UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

IBRAHIM TURKMEN, et al.,	:	
	:	
Plaintiffs,	:	
	:	02-CV-2307 (JG)(SMG)
v.	:	
	:	
JOHN ASHCROFT, Attorney General of the United States, et al.,	:	**Filed Electronically**
	:	
Defendants.	:	

DEFENDANT JAMES SHERMAN'S REPLY BRIEF IN SUPPORT OF HIS MOTION TO DISMISS

Defendant James Sherman hereby submits this Reply Brief in support of his Motion to Dismiss all claims in the Plaintiff's Fourth Amended Complaint.

I. ARGUMENT

In their opposition to Sherman's motion to dismiss ("Opposition"), Plaintiffs assert several arguments: 1) the five Colon factors remain in effect after Iqbal and Plaintiffs have alleged sufficient personal involvement to assert Biven claims against Sherman; 2) Sherman is not entitled to qualified immunity on the basis of following facially-valid orders because his actions were not objectionably reasonable and because the Plaintiffs have alleged violations of clearly-established constitutional rights; and 3) Plaintiffs have properly pled a conspiracy among the defendants. As explained below, Plaintiffs' arguments lack the factual and legal support necessary for their Fourth Amendment Complaint ("Complaint") to survive a motion to dismiss. For these reasons, Sherman requests this Court to dismiss all claims against him by Plaintiffs in their Complaint.

A. Plaintiffs' Claims Should Be Dismissed Because They Fail to Meet the Iqbal Standard For Pleading Bivens Claims.

As more detailed in Sherman's Memorandum of Law in support of his Motion to Dismiss ("Memorandum"), in order to assert a Bivens claim against a government official, a plaintiff must establish that the officials were personally involved in the challenged conduct. The doctrine of respondeat superior does not apply to government officials; each government official, regardless of position or title, "is only liable for his or her own misconduct." Ashcroft v. Iqbal, 129 S.Ct. 1937, 1949 (2009); see also Back v. Hasting on Hudson Free School Dist., 365 F.3d 107, 127 (2nd Cir. 2004); Ford v. Moore, 237 F.3d 156, 162-63 (2nd Cir. 2001); Richardson v. Goord, 347 F.3d 431, 435 (2nd Cir. 2003) ("'linkage in the prison chain of command' is insufficient" for a Bivens claim); Poe v. Leonard, 282 F.3d 123, 140 (2nd Cir. 2002). Mere knowledge of discriminatory actions by subordinates does not impose constitutional liability upon the supervisor. Iqbal, 129 S.Ct. at 1949.

In their Opposition, Plaintiffs contend that the Supreme Court's decision in Iqbal only addressed pleading standards for constitutional claims where intent is a necessary element and thus the pleading standard for Bivens claims changed little in the aftermath of the Supreme Court's decision in Iqbal. Opp. at pp. 16-19. Plaintiffs claim that all that can be drawn from Iqbal is that a supervisor is liable for his or her own "deliberate indifference, and not of subordinates." Opp. at p. 18. Sherman asserts that this is an incorrect reading of Iqbal and ignores the context of the Iqbal decision. The Iqbal Court discussed the necessary pleading of a

constitutional claim with an intent element because that was the claim at issue before it. A review of the decision reflects no direction by the Court to lower courts that they should limit this new pleading standard only to constitutional claims requiring intent. Rather, the decision is more appropriately interpreted as a new pleading standard for all Bivens claims, those with or without an intent element. As such, its "active" conduct standard, Iqbal, 129 S.Ct. at 1949, applies to Plaintiffs' claims and under this standard, for the reasons detailed in Sherman's Memorandum and as further explained below, Plaintiffs have failed to sufficiently plea Bivens claims against Sherman.

