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

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

PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO INDIVIDUAL DEFENDANTS' MOTION FOR RECONSIDERATION

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

PRELIMINARY STATEMENT

The government moves the Court to reconsider its May 7, 2009 decision and order denying the Individual Defendants' claim of qualified immunity. Based upon an interpretation of the Supreme Court's decision in *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009) that is completely unmoored from the legal and factual context in which the case was actually decided, the Individual Defendants suggest that *Iqbal* categorically eliminated the well-established "knowledge and acquiescence" standard of supervisory liability for all *Bivens* causes of action. Because *Iqbal* cannot remotely bear the weight the government seeks to place upon it, the government's motion should be denied.

First, *Iqbal*'s dicta regarding supervisory liability standards applies only to discrimination-type claims (e.g., claims under the First Amendment or Equal Protection Clause), not to claims where a supervisor's state of mind is irrelevant to the cause of action (e.g., Fourth Amendment claims). *See Iqbal*, 129 S. Ct. at 1948-49 (liability under a *Bivens* claim "will vary with the constitutional provision at issue," and in a case alleging "invidious discrimination" a plaintiff must plead and prove that all defendants acted "for the purpose of discriminating on the basis of race, religion or national

origin"). For the *Iqbal* Court, it thus followed that a supervisor's mere knowledge of a subordinate's unlawful behavior--without plausible allegations regarding that supervisor's discriminatory state of mind--could never be enough to prove the elements of a cause of action under the equal protection guarantees of the Fifth Amendment. *Id*. at 1948-49.

Because causes of action under the Fourth Amendment--such as those asserted by Plaintiffs--do not require proof of discriminatory purpose or intent, *see, e.g. Herring v. U.S.*, 129 S. Ct. 695, 703 (2009), a supervisor's liability for his "own misconduct," *Iqbal*, 129 S. Ct. at 1949, will attach where he fails to "'properly superintend[] the discharge' of his subordinates' duties," *id*. at 1948 (quoting *Dunlop v. Munroe*, 7 Cranch 242, 269 (1812)). In short, for claims not premised on discrimination, there has been no change in the governing Third Circuit law, which attaches liability to supervisors with "knowledge and acquiescence," of subordinates' unlawful conduct. *See Argueta v. Myers* (Dkt # 94), No. 08-1652 (May 7, 2009), slip op. at 40-41. Numerous post-*Iqbal* cases confirm this elementary understanding.

Second, *Iqbal* itself merely applies--and does not change--the pleading standard set forth in *Bell Atlantic v. Twombly*, 550 U.S. 544 (2007). *Iqbal*, therefore, provides no basis to reconsider this Court's prior conclusion that Plaintiffs' allegations are sufficient under *Twombly*. Indeed, unlike *Iqbal*'s "threadbare" allegations and "naked assertions" regarding the supervisory officials' discriminatory intent, *see*

Iqbal, 129 S. Ct. at 1949, Plaintiff's First Amended Complaint provides ample "factual content" to render plausible the claims concerning defendants' failure to abide by their constitutional duty to supervise subordinates' conduct. *See Argueta*, slip op at 41-42. Finally, *Iqbal* must ultimately be understood in light of the unique factual context in which the case arose. It does not, as the Individual Defendants would have it, broadly permit supervisors to act in reckless disregard for individuals' rights in a manner at odds with decades of established constitutional tradition.

In sum, reconsideration is not warranted because the Supreme Court's decision in *Iqbal* has not effected an intervening change in the law controlling the Court's analysis of defendants' qualified immunity motion.

ARGUMENT

I. IQBAL PROVIDES NO BASIS TO RECONSIDER THIS COURT'S DECISION

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

Iqbal says little new that is of consequence to cases, like this one, which allege misconduct that does not require proof of discriminatory intent. First, while the Court confirmed that there can be no *Bivens* or Section 1983 liability based on a theory of *respondeat superior* or vicarious liability, *Iqbal*, 129 S. Ct. at 1948 (citing *Monell v. N.Y. City Dep't of Soc. Servs.*, 436 U.S. 658, 691 (1978)), it nonetheless recognized that an

official will still be liable for personal conduct which violates that official's constitutional duty to others, *see id*. (citing *Dunlop*, 7 Cranch at 269 (noting supervisor's duty to "properly superintend[]" subordinate's conduct)).

