in those violations. But the Supreme Court squarely rejected that theory in Iqbal, and permitting it here would be inconsistent with the Supreme Court's holding.

Second, although in some situations creating an unconstitutional policy may serve as a basis for post-Iqbal Bivens liability, see Bellamy, 2009 WL 1835939, at *6, Iqbal still requires a plaintiff to state non-conclusory facts showing that the officials at issue actually created an unconstitutional policy. See Iqbal, 129 S. Ct. at 1949 ("[t]hreadbare recitals . . . supported by mere conclusory statements" are insufficient). Plaintiffs do not meet this requirement.

The complaint identifies four policies as potential bases for liability: (i) the SBI, "a comprehensive and aggressive immigration enforcement strategy"; (ii) DRO's increase in the arrest goals for fugitive operations teams; (iii) DRO's decision to allow "collateral" arrests (i.e., of aliens other than the specific target of an operation) to count toward the increased goal; and (iv) ICE's alleged use of ruses in enforcement operations. Cmplt. ¶¶ 73-74, 79-80, 84-85, 91. But plaintiffs do not allege any facts connecting these policies to what allegedly happened at their homes, and they do not claim that the policies require, or even authorize, ICE agents to violate the Fourth Amendment rights of persons they encounter. Nor do they assert that the policies themselves are unconstitutional.[7]

[7] This is hardly surprising, for there is nothing inappropriate, let alone unconstitutional, about enforcing immigration law, increasing arrest goals, or tabulating "collateral" arrests. Likewise, although use of a ruse is a factor in determining whether valid consent was obtained, it "does not itself . . . preclude a finding that an authorized person voluntarily consented" to entry. United States v. Montes-Reyes, 547 F. Supp. 2d 281, 290 (S.D.N.Y. 2008). Thus, just as the intimidating use of a firearm might cause the factfinder to conclude that consent was involuntary, the fact that such conduct occurred, without more, would not be sufficient to impose personal liability on the official who generally authorized agents to carry firearms.

Similarly, although the complaint asserts that the High-Ranking Officials "intended to violate constitutional rights" by "implementing [these] policies," Cmplt. ¶¶ 73, 80, 84, 90, it contains no facts supporting this conclusory allegation. This is fatal, because under Iqbal, plaintiffs must do more than merely raise the possibility that defendants acted unlawfully; they must instead show plausible entitlement to relief. See Iqbal, 129 S. Ct. at 1949; see also Missel v. County of Monroe, No. 09-0235-cv, 2009 WL 3617787 (2d Cir. Nov. 4, 2009) (affirming dismissal of § 1983 claims; no factual allegations supported a plausible inference that municipality's policies or customs caused violation of plaintiff's rights, that municipality failed to train employee, or that plaintiff's injuries resulted from deliberate indifference); Cuevas v. City of New York, No. 07 Civ. 4169 (LAP), 2009 WL 4773033, at *3, 4 (S.D.N.Y. Dec. 7, 2009) (dismissing cause of action based on city's policy of "supervisory indifference"; allegations did not show "what the policy [was] or how that policy subjected Plaintiff to suffer the denial of a constitutional right"); Querry v. Smale, No. 09 CV 0215 (WQH) (POR), 2009 WL 2151896, at *4 (S.D. Cal. Jul. 15, 2009) (dismissing, under Iqbal, claims of inadequate screening and hiring because complaint did not describe how practices were deficient or caused injury).[8]

Not only have plaintiffs failed to allege that the policies were designed to violate constitutional rights, the attachments to the complaint show that these policies were part of the government's efforts, especially after the attacks of September 11, 2001, to secure the borders and reduce illegal immigration. As explained in Exhibit 1, in 1995, Attorney General Janet Reno called for the creation of "abscondee removal teams" to reduce the number of aliens subject to

[8] Likewise, to the extent plaintiffs seek to hold Forman liable for "setting policy regarding ICE agent conduct" during the September 2007 operations in Long Island, see Cmplt. ¶ 90, they may not proceed on such a claim, because they do not identify the "policy" at issue, much less assert non-conclusory allegations explaining how that policy led to unconstitutional conduct by ICE agents. See Cuevas, 2009 WL 4773033, at *4.

outstanding removal orders. See Cmplt. Ex. 1 at 4. After September 11, the INS created the National Fugitive Operations Program ("NFOP"), id., and "no immigration enforcement program has experienced a more dramatic increase in funding," id. at 1. NFOP's funding increased from $9 million in 2003 to more than $218 million in 2008. Id.

In 2005, then-Secretary Chertoff instituted the SBI, a "comprehensive multi-year plan to secure America's borders and reduce illegal migration." Id. at 6 n.16. Under the SBI, DHS planned to use congressional appropriations to, among other things, increase border security, expedite detention and removal of illegal immigrants, improve technology and infrastructure, and step up workplace enforcement. Id.

