

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ERVIN AND ASSOCIATES, INC., et al.)
)
 Plaintiffs.)
)
 v.)
)
 HELEN DUNLAP, et al.)
)
 Defendants.)

Civ. A. No. 96-1253 (WBB)

FILED

AUG 15 1996

DEFENDANTS' MOTION TO DISMISS

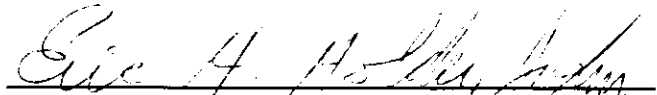
NANCY MAYER WHITTINGTON CLERK
DISTRICT COURT

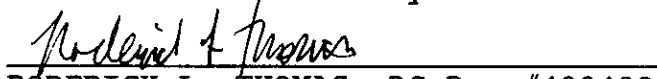
Pursuant to Fed. R. Civ. P. 8(a), 8(e), 12(b)(1), U.S. (6),
12(e)-(f), the defendants move to dismiss all claims against
them. First, the 207-page amended complaint, which has an
additional 38 pages of exhibits incorporated by reference, is not
a short, concise statement of a claim demonstrating that the
pleader is entitled to relief, thus violating Rules 8 and 12(e)-
(f). Second, the claims against the individually named defendant
are fatally flawed and should be dismissed because: (1) the
amended complaint fails to meet the heightened pleading
requirement applicable to all claims against federal officials
sued in their individual capacities; (2) the amended complaint
fails to state a claim upon which relief can be granted because
the individually sued federal defendant is entitled to qualified
immunity for her actions; and (3) special factors counsel against
a remedy under Bivens v. Six Unknown Named Agents of the Federal
Bureau of Narcotics, 403 U.S. 388 (1971), in this case.
Accordingly, the amended complaint should be dismissed against
the individual defendant pursuant to 12(b)(1) and (b)(6).

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The grounds for this motion are fully set out in the accompanying memorandum. A proposed Order consistent with the foregoing motion is attached hereto.

Respectfully submitted,


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Plaintiffs.)

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MEMORANDUM OF POINTS AND AUTHORITIES IN
SUPPORT OF DEFENDANTS' MOTION TO DISMISS

NANCY MAYER WHITTINGTON, CLERK
U.S. DISTRICT COURT

I. INTRODUCTION

On June 5, 1996, plaintiff Ervin and Associates, Inc. ("Ervin"), filed a 253-page "Complaint for Preliminary and Permanent Injunctive Relief, Declaratory Relief and for Money Damages" against numerous defendants. On August 1, 1996, two business days before defendants' date for a responsive pleading, plaintiffs filed a 207-page "First Amended Complaint for Preliminary and Permanent Injunctive Relief and Declaratory Relief."^{1/} Plaintiff Ervin is a contractor with HUD on several contracts and, apparently, is a disappointed bidder on a number of other contracts. In addition to other changes, discussed below, the amended complaint includes another plaintiff, EAA Capital Company, L.L.C. ("EAA"),^{2/} which also appears to be a

^{1/} Defendants will cite to the complaints as "Original Comp." and "Amended Comp."

^{2/} Formed in December 1995, EAA is an affiliate of Ervin, and shares the same offices and employees as Ervin. Amended Comp. ¶¶ 1-2, 91, 506.

disappointed bidder.^{3/}

In the amended complaint, plaintiffs name as a defendant Helen Dunlap, Deputy Assistant Secretary for Operations in the Office of Housing, United States Department of Housing and Urban Development ("HUD"). Plaintiffs sue defendant Dunlap in her individual and official capacities. Amended Comp. ¶ 3. Plaintiffs also name Henry Cisneros, as Secretary of HUD, and Philip Lader, as Administrator of United States Small Business Administration ("SBA"). Plaintiffs sue defendants Cisneros and Lader in their official capacities. Id. at ¶¶ 5, 7. Plaintiffs also sue HUD, SBA, and the United States of America. Id. at ¶¶ 4, 6, 8.

For the reasons set forth below, plaintiffs' amended complaint should be dismissed. First, the 207-page amended complaint, which has an additional 38 pages of exhibits incorporated by reference, is not a short, concise statement of a claim demonstrating that the pleader is entitled to relief. Rather, just like its 253-page predecessor, the amended complaint is a long, jumbled list of alluded wrongs, largely unconnected to the "facts" asserted.^{4/} Accordingly, the Court should dismiss

^{3/} Plaintiffs' amended complaint may also be stricken for failure to seek leave of the Court to file an amended complaint that adds a party -- EAA. See Fed. R. Civ. P. 21; see, e.g., 7 Charles A. Wright, Arthur R. Miller & Mary K. Kane, Federal Practice and Procedure §§ 1687, 1688 (1986).

^{4/} As discussed below, the original and amended complaints both suffer from the same flaws that are fatal under Rule 8. The following pleading nevertheless is focused upon the recently filed amended complaint, with references to the original complaint where necessary.

the amended complaint under Rule 8 of the Federal Rules of Civil Procedure.

Second, though substantially convoluted, the claims against the individually named defendant are fatally flawed and should be dismissed because: (1) the amended complaint fails to meet the heightened pleading requirement applicable to all claims against federal officials sued in their individual capacities; (2) the amended complaint fails to state a claim upon which relief can be granted because the individually sued federal defendant is entitled to qualified immunity for her actions; and (3) special factors counsel against a remedy under Bivens^{5/} in this case. Accordingly, the amended complaint should be dismissed with prejudice against the individual defendant.

II. PLAINTIFFS' COMPLAINT SHOULD BE DISMISSED UNDER RULES 8 & 12

A. Plaintiffs' Complaint

Plaintiffs' amended complaint consists of 207 pages with 671 numbered paragraphs of averments. The amended complaint also incorporates three exhibits, which add another 38 pages, for a total of 245 pages. The amended complaint violates Rule 8 of the Federal Rules of Civil Procedure because it does not contain simple, concise and direct averments, but rather, unfocussed, rambling and argumentative assertions and conclusions. Moreover, despite its extraordinary length, the amended complaint is devoid of substance and lacks the specificity required for the federal

^{5/} See Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971).

defendants to generate meaningful, intelligent responses to the "allegations."