Second, *Iqbal* emphasized that the nature of an individual or supervisor's duty for purposes of ascertaining *Bivens* liability "will vary with the constitutional provision at issue." *Id*.[1] It is hornbook law that, in order to state a claim for racial discrimination under the Equal Protection Clause (or under the federal analogy, the Fifth Amendment's Due Process Clause) or religious discrimination under the First Amendment, a plaintiff must plead and prove that the relevant decision-maker discriminated specifically on the basis of race or religion--*i.e*. with an invidious purpose or mindset. *Washington v. Davis*, 426 U.S. 229, 240 (1976); *see also Iqbal*, 129 S. Ct. at 1948. Thus, as the Court in *Iqbal* explained, where a specific claim asserts "invidious discrimination under the First and Fifth Amendments," a plaintiff must "plead sufficient factual matter to show that petitioners adopted and implemented the detention

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

policies at issue not for a neutral investigative reason, but for the purpose of discriminating on account of race, religion, or national origin." 129 S. Ct. at 1948-49.

The *Iqbal* Court concluded, therefore, that "a supervisor's mere knowledge of his subordinate's discriminatory purpose" does not demonstrate that the supervisor himself violated his limited duty under the First or Fifth Amendment. *Id*. at 1949. This principle makes obvious sense. Purposeful discrimination under Supreme Court precedent "requires *more than* 'intent as volition or intent as an *awareness of consequences*.'" *Id*. at 1948 (quoting *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979)) (emphasis added). Accordingly, "mere knowledge" that someone *else* is acting discriminatorily does not demonstrate that a supervisor herself has a discriminatory state of mind.[2]

Accordingly, the Individual Defendants are mistaken to the extent they argue (i) that *Iqbal* eliminated "knowledge and acquiescence" as a basis for supervisory liability for all causes of action, or (ii) that such a theory of liability is categorically "inconsistent with the premise that supervisors may not be held accountable for the misdeeds of their agents."

[2] Significantly, even for the discrimination claims under review in *Iqbal*, the Court did not--as the government repeatedly asserts--preclude supervisory liability for knowledge and acquiescence. The Court rejected supervisory liability in the discrimination context premised on a supervisor's "mere knowledge." 129 S. Ct. at 1949. As described *infra*, "acquiescence" in known, unlawful activity heightens the supervisor's culpability.

See Gov't Br. at 6.[3] Indeed, the Court specifically confirmed that, where a supervisor owes a constitutional duty to ensure subordinates' appropriate behavior, a supervisor will be liable for his failure to carry out that duty. *See Iqbal*, 129 S. Ct. at 1948 (quoting *Dunlop*, 7 Cranch at 269); *see also Innis v. Wilson*, No. 08-4909, 2009 WL 1608502 (3d. Cir. June 10, 2009) (applying, post-*Iqbal*, Third Circuit's long-standing "deliberate indifference" standard for supervisory liability claims under Eighth Amendment).[4] Under the Fourth Amendment as well as the Fifth Amendment's prohibition on excessive force--the principle causes of action in this litigation--an official may be liable regardless of his subjective state of mind at the time of the

[3] Plaintiffs do concede that *Iqbal*'s holding is relevant to their supervisory liability claims brought against the Individual Defendants alleging violation of the Equal Protection guarantees of the Fifth Amendment. *See* First Am. Cplt. ¶¶ 253-260.

