SHAW, BRANSFORD, VEILLEUX & ROTH
ATTORNEYS AT LAW
PROFESSIONAL CORPORATION
1100 CONNECTICUT AVENUE, N.W. SUITE 900
WASHINGTON, D.C. 20036
(202) 463-8400

FAX:
(202) 833-8082

WEB:
www.shawbransford.com

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By Federal Express

Catherine O'Hagan Wolfe
Clerk of Court
United States Court of Appeals for the Second Circuit
500 Pearl Street
New York, NY 10007

Re: *Maher Arar v. John Ashcroft, et al.*, No. 06-4216-cv
Supplemental Letter Brief

Dear Ms. Wolfe,

We represent Defendant-Appellee Edward J. McElroy, former INS New York District Director, in the above-captioned appeal. We submit this supplemental letter brief pursuant to this Court's August 12, 2008 Order granting rehearing en banc. We also rely on our February 22, 2007 Brief for Defendant-Appellee Edward J. McElroy and our November 2, 2007 Letter Brief addressing the impact of *Iqbal v. Hasty*, as requested by this Court's October 17, 2007 Order. In this letter brief we address: (1) Arar's incorporation of materials outside of the complaint; (2) the failure to sufficiently allege Mr. McElroy's personal involvement; (3) Arar's waived argument that his domestic detention claim (Count IV) must be evaluated as a single "course of conduct"; and (4) Mr. McElroy's entitlement to qualified immunity.[1]

1. In an attempt to bolster his claims at the en banc stage, Arar cites to a report issued by the Department of Homeland Security's Office of Inspector General on Arar's detention and removal (OIG Report). *See* Pl.'s Replacement Brief 3, n.3. The OIG Report was not incorporated into Arar's complaint, nor did Arar ever

[1] Pursuant to Federal Rule of Appellate Procedure 28(i), we join in the arguments of Defendants Ashcroft, Thompson and Mueller.

move this Court to take judicial notice of the report. Should the court choose to consider this information, however, the OIG Report contains findings of fact that contradict allegations in Arar's complaint.

First, the OIG Report contradicts Arar's complaint regarding his access to counsel claim (Count IV). The complaint conveys the impression that Arar was represented by only one attorney from the time of his detention at JFK airport until his physical removal from the United States. *See* Arar Nov. 2, 2007 Letter Brief re *Iqbal v. Hasty* at 3 ("As alleged in the complaint, McElroy's conduct ensured that Arar's attorney had no advance notice of Arar's questioning about his removal to Syria because McElroy did not call her until the Sunday evening of the proceeding—at her office phone—so she could not attend and could not prevent Arar's removal to Syria."). The complaint also states that Mr. McElroy attempted to contact only one of Arar's attorneys, by leaving a message on her office voicemail. A.32.

While Arar's complaint references one unsuccessful attempt to contact Arar's counsel, the OIG Report indicates that, in addition to a voicemail left for Arar's immigration attorney, the same individual (Mr. McElroy) spoke with Arar's criminal lawyer and advised that attorney of the interview. OIG Report at 24 ("The criminal attorney was also contacted. Arar's criminal attorney said he could not attend the interview and requested that it be rescheduled for Monday, October 7, 2002. His request was denied.").

Second, the OIG Report refutes the ascribed motive in Arar's complaint for Mr. McElroy's voicemail message. While Arar alleges that Mr. McElroy made this telephone call of his own initiative, in furtherance of a conspiracy to deny Arar the opportunity to have counsel present at his interview, the OIG Report states that Mr. McElroy made these notifications at the request of INS attorneys. *Id*. at 24 ("On Sunday, October 6, 2002, at approximately 4:30 p.m., the INS attorney sent the email to the INS Command Center *directing it to notify Arar's attorneys*.") (emphasis added).[2] The OIG Report also provides evidence that the decision to interview Arar on a Sunday did not come from the District level at INS: "INS

[2] As to the decision attributed to Mr. McElroy in the OIG Report not to reschedule Arar's interview, it is equally plausible that the denial of the request by Arar's second attorney to reschedule the interview was due to Mr. McElroy's lack of authority to reschedule the interview, because his role was that of a messenger, not an active participant in a wide-ranging conspiracy.

