

FILED

04 SEP 16 PM 3:52

RICHARD W. WIEKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

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
11

5
98

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

13 Plaintiffs,
14

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

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

No. C 04-2567 PJH

**NOTICE OF MOTION AND MOTION
TO DISMISS PLAINTIFFS'
COMPLAINT**

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

NTC. OF MTN AND MTN TO DISMISS
C 04-2567 PJH

1 **NOTICE OF MOTION**

2 PLEASE TAKE NOTICE that Defendants hereby move pursuant to Federal Rule of Civil
3 Procedure Rule 12(b)(1) and 12(b)(6) for dismissal of the Complaint filed by Plaintiffs Robert-
4 John:Foti, Joe Neufeld and Ken Augustine ("Plaintiffs"). This motion is based upon the Notice
5 of Motion and Memorandum of Points and Authorities contained herein, the Declarations of
6 Gerald Auerbach and Carol Lazzaro, the papers and pleadings on file in this action, and any other
7 matters that the Court may wish to consider. This motion will be heard on October 27, 2004, at
8 9:00 a.m., before the Honorable Phyllis J. Hamilton, at the United States Courthouse, Courtroom
9 3, 17th Floor, 450 Golden Gate Avenue, San Francisco, California.

10 **RELIEF REQUESTED**

11 Defendants request the dismissal of Plaintiffs' case in its entirety.

12 **ISSUES PRESENTED**

13 1. Whether Plaintiffs' tort claims must be dismissed because Plaintiffs have failed to
14 exhaust their mandatory administrative remedies under the Federal Tort Claims Act?

15 2. Whether Plaintiffs' constitutional claims against the U.S. Marshals Service and
16 the Federal Protective Service must be dismissed because such claims cannot be brought against
17 federal agencies?

18 3. Whether Plaintiffs' claims against Officer Timothy McHugh and "other unknown
19 number of unnamed officers of the U.S. Marshals Service and the Federal Protective Services"
20 must be dismissed because these individual Defendants are entitled to qualified immunity?

21 **INTRODUCTION/STATEMENT OF FACTS¹**

22 Plaintiffs' claims arise out of their May 21, 2004 attempt to enter the Phillip Burton
23 Federal Building at 450 Golden Gate Avenue in San Francisco ("Federal Building") without
24 showing any identification, as requested by officers of the U.S. Marshals Service ("USMS") and
25 the Federal Protective Service ("FPS"). Complaint, ¶¶ 5, 6, 8. Apparently relying on *Bivens v.*
26 *Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971)

27
28 ¹ Defendants accept Plaintiffs' allegations solely for purposes of this Motion to
Dismiss.

NTC. OF MTN AND MTN TO DISMISS
C 04-2567 PJH

1 (“*Bivens*”), 42 U.S.C. section 1983, and 28 U.S.C. sections 1331, 1332 and 1343, Plaintiffs
2 purport to bring state-law claims against Defendants for assault, battery, false arrest, false
3 imprisonment and kidnaping, as well as constitutional claims for alleged violations of Plaintiffs’
4 rights under the First, Fourth, Fifth, Thirteenth and Fourteenth Amendments. Complaint, ¶¶ 1, 2,
5 13, 15, 17, 19, 21.

6 ARGUMENT

7 **I. Plaintiffs’ State Law Claims Must Be Dismissed For Failure to Exhaust Their** 8 **Administrative Remedies.**

9 This Court lacks jurisdiction over Plaintiffs’ state-law tort claims for assault, battery,
10 false arrest, false imprisonment and kidnaping because Plaintiffs have failed to comply with the
11 prerequisites for federal court jurisdiction over their claims. It is axiomatic that, “[a]bsent a
12 waiver, sovereign immunity shields the Federal Government and its agencies from suit.” *Federal*
13 *Deposit Ins. Corp. v. Meyer*, 510 U.S. 471, 475 (1994). The Federal Tort Claims Act (“FTCA”),
14 28 U.S.C. §§ 1346(b) & 2674, is a limited waiver of sovereign immunity for state-law tort claims
15 such as those asserted by Plaintiffs, but only if claimants comply with certain prerequisites: “The
16 FTCA bars claimants from bringing suit in federal court until they have exhausted their
17 administrative remedies.” *McNeil v. United States*, 508 U.S. 106, 113 (1993).