The complaint never explains or alleges facts showing how or why it is plausible that Chertoff, Myers, Torres, and Forman intended to violate constitutional rights by implementing the SBI. In fact, with respect to the NFOP's apprehension goals, it is not surprising that given the program's dramatic, 23-fold increase in funding from 2003 to 2008, ICE policymakers would, as a matter of accountability to Congress and the taxpayers, raise apprehension benchmarks. Similarly, although the complaint repeatedly references "home raids," it does not explain why the goals would require agents to conduct operations at homes as opposed to other locations, like large processing plants or day laborer sites, where agents would presumably find higher concentrations of illegal aliens. Iqbal, 129 S. Ct at 1950 ("Determining whether a complaint states a plausible claim for relief will . . . be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense."). Under Iqbal, alleging that the SBI is a "comprehensive and aggressive immigration enforcement strategy," see Cmplt. ¶¶ 73, 79, and that ICE set accountability goals for itself, is insufficient to state a claim as to the High-Ranking Officials because merely pleading facts "consistent with a defendant's liability . . .

stops short of the line between possibility and plausibility of entitlement to relief." Iqbal, 129 S. Ct. at 1949 (internal quotations and citations omitted).

Finally, these pleading deficiencies are glaring given the opportunity plaintiffs have already had to conduct discovery. Before plaintiffs filed the fourth amended complaint, defendants had produced more than 40,000 pages of documents, including all relevant policies and approximately 12,000 pages of training materials, and 31 agents had testified about ICE's policies, including its arrest goals. Had discovery revealed any documents or testimony supporting plaintiffs' claim that the High-Ranking Officials promulgated unconstitutional policies (or that they intended to violate plaintiffs' Fourth Amendment rights by implementing such policies), allegations to that effect surely would have appeared in the fourth amended complaint, especially given plaintiffs' assertion that the complaint is "comprehensive" and based on "information learned during discovery." See Sept. 9, 2009, letter, at 2. Because they do not make such allegations, plaintiffs have not "show[n] . . . entitle[ment] to relief," see Fed. R. Civ. Proc. 8(a)(2), that the High-Ranking Officials were personally involved in the Fourth Amendment violations that allegedly occurred at plaintiffs' homes.

2. Plaintiffs' Failure-to-Remedy Claim Is Insufficient

The complaint also alleges that the High-Ranking Officials failed to adequately respond to allegations concerning ICE's conduct. See, e.g., Cmplt. ¶¶ 75 (alleging that "Chertoff's response (or lack thereof) to numerous high profile newspapers articles and letters" demonstrates that he "encouraged, endorsed, and thus intended the unconstitutional conduct by ICE during home raids"); 81 (alleging that Myers "received regular briefings on newspaper articles concerning ICE's unconstitutional conduct" and therefore had a "duty to take corrective measures when faced this knowledge" but instead "actively condoned and endorsed this unconstitutional conduct"); 87 (alleging that Torres was involved in "coordinating, editing, and

ultimately approving" a response to DHS's report concerning fugitive operations teams, and by "minimiz[ing] the effects" of the report Torres "actively defended ICE's custom or policy of unconstitutional conduct"); 92 (alleging that Forman continued to authorize operations "after becoming aware of concerns about the constitutionality of ICE agents' conduct through press reports and internal investigations."). This theory must also be rejected.

First, following Iqbal, high-level officials may not be held liable based on the purported failure to remedy constitutional conduct. As one district court has explained, this theory of liability "impose[s] the exact type[ ] of supervisory liability that Iqbal eliminated—situations where the supervisor knew of and acquiesced to a constitutional violation committed by a subordinate." Bellamy, 2009 WL 1835939, at *6.

But even if this theory has survived Iqbal, plaintiffs' claims must still be dismissed because mere receipt of post-conduct complaints cannot confer liability under Bivens. Liability must be based on the defendant's own misconduct, see Iqbal, 129 S. Ct. at 1949, and the plaintiffs have not plausibly alleged that Michael Chertoff, the former head of a 200,000-person agency with a budget of over $40 billion, committed a Fourth Amendment violation by not responding (if he did not) to an attorney's letter, see Cmplt. ¶ 75(a), by sending a four-page response to Senator Dodd (Ex. 6) "without adequate investigation or basis," id. ¶ 75(b), by too quickly drafting a response—"a mere two days after receipt"—to Thomas Suozzi, id. ¶ 75(c), or for any other responses, or non-responses, to alleged complaints that Chertoff received. See, e.g., Mateo v. Fischer, No. 08 Civ. 7779 (RJH) (DCF), 2010 WL 431229, at *4 (S.D.N.Y. Feb. 8, 2010) ("Courts . . . have said that the receipt of letters or grievances, by itself, does not amount to personal involvement." (collecting cases)); Harrison v. Goord, No. 07 Civ. 1806 (HB), 2009 WL 1605770, at *9 (S.D.N.Y. June 9, 2009) (receipt of letters alleging constitutional violations

"do[es] not necessarily indicate that those defendants satisfy the personal involvement requirement," even if letters are ignored); Westbrook v. City University of New York, 591 F. Supp. 2d 207, 225 (E.D.N.Y. 2008) (same); see also Thomas v. Coombe, No. 95 Civ. 10342 (HB), 1998 WL 391143, at *6 (S.D.N.Y. Jul. 13, 1998) ("that an official ignored a letter alleging unconstitutional conduct is not enough to establish personal involvement").