For instance, in the first 30 pages alone, the "allegations" of the amended complaint include the following:

¶ 11. HUD "is out of control [and has] subrogated its mission . . . to the personal and political whims of a few persons"

¶ 24. "This case involves . . . six categories of . . . generally outrageous conduct," and "[r]etaliation [t]hrough . . . [r]umor [and] [i]nnuendo"

¶ 29. Defendant Dunlap's management structure constitutes a "regime" characterized as "white boys hell."

¶ 38. "HUD is attempting to 'kill' [an unnamed, non-party] white male firm"

¶ 45. "[M]ismanagement, corruption, foul play and inequitable conduct" occur at HUD in the form of delivering HUD-owned notes to a "tag team" of two unidentified "Wall Street firms," one of which "is a very large contributor to the President's reelection campaign and has had very close connections to the Administration."

¶ 48. "HUD has buried [an alleged complaint by a non-party contractor's employee who] either quit or was fired . . . for raising . . . objections to the 'company line.'"

¶ 58. HUD has engaged in mismanagement of its personnel, including the alleged reassignment by defendant Dunlap of one HUD employee "to a much less prestigious and influential position within HUD" in order to send a "very strong message to other HUD employees as to the fate that would await anyone who challenged . . . Dunlap in the future."

¶ 62. HUD has attempted to "place a politically acceptable 'spin' on the rationale underlying [its] misconduct."

¶ 65. Defendant Dunlap "has waged a subterranean campaign to discredit Ervin while certain of Ervin's competitors are getting rich off fat 'honey pot' contracts."

¶ 67. "Dunlap's efforts to . . . encourage . . . rumors, or to allow an environment in which such rumors can exist . . . have severally [sic] damaged Ervin."

Indeed, throughout the amended complaint, plaintiffs refer in vague, conclusory, emotional, and cumbersome terms to various HUD employees' thoughts, intentions and fears, and to the levels of personal happiness and/or "power" held by HUD employees and various non-party and often-unnamed HUD contractors. Plaintiffs also vaguely and emotionally criticize at length HUD's alleged policies -- including alleged policies associated with HUD's hiring and treatment of employees, HUD's administration of contracts where plaintiffs are not parties, and HUD's decisions and policies associated with the management of its assets.

Plaintiffs also vaguely assert a conspiracy theory that not only includes the named defendants, but also apparently includes other contractors, HUD's Inspector General, the Government National Mortgage Association ("GNMA"), and the General Accounting Office. See, e.g., Amended Comp. ¶¶ 106, 109, 133, 156. This conspiracy apparently is either a cause or a result of plaintiffs' alleged "Six Governmental Sins," which, incidentally, is a reduction from the "Seven Governmental Sins" alleged in the original complaint.^{6/}

The primary target of these disjointed allegations is defendant Dunlap who, for example, allegedly "stretches the envelope of propriety until someone that is sufficiently powerful that she cannot crush or intimidate challenges her," at which time she "implements a spin control approach," and who at one

^{6/} Compare Amended Comp., at page 51 ("Six Governmental Sins") with Original Comp., at page 11 ("Seven Governmental Sins").

meeting went "absolutely ballistic" and "tore into Ervin."
Amended Comp., at ¶¶ 105, 417.

B. Federal Rule of Procedure 8(a)

Federal Rule of Civil Procedure 8(a) states in pertinent part that a pleading setting forth a claim for relief shall contain:

(1) a short and plain statement of the grounds upon which the court's jurisdiction depends, . . . (2) a short and plain statement of the claim showing that the pleader is entitled to relief, and (3) a demand for judgment for the relief the pleader seeks. (Emphasis added.)

Rule 8(e)(1) further provides that "[e]ach averment of a pleading shall be simple, concise and direct." The requirement of clarity in pleadings is also expressed elsewhere within the Federal Rules. Under Rule 12(e), a pleading which is "so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading," may result in the court ordering a more definite statement by the pleading party to which a responsive pleading is to be rendered. Additionally, Rule 12(f) provides that "the court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter."⁷ (emphasis added)

⁷ Plaintiffs' amended complaint also may be stricken in toto, pursuant to Fed. R. Civ. P. 12(e)-(f), because it is argumentative, redundant and verbose, and contains impertinent and scandalous material. See, e.g., Martin v. Hunt, 28 F.R.D. 35 (D. Mass. 1961); Schaedler v. Reading Eagle Publication, Inc., 39 F.R.D. 22, 23 (E.D. Pa. 1965) (complaint should "state only facts, without argument, and a demand for judgment for the relief requested"); Johnson v. Hunger, 266 F. Supp. 590, 591 (S.D.N.Y. (continued...))

Rule 8 -- as well as Rule 12(e)-(f) -- reflect the basic federal court policy of requiring fair notice so that a court or opposing party may determine what claims have been alleged and whether they may be valid. Vicom, Inc. v. Harbridge Merchant Services, Inc., 20 F.3d 771, 775-76 (7th Cir. 1994). It is also plain that "[t]he purpose of [Rule 8] is to give fair notice of the claim being asserted so as to permit the adverse party the opportunity to file a responsive answer, prepare an adequate defense and determine whether the doctrine of res judicata is applicable." Brown v. Califano, 75 F.R.D. 497, 498 (D.D.C. 1977).

In Brown, Judge Sirica opined that Rule 8(a) also "serves to sharpen the issues to be litigated and to confine discovery and the presentation of evidence at trial within reasonable bounds." 75 F.R.D. at 498. The need for adherence to Rule 8(a) is of such importance because a complaint that fails to comply with Rule 8(a), "if allowed to stand, becomes a springboard from which the parties dive off into an almost bottomless sea of interrogatories, depositions, and pre-trial proceedings on collateral issues, most of which may have little relationship to the true issue in the case." New Dyckman Theatre Corp. v. Radio-Keith-

¹⁷(...continued)
1967) (in dismissing the complaint, the court determined that the complaint contained a confusing and foggy mixture of evidentiary statements, arguments and conclusory matter, so that if permitted to stand it would not allow for meaningful responses from defendant and the issues would remain unclear and undefined); see also Talbot v. Robert Matthews Distributing Co., 961 F.2d 654, 664-65 (7th Cir. 1992); Wiggins v. Philip Morris, Inc., 853 F. Supp. 457, 457-58 (D.D.C. 1994).

Orpheum Corp., 16 F.R.D. 203, 206 (S.D.N.Y. 1954).