Headquarters notified the New York Asylum Office that it would conduct an interview on Sunday, October 6, 2002." *Id*. at 24.

2. The allegation of Mr. McElroy's personal involvement consists of a voicemail message left for Arar's counsel and identical allegations of conspiracy attributed to every Defendant. "Conclusory allegations or legal conclusion masquerading as factual conclusions will not suffice to prevent a motion to dismiss." *Smith v. Local 819 I.B.T. Pension Plan*, 291 F.3d 236, 240 (2d Cir. 2002) (citations omitted).

Here, Arar's complaint cites Mr. McElroy's voicemail message as evidence of his participation in a conspiracy to remove Arar to a foreign country where Mr. McElroy knew or had reason to know Arar would be subjected to torture. *Bell Atlantic Corp. v. Twombly* instructs that a plaintiff must allege "enough facts to state a claim for relief that is plausible on its face" which "nudge[s] [his] claims across the line from conceivable to plausible." 127 S. Ct. 1955, 1974 (2007). Plausibility, in the context of a conspiracy allegation, "calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal agreement[,]" *id*. at 1965, and that "an allegation of parallel conduct and a bare assertion of conspiracy will not suffice." *Id*. at 1966.

Here, Arar's claim of conspiracy is not plausible because it merely recites the same allegation against every Defendant. There is no factual allegation that Mr. McElroy's actions were in furtherance of a conspiracy, or that Mr. McElroy was even aware of the actions of any other federal officials named in the complaint, other than the bare allegations of conspiracy made as to every Defendant. Just as the court in *Bell Atlantic* did not find plausible an allegation of conspiracy based on parallel conduct, without more it is not plausible that Mr. McElroy, solely by virtue of his position at INS, is personally liable for actions taken by other INS officials, in the absence of evidence that he directed such actions or had any role in them. *Coughlin v. Colon*, 58 F.3d 865, 873 (2d Cir. 1995).

The District Court, in finding that the complaint did not sufficiently allege Defendants' personal involvement, concluded that "the allegations against the individually named defendants do not adequately detail which defendants directed, ordered and/or supervised the alleged violations of Arar's due process rights . . . or whether any of the defendants were otherwise aware, but failed to take action, while Arar was in U.S. custody." SPA 84-85 (citing *Colon v. Coughlin*, 58 F.3d at 873).

After the District Court provided Arar with an opportunity to amend his complaint as to Count IV, Arar chose to stand on his complaint. On appeal, Arar's replacement brief does not address the sufficiency of the complaint's allegations of personal involvement. It simply recites the allegations in Arar's complaint as to each Defendant. Pl.'s Replacement Br. 14-15. The argument that Arar sufficiently alleged Mr. McElroy's personal involvement is therefore waived. *Anderson v. Branen*, 27 F.3d 29, 30 (2d Cir. 1994) (per curiam) ("an argument not raised on appeal is deemed abandoned") (quoting *U.S. v. Quiroz*, 22 F.3d 489, 490 (2d Cir. 1994)).

3. Echoing Judge Sack's dissent, Arar now asserts that his domestic detention claim must be evaluated together with his mistreatment abroad as a single "course of conduct," a "scheme to coerce [him] into talking" in "violat[ion of] due process." Pl.'s Replacement Br. 20; *see Arar v. Ashcroft*, 532 F.3d 157, 203, 204 (2d Cir. 2008) (complaint should be read "as a whole" through "the entire arc of factual allegations") (dissenting opinion). But the complaint explicitly pleads separate claims for foreign mistreatment and domestic treatment in separate counts. A.38-A.42. And Arar's Panel Brief not only omits this "course of conduct" argument but effectively refutes it. The brief too explicitly divides Arar's claims into domestic and foreign components, asserting in Point II that his "transfer to Syria . . . violated the Fifth Amendment" and in Point III that his "detention and mistreatment in the U.S. also violates the Fifth Amendment," *see* Pl.'s Panel Br. Ii (emphasis omitted); nowhere does the brief mention the "entire arc"/"read-as-whole" theory he now endorses. The argument is therefore waived.