18 As a threshold matter, Plaintiffs cannot assert their state-law tort claims against the
19 USMS and FPS, as the only proper defendant in an FTCA case is the United States, not its
20 agencies. 28 U.S.C. §§ 1346(b) & 2679(a); *City of Whittier v. United States Dept. of Justice*, 598
21 F.2d 561, 562 (9th Cir. 1979) (FTCA claim against Department of Justice dismissed because “it is
22 ‘well established that federal agencies are not subject to suit *eo nomine* unless so authorized by
23 Congress in explicit language.’”) (quoting *Blackmar v. Guerre*, 342 U.S. 512, 515 (1952)).

24 Even assuming Plaintiffs had properly named the United States as the defendant, this
25 Court lacks jurisdiction over Plaintiffs’ state-law tort claims because they have not satisfied the
26 specific jurisdictional prerequisites for an FTCA suit in federal court. Pursuant to 28 U.S.C.
27 section 2675(a), the claimant must first submit an administrative tort claim to the appropriate
28 federal agency. The federal agency then has six months to make a final determination on the

1 claim. The claimant may file a lawsuit against the United States in the appropriate district court
2 only after the appropriate agency makes a final determination on the claim or six months has run
3 from the date of presentment of the claim – in other words, the district court does not have
4 jurisdiction over FTCA claims until denial of the claim or the running of six months. *Id.* See
5 also 28 U.S.C. § 2401(b); *Jerves v. United States*, 966 F.2d 517 (9th Cir. 1992) (suit dismissed
6 because it was prematurely filed before receipt of agency's final denial and before six months
7 from date of submission of the claim); *Sparrow v. United States Postal Serv.*, 825 F. Supp. 252
8 (E.D. Cal. 1993) (filing complaint before administrative claim was finalized could not be cured
9 through an amended complaint; new complaint must be filed).

10 Critically, failure to comply with the mandatory administrative requirements divests a
11 district court of jurisdiction to hear a party's FTCA claim. *Jerves*, 966 F.2d at 519. Because this
12 requirement is jurisdictional, it cannot be waived. *Meridian Int'l Logistics, Inc. v. United States*,
13 939 F.2d 740, 743 (9th Cir. 1991).

14 Here, Plaintiffs have not alleged that they satisfied the administrative claim requirement
15 under 28 U.S.C. § 2675(a) before filing suit. Indeed, it is clear that Plaintiffs have not submitted
16 the required administrative claims with either the USMS or FPS. See Declarations of Gerald
17 Auerbach and Carol Lazzaro.²

18 Accordingly, because Plaintiffs have not satisfied the jurisdictional prerequisites of the
19 FTCA, this Court lacks jurisdiction over their state-law claims for assault, battery, false arrest,
20 false imprisonment and kidnaping. These claims must therefore be dismissed.

21 **II. Plaintiffs' Constitutional Claims Against the USMS and FPS Must Be Dismissed**
22 **Because Plaintiffs Have Not Sustained Their Burden Of Establishing A Waiver Of**
Sovereign Immunity For These Claims.

23 As noted above, it is well established that a plaintiff who sues the United States or its
24

25 ² These declarations are submitted only to challenge the Court's jurisdiction under
26 Rule 12(b)(1). Defendants request that the Court consider these matters outside the pleadings as
27 they are relevant to the issue of this Court's subject matter jurisdiction. *Capitol Industries-EMI*
28 *Inc. v. Bennett*, 681 F.2d 1107, 1118 n.29 (9th Cir. 1982) (matters outside pleadings related to the
issue of subject matter jurisdiction can be considered on motion to dismiss). "Where subject
matter jurisdiction is lacking, dismissal, not summary judgment, is the appropriate disposition."
MacKay v. Pfiel, 827 F.2d 540, 543 (9th Cir. 1987).

