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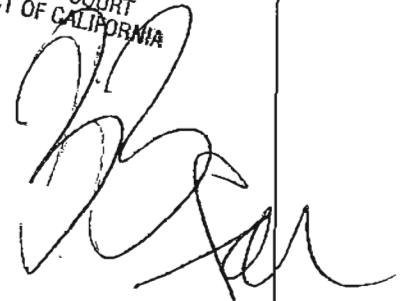
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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

ORIGINAL

FILED
DEC 15 2004
RICHARD W. WIEKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA



ROBERT-JOHN:FOTI; JOE NEUFELD;
KEN AUGUSTINE,

Plaintiffs,

v.

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

Defendants.

No. C 04-2567 PJH

**DEFENDANTS' REPLY IN SUPPORT
OF MOTION TO DISMISS
PLAINTIFFS' FIRST AMENDED
COMPLAINT**

The Honorable Phyllis J. Hamilton

[NO HEARING DATE; MOTION TO BE
DECIDED ON THE PAPERS]

REPLY RE: MTN TO DISMISS FIRST AM. CMPLT.
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INTRODUCTION

1
2 Defendants have moved this Court for an order dismissing the Plaintiffs' First Amended
3 Complaint ("FAC") in its entirety for four reasons: first, Plaintiffs may not bring state-law tort
4 claims against agencies or employees of the United States— instead, Plaintiffs are required to
5 bring such claims only against the United States as the defendant and only after complying with
6 the Federal Tort Claims Act (FTCA"), two prerequisites with which Plaintiffs have not complied;
7 second, Plaintiffs' constitutional claims for injunctive relief must be dismissed because Plaintiffs
8 have not met their burden of establishing the waiver of sovereign immunity upon which such
9 claims rely; third, Plaintiffs' *Bivens* claims against the individual defendants (Defendant
10 McHugh and the other unnamed officers) must be dismissed because such defendants are entitled
11 to qualified immunity; and fourth, Plaintiffs' obstruction of justice claim must be dismissed
12 because the United States has not waived its sovereign immunity so as to allow itself to be sued
13 for such claims.

14 Plaintiffs do not oppose the Defendants' contention that no FTCA claim is cognizable
15 here. Nor do Plaintiffs make any attempt to establish that their obstruction of justice claim has
16 any validity. Accordingly, Defendants' motion to dismiss Plaintiff's state law claims and their
17 obstruction of justice charge should be granted as unopposed. Moreover, Defendants' motion to
18 dismiss Plaintiffs' constitutional claims also should be granted because 1) as to the United States
19 Marshals Service ("USMS") and the Federal Protective Service ("FPS"), Plaintiffs still have not
20 identified a waiver of sovereign immunity upon which such claims may be pursued and 2) as to
21 the individual defendants, Plaintiffs have no legal support for their contention that it is clearly
22 established under federal law that federal officers may not check the identification of persons
23 seeking to enter federal property even when such property contains areas restricted to authorized
24 persons.

25 For all these reasons, Defendants respectfully request that this Court grant Defendants'
26 motion to dismiss the FAC in its entirety and that this Court dismiss Plaintiffs' cause and action
27 with prejudice.

ARGUMENT

- 1
2 1. Plaintiffs have not opposed the motion to dismiss as regards the state law claims
3 and the obstruction of justice claim.

4 Defendants have moved to dismiss Plaintiffs' state law claims on the ground that such
5 claims may be brought only against the United States as the defendant and only after Plaintiffs
6 have complied with the jurisdictional prerequisites of the FTCA. Motion at 2-4. Defendants
7 pointed out in their brief that there is no proof, for example, that Plaintiffs have complied with
8 the jurisdictional prerequisite that Plaintiffs exhaust their administrative remedies prior to
9 bringing a claim under the FTCA. *Id.*

10 In their opposition brief, Plaintiffs emphatically agree that this case is not being brought
11 under the FTCA. *See Layman's Opposition to defendant's Motion to dismiss first Amended*
12 *Complaint* ("Plaintiffs' Brief") at 3-4. In addition, Plaintiff's do not provide any authority for
13 bringing state law claims against the USMS or the FPS. Plaintiff's do not suggest nor provide
14 evidence that the individual defendants were acting outside the scope of their federal
15 employment with respect to any acts alleged in the complaint thereby attempting to establish that
16 their state law claims against the individual defendants have a basis in law. Instead, Plaintiffs
17 merely state that the state law claims are "actionable under the theory of pendent jurisdiction."
18 Plaintiff's Brief at 4, ¶ 6. This statement is not an effective counter to Defendants' motion.

19 There is no basis for plaintiffs' state law claims and Plaintiffs effectively have not opposed the
20 Defendants' motion to dismiss such claims. Accordingly, this Court should grant the
21 Defendants' motion to dismiss the state law claims.

22 Similarly, Defendants moved to dismiss the claim entitled "obstruction of justice" on the
23 ground that no waiver of sovereign immunity exists for such a claim. *See Motion* at 10 -11.
24 Plaintiffs do not challenge this legal contention in their opposition brief. Accordingly, the
25 Defendants' motion should be granted in this regard as well. *See Trentacosta v. Frontier Pacific*
26 *Aircraft Indus., Inc.*, 813 F.2d 1553, 1557-58 n. 4 (9th Cir.1987) (failure to address issue in
27 opposition to motion to dismiss deemed fatal to claim).

