

1 KEVIN V. RYAN (CSBN 118321)
United States Attorney
2 JOANN M. SWANSON (CSBN 88143)
Chief, Civil Division
3 TRACIE L. BROWN (CSBN 184339)
Assistant United States Attorney

4 450 Golden Gate Avenue, Box 36055
5 San Francisco, California 94102-3495
6 Telephone: (415) 436-6917
FAX: (415) 436-6748

7 Attorneys for Defendants

8 UNITED STATES DISTRICT COURT
9 NORTHERN DISTRICT OF CALIFORNIA
10 SAN FRANCISCO DIVISION

FILED
OCT 13 2004
RICHARD W. WELKING
CLERK U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA



12 ROBERT-JOHN:FOTI; JOE NEUFELD;
13 KEN AUGUSTINE,)

14 Plaintiffs,)

15 v.)

16 OFFICER McHUGH and other unknown
number of unnamed officers of the U.S.
Marshals Service and the Federal Protective
17 Service; U.S. MARSHALS SERVICE;
FEDERAL PROTECTIVE SERVICE,)

18 Defendants.)
19 _____)
20)
21)
22)
23)
24)
25)
26)
27)
28)

No. C 04-2567 PJH

**DEFENDANTS' REPLY TO MOTION
TO DISMISS PLAINTIFFS'
COMPLAINT**

Date: Wednesday, October 27, 2004
Time: 9:00 a.m.
Judge: Honorable Phyllis J. Hamilton
Courtroom 3, 17th Floor

1 **INTRODUCTION**

2 Plaintiffs' Opposition to Defendants' Motion to Dismiss is long on invective against the
3 government and Defendants' counsel, but short on legal argument or citation to authority that
4 saves their claims from dismissal.¹

5 **ARGUMENT**

6 **I. Plaintiffs' State Law Claims Must Be Dismissed.**

7 Plaintiffs assert that Defendants have engaged in a "blatant lie and attempt to defraud the
8 court" by arguing that Plaintiffs' state-law claims must be dismissed for failure to comply with
9 the administrative exhaustion requirements of the Federal Tort Claims Act (FTCA). *See* Opp.
10 Br. at 3, first paragraph. Notwithstanding Plaintiffs' assertion that "Plaintiffs have found no
11 evidence the Federal Tort Claims Act has application to Biven's [sic] actions," *see id.*, the law is
12 clear that *Bivens* claims require an underlying *constitutional* violation and cannot be based on
13 state-law torts such as those asserted by Plaintiffs: *e.g.*, assault, battery, kidnaping, *etc.* *See*
14 *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971)
15 (plaintiff could seek money damages for violation of his *constitutional* rights); 28 U.S.C.
16 §§ 1346(b), 2671 *et seq.*; Complaint, Counts 1-3 (state-law tort claims). Plaintiffs fail to
17 acknowledge that state-law claims such as those asserted in Counts 1-3 of their Complaint can
18 only be brought against the government via the FTCA; accordingly, Plaintiffs' admitted failure to
19 comply with the administrative prerequisites of the FTCA requires dismissal of all of their state-
20 law tort claims. *See* Defendants' Motion to Dismiss at 2:7-3:20; 28 U.S.C. § 2675(a).

21 **II. Plaintiffs' Constitutional Claims Against the USMS and FPS Must Be Dismissed.**

22 Although this was not entirely clear from the Complaint, Plaintiffs now unequivocally
23 state that they are "not suing the Federal Protective Services or the United States Marshall's [sic]
24 Service for monetary damages." Opp. Br. at 3, first paragraph.

25 Plaintiffs apparently attempt to assert claims for injunctive relief only against the
26

27
28 ¹ In addition to being substantively without merit, Plaintiffs' request for sanctions
fails to comply with the procedures set forth in Fed. R. Civ. P. 11(c)(1)(A), and will therefore not
be further addressed by Defendants.

1 Defendant federal agencies. However, Plaintiffs effectively fail to address Defendants' argument
2 that they have the burden of establishing a waiver of sovereign immunity for such claims, and
3 that the authorities cited in Plaintiffs' Complaint do not support a waiver for these claims.
4 Motion to Dismiss at 3:23-4:6, 5:2-6:4. Plaintiffs' sole response is their conclusory assertion –
5 without benefit of citation to statute or case law – that “no waiver of sovereign immunity is
6 needed to stop unconstitutional acts.” Opp. Br. at 3, first paragraph. This unsupported contention
7 fails to discharge Plaintiffs' burden of pointing to a waiver of sovereign immunity that will
8 permit their claims to go forward. *Blue v. Widnall*, 162 F.3d 541, 544 (9th Cir. 1998); *Lane v.*
9 *Pena*, 518 U.S. 187 (1996) (waiver of sovereign immunity must be unequivocal and will not be
10 implied); *Cato v. United States*, 70 F.3d 1103, 1107 (9th Cir. 1995) (plaintiff bears burden of
11 establishing waiver of sovereign immunity).

12 As established in Defendants' moving papers, *Bivens*, 42 U.S.C. § 1983 and 28 U.S.C.
13 §§1331, 1332 1343 do not constitute waivers of sovereign immunity for the injunctive relief
14 claims Plaintiffs seek to assert against the U.S. Marshals Service and Federal Protective Service.
15 Motion to Dismiss at 5:2-6:4. Because Plaintiffs' Opposition brief fails to point to any other
16 possible authority for the necessary waiver of sovereign immunity for injunctive relief claims
17 against the agencies, these claims should be dismissed.