In Colon v. Coughlin, 58 F.3d 865, 873 (2nd Cir. 1995), the Second Circuit determined there were five methods by which a party could show the necessary personal involvement of a supervisory government official in order to support a constitutional claim against that official. Under the Iqbal standard, much of these methods appear to no longer apply.[1] See Bellamy v. Mount Vernon Hospital, 2009 WL 1835939, at *5 (S.D.N.Y. June 26, 2009) aff'd without opinion 2010 WL 2838534 (2nd Cir. July 21, 2010). While it is true, as pointed out by Plaintiffs, that the Second Circuit has not passed on the impact of Iqbal on Colon, several district courts have decided that only Colon factors (1) and part of (3) passed the "active conduct" standard enunciated in Iqbal. See Bellezza v. Holland, 2010 WL 3000184 (S.D.N.Y. July 30, 2010);

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1 The five factors are (1) participated directly in the alleged constitutional violation; (2) failed to remedy the violation after being informed of the violation through a report or appeal; (3) created or allows the constitution of a policy or custom under which unconstitutional practices occurred; (4) acted with gross negligence in supervising subordinates who commit the wrongful acts; or (5) exhibited deliberate indifference to the rights of inmates by failing to act on information indicating that unconstitutional acts were occurring. Colon v.

Rivera v. Metropolitan Transit Authority, 2010 WL 4545579 (Nov. 11, 2010); Kleehammer v. Monroe County, 2010 WL 4053943 (Sept. 8, 2010). District Judge Scheindlin, who issued the decision in Bellamy, recently issued a decision in Kleehammer again addressing this point. The district court analyzed the Iqbal pleading requirements and found that "a plaintiff must plead that each Government-official defendant, through the official's *own individual actions*, has violated the Constitution." Kleehammer, 2010 WL 4053943, at *6. The district court then concluded that only two Colon categories survive after Iqbal, factor (1) and part of factor (3),[2] and that the "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." Id. Contrary to Plaintiffs' assertions in their Opposition, the allegations against Sherman do not meet the Iqbal standard because here the Complaint does not allege "active conduct" by Sherman that violated the Constitution. See Memorandum, pp. 5-9; Complaint, ¶¶ 69, 73-76, 79, 97, 126, 129-130, 132.

Moreover, even if all five Colon factors still apply, as argued by Plaintiffs, the few paragraphs within the 306-paragraphed Complaint that assert allegations against Sherman (one of which he is merely identified as a party, Complaint, ¶ 26), that are not sufficient under any of the other factors to demonstrate the necessary personal involvement to support Bivens claims

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Coughlin, 58 F.3d 865, 873 (2nd Cir. 1995) (citations omitted).

2 The part of Factor 3 that the district court found survives is "if that supervisor creates a policy or custom under which unconstitutional practices occurred." Id. (Emphasis added.)

against Sherman under the Iqbal pleading standard. See Memorandum, pp. 5-9.[3]

For these reasons and those stated in his Memorandum, Plaintiffs claims against Sherman should be dismissed.

B. Sherman is Entitled to Qualified Immunity Because He Reasonably Followed Facially-Valid Orders.

As more detailed in Sherman's Memorandum, a court does not make a generalized, "abstract legal" inquiry into whether the plaintiff has any constitutional rights, Gittens v. LeFevre, 891 F.2d 38, 42 (2nd Cir. 1989), but instead asks the "more particularized" question of whether, under the particular circumstances of the case, a defendant could have reasonably believed that his acts were lawful. Saucier v. Katz, 533 U.S. 194, 202 (2001). A subordinate official is not liable for constitutional violations that occur while following his superior's orders, unless the order was "facially invalid." Varrone v. Bilotti, 123 F.3d 75, 81-82 (2nd Cir. 1997); see also Anthony v. City of New York, 339 F.3d 129, 138 (2nd Cir. 2003); Lauro v. Charles, 219 F.3d 202, 216 n.10 (2nd Cir. 2000); Washington Square Post No. 1212 Am. Legion v. Maduro, 907 F.2d 1288, 1293 (2nd Cir. 1990); cf. Diamondstone v. Macaluso, 148 F.3d 113, 126 (2nd Cir. 1998) (same). For the subordinate official, the test becomes whether "it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." Saucier, 533 U.S. at 202. Where a subordinate official acts pursuant to or executes orders that he reasonably

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3 For example, under Plaintiffs' interpretation of Iqbal, Count II - their Equal Protection claim - does not plead the requisite facts to survive a motion to dismiss. Nowhere in the allegations concerning alleged equal protection violations by the MDC Defendants do Plaintiffs allege that Sherman or Hasty had the necessary discriminatory animus to support an Equal Protection claim. Complaint, ¶¶ 61-78. In contrast, Plaintiffs allege multiple allegations of

believes in good faith is valid, his actions are "objectively reasonable," and the doctrine of qualified immunity shields him from claims for damages. Anthony, 339 F.3d at 138.