In any event, since each count fails to state a constitutional violation, much less a clearly established one, so must their "entire arc." *See Campbell v. Maine*, 787 F.2d 776, 777 (1st Cir. 1986); *Arar*, 532 F.3d at 179 n.15. In *Campbell*, the plaintiff made the same argument Arar now makes—that "the district court erred in treating his claims piecemeal, rather than examining his complaint as an indivisible unit alleging a master conspiracy." 787 F.2d at 777. Rejecting that claim, the First Circuit held that defendants were "entitled to summary judgment when each claim in the complaint [was] legally infirm" because "the whole is emphatically not greater than the sum of its parts." *Id.* The same is true here.

4. If this Court were to infer a *Bivens* remedy, the legal questions raised demonstrate that any such constitutional right was not clearly established, and that Mr. McElroy is entitled to qualified immunity.

Arar's brief seeks to address this issue by addressing torture as a general concept, while the qualified immunity analysis requires more than the citation to a general category or constitutional provision to be clearly established. *See Wilson v. Layne*, 526 U.S. 603, 615 (1999) ("right allegedly violated must be defined at the appropriate level of specificity before a court can determine if it was clearly established"). The focus is on whether the federal official "acted reasonably under settled law in the circumstances, not whether another reasonable, or more reasonable, interpretation of the events can be constructed . . . years after the fact." *Hunter v. Bryant*, 502 U.S 224, 228 (1991) (per curiam).

A recent Supreme Court decision more directly addresses the issue of torture and whether its application to the facts of this case was clearly established in October 2002. In *Munaf v. Geren*, 128 S. Ct. 2207 (2008), the petitioners, American citizens who voluntarily traveled to Iraq, sought to enjoin their transfer from the Multinational Force-Iraq to Iraqi custody. *Id*. at 2213. Specifically, Munaf alleged that "[his] transfer to Iraqi custody is likely to result in torture. *Id*. at 2225.

In addressing Munaf's argument, the Supreme Court analyzed the issue of torture in the factual context of the case presented, not as a general concept. *See County of Sacramento v. Casey*, 523 U.S. 833, 841 n.5 (1998) ("the first step is to identify the exact contours of the underlying right said to have been violated."). The Court recognized the unsettled nature of the claim as it pertained to an American citizen-which Arar argues in this litigation is clearly established as applied to an unadmitted alien: "[T]his is not a more extreme case in which the Executive has determined that a detainee is likely to be tortured but decides to transfer him anyway." *Munaf*, 128 S. Ct. at 2226.

Although *Munaf* did not specifically address this issue in the context of qualified immunity, the Court's opinion demonstrates that, as of June 2008, the issue of transferring an American citizen to foreign custody was not clearly established-as to an American citizen. *A fortiori*, it was not clearly established in June 2008 (much less October 2002) that an unadmitted alien, determined to be a member of a terrorist organization, had a constitutional right not to be removed to a particular country. Therefore, Mr. McElroy is entitled to qualified immunity.[3]

[3] Even if the Court had addressed this issue as it would relate to an unadmitted alien, the defendants are still entitled to qualified immunity since any such right was not clearly established as of October 2002.