When a plaintiff fails to comply with the Federal Rules, or any order of the Court, its complaint can be dismissed under Fed. R. Civ. P. 41(b). Failure to comply with Rules 8(a) and (e) is grounds for immediate dismissal without prejudice of an original complaint or, if the violation occurs with an amended complaint, for dismissal with prejudice. See United States v. Cannon, 642 F.2d 1373, 1386 (D.C. Cir. 1981), cert. denied, 455 U.S. 999 (1982); Maddox v. Shroyer, 302 F.2d 903, 904 (D.C. Cir.), cert. denied, 371 U.S. 825 (1962); see also Nevijel v. North Coast Life Ins. Co., 651 F.2d 671, 673-74 (9th Cir. 1981); Michaelis v. Nebraska State Bar Ass'n, 717 F.2d 437, 439 (8th Cir. 1993).

Generally, it is "left to the trial judge in each case to determine whether a particular pleading complies with the Rule 8 mandate for clarity and brevity." Crumpacker v. Civiletti, 90 F.R.D. 326, 329 (N.D. Ind. 1981). Rule 8 also "generously accords the plaintiff wide latitude in framing his claims," and courts have recognized that the appropriate length and complexity of a pleading will vary from case to case because of the varying complexity of litigation. Nevertheless, courts have dismissed actions where the complaints were confusing, ambiguous, redundant, verbose, disorganized and little more than demands, charges and conclusions. Brown, 75 F.R.D. at 499.^{8/}

^{8/} The District of Columbia Circuit has long recognized that complaints failing to comply with Rule 8 should be dismissed. Condol v. Baltimore & O.R. Co., 199 F.2d 400, 401-02 (D.C. Cir. 1952) (complaint should be dismissed when it is
(continued...))

Plaintiffs' amended complaint fails to meet the strictures of Rule 8 in numerous respects. First, it is clear that the sheer volume of the amended complaint alone is a sufficient basis for dismissing a complaint or ordering an amendment.^{9/} Here, the amended complaint's excessive length of 207 pages (or 245 pages with the 38 pages of exhibits), and containing 671 numbered paragraphs of averments, is clearly so long as to be violative of Fed. R. Civ. P. 8(a).^{10/} Accordingly, plaintiffs' amended complaint may be dismissed on the basis of its excessive volume.

^{8/}(...continued)

disproportionately long compared with complexity of matters at issue); McCann v. Clark, 191 F.2d 476, 476-77 (D.C. Cir.) (prolix, redundant complaint containing scurrilous matter dismissed under Rule 8), cert. denied, 342 U.S. 872 (1951).

^{9/} See, e.g., McCann, 191 F.2d at 476-77 (pleading was "prolix and redundant" and was not simple, concise or direct), aff'd, 161 F.2d 377, cert. denied, 332 U.S. 792 (1947); Burns v. Spiller, et al., 4 F.R.D. 299 (D.D.C. 1945) (complaint consisting of 32 legal-size typewritten pages found to be violative of Rule 8(a)); Crumpacker, 90 F.R.D. at 329 (concluding that a complaint that spanned 53 legal-sized pages and contained 57 paragraphs was overly-long); see also Johns-Manville Sales Corp. v. Chicago Title and Trust Co., 261 F. Supp. 905, 908 (N.D. Ill. 1966) (exhibits, which are attached to and therefore part of the complaint, are included in assessment of the volume of a complaint).

^{10/} See, e.g., Mangan v. Weinberger, 848 F.2d 909, 910-11 (8th Cir. 1988) (Rule 8 dismissals with prejudice appropriate where plaintiff filed "rambling, needlessly long and confusing" 432-page, 28-count, 1,793-paragraph complaint, later amended to 24 pages, 15 counts and 364 paragraphs, and second 622-page, 64-count, 1,800 paragraph complaint later amended to 26 pages, 65 counts, and 375 paragraphs), cert. denied, 488 U.S. 1013 (1989); Michaelis, 717 F.2d at 439 (38-page complaint containing 98 paragraphs was "needlessly long, repetitious and confused," and was dismissed without prejudice; subsequent complaint of 98 pages and 144 paragraphs dismissed with prejudice because "style and prolixity . . . would have made an orderly trial impossible").

Second, the content of the amended complaint provides an additional basis for dismissal. Plaintiffs' amended complaint is not a proper complaint against the defendants it names -- the United States, two of its agencies and two of its officials. Rather, it is, to the extent it can be deciphered, a stream-of-consciousness tome in which plaintiffs express in vague and murky terms a history of general disapproval of the day-to-day operations of HUD.^{11/} The amended complaint is merely a springboard for plaintiffs' extreme personal dislike for defendant Helen Dunlap, one of HUD's high-ranking officials. Throughout the amended complaint, plaintiffs simply offer a series of irrelevant, ad hominem attacks on defendant Dunlap and other, named and unnamed HUD officials and employees through vague and conclusory references to personal attitudes, rumors, innuendo, speculation concerning the states-of-mind of third parties, evidentiary outbursts and other ethereal concepts that cannot on their face be tied to any legal theory supporting relief in plaintiffs' favor.^{12/}

^{11/} Similarly, with respect to the SBA, plaintiffs vaguely allege that Section 8(a) of the Small Business Act, 15 U.S.C. § 637(a), is unconstitutional. Plaintiffs, however, fail to allege any facts that would support standing to raise such a challenge, nor does plaintiffs' amended complaint specify their apparent claims with any clarity.

^{12/} In Gordon v. Green, 602 F.2d 743, 744 (5th Cir. 1979), cert. denied, 459 U.S. 1203 (1983), the court held that a lengthy complaint containing "verbose, confusing, [and] scandalous" material should have been dismissed because it violated Rule 8. The court quoted some of the rambling, scandalous, and irrelevant allegations in that complaint -- those allegations are extraordinarily similar, in length, form, and tone to the
(continued...)

For example, in paragraph 287, under the caption "HUD Career Staff" the averment is made that "Ervin has been advised that Dunlap has publicly stated that 'the only fitting job for a male is as a secretary.' It is obvious that she intends to make this a self-fulfilling prophesy at HUD." Plaintiffs are not employees of HUD and certainly are not employees in Ms. Dunlap's office. Any comment about these employees or Ms. Dunlap's relationship with these employees is irrelevant to this lawsuit and only introduced to be argumentative and scurrilous.