[4] Since *Iqbal*, courts deciding supervisory liability claims not based on discrimination, while citing *Iqbal* for pleading standards, have continued to apply "deliberate indifference," "knowledge or acquiescence" and "failure to train" supervisory liability standards. *See Banks v. Montgomery,* No. 3:09-cv-23-TS, 2009 WL 1657465 (N.D. Ind., June 11, 2009) (Eighth Amendment); *Williams v. Fort Wayne Police Dept*, No. 1:08-cv-152 RM, 2009 WL 1616749 (June 9, 2009 N.D. Ind.) (Fourth and Fourteenth Amendment unlawful arrest and excessive force claims); *Preyer v. McNesby*, No. 3:08cv247, 2009 WL 1605537 (N.D. Fla. Jun 05, 2009) (Fourteenth Amendment excessive force claim); *Williams v. Hull,* No. 08-135Erie, 2009 WL 1586832 (W.D. Pa. Jun 04, 2009) (Eighth Amendment); *Swagler v. Harford County*, No. RDB-08-2289, 2009 WL 1575326 (D. Md. June 02, 2009) (Fourth Amendment unreasonable search and seizure); *see also Levy v. Holinka*, No. 09-cv-279-slc, 2009 WL 1649660 (W.D. Wis. June 11, 2009) (applying *Iqbal* to deny supervisors' qualified immunity on discrimination claims under the Fifth Amendment); *McReaken v. Schriro*, No. 09-327-PHX-DGC, 2009 WL 1458912 (D. Ariz. May 26, 2009) (same under Fourteenth Amendment).

constitutional violation. *See Herring*, 129 S.Ct. at 703 (Fourth Amendment "look[s] to an officer's knowledge and experience, but not his subjective intent").[5]

Thus, the constitutional duty of supervisory officials in this case is precisely as it was before *Iqbal* was decided. In sum, a supervisor will be liable for: (i) creating or implementing a policy or practice that is a "moving force" or otherwise contributes to alleged unlawful conduct by subordinates, *see Sanford v. Stiles*, 456 F. 3d 298, 314 (3d Cir. 2006) (citing *Bd. of County Comm'rs of Bryan County, Okl. V. Brown*, 520 U.S. 397, 400 (1997));[6] (ii) failing to adequately train its subordinates appropriately when carrying out the supervisor's policies, *see City of Canton v. Harris*, 489 U.S. 378, 388 (1989); or (iii) failure to take action to stop or remediate unconstitutional conduct by subordinates when the supervisor is put on notice of the conduct, *see Baker v. Monroe Twp.*, 50 F.3d 1186, 1190-91 (3d. Cir. 1995). As this Court recognized, these various and independent sources of a supervisor's liability are characterized in shorthand as

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

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

"knowledge and acquiescence." *Argueta*, slip op. at 40-41 (summarizing theories of supervisory liability in Third Circuit). In the context of claims not involving discrimination, supervisors are liable for their "knowledge and acquiescence" because "it is logical to assume that continued official tolerance of repeated misconduct facilitates similar unlawful actions in the future." *Bielevicz v. Dubinon*, 915 F.2d 845, 851 (3d Cir. 1990). Such dereliction of supervisory responsibility rises to an independent constitutional wrong.

Thus, the government is as wrong today as it was pre-*Iqbal* in arguing that the Individual Defendants, to be liable, must themselves have directly undertaken the unconstitutional and excessively forceful searches of Plaintiffs' homes. *See Padilla v. Yoo*, No. C 08-00035 JSW, 2009 U.S. Dist. LEXIS 50154, at *63-69 (N.D. Cal. June 12, 2009) (denying motion to dismiss for qualified immunity where DOJ attorney wrote legal memoranda that plausibly "set in motion a series of events that resulted in the deprivation of [plaintiff's] constitutional rights") (*citing Iqbal*, 127 S. Ct. at 1951); *Beilevicz*, 915 F.2d at 851-52 (allegations that municipality "knew that people were being arrested for public intoxication without probable cause yet did not remedy the problem" stated a Fourth Amendment claim).[7]

[7] There is certainly nothing in *Iqbal* that could be read to suggest that plaintiffs must allege that supervisors made individualized decisions affecting each particular plaintiff. If the Court had intended to take that extraordinary step, the Court would not have bothered to examine the specificity or plausibility of Iqbal's allegations because Iqbal never alleged that Ashcroft and Mueller made individualized decisions

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

The Supreme Court's *Iqbal* decision merely applies the pleading standards set forth in *Twombly*; it does not change them. *Iqbal*, 129 S. Ct. at 1949-53. Because this Court already found Plaintiffs' allegations sufficient under *Twombly*, *Iqbal* simply provides no basis to reconsider that judgment.