1 2. Plaintiffs have failed to establish that there exists a valid waiver of sovereign
2 immunity for claims against the USMS or the FPS for constitutional claims.

3 As set out in Defendants' moving papers (*see* Motion at 2-6) the burden is on plaintiff to
4 point to an explicit waiver of sovereign immunity. *Cato v. United States*, 70 F.3d 1103, 1107
5 (9th Cir. 1995) (quotations and citations omitted). If any valid waiver of immunity exists, the
6 Plaintiffs are obligated to point it out so that the parameters of any lawsuit and waiver of
7 immunity can be established.

8 In response, Plaintiffs identify only *Bivens*-type liability. *See* Plaintiff's Brief at 5-9.
9 Such liability, however, only relates to damages (not injunctive relief) and applies only to
10 individuals acting under color of federal law. Stated more directly, *Bivens* does not apply as
11 against to the United States because the United States has not waived sovereign immunity for
12 suits for damages based on alleged constitutional violations by its employees. *See Clemente v.*
13 *United States*, 766 F.2d 1358, 1363 (9th Cir.1985), *cert. denied*, 474 U.S. 1101 (1986); *Arnsberg*
14 *v. United States*, 757 F.2d 971, 980 (9th Cir.1985), *cert. denied*, 475 U.S. 1010 (1986). Plaintiffs
15 have failed to point to any other basis for liability. Accordingly, the constitutional claims against
16 the USMS and the FPS must be dismissed in their entirety.

17 3. Plaintiffs have not demonstrated that clearly established law precludes officers
18 from checking the identification of persons seeking to enter onto federal property.

19 The final claims remaining to be addressed are the constitutional claims against the
20 individual defendants (i.e. *Bivens* claims). As pointed out in Defendants' brief, *Bivens*
21 defendants are entitled to qualified immunity unless their conduct violated "clearly established
22 statutory or constitutional rights of which a reasonable person would have known." *Harlow v.*
23 *Fitzgerald*, 457 U.S. 800, 818 (1982). Here, Defendant have established that plaintiffs have no
24 constitutional right to be free from identification checks when entering federal property. *See* 41
25 C.F.R. § 102.74-375(c) (agencies must "[e]nsure, when property or a portion thereof is closed to
26 the public, . . . [persons must] when requested, display Government or other identifying
27 credentials to Federal police officers . . .). Moreover, even if such a constitutional right does
28 exist, it was not "clearly established" at the times mentioned in the complaint. *See e.g., Saucier v.*
Katz, 533 U.S. 194 (2001) (violation of rights not actionable if rights were not clearly

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1 established); *Florida v. Royer*, 460 U.S. 491, 501 (1983) (“[a]sking for and examining [airplane]
2 ticket and driver’s license were no doubt permissible in themselves”).

3 Plaintiffs have not cited a single case of persons seeking to avail themselves of federal
4 property without presenting any form of identification. The cases that Plaintiffs’ cite do not
5 involving persons in secure areas and therefore are inapposite. Regulatory and decisional law (as
6 well as common sense) all appear to suggest that the requirement to present identification is not a
7 violation of constitutional rights. Nevertheless, this Court need not even address the issue.
8 Instead, qualified immunity for federal officers should be granted whenever the alleged right is
9 not clearly established. *See Saucier*, 533 U.S. at 202. Here, Plaintiffs are not able to cite a
10 single case finding that persons have a constitutional right to enter secure federal property
11 without identification and that enforcement of a requirement for identification is a violation
12 of constitutional rights. Because Plaintiffs have failed to demonstrate that the rights alleged to
13 have been violated are clearly established, the federal officers are entitled to qualified immunity
14 and Plaintiffs’ *Bivens* claims must fail. *See Saucier*, 533 U.S. at 202.

15 **CONCLUSION**

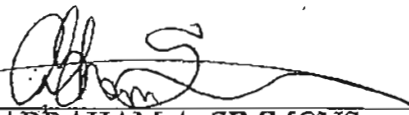
16 Plaintiffs do not dispute that this Court lacks jurisdiction over their FTCA and
17 obstruction of justice claims. Such claims should be dismissed. Further, Plaintiffs’ claims
18 against the USMS and FPS should likewise be dismissed because they have failed to establish a
19 waiver of sovereign immunity against the agencies. Additionally, this Court should dismiss
20 Plaintiffs’ *Bivens* claims against Officer McHugh and the other unnamed officers because those
21 individual Defendants are entitled to qualified immunity.

22 In sum, Defendants respectfully request that the SAC and this entire action be dismissed
23 with prejudice.

24 DATED: December 15, 2004

Respectfully submitted,

25 KEVIN V. RYAN
26 United States Attorney

27 
28 ABRAHAM A. SIMMONS
Assistant United States Attorney

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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:

Defendants' Reply Brief in Support of Motion to Dismiss Plaintiffs' First Amended 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**
- E-MAIL**

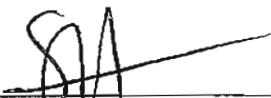
to the party addressed as follows:

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I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct. Executed on December 15, 2004 at San Francisco, California.



LILY HO-WUONG
Legal Assistant