Plaintiffs' conclusory, irrelevant, and unsubstantiated allegations are not limited to Ms. Dunlap. For example, although he is not a party to this litigation, plaintiffs accuse HUD's General Counsel of acts of discrimination in hiring practices:

The General Counsel's Office practices the same approaches directed against caucasians. This is particularly prevalent in employment practices, but also carries over into contracting issues. Indeed, the General Counsel himself has stated that "there are too many white faces" at HUD.

Amended Comp. ¶ 30. These are precisely the types of comments that contribute to the Rule 8 flaws in this amended complaint, and the types of comments that are routinely stricken pursuant to Fed. R. Civ. P. 12(e)-(f). See, e.g., supra. note 7 and accompanying text. Improper and inappropriate comments such as these offer no facts pertinent to the case and merely serve to inflame the proceedings, add to the length of the document and

^{12/} (...continued)
allegations plaintiffs make here. Compare Gordon, 602 F.2d at 745 n.7 with Amended Comp. ¶¶ 93-106, 126-148, 417, 445-468.

potentially misdirect future litigation events -- such as responsive pleadings and discovery.^{13/}

Furthermore, much of the language offered as to one claim is repeated with regard to other claims. As one example, plaintiffs raise challenges and disparaging allegations regarding HUD's mortgage note sales program in at least three different parts of the amended complaint. The allegations of corruption and contract disputes surrounding this program are first discussed at pages 45 through 49, are reiterated at pages 100 through 107, and are once again addressed on pages 158 and 159. Plaintiffs use the same subject under three separate categories within the amended complaint -- clearly being redundant and ambiguous. By raising the same issue three different ways, it is unclear which facts are the underlying bases giving rise to which specific claims, and which area of law pertains to which claim.

Other examples of redundancy and ambiguity are present throughout the amended complaint. For instance, the "Six Governmental Sins" allegations that flow throughout this amended complaint do not serve to clarify the claims for relief, but

^{13/} Schmidt v. Herrmann, 614 F.2d 1221, 1224 (9th Cir. 1980) (second amended complaint dismissed with prejudice because 30-page complaint contained only "conclusory allegations; material that is "distracting, ambiguous and unintelligible" violates Rule 8); Koll v. Wayzata State Bank, 397 F.2d 124, 126-27 (8th Cir. 1968) (16-page complaint consisting of "disconnected, incoherent and rambling statements" prevented defendants from intelligently filing responsive pleadings and should have been dismissed under Rule 8). Compare Johnson, 266 F. Supp. 590 (complaint containing confusing and foggy mixture of evidentiary statements would not allow for meaningful responses from defendant) with Amended Comp. ¶¶ 169, 188, 192-199.

rather blur the issues entirely. In reading, and attempting to comprehend this amended complaint, one discovers that the first sin ("Contracting Corruption and Favoritism") is not separate and apart from the second sin of "Racial, Gender and Age Discrimination," but rather, presumably, is a result of alleged "reverse" racial, gender and age discrimination. The sin of "Retaliation Through Breach of Contract" also apparently arises from discrimination against plaintiffs as a means to awarding contracts through corruption and favoritism. It seems that each sin builds upon the previous one. Although these "sins," perhaps, need not be mutually exclusive of each other, it is certain that all are argumentative statements, which are complex and indirect, not simple, concise and direct.

The deficiencies in plaintiffs' amended complaint under Rule 8 are further compounded by the pervasive inclusion of claims that are clearly outside of this Court's jurisdiction. A great majority of plaintiffs' claims involve disputes over plaintiff Ervin's contracts with HUD. Under the Contract Disputes Act of 1978 ("CDA"), 41 U.S.C. § 601 et seq., however, federal district courts lack jurisdiction to hear such claims.^{14/} In plaintiffs'

^{14/} Under the CDA, "all claims by a contractor against the government relating to a contract" covered by the CDA must be submitted first to the contracting officer for a decision. 41 U.S.C. § 605(a); see also A & S Council Oil Co., Inc. v. Lader, 56 F.3d 234, 239 (D.C. Cir. 1995). The CDA provides only two methods for review of the contracting officer's decision: (1) an appeal to the appropriate agency board of contract appeals, or (2) direct appeal to the Court of Federal Claims, where the claim is subject to de novo review. 41 U.S.C. §§ 606, 609(a)(1) & (3). Regardless of which route is taken, an appeal lies only to the
(continued...)

amended complaint, plaintiffs dropped many of the original complaint's explicit references in the counts for breach of contract and quantum meruit. See, e.g., Original Comp., Count XI (page 234), Count XIII (page 240), Count XV (page 244).

Nevertheless, the amended complaint is replete with allegations associated with contract administration issues and breach of contract claims.^{15/} The inclusion of such claims where the Court lacks jurisdiction further demonstrates the deficiencies in plaintiffs' amended complaint under Rule 8,^{16/} and provides

^{14/} (...continued)

United States Court of Appeals for the Federal Circuit. 28 U.S.C. §§ 1295(a)(3) & (10). "Nowhere in the [Contract Disputes Act] are provisions made for the district courts to ever hear government contract dispute cases." APA, Inc. v. FSLIC, 562 F. Supp. 884, 887 (W.D. La. 1983); see also Ingersoll-Rand Co. v. United States, 780 F.2d 74 (D.C. Cir. 1985).

^{15/} For examples in the first few pages alone, see Amended Comp. ¶¶ 21, 24, 42-44, which expressly refer to alleged "breaches." The amended complaint also uses numerous synonyms for "breach." See, e.g., Amended Comp. ¶ 16 (referring to "depriv[ing] Ervin of its rights under existing contracts"); ¶ 20 (alleging that Ervin should be allowed to "finish the contracts which it has fairly won"); ¶ 35 (alleging "violation" of contracts). Moreover, in a number of places, the Amended Complaint simply substitutes terms such as "constitutional violation" for the original complaint's use of the term "breach of contract," thus revealing plaintiffs' attempt to evade the jurisdictional bar. As an example, compare Original Comp. ¶ 338 ("By awarding a contract to a minority firm for work that was included in Ervin's physical inspection contract, HUD breached its contract with Ervin.") with Amended Comp. ¶ 329 ("By awarding a contract to a minority firm for work that was included in Ervin's physical inspection contract, HUD denied Ervin due process and equal protection of the law.") (emphasis supplied).

