UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

AMIR MESHAL,	)	
Plaintiff,	)	
v.	)	No. 09-cv-2178 (EGS)
CHRIS HIGGINBOTHAM, *et al.*,	)	
Defendants.	)	

DEFENDANTS' NOTICE OF SUPPLEMENTAL AUTHORITY

Defendants Steve Hersem, Chris Higginbotham, John Doe 1, and John Doe 2 (collectively, the "Defendants") respectfully submit this Notice to alert the Court to the United States Court of Appeals for the District of Columbia Circuit's recent decision in *John Doe v. Donald H. Rumsfeld, et al.*, No. 11-5209, 2012 WL 2161133 (D.C. Cir. June 15, 2012) ("*Doe*"), which is relevant to the Court's consideration of the Defendants' Motion to Dismiss Plaintiff's Second Amended Complaint. *See* Docket Nos. 33, 37, 52. *Doe* reverses the decision of the United States District Court for the District of Columbia in *Doe v. Rumsfeld,* 800 F.Supp.2d 94 (D.D.C. 2011), which Plaintiff Amir Meshal cited as support for his claims in a Notice of Supplemental Authority filed on August 22, 2011. *See* Docket No. 44.

In their Motion to Dismiss ("Defs' MTD"), the Defendants argued that special factors counseling hesitation preclude the *Bivens* remedy sought by Meshal. In particular, the Defendants cited bedrock separation of powers principles which dictate that the subject matters that form the context of Meshal's claims – national security and intelligence operations – are the province and responsibility of the Executive. *See* Defs' MTD at 11-12. In *Doe*, the D.C. Circuit

found that special factors applied to preclude the *Bivens* remedy sought by the plaintiff in that case – John Doe, an American citizen who challenged his detention, interrogation, and alleged physical abuse by military officers at a military base in Iraq. *Doe*, 2012 WL 2161133, at *4-6. *Doe* claimed that the actions of Donald Rumsfeld and other United States government officers and agents violated Doe's Fifth, Eighth, and Fourteenth Amendment rights. *Id.* at *2. The United States District Court for the District of Columbia held that no special factors counseled hesitation against implying a *Bivens* remedy for Doe and that Doe had stated a cause of action under *Bivens* for the violation of his substantive due process rights. *Id.* The district court held that Doe had a substantive due process right to be free from detention and interrogation practices that "shock the conscience." *Id.* (citing *Doe v. Rumsfeld*, 800 F.Supp.2d 94, 115 (D.D.C. 2011)). The D.C. Circuit, however, found that special factors precluded Doe's constitutional claim. *Id.* at *1.

The D.C. Circuit began its analysis with the observation that the viability of Doe's due process claims depends upon the Court extending the bounds of Bivens, which "is not something to be undertaken lightly." *Id.* at *3. The Court then noted that "[t]he Supreme Court has never implied a *Bivens* remedy in a case involving the military, national security, or intelligence." *Id.* at *4. The strength of national security as a special factor, the Court observed, "is underlined by precedent beyond *Bivens* cases, and indeed before the creation of *Bivens* remedies. . . . In the context of national security and intelligence, the [Supreme] Court has cautioned that "[m]atters intimately related to . . . national security are rarely proper subjects for judicial intervention." *Id.* (quoting *Haig v. Agee*, 453 U.S. 280, 292 (1981)). The D.C. Circuit then cited *Wilson v. Libby*, 535 F.3d 697 (D.C. Cir. 2008), and *Arar v. Ashcroft*, 585 F.3d 559 (2d Cir. 2009), both of which have been cited by the Defendants in their motion to dismiss Meshal's complaint, as applicable

precedential examples of the failure to imply a *Bivens* remedy in cases involving national security and/or intelligence matters. *Doe*, 2012 WL 2161133, at *5. The D.C. Circuit's reliance on *Arar* and *Wilson* is particularly significant with respect to Meshal's claims because in *Arar* and *Wilson* the courts relied on special factors to support dismissal in the national security/intelligence context, despite the fact that neither case (like Meshal's) was specifically alleged to have involved military operations.

In his Opposition to the Defendants' Motion to Dismiss, Meshal repeatedly cites his status as a U.S. citizen to refute the Defendants' argument that special factors counseling hesitation bar the *Bivens* remedy he seeks. *See, e.g.*, Pl.'s Opp. at 8-11. In *Doe*, the D.C. Circuit rejected the plaintiff's argument that his U.S. citizenship trumped the special factors counseling hesitation identified by the Court. *Doe*, 2012 WL 2161133, at *6.

Doe v. Rumsfeld represents the most recent statement by a federal appellate court on the issues at the heart of this case. A copy of the decision is attached as an exhibit to this motion.

Finally, the Defendants also note that the United States Supreme Court has denied a petition for certiorari in *Lebron and Jose Padilla, et al. v. Rumsfeld, et al.*, 670 F.3d 540 (4th Cir. 2012). *See Lebron v. Rumsfeld*, No. 11-1277, 2012 WL 1425145 (U.S. June 11, 2012). In *Lebron*, the Fourth Circuit affirmed the judgment of the United States District Court for the District of South Carolina in *Lebron v. Rumsfeld*, 764 F.Supp.2d 787 (D.S.C. 2011), which the Defendants brought to the Court's attention in a Notice of Supplemental Authority filed on March 3, 2011.

Respectfully submitted,

Dated: June 22, 2012

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