In *Iqbal*, the Court reiterated that, at the pleading stage, a plaintiff must "plead[] factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." 129 S. Ct. at 1949 (citing *Twombly*, 50 U.S. at 556). By contrast, a complaint is insufficiently pled if "it tenders 'naked assertion[s]' devoid of 'further factual enhancement.'" *Id*. (quoting *Twombly*, 550 U.S. at 557). All that Iqbal alleged against United States Attorney General John Ashcroft and FBI Director William Mueller was that each, respectively, was a "principal architect" and an "instrumental" force in developing a policy that caused "high interest" detainees to be housed in harsh, segregated prison conditions while awaiting trial. *Id*. at 1951. While Iqbal also asserted that Ashcroft and Mueller adopted this policy "on

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regarding prison administration or that they otherwise themselves directed that Iqbal specifically be abused. Indeed, to accept the government's categorical view, one must assume the *Iqbal* Court *sub silentio* overturned decades of its own precedent recognizing municipal and supervisory liability for "knowledge and acquiescence," dating from the Court's landmark decision in *Monell*. If the Supreme Court sought to overrule *Monell* and its decades-long progeny in the manner the government presumes, it would have stated so expressly.

account of his religion, race and/or national interest" the Court concluded that this bald statement--without further factual content substantiating the official's alleged discriminatory purpose--constituted little "more than a 'formulaic recitation of the elements' of a constitutional discrimination claim." *Id.* (quoting *Twombly*, 550 U.S. at 555) The complaint did "not show, or *even intimate* that petitioners purposefully housed detainees in [harsh conditions]" specifically because of impermissible racial considerations. *Id*. at 1952 (emphasis added); *see also id*. (Iqbal's complaint "does not contain any factual allegation sufficient to plausibly suggest petitioners' discriminatory state of mind").

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

> Custom and Policy Contributing to or a Moving Force Behind Subordinates' Constitutional Violations:
>
> - Defendants Myers and Torres implemented relevant portions of the federal government's "Operation Return to Sender"

program (*see* FAC ¶¶ 4-5; 25-26)--a fact that establishes their supervisory authority.

- Between 2005-2007, these Defendants oversaw a five-fold increase in Fugitive Operations Teams ("FOT") and an incredible 800% increase in arrest quotas for each FOT (FAC ¶¶ 36, 191); these facts provide a plausible explanation for the dramatic number of hurried and unlawful conduct associated with the home raids policy.

- Defendant Weber is Director of the DRO Field Office in New Jersey and was responsible for the implementation of Operation Return to Sender by FOTs in New Jersey. (FAC ¶ 27.) Defendant Rodriguez held that same position from February to May 2007. (FAC ¶ 28.) They were thus each responsible for carrying out the policy developed by Myers and Torres in New Jersey where these constitutional violations allegedly occurred.

- There is a remarkable similarity to the home raids described in the First Amended Complaint, especially as to the similar constitutional violations that occurred--*i.e*. warrantless, forced entry, violence and intimidation. (*See* FAC ¶¶ 39-51, 55-189, 190, 193.) These alleged facts suggest an unlawful pattern and practice of warrantless and abusive home raids, which was plausibly "set in motion" by each of the Individual Defendants.

- Documents discovered after the initial complaint was filed include memos authored by Defendant Torres (produced in a Freedom of Information Act litigation) which unambiguously confirm the direct relationship between ICE policy in Washington, D.C. and field operations in New Jersey. *See* Letter to Hon. Judge Peter G. Sheridan, Feb. 6, 2009, Exhs. B and C, (Dkt # 91).[8] The Memos, dated January 31, 2006 and September 29, 2006, demonstrate, among other relevant facts, that ICE

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

headquarters directed fugitive operations in New Jersey and establish that most fugitive operations would need to be "approved" by "DRO headquarters." *Id*.