^{16/} Similarly, while the amended complaint deletes the original complaint's explicit reference in the counts for Copyright Infringement, see Original Complaint, Count XVI (page 249), the amended complaint is replete with such allegations of misappropriated intellectual property, "proprietary" data and
(continued...)

another independent basis for dismissing the amended complaint.

Even if plaintiffs' various contract issues were subject to this Court's review, plaintiffs' allegations nevertheless are so convoluted as to require dismissal. Plaintiffs' amended complaint appears to contain various types of allegations concerning HUD contracts -- current contracts between plaintiff Ervin and HUD, which plaintiff Ervin alleges were breached by HUD; contracts that plaintiffs competed for, but for which they were not successful, or qualified, bidders; and contracts for which plaintiffs did not compete. Plaintiffs also vaguely and emotionally raise numerous issues associated with the administration of contracts to which they are not parties, without providing this Court any basis for hearing such ill-defined claims. Plaintiffs also uniformly fail to identify for the defendants or the Court even basic information, such as a contract number and date of execution -- which is remarkable in light of the thousands of insured properties and dozens of HUD offices, many of which have contracts for the types of services

^{16/} (...continued)

information. See, e.g., Amended Comp. ¶¶ 179, 207, 211, 235, 485, 517-18. Moreover, while the Prompt Payment Act count was deleted from the original complaint, see Original Comp. Count XII (page 239), such allegations still remain in the Amended Complaint. See Amended Comp. ¶ 43. Plaintiffs provide no jurisdictional basis for this Court to hear their claims under the Prompt Payment Act, 31 U.S.C. § 3901, et seq., their copyright claims, see 28 U.S.C. § 1498(b) (exclusive jurisdiction for copyright claims is Court of Federal Claims), their quantum meruit claims, see, e.g., Carroll v. U.S. Postal Service, 764 F. Supp. 143 (E.D. Mo. 1991) (district court lacks jurisdiction to hear quantum meruit claims), or indeed to hear any of plaintiffs' claims "relating to a contract." 41 U.S.C. § 605(a).

about which Ervin alleges there were contracting improprieties. This vagueness is simply one example of the significant confusion and ambiguity in attempting to comprehend the particular contract challenges being set forth and, consequently, in preparing appropriate and adequate responses.^{17/}

Moreover, plaintiffs fail to identify in the amended complaint tangible actions by specific people in connection with any specific contracts -- much less contracts where Ervin may be a party or contracts where plaintiffs were bidders. This lack of specificity makes a reasoned response to the amended complaint impossible. See, e.g., Amended Comp. ¶¶ 73, 74, 93-106 (non-specific, irrelevant, ad hominem attacks on defendant Dunlap); ¶¶ 126-148 (non-specific criticisms of HUD's overall operations, with no nexus alleged to any of Ervin's contractual dealings)).

Finally, plaintiffs' assertions in the amended complaint^{18/} that the matters supposedly referenced in the amended complaint are "complex" does not excuse plaintiffs from complying with the Federal Rules and filing a complaint that is free of needlessly confusing, irrelevant, redundant, speculative and scandalous arguments and assertions. As the court in Vicom stated:

^{17/} Although plaintiff provides Exhibit A to the amended complaint, which provides references to different contracts, even that Exhibit does not identify the contracts with specificity in context or specificity concerning the nature of plaintiffs' claims. Moreover, as with the body of the amended complaint, that Exhibit refers to contracts that HUD has with entities that are not parties to this action.

^{18/} See, e.g., Amended Comp., page 5 n.1; Amended Comp., Exhibit A, page 1.

Many plaintiffs attempt to excuse lengthy and confusing complaints by pointing to the type of claim or theory under which they are pleading. The caselaw, however, is clear that Rule 8 applies to all cases.

Vicom, 20 F.3d at 776.

In summary, it is without doubt that courts have dismissed complaints for less egregious shortcomings than those found in this one. In similar situations, courts have not hesitated to dismiss complaints without prejudice or, if a plaintiff fails to comply with the strictures of Rules 8(a) and (e) in an amended complaint, with prejudice.^{19/} Accordingly, since the amended complaint fails in every respect to satisfy the requirements of Rule 8, it should be dismissed pursuant to Fed. R. Civ. P. 8.

^{19/} See, e.g., Vicom, 20 F.3d at 775-76 (119-page, 385-paragraph, 9-count amended complaint dismissed for being "prolix," "less than coherent," "confusing, redundant, and seemingly interminable," and "violated the letter and the spirit of Rule 8"); Wade v. Hopper, 993 F.2d 1246, 1249 (7th Cir.) (52-page complaint with "rambling and confusing" material violated Rule 8), cert. denied, 510 U.S. 868 (1993); Jennings v. Emry, 910 F.2d 1434, 1436 (7th Cir. 1990) (complaint "must be presented with clarity sufficient to avoid requiring a district court or opposing party to forever sift through its pages in search of" allegations and contentions); Nevijel, 651 F.2d at 674 (original 48-page complaint was verbose, confusing and conclusory, and was dismissed without prejudice; amended complaint of 23 pages was equally verbose, confusing and conclusory, and was dismissed with prejudice).

III. PLAINTIFFS' COMPLAINT AGAINST THE INDIVIDUAL DEFENDANT
SHOULD BE DISMISSED

A. The Complaint Fails to State a Claim Upon Which Relief
Can Be Granted Against Helen Dunlap In Her Individual
Capacity

None of the allegations in the amended complaint (or the original complaint) can support a claim for relief against the individual defendant in her individual capacity since (1) the Court lacks subject matter jurisdiction in the absence of greater specificity in plaintiffs' complaint, (2) the individual defendant is entitled to immunity from plaintiffs' claims, and (3) special factors counsel against a Bivens remedy in this case.

Before discussing each of these issues, it is apparent that plaintiffs' amended complaint is not truly an action against the individual defendant in her individual capacity since plaintiffs appear to seek only injunctive or declaratory relief in their amended complaint.^{20/} The immunities fashioned for government officials as a defense to damages actions, as discussed below, are not available in suits seeking specific (e.g., injunctive or declaratory) relief because such suits necessarily are maintained against the named defendant in his or her official capacity. The relief sought in such suits ultimately runs against the defendant's employing governmental entity, and it does not give

^{20/} The amended complaint also does not raise common law tort claims. Nevertheless, defendants reserve the right, pursuant to certification authority under 28 U.S.C. § 2679, to substitute the United States for the individual federal defendant as the exclusive defendant for any common law tort claim plaintiffs may be seeking to assert.

rise to a need for the individual defendant to have the protection of immunity. See, e.g., Hafer v. Melo, 112 S. Ct. 358, 362-63 (1991); Kentucky v. Graham, 473 U.S. 159, 166-67 (1985). Accordingly, the action against the individual defendant in her individual capacity must necessarily be dismissed.