Nor can plaintiffs succeed on the theory that because the High-Ranking Officials were allegedly put on notice of Fourth Amendment violations, they somehow personally participated in such violations. First, courts in this district to consider the issue have concluded that the second and fifth Colon categories—failure to remedy and deliberate indifference—have not survived Iqbal. See Bellamy, 2009 WL 4824669, at *6 (stating that only the first and third Colon categories "pass Iqbal's muster," because "[t]he other Colon categories impose the exact types of supervisory liability that Iqbal eliminated—situations where the supervisor knew of and acquiesced to a constitutional violation committed by a subordinate"). Thus, while plaintiffs may argue that the High-Ranking Officials "had a hand" in creating the policies under which the alleged violations occurred, it cannot be that the High-Ranking Officials' leadership positions within an agency that launched an immense enforcement initiative means that they are personally liable for every constitutional violation that allegedly occurred in connection with the initiative.

Second, even if a "deliberate indifference" theory were available to plaintiffs, they could not meet the standard here due to the nature and timing of the alleged complaints. According to the complaint, Chertoff did not receive the attorney's letter regarding 165 Main Street, see Cmplt. ¶ 75(a), until after four of the home operations had occurred, so there is nothing he could have done with respect to those operations. Nor is it clear why Chertoff somehow had an obligation to change official policy after receiving the letter, given that the letter alleged a

"warrantless, nonconsensual entry," id. ¶ 75(a), and the complaint nowhere alleges that such entries were required by official policy such that the High-Ranking Officials could have been expected to respond by revising that policy. Similarly, Chertoff's response to Senator Dodd also does not establish a Fourth Amendment violation, notwithstanding the complaint's allegations that he responded "without adequate investigation" and "with reckless disregard as to truth or falsity." Id. ¶ 75(b). Even if true, the facts that Secretary Chertoff sent an inadequately researched letter and that an immigration judge ruled, two years later and apparently without hearing testimony from the agents who were present, that constitutional violations occurred in New Haven, Connecticut, certainly do not establish that the High-Ranking Officials were personally involved with what happened at the eight homes at issue here.

3. Plaintiffs' Planning Theory as to Torres and Forman Must Be Dismissed

As their final theory of liability, plaintiffs allege that defendants Torres and Forman—who each were responsible for supervising thousands of employees and administering budgets in excess of $1 billion—are subject to liability because they helped implement the nationwide programs under which the plaintiffs' injuries purportedly occurred. In particular, plaintiffs assert that Torres "was the approving official" for Return to Sender and Cross Check operation plans, and that Forman oversaw training for agents who took part in the September 2007 operations. Cmplt. ¶¶ 86, 90. These allegations are insufficient to confer liability.

First, although plaintiffs claim that the plans Torres allegedly approved "detailed targets, operational planning and execution, tasks for each group or office involved, coordinating instructions, and logistics," id. ¶ 86, they never identify anything within these plans requiring or authorizing agents to enter homes without consent. Thus, although plaintiffs have certainly alleged that Torres played some role in implementing agency policy, they have not shown how he was personally involved in the alleged Fourth Amendment violations. Indeed, if approval of a

large-scale operational plan were sufficient to confer personal liability with respect to any misconduct occurring during the operation, it is difficult to understand why anyone would accept a high-level agency position. See Iqbal, 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"). And because liability would be based solely on the employee's managerial position, rather than personal involvement, it is difficult to imagine under what circumstances an approving official would not be personally liable for misconduct occurring during the operation.

Similarly, although plaintiffs allege that Forman "was in charge of overseeing training and setting policy regarding ICE agent conduct during home raids," Cmplt. ¶ 90, they never identify which aspect of ICE's training permits nonconsensual entries of homes, an omission that is glaring given that at the time plaintiffs filed the fourth amended complaint, defendants had produced approximately 12,000 pages of training materials and 31 ICE employees had testified about the training they received. Finally, although plaintiffs claim that Forman "did not address lapses in training," such "passive failure to train claims . . . have not survived [Iqbal]." Newton v. City of New York, 640 F. Supp. 2d 426, 448 (S.D.N.Y. 2009).