1. The OIG Report Attached To The Complaint Makes Clear That Plaintiffs' Allegations Against Sherman Are Not Plausible.

In their Opposition, Plaintiffs assert that Sherman was involved in establishing policy, and not just implementing orders, and therefore qualified immunity does not apply. Opp. at pp. 45-48. Plaintiffs rely on the OIG Report to support this claim, asserting that the lack of mention in the OIG Reports of Sherman's involvement in the decision-making does not merit the conclusion that he was not involved in determining the manner by which to contain the Plaintiffs at the MDC. Opp. at p. 47. A review of the OIG Report, however, establishes that, as Sherman asserted in his Memorandum, he was not involved in the creation of containment policies, but merely followed orders from high-level Bureau of Prison (BOP) officials.

The OIG investigation "focused on the treatment of aliens who were held on federal immigration charges in connection with the September 11 investigation." OIG Report at p. 4. The OIG Report issued findings on the policies that Plaintiffs have alleged were initiated or created by Sherman, and it is clear that Plaintiffs allegations against Sherman are not plausible because he had no role in their creation.[4] For example, the OIG Report stated that on September

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discriminatory animus by the Washington, D.C. Defendants at the time they created the policies that led to Plaintiffs' detention and conditions of confinement. See Complaint, ¶¶ 39-60.

4 Among the officials interviewed were the Attorney General, the Deputy Attorney General (DAG), the Associate Deputy Attorney General responsible for immigration issues, and various officials in their offices; the Assistant Attorney General for the Criminal Division and attorneys from the Criminal Division involved in the September 11 investigation; the INS Commissioner; the INS Executive Associate Commissioner for Field Operations, the INS

12, 2001, Northeast Region Director David Rardin "directed wardens in his region [which included the MDC] not to release inmates classified by the BOP as 'terrorist related' from restrictive detention in SHUs 'until further notice.'" OIG Report at p. 113. The OIG Report also concluded that "Cooksey's [the BOP's Assistant Director for Correctional Programs] October 1 memorandum directed all BOP staff, including staff at the MDC, to continue holding September 11 detainees in the most restrictive conditions of confinement possible until the detainees could be 'reviewed on a case-by-case basis *by the FBI* and cleared of any involvement or knowledge of on-going terrorist activities.'" OIG Report at p. 116. The OIG Report additionally found that "Rardin also ordered a communications blackout for September 11 detainees during a telephone conference call with all Northeast Region Wardens on September 17, 2001." OIG Report at p. 113.

Thus, the OIG Report contains specific facts relating to the personal involvement of federal officials and agencies involved in the formulation of the policies at issues and reflect the reality, despite Plaintiffs' futile attempt to claim the contrary, that Sherman had no involvement in the creation of those policies, but instead followed the orders of the high-level BOP officials identified in the OIG Report. It is therefore disingenuous for Plaintiffs to claim silence in the

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General Counsel, and a variety of other INS attorneys and staff; the FBI Director, the former Deputy Director, General Counsel, and other FBI officials; the BOP Director, the BOP's Assistant Director for Correctional Programs, and other BOP attorneys and staff; and officials in the Department's Executive Office for Immigration Review (EOIR). The OIG interviewed the wardens, supervisors, correctional officers, medical staff, and other employees who had contact with or oversight of September 11 detainees. The OIG also interviewed managers and employees in the FBI's New York Field Office and Newark Field Office, the INS's New York and Newark District Offices, and the U.S. Attorney's Office for the Southern District of New York." OIG Report at p. 7.

OIG Report as to Sherman's role in setting policy does not contradict their express allegations. Opp. at 47. In light of the OIG Report, those allegations against Sherman simply are not plausible.