1 agencies “must point to an unequivocal waiver of sovereign immunity”; otherwise, the court
2 lacks subject matter jurisdiction over the suit. *Blue v. Widnall*, 162 F.3d 541, 544 (9th Cir. 1998);
3 *see also Lane v. Pena*, 518 U.S. 187 (1996) (waiver of sovereign immunity must be unequivocal
4 and will not be implied). The burden is on plaintiff to point to such an unequivocal waiver of
5 sovereign immunity. *Cato v. United States*, 70 F.3d 1103, 1107 (9th Cir. 1995) (quotations and
6 citations omitted). This Plaintiffs have failed to do.

7 **A. Plaintiffs Cannot Sue the USMS and FPS For Damages.**

8 Plaintiffs cannot sue federal agencies such as the USMS and FPS for damages based on
9 alleged constitutional violations.³ Although Plaintiffs cite *Bivens*, *see* Complaint, ¶ 1, *Bivens*-
10 type claims for damages may only be brought against federal officers in their individual
11 capacities – subject, of course, to the defense of qualified immunity, discussed below.
12 *Correctional Servs. Corp. v. Malesko*, 524 U.S. 61, 70 (2001) (“The purpose of *Bivens* is to deter
13 *individual federal officers* from committing constitutional violations.”) (emphasis added). The
14 Supreme Court has made abundantly clear, however, that *Bivens* provides no basis for
15 constitutional tort claims for damages against federal agencies themselves. In *Federal Deposit*
16 *Ins. Corp. v. Meyer*, 510 U.S. 471 (1994), the Court reversed the Ninth Circuit’s holding that
17 permitted Meyer’s due process claim to go forward against a federal agency, and explained:

18 Meyer’s proposed “solution” – essentially the circumvention of qualified
19 immunity – would mean the evisceration of the *Bivens* remedy, rather
20 than its extension. . . . If we were to imply a damages action directly
21 against federal agencies, thereby permitting claimants to bypass qualified
22 immunity, there would be no reason for aggrieved parties to bring
23 damages actions against individual officers. Under Meyer’s regime, the
24 deterrent effects of the *Bivens* remedy would be lost. . . . If we were to
25 recognize a direct action for damages against federal agencies, we would
26 be creating a potentially enormous financial burden for the Federal
27 Government.

28 *Id.* at 484-86.

Under *Meyer*, then, any claims for damages against the USMS and FPS based on alleged

29 ³ It is not entirely clear from the Complaint whether Plaintiffs seek damages from
30 the USMS and FPS; to the extent they do intend to assert such claims for damages from the
31 agencies, Defendants address this request for relief.

1 violations of the First, Fourth, Fifth, Thirteenth and Fourteenth Amendments must be dismissed.

2 **B. Plaintiffs' Claims For Injunctive Relief Based On Alleged Constitutional**
3 **Violations Must Be Dismissed Because The Authorities Plaintiffs Cite Do Not**
4 **Establish A Waiver Of Sovereign Immunity For Such Claims.**

5 Plaintiffs also request an injunction preventing the USMS and/or FPS from requiring
6 them to show identification prior to entering the Federal Building. Complaint, ¶ 23. Although
7 Plaintiffs purport to rely on *Bivens*, 42 U.S.C. section 1983 and 28 U.S.C. sections 1331, 1332
8 and 1343, *see id.*, ¶ 1, none of these authorities helps Plaintiffs discharge their burden of pointing
9 to an unequivocal waiver of sovereign immunity that would permit assertion of constitutional
10 claims for injunctive relief against the USMS and FPS. *See Cato*, 70 F.3d at 1107.

11 As discussed above, the Supreme Court's decision in *Bivens* permits suits for money
12 damages only against individual federal officers – not claims against agencies for either damages
13 or injunctive relief. Plaintiffs' citation to *Bivens* is therefore unavailing. *See* Section II.A, *supra*.

14 Nor does reliance on 42 U.S.C. section 1983 aid Plaintiffs. That statute applies to suits
15 where the official is alleged to have acted “under color of any statute, ordinance, regulation,
16 custom, or usage, of any State or Territory or the District of Columbia” 42 U.S.C. § 1983.
17 As noted by the Supreme Court in *District of Columbia v. Carter*, 409 U.S. 418, 424-35 (1973),
18 the federal government and its officers are “exempt from [section 1983's] proscriptions.” *See*
19 *also Gerritsen v. Consulado General de Mexico*, 989 F.2d 340, 342-43 (9th Cir. 1993)
20 (constitutional and section 1983 claims against FBI held properly dismissed because federal
21 courts “lack jurisdiction over suits against a federal agency absent express statutory
22 authorization”).