C. The Complaint Fails to Plead Plausible Equal Protection Violations by the High-Ranking Officials

Plaintiffs' second and third causes of action, which they purport to bring on behalf of Latinos living in the New York area, seek "injunctive and declaratory relief against Defendants to redress continuing and likely future violations of the Equal Protection Clause of the Fifth Amendment," Cmplt. ¶ 471, and "the right to be free from discriminatory application of the law and the right to equal protection under the law." Id. ¶ 485(d). Plaintiffs purport to bring these claims against all defendants—i.e., not only against the United States, DHS, and ICE, but also

against all the individual-capacity defendants, including the High-Ranking Officials. But any claims against the High-Ranking Officials for purported violations of the Equal Protection Clause should be dismissed.

As an initial matter, although this action is cast as an action for money damages against agency officials in their individual capacities, the equal protection claim is essentially a constitutional challenge to executive policy. For example, plaintiffs allege that the defendants "have . . . officially implemented, enforced, encouraged and/or sanctioned a policy, practice and/or custom of identifying and targeting locations with known concentrations of Latino residents." Id. ¶ 472.[9] Accordingly, to the extent that plaintiffs adequately state an equal protection violation at all, their claims are properly directed at DHS and ICE, not former government officials sued in their individual capacities. See, e.g., Arar v. Ashcroft, 585 F.3d 559, 574 (2d Cir. 2009) (en banc) (ostensible Bivens claim "operates as a constitutional challenge to policies promulgated by the executive.").

1. Legal Standards Pertaining to Equal Protection Claims

A plaintiff can plead a claim for discrimination in violation of the Equal Protection Clause in one of three ways. First, a plaintiff may allege that a law or policy is discriminatory because it "expressly classifies persons on the basis of race." Hayden v. County of Nassau, 180 F.3d 42, 48 (2d Cir. 1999). Second, a plaintiff can identify a "facially neutral law or policy that has been applied in an intentionally discriminatory manner." Brown v. City of Oneonta, 221

[9] Allegations throughout the complaint make it clear that plaintiffs' equal protection claim against the High-Ranking Officials is directed at ICE policy. See, e.g., Cmplt. ¶¶ 19 (Chertoff and Myers are "senior policymakers" who "support a policy of unconstitutional entries into homes"); 20 (referring to ICE's "custom or policy"); 82 ("there is no evidence of material changes since 2007 in ICE policy"); 90 (Forman "was in charge of overseeing training and setting policy regarding ICE agent conduct"); and p. 107 (heading) (referring to "ICE's pattern and practice, if not policy," of conducting home searches).

F.3d 329, 337 (2d Cir. 2000). Finally, a plaintiff may allege that a "facially neutral statute or policy has an adverse effect and that it was motivated by discriminatory animus." Id. (citations omitted); see also Hayden, 180 F.3d at 48.

The Supreme Court has instructed that "[w]here the claim is invidious discrimination . . . the plaintiff must plead and prove that the defendant acted with discriminatory purpose." Iqbal, 129 S. Ct. at 1948. Purposeful discrimination requires more than "intent as volition or intent as awareness of consequences. It instead involves a decisionmaker's undertaking a course of action because of, not merely in spite of, the action's adverse effects upon an identifiable group." Id.

Plaintiffs do not allege that any policy at issue here "expressly classifies persons on the basis of race," Hayden, 180 F.3d at 48; indeed, plaintiffs allege the opposite—that the challenged policies, on their face, were "comprehensive and aggressive immigration enforcement strateg[ies]," Cmplt. ¶ 73, 79, the purpose of which was "to arrest and remove specifically identified targets." Id. ¶ 3. Because plaintiffs concede that the policies here are facially neutral, they must show either (i) that ICE applied a facially neutral immigration enforcement strategy "in an intentionally discriminatory manner," or (ii) that ICE's method of enforcing the immigration laws "has an adverse effect" on Latinos and "was motivated by discriminatory animus." Brown, 221 F.3d at 337. And to do either, Iqbal instructs that plaintiffs must "plead sufficient factual matter to show that [the defendants] adopted and implemented" the policies at issue "not for a neutral, investigative reason but for the purpose of discriminating on account of race, religion, or natural origin." Iqbal, 129 S. Ct. at 1948-49.

2. Plaintiffs Have Not Plausibly Alleged That ICE Enforces the Immigration Laws With Intentional Discriminatory Animus

As discussed above, under Iqbal, the motion court should first disregard all "bare assertions." Id. at 1951. In Hayden v. Paterson, __ F.3d __, 2010 WL 308897 (2d Cir. Jan. 28,

2010), the Second Circuit recently considered what assertions qualify as "bare" in the equal protection context. The plaintiffs in Hayden alleged that felon disenfranchisement violated equal protection because it was intended to "deprive minorities of the right to vote," and that certain New York election laws were enacted "with the intent to disenfranchise Blacks." Hayden, 2010 WL 308897, at*4, 8. The Circuit disregarded these allegations, explaining that plaintiffs' claims that defendants intended to violate constitutional rights, without factual support, amounted "to nothing more than a formulaic recitation of the elements of a constitutional claim." Hayden, 2010 WL 308897, at 8 (citing Iqbal).