In addition, a review of the OIG Report's findings, contrasted with a review of the identities of the federal officials sued by Plaintiffs in this action, reflect why the individual defendants here have put forth defenses that in a superficial review appear inconsistent with each other. Opp. at p. 45. The individuals who Plaintiffs sued in this action consist primarily of two distinct groups, high political appointees or non-BOP federal officials in Washington, DC, referred to by Plaintiffs as the "Washington D.C. Defendants," and BOP officials who worked at the MDC, the "MDC Defendants." Plaintiffs do not allege facts that reflect any specific interactions between the two sets of defendants relating to the confinement of the Plaintiffs. That likely is due to Plaintiffs inexplicable decision not to sue the senior BOP officials named in the OIG Report who received the orders from the Washington, D.C. Defendants regarding the confinement of the Plaintiffs and who initiated policies and directed the MDC Defendants to confine the Plaintiffs per these policies.[5] It is implausible to assume, as Plaintiffs ask this court to do, that Sherman and his director supervisor, Hasty, acted on their own to initiate the manner and means by which to confine and to classify Plaintiffs. The Complaint's deliberate omission of key, high level BOP officials defendants, therefore causes an inherent disconnect (and the seemingly contradictory defenses) between the policy actions of the Washington, D.C.

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5 Unlike the plaintiffs in the parallel Elmaghraby/Iqbal case, 1:04-cv-01809-JG-SMG, the Plaintiffs did not sue top BOP officials who are described in the OIG Report as having interactions with both Washington, D.C. Defendants and the MDC Defendants on these issues.

Defendants and what Sherman and his other MDC Defendants were ordered to do by their high level BOP superiors regarding the confinement of Plaintiffs.

2. Sherman Acted Reasonably When Following His Superiors' Facially-Valid Orders

Plaintiffs also allege that Sherman could not have acted reasonably even if he had been ordered to enforce these policies because the Defendants' rights were clearly-established and that he knew the FBI lacked information linking Plaintiffs to terrorism. Opp. at pp. 48-52. For reasons explained below, Plaintiffs' arguments have no factual or legal basis and Sherman's motion to dismiss should be granted because of qualified immunity.

Qualified immunity protects government officials unless their actions violate "clearly established statutory or constitutional rights of which a reasonable person would have known." Behrens v. Pelletier, 516 U.S. 299, 305 (1996); Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). Plaintiffs assert in their Opposition that Sherman acted unreasonably when he followed his superiors' orders. Opp. at pp. 48-52. In support of their assertion, Plaintiffs allege that Sherman should have known he was violating the Plaintiffs' constitutional rights, and therefore acted unreasonably, when the individuals were placed in the SHU and the containment did not comport with internal rules.

i. Sherman Is Entitled to Qualified Immunity for the Conditions of Confinement Claims

Contrary to Plaintiffs' implication, assigning an individual to a SHU is not a constitutional violation. Indeed, the Second Circuit in Redd v. Wright, ___ F.3d ___, 2010 WL 774304 (2nd Cir. March 9, 2010), held that a highly-restrictive containment policy by which the

prisoner was contained for over one year, longer than what the policy had called for, because of possible health concerns did not violate any clearly-established law and thus the qualified immunity applied. Redd, 2010 WL 774304, at *4. Likewise, Sherman had no reason to believe that placing the Plaintiffs, who admit in their complaint that they had violated federal immigration law at the time of their detention, into the facility's SHU violated any clearly established constitutional right or was otherwise unlawful.

Plaintiffs also contend that because the confinement of these individuals did not comport with MDC's internal policies put Sherman on notice that the Plaintiffs' constitutional rights were being violated. This argument holds little weight and should be disregarded in light of the special circumstances surrounding the September 11 attacks and subsequent investigation, as detailed in the OIG Report, that gave rise to Plaintiffs' detention.

Plaintiffs also assert that Sherman acted unreasonably when following his superiors' orders because, they allege, he knew that the FBI did not have information linking Plaintiffs to terrorism. Opp. at p. 50. Presumably, Plaintiffs would expect Sherman to have overruled the FBI or otherwise have questioned the FBI as to the bases for its decisions to contain Plaintiffs. Plaintiffs therefore are demanding the creation of a standard whereby a BOP official would be required to question the FBI on whether it had sufficient information to order BOP to hold an individual in order to avoid Bivens liability arising from the FBI's order to contain that individual. This unique reading of the duties and responsibilities of a BOP official is unreasonable. It would force officials in government agencies to question other government agencies' officials on matters not in their purview. It is simply implausible and irrational for

Plaintiffs to require Sherman or any other BOP official to question the FBI and to demand more information before confining an individual per FBI's order.