23 Similarly, 28 U.S.C. sections 1331, 1332 and 1343 do not constitute express waivers of
24 sovereign immunity for Plaintiffs' constitutional claims seeking injunctive relief against the
25 federal government. Those statutes are nothing more than statutes relating to district courts'
26 jurisdiction *generally*, and do not in any way speak to whether the federal government has
27 waived its sovereign immunity for the specific type of claims asserted by Plaintiffs against the
28 agencies here. *See, e.g., Hughes v. United States*, 953 F.2d 531, 538 n.5 (9th Cir. 1991) (citations
omitted) (noting that general jurisdiction statutes such as 28 U.S.C. § 1331 “cannot, however,

1 waive the government's sovereign immunity.").

2 Accordingly, Plaintiffs have failed to sustain their burden of establishing an unequivocal
3 waiver of sovereign immunity for their constitutional claims seeking injunctive relief from the
4 USMS and FPS. *See Cato*, 70 F.3d at 1107.⁴

5 **III. Plaintiffs' Claims Against FPS Officer McHugh and the Unnamed Officers Must be**
6 **Dismissed Because the Individual Defendants Are Entitled to Qualified Immunity.**

7 Relying on *Bivens*, Plaintiffs also claim that they are entitled to damages from FPS
8 Officer Timothy McHugh and the unnamed officers whom they encountered when they
9 attempted to enter the Federal Building after refusing to present identification. Plaintiffs' *Bivens*
10 claims must be dismissed because the individual Defendants are entitled to qualified immunity,
11 as there is no clearly established law prohibiting federal officials from requesting identification at
12 a security checkpoint in a federal courthouse.

13 *Bivens* defendants are entitled to qualified immunity unless their conduct violated "clearly
14 established statutory or constitutional rights of which a reasonable person would have known."
15 *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). In *Saucier v. Katz*, 533 U.S. 194 (2001), the
16 Supreme Court established a two-part analysis for determining whether qualified immunity is
17 appropriate in a suit against an officer for an alleged violation of a constitutional right. "Under
18 *Saucier*, courts 'must examine first whether the [officers] violated [the plaintiff's] constitutional
19 rights on the facts alleged and, second, if there was a violation, whether the constitutional rights
20 were clearly established.'" *Desyllas v. Bernstine*, 351 F.3d 934, 939 (9th Cir.2003) (quoting
21 *Saucier*, 533 U.S. at 201) (bracketed material in original). "As to the second inquiry, the
22 Supreme Court has held that '[i]f the law did not put the officer on notice that his conduct would
23 be clearly unlawful, summary judgment based on qualified immunity is appropriate.'" *Boyd v.*
24 *Benton County*, 374 F.3d 773, 778 (9th Cir. 2004) (quoting *Saucier*, 533 U.S. at 202).

25 The Supreme Court has long held that qualified immunity protects "all but the plainly
26

27 ⁴ Should Plaintiffs present on opposition a new basis for a waiver of sovereign
28 immunity for their constitutional claims against the USMS and FPS, or should the Court permit
these claims to go forward, Defendants reserve the right to address the merits (or lack thereof) of
Plaintiffs' constitutional claims in subsequent briefing.

1 incompetent or those who knowingly violate the law.” *Malley v. Briggs*, 475 U.S. 335, 341
2 (1986). Thus, if “officers of reasonable competence could disagree on th[e] issue, immunity
3 should be recognized.” *Id.*