Here, plaintiffs make the same types of allegations that the Second Circuit rejected in Hayden. Plaintiffs allege, for example, that when defendants Chertoff and Myers "conceived and announced the Secure Border Initiative," they "intended to violate constitutional rights by, *inter alia*, implementing these policies." Cmplt. ¶¶ 73, 79. They further allege, "upon information and belief," that the High-Ranking Officials "condoned . . . unconstitutional conduct by dismissing the internal accusations without conducting proper investigations." Id. ¶ 12. Similarly, plaintiffs allege that Torres "intended to violate constitutional rights" when he increased the arrest goal for fugitive-operation teams, id. ¶ 84, and that Forman "intended to violate constitutional rights" while "overseeing training and setting policy regarding ICE agent conduct." Id. ¶ 90. Allegations such as these are exactly the types of "bare assertions," Iqbal, 129 S. Ct at 1951, that the Supreme Court and Second Circuit have disregarded as conclusory.

After disregarding these bare assertions, the Court must then consider whether the remaining factual allegations plausibly demonstrate the defendants' intentional discrimination. See Hayden, 2010 WL 308897, at *7 ("At the second step, a court should determine whether the well-pleaded factual allegations, assumed to be true, plausibly give rise to an entitlement to

relief.") (citing Iqbal). But the fourth amended complaint, for all its length and exhibits, is remarkably devoid of non-conclusory factual allegations with respect to plaintiffs' equal protection claim. A few factual allegations do stand out, however, as non-conclusory. Plaintiffs allege, for example, that in 2006 ICE enacted a policy under which each fugitive operations team was expected to arrest 1,000 aliens per year, which represented an 800% increase over previous years, in which the same teams were expected to make 125 arrests per year. Cmplt. ¶¶ 8, 182. Plaintiffs further allege that the 800% increase "clearly demonstrated an intent and purpose to target Latino individuals." Id. ¶ 8. But putting aside any conclusory assertion that intentional racial discrimination can be inferred merely from increased enforcement of a facially neutral policy, this allegation is not plausible under Iqbal.

As the exhibits to the complaint demonstrate, while ICE increased its fugitive-operations goals by 800%, funding for its fugitive-operations programs increased 2300% (from $9 million in 2003 to $218 million in 2008), and the personnel for the program increased 1300%. See Cmplt. Ex. 1 at 1; see also Cmplt. Ex. 16 at 6. While it may be theoretically possible that the 800% increase in teams' apprehension goals was driven by discriminatory animus towards Latinos, it is far more plausible, as evidenced by contemporaneous increased funding by Congress, that the goals arose from the agency's renewed emphasis on immigration enforcement in the years following September 11. Moreover, during the time that Torres was the Director of DRO, the apprehension goal was raised from 500 (not 125) to 1000, representing only a two-fold increase,[10] and given that teams of seven agents worked approximately 240 days per year, an annual goal of 1000 only required each member to make approximately one apprehension every other day.

[10] See http://www.dhs.gov/xlibrary/assets/Budget_PBOAppB_FY2007.pdf.

Plaintiffs also allege that "deposition testimony from a local law enforcement agency" has indicated that "ICE agents on multiple occasions used derogatory and racist terms such as 'wetback' to refer to [Latinos]," Cmplt. ¶ 12, and that "of the four bars or clubs chosen for raids on one night during the same operation, only two were known gang hangouts—the other two were mere establishments frequented by Latinos." Id. The only possible source for these allegations is the deposition testimony of Andrew Mulrain, a lieutenant with the Nassau County Police Department ("NCPD"), who testified as a 30(b)(6) witness on behalf of the NCPD.

Even assuming these allegations are true, they are insufficient to allow the equal protection claim to proceed against the High-Ranking Officials. First, the allegation that some unspecified ICE field agent used racially derogatory language during a field operation is insufficient, as a matter of law, to sustain a Bivens cause of action against high-ranking supervisors who were not present. As discussed above, there is no respondeat superior liability under Bivens, and therefore, direct, personal involvement of the High-Ranking Officials in enacting an unconstitutional policy is required. Inaction or indifference in response to a field agent's alleged use of racially abusive language is insufficient. See, e.g., Ricciuti v. N.Y.C. Transit Auth., 941 F.2d 119, 123 (2d Cir. 1991) ("a single incident alleged in a complaint, especially if it involves only actors below the policy-making level, does not suffice" to show a policy that violates equal protection); Thompson v. Upshur County, 245 F.3d 447, 459 (5th Cir.