Also, as the OIG Report makes clear, in the aftermath of September 11, the FBI was tasked the responsibility to determine whether these Plaintiffs should be contained, further supporting the absurdity of Plaintiffs' claim that Sherman had a heightened duty to Plaintiffs beyond his duties as a prison official to assess the validity of the FBI's decision to detain the Plaintiffs and to do so in a SHU. In addition, while Plaintiffs can view the actions of the FBI with hindsight and after the OIG investigated the events, the OIG Report makes clear that Plaintiffs' allegations regarding Shermans' alleged knowledge of the paucity of the FBI's information are not plausible. See OIG Report at p. 19. (the FBI provided "so little information about the detainees" to Sherman' superiors at BOP). Thus, the record, as framed by the Plaintiffs' use of the OIG Report, affirmatively establishes that Sherman also could not reasonably have known that the FBI's determination of the detainees' status was unfounded, if indeed that was the case.

Ultimately, this Court must decide if Sherman should have known that the policies put in place at the time, based on the circumstances reasonably known to Sherman, were facially invalid. To be legally valid, Plaintiffs' procedural protections need only be reasonable in light of the particular circumstances. See Magluta v. Samples, 375 F.3d 1269, 1279 n.7 (11th Cir. 2004) (rejecting the proposition that all of the procedures mandated by the BOP regulations were constitutionally required). Here, Plaintiffs' detention and conditions of confinement in the ADMAX SHU was based on an assessment made by the FBI – who, due to the unique

circumstances that existed in the wake of the September 11 attacks, was the appropriate agency to make this determination, and not the BOP.

Even if Plaintiffs could show that the policy violated their constitutional rights, which they cannot, the critical issue *here* is whether it was reasonable for Sherman to accept the policy dictated at that time – given the circumstances reasonably known to him – as facially valid. Viewed in this light, it cannot be said that Sherman' actions in direct reliance on his superiors' facially valid directives was unreasonable.

ii. Sherman Also is Entitled to Qualified Immunity for Claims Three - Six.

As for Plaintiffs' other claims arising from policies that they allege created a temporary communications blackout, a temporary interference with counsel, unreasonable strip searches and the infringement on their religious practices, those also must be dismissed because Sherman acted reasonably on those issues as well.

As detailed in Sherman's Memorandum, Sherman does not concede that Plaintiffs have alleged facts demonstrating a violation of clearly established constitutional rights relating to these policies. Memorandum, pp. 15-18. In Plaintiffs' Opposition, Plaintiffs rely on their constitutional right to free speech to support their communications blackout claim, but do not point to any clearly-established law that a temporary blackout, lasting approximately one month, and restricted access to visitors and to communications by telephone in the period thereafter violates any clearly-established law. As made clear in Redd, supra., the application of restrictive, high-security detention policies is not a per se constitutional violation. Plaintiffs also rely on Benjamin v. Fraser, 264 F.3d 175 (2nd Cir. 2001), to support their contention that their

right to counsel was clearly established. Opp. at pp. 71-72. Benjamin was decided on September 5, 2001, and to the extent it supports Plaintiffs' assertion, in light of the fact that the terrorist attacks occurred just 6 days later, it would be unreasonable to expect Sherman to be aware of this recent decision and conclude from that decision that the temporary impediment to counsel violated clearly-established law.

Finally, in their Opposition, Plaintiffs contend that their allegations regarding the strip searches show that Sherman should have known that the strip search policy violated clearly-established law because they were degrading and "unrelating to legitimate governmental purposes, . . ." Opp. at pp. 73-74. In so making this assertion, Plaintiffs fail to adequately not address the argument raised in Sherman's Memorandum, pp. 17-18, that this claim against Sherman must because dismissed under Iqbal because Plaintiffs did not allege any facts that reflect any involvement by Sherman in the strip-searches or that he created, approved or implemented policies and procedures relating to those strip-searches. Complaint, ¶¶ 111-118.