Knowledge and Acquiescence of Unconstitutional Activity

- Myers and Torres were put repeatedly on notice of the unconstitutional conduct of their subordinates. Plaintiffs specifically cite to the numerous media reports that put them on notice, (FAC ¶¶ 47, 190); the numerous lawsuits instituted since 2006 that also put the Defendants on notice, (FAC ¶ 192); and to specific communications and warnings issued by congresspersons and advocacy groups,(FAC ¶¶ 52, 188, 189, 193).[9]
- Despite their knowledge, Myers and Torres took no corrective action and at times deflected rather than investigated criticism of their policies. (FAC ¶¶ 193-196); *see also* Elizabeth Llorente, *Menendez denounces raids on migrants*, Bergen Record, June 13, 2008. These facts permit the reasonable inference that the Defendants acquiesced in and "tolerated" ongoing constitutional violations.
- Plaintiffs further specifically allege that Myers and Torres actually *boasted* about the success of the raids their subordinates initiated in New Jersey. (FAC ¶¶ 195). These facts go beyond even the "knowledge and acquiescence" standard or constructive ratification to plausibly suggest active implicit encouragement of unconstitutional behavior by subordinates.
- Plaintiffs make similar, specific allegations that Defendants Weber and Rodriguez were aware of specific instances of unconstitutional conduct by their subordinates and were in some cases warned by public officials; yet, they not only acquiesced in this

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

unconstitutional behavior, they boasted of and encouraged it. (FAC ¶ 199)

Inadequate Training

- Plaintiffs specifically allege that all the Individual Defendants failed to adequately train the individual officers, even after being put on notice of persistent constitutional violations by subordinates. (FAC ¶¶ 191, 198)

Under *Iqbal* and *Twombly*, these allegations are sufficiently detailed and plausible to demonstrate that the Individual Defendants breached their duty of supervisory care and to "nudge[]" Plaintiffs' allegations "across the line from conceivable to plausible." *Iqbal*, 129 S. Ct. at 1951 (internal quotations omitted).

C. *Iqbal* Is Factually Distinguishable in Important Respects

Iqbal sued nineteen individual officers and thirty-four supervisory officials, including Attorney General Ashcroft and FBI Director Mueller--officers the Court stressed were at the "highest level of the federal law enforcement hierarchy," *Iqbal*, 129 S. Ct. at 1943. By contrast, Plaintiffs here sued only those government officials who directly set (*i.e.*, Myers and Torres) and/or implemented (*i.e.*, Weber and Rodriguez) the unconstitutional home raids policies and practices at issue. Plaintiffs did not sue the Attorney General or former DHS Secretary Chertoff.

Further, whereas the Ashcroft and Mueller were forced to make quick, discretionary policy decisions during "a national and international security emergency unprecedented in the

history of the American Republic," *see* 129 S. Ct. at 1945, 1953 (internal quotations omitted), the Individual Defendants here methodically set and maintained their unconstitutional policies over a course of years, with ample time to evaluate and remedy the widespread constitutional violations of which they were aware. This factual distinction necessarily affects the scope of a government official's legal obligation. As the Supreme Court explained, where government officials have "time to make unhurried judgments," and "extended opportunities to do better are teamed with protracted failure even to care, indifference [to rights of individuals] is truly shocking;" but, "when unforeseen circumstances demand [an officer's] instant judgment," the courts are less likely to view the officer's conduct as unlawful. *County of Sacramento v. Lewis*, 523 U.S. 833, 853-54 (1998)

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

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

It is true, as the Individual Defendants suggest, that *Iqbal* rejected an "incremental" approach to the discovery

ordered by the district court related to defendants Ashcroft and Mueller. But that particular ruling followed naturally from the Court's predicate that the complaint's allegations were insufficient. Where, as here, qualified immunity has been properly denied based on sufficient factual allegations, nothing in *Iqbal* prevents the orderly processing of litigation under the Federal Rules of Civil Procedure. *See Swierkiewicz v. Soreman N.A.*, 534 U.S. 506, 512 (2002). Indeed, evidence regarding the Individual Defendants' personal involvement in home raids practices that has emerged subsequent to the filing of Plaintiffs' Amended Complaint, *see supra* at pp. 10-13, demonstrates the wisdom of the presumption against dismissal of an otherwise well-pled complaint prior to discovery. At a minimum, should this Court grant the Motion, Plaintiffs request an opportunity to re-plead the complaint to include newly-discovered facts.

CONCLUSION

For the foregoing reasons the Court should deny the Individuals Motion for Reconsideration.

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