2001) ("Proof of more than a single instance of the lack of training or supervision causing a violation of constitutional rights is normally required.").[11]

Second, the allegation that only two of the four bars visited by ICE agents were "known gang hangouts," and the other two were "were establishments frequented by Latinos," Cmplt. ¶ 12, is also legally insufficient. At most, this attempts to state a claim for selective enforcement of the immigration laws,[12] but there is "no authority clearly establishing an equal protection right to be free of selective enforcement of the immigration laws based on national origin, race, or religion." Turkmen v. Ashcroft, 589 F.3d 542, 550 (2d Cir. 2009). Therefore, even if the Court were to find that selective enforcement of the immigration laws against Latinos violates the Equal Protection Clause, the High-Ranking Officials would be entitled to qualified immunity. Id.[13]

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[11] Ricciuti and Thompson were decided in the context of claims under 42 U.S.C. § 1983, rather than Bivens, but their logic applies with equal force here. First, "federal courts have typically incorporated § 1983 law into Bivens actions." Tavarez v. Reno, 54 F.3d 109, 110 (2d Cir. 1995). Second, as the Second Circuit has explained, Bivens liability is distinct from Section 1983 liability in that it is limited to individuals. Whereas a municipality may be held liable under Section 1983, there is no Bivens liability for the federal government. See Arar, 585 F.3d at 574 ("A Bivens action is sometimes analogized to an action pursuant to 42 U.S.C. § 1983, but it does not reach so far as to create the federal counterpart to an action under [Monell v. Dep't of Social Servs., 436 U.S. 658 (1978)].").

[12] See Cmplt. ¶ 12 ("selective enforcement of the federal immigration laws" violates the Equal Protection Clause).

[13] The Second Circuit has held that a claim for selective prosecution based on racial animus may "call for some remedy," because the Supreme Court has "not ruled out the possibility of a rare case in which the alleged basis of discrimination is so outrageous." Rajah v. Mukasey, 544 F.3d 427, 438 (2d Cir. 2008). But Rajah concerned claims against government officials in their official capacities, challenging a policy that, on its face, required registration by individuals with Muslim backgrounds. The Circuit rejected that challenge, and its logic applies with even greater force to claims made against High-Ranking Officials in their individual capacities, which are subject to heightened pleading standards to overcome qualified immunity. As the Rajah court put it, no equal protection claim would lie against a program that was a "plainly rational attempt to enhance national security." Id. at 439.

Finally, the testimony of Lieutenant Mulrain, who was not present at any of the operations, has been contradicted by every testifying NCPD officer, all of whom were actually present during the operations. And, when assessing the plausibility of plaintiffs' allegations under Rule 12(b)(6), it may be appropriate for the Court to consider this subsequent deposition testimony because the complaint incorporates by reference the testimony of the NCPD, stating that the "wetback" allegation is based on "deposition testimony from a local law enforcement agency." Cmplt. ¶ 12.[14]

Lieutenant Mulrain testified that officers under his supervision told him that "terms like wetback and other derogatory terminology was being utilized" by unspecified ICE Agents, see Deposition of NCPD Lieutenant Mulrain at 90-91, but he learned this information "almost third hand," after speaking with "sergeants who were there . . . out in the field," id. at 92. No first-hand witness testimony corroborates this hearsay report, and numerous eyewitnesses specifically contradicted it. See, e.g., Deposition of NCPD Detective Stewart Cabanillas at 143:3-25 (ICE agents did not use "inappropriate language"; Cabanillas did not hear term "wetback" or any "derogatory terminology"); see also Deposition of Port Washington Detective Raymond Ryan (taken November 24, 2009) 139:13-20 (Q: Did you hear the term "wetback" being used on either September 24, 2007 or September 26, 2007? A. No, absolutely not. Q. Did you hear any derogatory terms towards Latinos being used on September 24, 2007 or September 26, 2007? A.

[14] When a plaintiff relies on discovery to amend the complaint to add new allegations, district courts are permitted to consider the contents of materials incorporated into the complaint, including deposition testimony. See, e.g., Island Lathing & Plastering v. Travelers Indem. Co., 161 F. Supp. 2d 278, 283 (S.D.N.Y. 2001) ("When a party seeks to introduce affidavits, depositions, or other extraneous documents not set forth in the complaint for a court to consider on a Rule 12(b)(6) motion, the court may do so if there was "undisputed notice" of their contents and they were 'integral to the plaintiff's claim.'") (citation omitted); cf. Rothman v. Gregor, 220 F.3d 81, 88 (2d Cir. 2000) (explaining that on 12(b)(6) motion courts may consider "any statements or documents" incorporated by reference in complaint).