An important policy reason behind the concept of qualified immunity is "in part to protect society from the 'substantial social cost[ ]' that governmental officials, fearing 'personal monetary liability and harassing litigation [,] will unduly [be inhibited] in the discharge of their duties.'" *Poe v. Leonard*, 282 F.3d 123, 135 (2d Cir. 2002) (quoting *Anderson v. Creighton*, 483 U.S. 635, 638) (1987)). We do not want federal officials to hesitate when asked to perform tasks by a supervisor or higher-level official, or when required to make difficult decisions with no clear-cut answer. The purpose of qualified immunity is to protect federal officials in situations where they make such decisions and, although incorrect in hindsight, their mistake was reasonable. *See Wilson v. Layne*, 526 U.S. 603, 618 (1999) ("If judges thus disagree on a constitutional question, it is unfair to subject [government officials] to money damages for picking the losing side of the controversy.").

Mr. McElroy is a defendant in this action because he left a voicemail message for Arar's immigration attorney, and based on conclusory allegations of conspiracy made against him and every other higher level Defendant, including the Attorney General and the FBI Director. Because Arar's allegations of conspiracy, without more, do not cross the line "between the factually neutral and the factually suggestive . . . to enter the realm of plausible liability," *Iqbal v. Hasty*, 490 F.3d 143, 156 (2d Cir. 2007), this Court should affirm the District Court's dismissal of the complaint.

Sincerely,

/s Debra L. Roth
Debra L. Roth
Thomas M. Sullivan

cc: Service List

SERVICE LIST

Maria Couri LaHood
David Cole
Katherine Gallagher
Jules Lobel.
Center for Constitutional Rights
666 Broadway, 7th Floor
New York, N.Y. 10012

mlahood@ccr-ny.org
cole@law.georgetown.edu
kgallagher@ccr-ny.org
lobell@law.pitt.edu

Robert F. Fink
Stanley McDermott III
Joshua S. Sohn
Sarah J. Sterken
DLA Piper Rudnick Gray Cary US LLP
1251 Avenue of the Americas
New York, New York 10020

robert.fink@dlapiper.com
stanley.mcdermott@dlapiper.com
joshua.sohn@dlapiper.com
sarah.sterken@dlapiper.com

Attorneys for Maher Arar

Barbara L. Herwig
Robert M. Loeb
United States Department of Justice
Civil Division, Appellate Staff
950 Pennsylvania Ave, N.W.
Room 7268
Washington, D.C. 20530

barbara.herwig@usdoj.gov

robert.loeb@usdoj.gov

Scott Dunn
Assistant United States Attorney
Eastern District of New York
147 Pierrepont Street
14th Floor
Brooklyn, NY 11201

scott.dunn@usdoj.gov

Attorneys for United States

Dennis C. Barghaan
Larry Gregg
Assistant United States Attorneys
Eastern District of Virginia
2100 Jamieson Ave.
Alexandria, Virginia 22314

dennis.barghaan@usdoj.gov
larry.gregg@usdoj.gov

Attorneys for John Ashcroft

Jeremy Maltby
Pammela Quinn
O'Melveny & Myers LLP
400 South Hope Street
Los Angeles, CA 90071

jmaltby@omm.com
pquinn@omm.com

Attorneys for Robert Mueller

John J. Cassidy
Jeffrey A. Lamken

Jamie S. Kilberg
Paul J. Nathanson
Baker Botts, LLP
1299 Pennsylvania Avenue, N.W.
Washington, D.C. 20004

john.cassidy@bakerbotts.com
jeffrey.lamken@bakerbotts.com
jamie.kilberg@bakerbotts.com
paul.nathanson@bakerbotts.com

Stephen L. Braga
Ropes & Gray, LLP
700 12th Street, N.W.
Washington, D.C. 20005

stephen.braga@ropesgray.com

Attorneys for Larry Thompson

William Alden McDaniel, Jr.
Bassel Bakhos
Law Offices of William Alden McDaniel, Jr.
118 West Mulberry Street
Baltimore, Maryland 21201

wam@wamcd.com
bb@wamcd.com

Attorneys for James W. Ziglar

Thomas G. Roth
395 Pleasant Valley Way
West Orange, New Jersey 07052

tgroth395@aol.com

Attorney for J. Scott Blackman