4 In this case, even assuming *arguendo* that Plaintiffs could convince this Court that their
5 Complaint satisfies the first prong of the *Saucier* inquiry (*i.e.*, that their constitutional rights had
6 been violated), the individual Defendants are nonetheless entitled to qualified immunity because
7 there is no “clearly established” law informing the officers that it was unconstitutional to request
8 identification from a person seeking entry into a federal building – particularly in the wake of the
9 Oklahoma City bombing and the events of September 11, 2001. *Harlow*, 457 U.S. at 818.
10 Indeed, research has revealed not a single case holding it to be “clearly unlawful” for federal
11 officers to request for identification at a federal courthouse security checkpoint. *Saucier*, 533
12 U.S. at 202. Thus, because there was no law clearly establishing that the request for Plaintiffs’
13 identification was unconstitutional, the individual Defendants are entitled to qualified immunity.
14 *Cf. Meredith v. Erath*, 342 F.3d 1057, 1063-64 (9th Cir. 2003) (holding defendant entitled to
15 qualified immunity notwithstanding his violation of plaintiff’s constitutional rights because
16 “until the filing of this opinion, it had not been clearly established” that the conduct was
17 unconstitutional).

18 Furthermore, although there is no case addressing these factual circumstances, the law of
19 which a reasonable officer would have known strongly indicates that the individual Defendants’
20 request for Plaintiffs’ identification prior to permitting entry into the federal courthouse was
21 lawful. The Constitution itself provides that “Congress shall have power to dispose of and make
22 all needful rules and regulations respecting the territory or other property of the United States.”
23 U.S. Const., Art. IV, sec. 3. Congress has authorized the USMS to “provide for the security . . .
24 of the United States District Courts,” and to “provide for the personal protection of federal
25 jurists, court officers, witnesses and other[s] . . .” 28 U.S.C. § 566(a), (e)(1)(A). Similarly,
26 Congress has authorized the Department of Homeland Security (of which FPS is a component
27 agency) to “prescribe regulations necessary for the protection and administration of property
28 owned or occupied by the Federal Government and persons on the property” in consultation with

1 General Services Administration (“GSA”). 40 U.S.C. § 1315(c)(1); *see also* 41 C.F.R. Part 102-
2 74, Subpart C (regulations governing conduct on and admission to federal property).

3 Included in such regulations is the requirement that the agencies must “[e]nsure, when
4 property or a *portion thereof* is closed to the public, that admission to the property, or the
5 affected portion, is restricted to authorized persons who must register upon entry to the property
6 and *must, when requested, display Government or other identifying credentials to Federal police*
7 *officers* or other authorized individuals when entering, leaving or while on the property.” 41
8 C.F.R. § 102.74-375(c) (emphases added).⁵ Thus, Officer McHugh and the unnamed officers
9 reasonably (and correctly) believed they were acting in accordance with Constitutional, statutory
10 and regulatory authority when they requested identification from Plaintiffs at the security
11 checkpoint at the Federal Building’s entrance.

12 Moreover, in addition to these statutory and regulatory authorities, it has long been
13 recognized that an individual does not have an unfettered right of access to government property.
14 In *Adderley v. Florida*, 385 U.S. 39, 47 (1966), the Supreme Court held that the government, “no
15 less than a private owner of property, has the power to preserve the property under its control for
16 the use to which it is lawfully dedicated.” The Court further stated that there was “no merit to
17 petitioners’ argument that they had a constitutional right to stay on the [jailhouse] property”
18 despite the objections of the state government. *Id.* In affirming petitioners’ convictions, the
19 Court squarely rejected petitioners’ position that they had a constitutional right to access
20 government property for their own purposes “whenever and however and wherever they please.”
21 *Id.* at 47-48. The Court held: “The United States Constitution does not forbid a State to control
22 the use of its own property for its own lawful nondiscriminatory purpose.” *Id.* at 47-48.

23 The argument rejected by the Supreme Court in *Adderley* is precisely the argument that
24 Plaintiffs advance here. Complaint, ¶ 7. Contrary to Plaintiffs’ conclusory assertions and
25 assumptions, there is nothing in the Constitution and no case law prohibiting federal officials
26

27 ⁵ Defendants request that the Court take judicial notice of the fact that several
28 portions of the Federal Building – including, *e.g.*, the FBI offices and the Judges’ chambers – are
closed to the public. Fed. R. Evid. 201.

1 from requesting identification at a security checkpoint as a means to control access to federal
2 courtrooms and property.