Even if Plaintiffs had alleged facts reflecting Sherman's personal involvement in the strip searches, the OIG Report renders Plaintiffs' characterization of the strip searches implausible. As has been explained in Section B.2, BOP officials ordered repeated strip searches of individuals believed to be potentially dangerous individuals. There is clearly a legitimate governmental interest in ensuring that persons viewed as possibly highly-dangerous individuals were not concealing any contraband or weapons that could be used against federal officials or fellow inmates.

Thus, looking at the terrorist events that gave rise to the detention and confinement of

Plaintiffs, it is not unreasonable for Sherman to believe that the directive to confine the Plaintiffs in this manner was lawful in light of the unparalleled security concerns created by the MDC's housing of potentially dangerous individuals who were believed to have ties to the September 11 terrorist attacks. Again, regardless of whether Plaintiffs are correct that this policy ultimately resulted in a violation of constitutional rights, the only issue to consider is the information reasonably available to Sherman at that time in determining whether his actions were reasonable. *See, e.g., Anthony*, 339 F.3d at 138 (finding that qualified immunity should only be denied if "no officer of reasonable competence could have made the same choice in similar circumstances"). Under the then-present unique circumstances created by the terrorist attacks, these orders were not facially invalid. Thus, it cannot be said that "no officer of reasonable competence could have made the same choice in similar circumstances," and, therefore, Sherman is entitled to qualified immunity on Counts One-Six. *Anthony*, 339 F.3d at 138 (citations omitted).

j. **Plaintiffs' Section 1985 Claim, Conspiracy to Violate Plaintiffs' Civil Rights (Count VII), Should Be Dismissed.**

As explained in more detail in Sherman's Memorandum, Plaintiff's final claim, a statutory claim that the defendants entered into a "conspiracy" with each other to implement a policy and practice to violate Plaintiffs' civil rights, should be dismissed because it fails to establish the necessary elements of the claim. See Complaint ¶¶ 303-306. In their Opposition, Plaintiffs attempt to side-step this fatal defect by asserting allegations not in the Complaint. This Court should conclude that Plaintiffs' argument has no merit and dismiss this claim against Sherman.

In Sherman's Memorandum and in other defendants' memorandums to support their motions to dismiss, it was pointed out to this Court that Plaintiffs have failed to allege the necessary elements of a Section 1985(3) conspiracy because Plaintiffs did not allege plausible facts reflecting a meeting of the minds to enter into an agreement to conspire to deprive Plaintiffs' their civil rights, much less facts demonstrating that Sherman and the others acted with discriminatory animus. In their Opposition, in an apparent acknowledgement of the implausibility of claiming that Sherman and other MDC officials entered into a conspiracy with the U.S. Attorney General and other high-level political appointees and other federal officials located in Washington, D.C., Plaintiffs assert for the first time that there were two conspiracies, one amongst the Washington, D.C. Defendants and the other amongst the MDC Defendants. Opp. at pp. 74-77. That is not, however, what they allege in the Complaint. The Complaint allegations state that all the defendants conspired together in order to deprive Plaintiffs of the equal protection of the law and of equal privileges and immunities of the laws, in other words, there was one alleged conspiracy. Complaint, ¶ 305. Plaintiffs cannot now change the allegations in an attempt to avoid dismissal.

k. Plaintiffs' Claims Should Further Be Dismissed for the Reasons Set Forth in Other Defendants' Briefs.

Sherman's arguments are not intended to be read as inconsistent with the arguments raised in co-defendants' briefs. Moreover, Sherman incorporates and adopts herein the arguments that form the bases of his co-defendants' motions to dismiss.

CONCLUSION

For these reasons and those articulated in Sherman's Memorandum in Support of His Motion to Dismiss, Sherman respectfully requests this Court to grant his motion and dismiss with prejudice all claims against him in the Complaint.

Dated: Washington, D.C.
January 12, 2011

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on January 12, 2011, I caused a true copy of DEFENDANT JAMES SHERMAN'S REPLY BRIEF IN SUPPORT OF HIS MOTION TO DISMISS to be served via ECF to the following parties of record:

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