Moreover, if plaintiffs are attempting to seek damages against the individual defendant in her individual capacity, plaintiffs' amended complaint nevertheless should be dismissed against the individual defendant because it utterly fails to provide notice of any such damages claims. Indeed, such a claim would be entirely inconsistent with the amended complaint. As an example, the original complaint was styled "Complaint for Preliminary and Permanent Injunctive Relief, Declaratory Relief and for Money Damages," see Original Comp. (emphasis supplied), while the amended complaint has been restyled "First Amended Complaint for Preliminary and Permanent Injunctive Relief and Declaratory Relief." The amended complaint further deletes references to monetary damages in other sections.^{21/}

^{21/} Compare Original Comp., page 3, line 1 (referring to damages action against Dunlap) with Amended Comp., page 1, lines 5-6 (deleting reference to damages action against Dunlap); compare Original Comp. ¶ 80 ("By this complaint, Ervin seeks injunctive and declaratory relief, specific performance, and statutory and compensatory damages against the defendants, jointly and severally, in an amount to be determined according to proof at trial.") (emphasis supplied) with Amended Comp. ¶ 75 ("By this complaint, Ervin seeks injunctive and declaratory relief, to declare Ervin's rights and to prevent further constitutional deprivations from occurring."); compare Original Comp., Prayer for Relief, page 253, ¶ D (seeking damages for various counts) with Amended Comp., Prayer for Relief, page 206 (deleting references to damages for specific counts). The Prayer (continued...)

Accordingly, this action should be dismissed against the individual defendant in her individual capacity because it is, in reality, an injunctive and declaratory action against her in her official capacity. Finally, even if the amended complaint somehow could be construed as an action against the individual defendant in her individual capacity, it nevertheless must be dismissed for the additional reasons set forth below.

1. **The Complaint Fails To State Factual Allegations With Sufficient Specificity to Support A Bivens Claim**

The Supreme Court held in Bivens^{22/} that a cause of action exists against federal officials individually for violations of a person's constitutional rights while acting in an official capacity. It is fundamental, however, that for a federal official to be properly sued individually for actions taken by her in an individual capacity, the complaint must allege a specific constitutional deprivation of the plaintiff's rights by that defendant supplemented with specific factual allegations. Failure to allege a specific, factually detailed constitutional violation deprives the Court of subject matter jurisdiction over the individual and fails to state a claim as to any individual

^{21/} (...continued)
for Relief in the amended complaint, however, states that plaintiffs seek "Such other and further relief, including equitable relief in the form of money damages, as this Court may deem just, equitable and proper." That Prayer, however, is not only inconsistent with the remainder of the complaint, but a demand for "equitable relief in the form of money damages" is a non-sequitur.

^{22/} See Bivens, 403 U.S. 388.

liability for actions taken in an official capacity. In such a case the complaint must be dismissed. See Carlson v. Green, 446 U.S. 14, 18 (1980); Baker v. McCollan, 443 U.S. 137, 140 (1979); Davis v. Passman, 442 U.S. 228, 239 (1979).

The Court of Appeals for this Circuit has held on several occasions that Bivens plaintiffs are held to a "heightened pleading standard," which requires plaintiffs "at the very least [to] specify the 'clearly established' rights they allege to have been violated with . . . precis[ion]." Martin v. Malhoyt, 830 F.2d 237, 253, reh. denied, 833 F.2d 1049 (D.C. Cir. 1987), quoting Smith v. Nixon, 807 F.2d 197, 200 (D.C. Cir. 1986) and Hobson v. Wilson, 737 F.2d 1, 29 (D.C. Cir. 1984), cert. denied, 470 U.S. 1084 (1985). This heightened pleading standard is applicable to all Bivens cases no matter what allegations are made. Martin v. Malhoyt, 830 F.2d at 253 and n.40; see also Hunter v. District of Columbia, 943 F.2d 69, 75 (D.C. Cir. 1991); Siegert v. Gilley, 895 F.2d 797 (D.C. Cir.), aff'd on other grounds, 111 S. Ct. 1789 (1991); Whitacre v. Davey, 890 F.2d 1168 (D.C. Cir. 1989), cert. denied, 110 S. Ct. 3301 (1990); Hobson, 737 F.2d at 29-31; Martin v. D.C. Metropolitan Police Dept., 812 F.2d 1425, 1434-36 (D.C. Cir. 1987).^{23/} The Court of Appeals has reiterated the need to apply this heightened standard of pleading, requiring that a plaintiff must do more than offer

^{23/} Part IV of this opinion was at one point vacated, 817 F.2d 144 (D.C. Cir. 1987), only to be reinstated subsequently. 824 F.2d 1240, 1246 (D.C. Cir. 1987).

conclusory allegations or circumstantial evidence of bad faith by a federal defendant. See Kartseva v. Department of State, 37 F.3d 1524, 1530-31 (D.C. Cir. 1995) (plaintiff must meet "heightened pleading standard" and must produce direct evidence of intent when the outcome depends on the defendant's state of mind).^{24/}

Application of this heightened pleading standard to plaintiffs' amended complaint in this case turns up fatal deficiencies. As discussed above in the context of defendants' Rule 8 motion, throughout the amended complaint, plaintiffs simply offer a series of irrelevant, ad hominem attacks on defendant Dunlap and other, named and unnamed HUD officials and employees through vague and conclusory references to personal attitudes, rumors, innuendo, speculation concerning the states-of-mind of third parties, and other ambiguous concepts that cannot on their face be tied to any legal theory supporting relief in plaintiffs' favor.