No.); Deposition of NCPD Detective Richard Ierardi (taken November 10, 2009) 252:5-21 (Q. On September 24, 2007 do you remember any of the ICE agents using derogatory language? A. No. Q. Do you remember any ICE agent referring to Latinos as wetbacks? A. No. Q. Is that something you think you'd remember? A. Yes. My partner's Latino.).[15]

Given that Mulrain's admittedly hearsay testimony has been contradicted by a number of NCPD first-hand witnesses who testified after he did (including several who testified before plaintiffs added this allegation on December 21, 2009), it is unclear whether the "wetback" allegation could ever satisfy Rule 12(b)(6), even if it were not legally irrelevant to claims against the High-Ranking Officials. Similarly, although not a necessary predicate of this motion, subsequent NCPD testimony has also undercut plaintiffs' assertion that only two of the four bars visited during the September operation were known gang establishments; NCPD officers who assisted ICE have testified that all of the establishments were known gang locations, and that violent crime was common at all four locations.

D. The Complaint Fails to State a Claim for Injunctive Relief Against the High-Ranking Officials

Plaintiffs seek injunctive relief against the High-Ranking Officials (along with all other defendants), but that claim fails because (1) plaintiffs lack standing to seek their requested injunctive relief at all; and (2) that failure is especially stark as against the High-Ranking Officials, none of whom occupy the positions they did when this litigation was initiated.

First, as defendants will argue when they renew their motion to dismiss plaintiffs' injunction claim for lack of standing, under the Supreme Court's decision in City of Los Angeles v. Lyons, 461 U.S. 95 (1983), plaintiffs are not entitled to prospective injunctive relief. In

[15] Copies of the relevant pages from each deposition are annexed to the Declaration of David Bober, dated March 11, 2010, which is being filed concurrently with this memorandum.

Lyons, the Supreme Court stated that "[a]bstract injury is not enough" to obtain injunctive relief, and that even where a constitutional violation has occurred in the past, for a plaintiff to have standing, the threat of a recurrence must be "real and immediate," not "conjectural or hypothetical." Id. at 101-02 (citations and internal quotations marks omitted). A plaintiff's fear that unconstitutional conduct will be repeated is on its own insufficient to establish the requisite likelihood of future injury. In applying Lyons, the Second Circuit has recognized that to establish standing to enjoin law enforcement practices, a plaintiff "must demonstrate *both* a likelihood of future harm *and* the existence of an official policy or its equivalent." Shain v. Ellison, 356 F.3d 211, 216 (2d Cir. 2004) (emphasis in original).

Here, plaintiffs make no allegation that ICE agents have returned to any of their homes in the more than three years (in the case of two complaint locations) since the operations detailed in the complaint. Cf. Lyons, 461 U.S. at 108 (because five months had passed, rejecting the notion that the "odds" that Lyons would be subjected to another chokehold "are sufficient to make out a federal case for equitable relief"). Nor have plaintiffs made any factual allegations suggesting that agents are likely to return. Thus, plaintiffs' alleged fear of a future unconstitutional encounter is no less speculative than the plaintiff's claim in Lyons, and plaintiffs cannot meet the irreparable-injury requirement. See 461 U.S. at 111 (the irreparable-injury requirement "cannot be met where there is no showing of any real or immediate threat that the plaintiff will be wronged again"); see also JSG Trading Corp. v. Tray-Wrap, Inc., 917 F.2d 75, 79 (2d Cir. 1990) (plaintiff "must show that it is likely to suffer irreparable harm if equitable relief is denied," not merely that such harm is a "possibility").

Nor have plaintiffs identified, after expansive discovery, any official policy, or its equivalent, requiring or authorizing agents to violate constitutional rights, see Shain, 356 F.3d at

216, and the conclusory allegation that the High-Ranking Officials authorized and enforced a "policy, practice and/or custom" of allowing agents to enter homes without consent, see Cmplt. ¶¶ 44, 456, 472, is the kind of "incredible assertion" that the Supreme Court rejected in Lyons. See Lyons, 461 U.S. at 106 (it would be an "incredible assertion" for plaintiff to allege that Los Angeles "ordered or authorized" police officers to apply a chokehold to every person they encounter). Thus, the complaint contains no factual allegations that would render plaintiffs' claimed fear of future violations plausible, and plaintiffs are no more entitled to an injunction than any other resident of the New York metropolitan area. See id. at 111 ("Lyons is no more entitled to an injunction than any other citizen of Los Angeles").

Second, plaintiffs are unable to demonstrate that the High-Ranking Officials will irreparably harm them in the future because they no longer hold the positions they did in 2007; thus, plaintiffs' claim against the High-Ranking Officials is not redressable via a favorable decision with respect to their injunction claim. See, e.g., Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992) (stating that one of three "irreducible constitutional" elements of standing is that it must be likely, not merely speculative, that the injury will be redressed by a favorable decision) (citations and quotations marks omitted).