3 Plaintiffs' citation to *Florida v. Royer*, 460 U.S. 491 (1983), and *Carey v. Nevada*
4 *Gaming Auth.*, 279 F.3d 873 (9th Cir. 2002), is unavailing. Complaint, ¶ 9, n.10. First, neither
5 case involves access to a federal courthouse, property that the government unquestionably has the
6 duty and right to control. See 28 U.S.C. § 566(a); *Adderley*, 385 U.S. at 47. Furthermore, the
7 plurality in *Royer* made clear that “[a]sking for and examining Royer’s [airplane] ticket and
8 driver’s license were no doubt permissible in themselves.” *Royer*, 460 U.S. at 501 (emphasis
9 added). Asking for identification is exactly what Plaintiffs allege the federal agents did here.
10 The constitutional violation in *Royer* occurred because the officers retained Royer’s airplane
11 ticket and license, then took him to a large storage closet where he was detained and interrogated
12 for fifteen minutes before being placed under arrest. Here, by contrast, Plaintiffs were not taken
13 away and arrested; they were simply instructed to leave the area. Complaint, ¶ 8.

14 Nor does *Carey* aid Plaintiffs’ case. There, the Ninth Circuit held unconstitutional
15 Nevada statutes under which officers arrested Carey and put him in jail overnight for refusing to
16 identify himself. 279 F.3d at 880-81. *Carey* is thus irrelevant because not only does it not
17 involve access to government property, Plaintiffs do not allege that they were ever placed under
18 arrest by the individual Defendants; again, they specifically allege that after they refused to
19 provide identification, they were told to leave. Complaint, ¶ 8; see also *United States v.*
20 *Christian*, 356 F.3d 1103, 1106 (9th Cir. 2004) (explaining that *Carey* and similar cases stand for
21 the proposition that “failure to identify oneself cannot, on its own, justify an arrest,” but noting
22 that “nothing in our case law prohibits officers from asking for, or even demanding”
23 identification).

24 Moreover, *Carey* has since been effectively overruled by *Hübel v. Sixth Judicial Dist.*
25 *Court of Nevada*, ___ U.S. ___, 124 S.Ct. 2451 (2004). In that case, the Supreme Court reviewed
26 the same Nevada “stop and identify” statute at issue in *Carey* and held arresting Hübel for
27 refusing to comply with the state requirement that he identify himself when asked by a police
28 officer “did not contravene the guarantees” of the Fourth or Fifth Amendments. *Id.* at 2459-61.

1 In the course of rejecting Hiibel's constitutional challenges, the Court reiterated its prior holdings
2 that, "[i]n the ordinary course a police officer is free to ask a person for identification without
3 implicating the Fourth Amendment. Interrogation relating to one's identity or a request for
4 identification by the police, without more, does not constitute a Fourth Amendment seizure." *Id.*
5 at 2458 (internal quotations and citations omitted). Thus, contrary to Plaintiffs' claims, *Royer*
6 and *Carey* in no way deprive the individual Defendants of qualified immunity.

7 Accordingly, because there was no clearly established law holding that the individual
8 Defendants' request for identification at the Federal Building security checkpoint was unlawful,
9 Plaintiffs' *Bivens* claims must be dismissed. *Saucier*, 533 U.S. at 202.

10 CONCLUSION

11 This Court lacks jurisdiction over Plaintiffs' FTCA claims because Plaintiffs have failed
12 to comply with the mandatory administrative exhaustion requirements. Plaintiffs' claims against
13 the USMS and FPS should likewise be dismissed because they have failed to establish a waiver
14 of sovereign immunity for either damages or injunctive relief claims against the agencies.
15 Finally, this Court should dismiss Plaintiffs' *Bivens* claims against Officer McHugh and the other
16 unnamed officers because those individual Defendants are entitled to qualified immunity.

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

18 DATED: September 16, 2004

Respectfully submitted,

19 KEVIN V. RYAN
United States Attorney

20
21 
22 TRACIE L. BROWN
Assistant United States Attorney

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. **Notice of Motion and Motion to Dismiss Plaintiffs' Complaint**
- 2. **Declaration of Carol Lazzaro in Support of Defendants' Motion to Dismiss Plaintiffs' Complaint**
- 3. **Declaration of Gerald Auerbach in Support of Defendants' 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 September 16, 2004 at San Francisco, California.


STEPHANIE MIZUHARA
Legal Assistant