Plaintiffs also fail to identify in the amended complaint specific actions by Ms. Dunlap in connection with any specific

^{24/} The Court of Appeals reiterated the need to apply the heightened standard of pleading in Kimberlin v. Quinlan, 6 F.3d 789, 793-94 (D.C. Cir. 1993), vacated and remanded, 115 S. Ct. 2552 (1995). The Kimberlin decision, however, was vacated on other grounds on June 12, 1995. Nevertheless, the heightened pleading standard remains the applicable standard based on the earlier Circuit decisions in Siegert, Whitacre and the other cases cited above. See also Kartseva v. Department of State, 37 F.3d at 1530-31. This standard of pleading is currently being considered by the United States Court of Appeals for the District of Columbia Circuit en banc. See Crawford-El v. Britton, No. 94-7203 (D.C. Cir. Nov. 28, 1995).

contract, person, or other agency action, that is tied to a specific legal theory, let alone tied to a "clearly established" right that was allegedly violated. Plaintiffs have offered nothing more than conclusory allegations or circumstantial evidence of bad faith by a federal defendant, which fails to satisfy this Circuit's heightened-pleading standard. See, e.g., Kartseva, 37 F.3d at 1530-31.

Moreover, to the extent that plaintiffs allege that some conspiracy existed between defendants, the allegations fall short of asserting a cause of action. As this Circuit explained in the conspiracy setting,

[u]nsupported factual allegations which fail to specify in detail the factual basis necessary to enable [defendants] to intelligently prepare their defense, will not suffice to sustain a claim of governmental conspiracy to deprive [plaintiffs] of their constitutional rights.

Martin v. Malhoyt, 830 F.2d at 258 (citation omitted). Plaintiffs have asserted no factual basis for any conclusion that a conspiracy existed. Therefore, with respect to these unsupported claims, plaintiffs' amended complaint should be dismissed.

Thus, plaintiffs fail to meet the heightened standard of pleading required in order to sustain a Bivens claim against a federal official in an individual capacity, and fail to state a claim upon which relief can be granted. Accordingly, the claims against the individual defendant in her individual capacity should be dismissed.

2. The Individual Defendant Is Entitled To Qualified Immunity With Respect To Any Claim Asserted Against Her In An Individual Capacity

In addition to all of the foregoing reasons, any claim against the individual defendant in an individual capacity must also be dismissed because she is entitled to official immunity. She is shielded by qualified immunity with regard to any constitutional or statutory claim plaintiffs may be seeking to assert.

Federal officials, such as the individual defendant, enjoy a qualified immunity from constitutional and statutory claims. Cleavinger v. Saxner, 474 U.S. 193, 206 (1985); Procunier v. Navarette, 434 U.S. 555, 561 (1978). The framework for application of qualified immunity to such claims is set out in Harlow v. Fitzgerald, 457 U.S. 800 (1982). In that case, the Supreme Court confirmed that government officials are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. Id. at 818; see also Hunter v. District of Columbia, 943 F.2d at 75. Moreover, under Harlow this determination requires an objective, not subjective, analysis. McSurely v. McClellan, 697 F.2d 309, 316 (D.C. Cir. 1982). Harlow thus places squarely on the plaintiff the burden of showing a "prima facie case of defendants' knowledge of impropriety, actual or constructive." Krohn v. United States, 742 F.2d 24, 31-32 (1st Cir. 1984); Davis v. Scherer, 468 U.S. 183, 191 (1984). Furthermore, as the

Supreme Court has held:

Unless the plaintiffs' allegations state a claim of violation of clearly established law, a defendant pleading qualified immunity is entitled to dismissal before the commencement of discovery.

Mitchell v. Forsyth, 472 U.S. 511, 526 (1985).^{25/}

The paramount point to keep in mind in analyzing claims such as plaintiffs', therefore, is that neither the Court nor the plaintiff can engage in an inquiry into the state of mind of a defendant in the "threshold" resolution of qualified immunity claims. Harlow, 457 U.S. at 818. Subjective inquiries are legally irrelevant. The only inquiry of any import is whether the defendant's alleged actions violated clearly established law or were objectively reasonable. Brogsdale v. Barry, 926 F.2d 1184, 1189 (D.C. Cir. 1991).

As to the "clearly established" inquiry, defendants need not demonstrate that "the law was established in [their] favor at the time [they] acted." Rather, "[i]t is only necessary for [defendants] to show that the law was unsettled . . . not . . . that a Supreme Court opinion had specifically approved their actions." Zweibon v. Mitchell, 720 F.2d 162, 173-74 n.19 (D.C. Cir. 1983), cert. denied, 469 U.S. 880 (1984), reh. denied, 469 U.S. 1068 (1984); accord Brogsdale v. Barry, 926 F.2d at 1188-1192.

"[O]nce the trial judge determines the law was not clearly

^{25/} A defendant's right is to "immunity from suit" not a "defense to liability." Id.; see also Cleavinger v. Saxner, 474 U.S. at 207-08.

established at the time the contested conduct occurred, the inquiry ceases." Zweibon, 720 F.2d at 168 (citing Harlow v. Fitzgerald). Given Harlow's focus, it is irrelevant whether the Court concludes that a complaint states a claim upon which relief may be granted, or even that the plaintiff's rights were in fact violated. "The decisive fact is not that a defendant's position turned out to be incorrect, but that the question was open at the time he acted." Mitchell v. Forsyth, 472 U.S. at 535; accord Brogsdale v. Barry.

Furthermore, as the Supreme Court and the Court of Appeals have explained,

[t]he contours of the rights [the official is alleged to have violated] must be sufficiently clear that a reasonable officer would understand that what he is doing violates that right.

Anderson v. Creighton, 107 S. Ct. 3034, 3038 (1987); accord Hunter v. District of Columbia, 943 F.2d at 75-78; Brogsdale v. Barry, 926 F.2d at 1189; Martin v. Malhoyt, 830 F.2d at 253.

Thus, the Supreme Court held in Anderson that, even though plaintiff's Fourth Amendment rights were violated in that case, the defendant officers were entitled to qualified immunity from suit individually because they acted reasonably.

In this case, the individual defendant is entitled to immunity from all causes of action asserted against her in her individual capacity. Review of the applicable law demonstrates that the individual defendant did not violate any clearly established right of plaintiffs, nor have plaintiffs provided any specific allegations that would support the conclusion that the

individual acted unreasonably in regard to the matters about which plaintiffs complain.