Chertoff and Myers no longer hold government positions, so it is difficult to understand how any injunction against them, relating to the conduct of DHS and/or ICE, would redress the violations plaintiffs claim to have suffered in 2007. With respect to Torres and Forman, because they no longer hold policymaking positions and they have no supervisory control over ICE operations in the New York metropolitan area,[16] it is similarly difficult to see how an injunction

[16] Torres is now the Special Agent in Charge of the ICE Washington, D.C., Field Office. Forman is now Director of ICE's National Intellectual Property Rights Coordination Center.

issued against them, in their personal capacities, would have any bearing on ICE's enforcement activities in this area.[17] In fact, because of their current positions, it would be impossible for the High-Ranking Officials to implement any of the forms of injunctive relief requested in the complaint. See Cmplt., Prayer for Relief, ¶¶ 2-3.

Finally, as the Second Circuit has recently stated in Arar v. Ashcroft, 585 F.3d 559 (2d Cir. 2009) (en banc), courts should be skeptical of claims against individuals that, as a practical matter, are challenges to executive policy. In Arar, the plaintiff alleged that after being detained at Kennedy Airport, he was removed to Syria and then tortured pursuant to an alleged inter-governmental agreement. Id. at 563. In concluding that Bivens relief was not available with respect to Arar's extraordinary-rendition claim, the Court reiterated that the "purpose of the Bivens remedy 'is to deter individual federal officers from committing constitutional violations,'" id. at 571 (quoting Corr. Servs. Corp. v. Malesko, 534 U.S. 61, 70 (2001)), so that Bivens actions are "brought against individuals, and any damages are payable by the offending officers," id. (citing Carlson v. Green, 446 U.S. 14, 21 (1980)).

But when high-level officials are sued under Bivens, the action, though cast in terms of money damages, actually "operates as a constitutional challenge to policies promulgated by the executive." Id. at 574. Arar's complaint explicitly targeted the alleged "policy" of extraordinary rendition, and the Court concluded that the claim could not proceed without "inquiry into the perceived need for the policy, the threats to which it responds, the substance and sources of the

[17] See Cmplt. ¶¶ 72 (Chertoff "was" the Secretary of the Department of Homeland Security); 78 (Myers "was" the Assistant Secretary of ICE), 83 (Torres "was" the director of DRO); 89 (Forman "was" the director of OI). The Court is permitted to take judicial notice that Chertoff, Myers, Torres, and Forman no longer hold the positions that they held at the time of the events described in the complaint. See, e.g., Moore v. City of New York, No. 08 Civ. 8879, 2010 WL 742981, at *3 (S.D.N.Y. Mar. 2, 2010) (explaining that Court is permitted, "for Rule 12(b)(6) purposes," to consider "matters of which judicial notice may be taken").

intelligence used to formulate it, and the propriety of adopting specific responses to particular threats in light of apparent geopolitical circumstances and our relations with foreign countries." Id. at 575. The claim, therefore, "would enmesh the courts ineluctably in an assessment of the validity and rationale of that policy and its implementation in this particular case, matters that directly affect significant diplomatic and national security concerns." Id. Thus, although "[o]ur federal system of checks and balances provides means to consider allegedly unconstitutional executive policy, . . . a private action for money damages against individual policymakers is not one of them." Id. at 574.

So too here. Although plaintiffs have named Chertoff, Myers, Torres, and Forman as Bivens defendants (against whom they also seek injunctive relief), they repeatedly emphasize that they are challenging ICE's current policies as implemented and enforced by ICE, the federal agency. Thus, while acknowledging that John Morton, an official-capacity defendant, was not the Assistant Secretary of ICE during the time of the incidents, plaintiffs state that "operations such as Return to Sender are ongoing." Cmplt. ¶ 82; see also id. ¶¶ 88, 93 (same allegations with respect to other new high-level officials). Similarly, the complaint concedes that Janet Napolitano replaced Chertoff as Secretary of DHS on January 21, 2009, but alleges that "[s]ince Defendant Napolitano became Secretary of DHS, arrests and deportations have doubled when compared with the same period two years ago." Id. ¶ 77. "Thus, Defendant Napolitano is not only continuing the policies that fostered the unconstitutional practices that are the subject of this complaint, but is multiplying their negative effects." Id.

As Arar recognized in a pure Bivens context, plaintiffs' allegations against the High-Ranking Officials amount to challenges to ICE's priorities, the allocation of its resources, and other policy matters that should be pursued through the political branches, not via injunctive

relief in federal court. And to the extent injunctive relief is available to plaintiffs, it is only ICE or official-capacity defendants—not former employees sued in their individual capacities—that could implement the requirements of a federal court injunction.

CONCLUSION

For the foregoing reasons, the Court should dismiss all claims against the High-Ranking Officials, resulting in their dismissal from this action.

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