18 **III. FPS Officer McHugh and the Unnamed Officers Are Entitled to Qualified**
19 **Immunity.**

20 In their moving papers, Defendants established that there is no “clearly established law”
21 holding that it is unconstitutional to require the presentation of identification at a federal
22 courthouse security checkpoint. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Defendants
23 further set forth the Constitutional, statutory and regulatory authority that would have indicated
24 to a reasonable officer that requiring the presentation of identification upon entry to a federal
25 courthouse was, in fact, constitutionally permissible. Motion to Dismiss at 6:5-9:9.

26 Although Plaintiffs rail against the government's actions² and certain of the citations in
27

28 ² Defendants' counsel is unfamiliar with the phrase “Government Pappas,” repeated
throughout Plaintiffs' Opposition papers, and is therefore unable to address this contention
NTC. OF MTN AND MTN TO DISMISS
C 04-2567 PJH

1 Defendants' moving papers, Plaintiffs do contest the fundamental point that there is not a single
2 case holding it unconstitutional for court security personnel to request a show of identification at
3 a court security checkpoint. Even assuming for purposes of this Motion that Officer McHugh
4 and the Unnamed Officers did violate Plaintiffs' constitutional rights in the first instance,³ the
5 conceded lack of authority on this point demonstrates that Officer McHugh and the Unnamed
6 Officers are entitled to qualified immunity, as there was no clearly established law informing
7 them that their actions were unconstitutional. *Boyd v. Benton County*, 374 F.3d 773, 778 (9th Cir.
8 2004); *Desyllas v. Bernstine*, 351 F.3d 934, 939 (9th Cir.2003); *Meredith v. Erath*, 342 F.3d
9 1057, 1063-64 (9th Cir. 2003) (holding defendant entitled to qualified immunity notwithstanding
10 his violation of plaintiff's constitutional rights because "until the filing of this opinion, it had not
11 been clearly established" that the conduct was unconstitutional).

12 Because Defendants' moving papers establish that Officer McHugh and the Unnamed
13 Officers are entitled to qualified immunity, this Court should dismiss Plaintiffs' *Bivens* claims
14 against them.

15 CONCLUSION

16 Plaintiffs' Opposition does nothing to undermine the points set forth in Defendants'
17 moving papers that require dismissal of Plaintiffs' Complaint. Plaintiffs' state-law tort claims
18 must be dismissed for failure to comply with the mandatory administrative exhaustion
19 requirements under the FTCA. Plaintiffs disclaim any entitlement to monetary damages against
20 the U.S. Marshals Service and Federal Protective Service, and their injunctive relief claims
21 against the Defendant agencies should likewise be dismissed because Plaintiffs have failed to
22 discharge their burden of establishing a waiver of sovereign immunity for such claims. Finally,
23 this Court should dismiss Plaintiffs' *Bivens* claims against Officer McHugh and the other
24 Unnamed Officers because there was no clearly established law informing the officers that
25 requiring the presentation of identification at a federal courthouse security checkpoint is
26 _____
27 specifically. *See, e.g.*, Opp. Br. at 3, third and fourth paragraphs; *id.* at 4, second paragraph.

28 ³ To the extent this Court permits any of Plaintiffs' claims to go forward,
Defendants will address the substance of Plaintiffs' constitutional claims in subsequent briefing.


1 unconstitutional.

2 Accordingly, Defendants respectfully request that this action be dismissed with prejudice.

3 DATED: October 13, 2004

Respectfully submitted,

4 KEVIN V. RYAN
United States Attorney

5
6 
7 TRACIE L. BROWN
Assistant United States Attorney

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

26

27

28

CERTIFICATE OF SERVICE

The undersigned hereby certifies that she is an employee of the Office of the United States Attorney for the Northern District of California and is a person of such age and discretion to be competent to serve papers. The undersigned further certifies that she is causing a copy of the following:

1. Defendants' Reply to Motion to Dismiss Plaintiffs' Complaint

Foti, et al. v. McHugh, et al.
C 04-2567 PJH

to be served this date upon the party in this action by placing a true copy thereof in a sealed envelope, and served as follows:

- FIRST CLASS MAIL** by placing such envelope(s) with postage thereon fully prepaid in the designated area for outgoing U.S. mail in accordance with this office's practice.
- CERTIFIED MAIL (#)** by placing such envelope(s) with postage thereon fully prepaid in the designated area for outgoing U.S. mail in accordance with this office's practice.
- PERSONAL SERVICE (BY MESSENGER)**
- FEDERAL EXPRESS**
- FACSIMILE (FAX)**
- HAND-DELIVERED**


to the party addressed as follows:

Robert-John Foti
General Delivery
Woodacre, CA 94973

Joseph Leonard Neufeld
General Delivery
Mission Rafael Station
San Rafael, Ca 94915-9999

Kenneth Augustine
53 Mark Drive
San Rafael, CA 94903
Ph: 415-472-4952

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct. Executed on October 13, 2004 at San Francisco, California.


STEPHANIE MIZUHARA
Legal Assistant