Even setting aside the other deficiencies in plaintiffs' amended complaint discussed in this motion, plaintiffs cannot specify a "clearly established" constitutional right that was violated. For example, plaintiffs repeatedly argue in their amended complaint that defendant Dunlap violated the First Amendment by "retaliating" against Ervin (a contractor) for alleged protected speech. Plaintiffs, however, completely fail to specify any "clearly established" rights Dunlap allegedly violated in her individual capacity at the time she allegedly acted.

Indeed, it was not until after plaintiffs filed their complaint in this action that the Supreme Court ruled that contractors may have a cause of action where an agency retaliates against a contractor for the exercise of protected speech. See, e.g., Board of City Com'rs., Wabaunsee County, KS v. Umbehr, 116 S. Ct. 2342 (1996). Accordingly, at the time Ms. Dunlap allegedly acted, not only was existence of the right unsettled, but the Umbehr Court determined for the first time that a contractor's interests would be weighed by a "Pickering" balancing test that had previously been reserved for weighing the First Amendment interests of government employees.^{26/}

^{26/} In Pickering v. Board of Ed. of Township High School Dist. 205, Will Cty., 391 U.S. 563 (1968), the Court concluded that government employees' First Amendment rights depend on the "balance between the interests of the [employee], as a citizen,
(continued...)

Even if the existence of the right had been settled, and even if the application of the Pickering test to government contractors had been settled, the Pickering test itself would preclude a Bivens remedy in this case. Federal courts have frequently concluded that law is "rarely 'clearly established' where the Pickering balancing test must be applied" because of the complexity and fact-intensive nature of that balancing test. See, e.g., Sheppard v. Beerman, 911 F. Supp. 606, 614 & n.3 (E.D.N.Y. 1995) (collecting cases).^{27/} Finally, the Umbehr litigation leading to the Supreme Court decision directly supports the application of qualified immunity here. The district court granted qualified immunity precisely because the law was unsettled -- a proposition that was affirmed on appeal. See Umbehr, 116 S. Ct. at 2346 (citing and discussing lower court decisions).

Plaintiffs therefore completely fail to specify any "clearly

^{26/} (...continued)

in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." 391 U.S. at 568; see also Umbehr, 116 S. Ct. at 2348-49.

^{27/} Moreover, as discussed earlier in this brief, even if the law were "clearly established" and plaintiffs had satisfied all the other prerequisites to a Bivens action, this case must be dismissed against the individual defendant because the injunctive and declaratory relief they seek necessarily makes this an action against the agency, or perhaps the individual defendant in her official capacity. Similarly, while plaintiffs appear to contend in their complaint that the individual defendant should be enjoined because of the Supreme Court's decision in Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097 (1995), plaintiffs fail either to articulate a specific "clearly established" right that was violated or to provide a basis for equitable relief against an individual defendant in an individual capacity.

established" rights Dunlap allegedly violated in her individual capacity at the time she allegedly acted, nor have plaintiffs provided any specific allegations that would support the conclusion that the individual acted unreasonably in regard to the matters about which plaintiffs complain. Accordingly, the individual defendant is protected in the exercise of her duties by qualified immunity and plaintiffs have failed to state a claim upon which relief can be granted.

3. Special Factors Counsel Against A Bivens Remedy In This Action

Federal courts have also recognized that special factors counseling against the creation of an alternative Bivens-type remedy must be recognized where a comprehensive statutory scheme has been established to provide relief in a given area. See Spagnola v. Mathis, 859 F.2d 223, 229-30 (D.C. Cir. 1988) (en banc) (recognizing the exclusivity of the Civil Service Reform Act's remedies); see also Bush v. Lucas, 462 U.S. 367 (1983) (comprehensive procedural and substantive provisions of the Civil Service Reform Act constitute "special factors" counselling hesitation against a Bivens remedy); Schweiker v. Chilicky, 487 U.S. 412 (1988) (Social Security Disability Benefits Reform Act of 1984); Brown v. GSA, 425 U.S. 820 (1976) (Title VII is the sole remedy for federal employees complaining of job discrimination on account of sex or race); Gleason v. Malcomb, 718 F.2d 1044, 1048 (11th Cir. 1983) (special factors counsel against a Bivens remedy where plaintiff could have sought equitable relief pursuant to the Administrative Procedure Act);

Mittleman v. U.S. Treasury, 773 F. Supp. 442, 454 (D.D.C. 1991)
(Privacy Act bars plaintiff's constitutional claims).

In this action, plaintiffs in essence appear to seek relief for allegations associated with breach of various contracts and for allegations associated with agency decision-making in the area of contracting. Congress, however, has provided comprehensive remedial schemes for addressing such claims -- including, for example, the Administrative Procedure Act and the Contract Disputes Act. Special factors accordingly counsel against the creation of a Bivens remedy here and plaintiffs' claims against the individual defendant should be dismissed.^{28/}

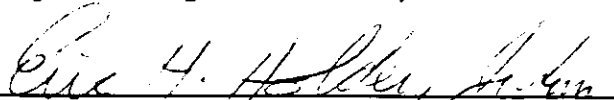
It is not necessary that the statutory remedial schemes be capable of affording the plaintiffs all of the relief plaintiffs seek in this action. The controlling factor is that Congress has created a comprehensive scheme. Spagnola v. Mathis, 859 F.2d at 228-30; Bush v. Lucas, 462 U.S. at 388-90. Thus, special factors counsel against the creation of a Bivens remedy here.

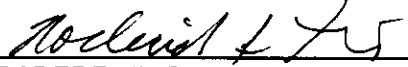
^{28/} See, e.g., Janicki Logging Co. v. Mateer, 42 F.3d 561, 564-66 (9th Cir. 1994) (Contract Disputes Act precluded Bivens action); Sky Ad, Inc. v. McClure, 951 F.2d 1146, 1148 (9th Cir. 1991) (APA precluded Bivens action), cert. denied, 506 U.S. 816 (1992); Gleason v. Malcomb, 718 F.2d 1044, 1048 (11th Cir. 1983) (same).

IV. CONCLUSION

For the foregoing reasons, defendants respectfully request that the Court grant their motion to dismiss.

Respectfully submitted,


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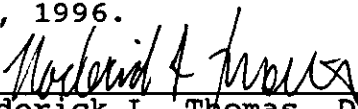
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing Defendants' Motion to Dismiss, Memorandum in Support Thereof, and proposed Order were served by hand-delivery and by mailing a copy thereof, first class, postage prepaid to:

Wayne T. Travell, Esquire
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