UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

GERARDO VAZQUEZ-MENTADO :

Plaintiff,

-vs- :

MORGAN BUITRON, JAVIER LORENZO and JOHN DOES 1 and 2, individually and in their official capacities as U.S. Border Patrol Agents; KEVIN OAKS, Chief Border Patrol Agent, Buffalo Sector in his individual capacity; and the UNITED STATES OF AMERICA, :

Civil Action
No. 5:12-CV-797-LEK-ATB

Defendants. :

PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

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I. INTRODUCTORY STATEMENT

Plaintiff GERARDO VAZQUEZ-MENTADO (VAZQUEZ) submits this memorandum of law in opposition to defendants' December 7, 2012 motion to dismiss under Federal Rule of Civil Procedure 12(b)(1) and (b)(6). This action, alleging that VAZQUEZ was unlawfully detained and arrested by defendant U.S. Border Patrol officials, contains claims pursuant to Bivens v. Six Unknown Federal Narcotic Agents, 403 U.S. 388 (1971) and under the Federal Torts Claims Act, 28 U.S.C. §2671 et seq.

II. ARGUMENT

POINT ONE

PLAINTIFF'S COMPLAINT, ON ITS FACE, SHOWS THAT THE DEFENDANTS DID NOT HAVE PROBABLE CAUSE TO ARREST HIM

Defendants BUITRON and LORENZO contend that the complaint, on its face, shows that they had probable cause to arrest[1] VAZQUEZ. Defendant's Memorandum at 8-9. However, their conclusion is based upon a partial reading of the complaint. In deciding this motion, the Court must consider the complaint in its entirety, including documents incorporated into it by reference. Telltabs, Inc. v. Makor Issues and Rights, Ltd., 551

[1]The complaint alleges that VAZQUEZ was handcuffed and taken by two of the defendants from the location where he was detained to the Border Patrol station. Complaint ¶¶21, 33-34. These acts support his legal conclusion that he was arrested. Kaupp v. Texas, 538 U.S. 626, 631 (2003).

U.S. 308, 322 (2007). It must treat all its allegations as being true. Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009).

A showing that the defendants had probable cause to arrest VAZQUEZ defeats both his Bivens claim, based on the Fourth Amendment's prohibition against unreasonable seizures, and his FTCA claim based on the New York cause of action of false arrest/imprisonment. Weyand v. Okst, 101 F.3d 845, 852 (2nd Cir. 1996); Broughton v. State of New York, 37 N.Y.2d 451, 458 (1975). To determine whether his complaint sufficiently alleges a lack of probable cause, in order to withstand this motion, this Court must determine if his claim is "plausible," as opposed to "probable." Iqbal v. Ashcroft, 556 U.S. 662, 678 (2009).

In the immigration context of this action, in order to arrest VAZQUEZ, the defendants were required to have "reason to believe" that he was an alien unlawfully in the U.S. 8 U.S.C. §1357(a)(2); 8 C.F.R. 287.8(c)(2)(I). Reason to believe has been defined as requiring probable cause. Avila-Gallegos v. INS, 525 F.2d 666, 667 (2nd Cir. 1975); Ojeda-Vinales v. INS, 523 F.2d 286, 288 (2nd Cir. 1975).

Probable cause is deemed to exist "where the facts and circumstances within the officer's knowledge and of which they had reasonably trustworthy information are sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed." Brinegar v.

U.S., 338 U.S. 160, 175 (1949). Whether the facts, viewed objectively and in their totality, justify the arrest is key. Scott v. U.S., 436 U.S. 128, 138 (1978); Jenkins v. City of New York, 478 F.3d 76, 90 (2nd Cir. 2007). Where, as here, a warrantless arrest is made, the requirements of particularity and reliability of the information cannot be less stringent than where a warrant has been obtained. First Amended Complaint (Complaint) ¶47; Wong Sun v. U.S., 371 U.S. 471, 479-480 (1963).

Based on what he was told by the defendants, VAZQUEZ asserts that he was arrested because defendants BUITRON and LORENZO believed he was Gerardo Vasquez-Mentado,[2] an undocumented alien with the same date of birth as VAZQUEZ. Complaint ¶¶20, 41. While mistakes may be made by law enforcement officials in determining whether probable cause exists to arrest a person, the mistakes "must be those of reasonable men, acting on facts leading sensibly to their conclusions of probability. " Brinegar v. U.S., 338 U.S. at 176.

In a mistaken identity case in the criminal context, the Supreme Court held that a warrantless arrest will pass

[2]Whether this is actually why the defendants arrested VAZQUEZ, whether such a person exists, and if so, what his characteristecs are, are questions that he has not had the opportunity to seek discovery on. He should be permitted to conduct discovery for this purpose. Ramirez v. U.S., 998 F.Supp. 425, 430 (D.N.J. 1998)(in denying motion to dismiss, need for discovery recognized since the reason why the plantiff was arrested by immigration officers was known only to them).

constitutional muster only if it is reasonable to believe that the person being arrested is the person being sought. Hill v. California, 401 U.S. 797, 802-4 (1969). Subsequent cases have applied this standard in the civil arena. Berg v. County of Allegheny, 219 F.3d 261, 273 (3rd Cir. 2000); Ingram v. City of Columbus, 185 F.3d 579, 596 (6th Cir. 1999); Ramirez v. U.S., 998 F.Supp. 425, 430 (D.N.J. 1998). Similarly, under the New York law of false arrest/imprisonment, which controls the FTCA claim, the arresting officer must exercise reasonable care and due diligence to ensure that the person arrested is the person sought. Boose v. City of Rochester, 71 App. Div. 2d 59, 67 (4th Dept. 1979); Maracle v. State, 50 Misc. 2d 348, 351-2 (Ct. Claims 1966).

The facts as alleged in the complaint present a plausible argument that the defendants' misidentification of VAZQUEZ was not reasonable. Defendants BUITRON and LORENZO arrested VAZQUEZ after he presented, at their request, his New York driver's license. Complaint ¶18-21 . The license indicated that his name was Gerardo Vazquez. Complaint ¶19; Ex. B of Complaint. The defendants later gave him a writing indicating that the person they sought was Gerardo Vasquez-Mentado. Complaint ¶41. The fact that the first part of plaintiff's surname was spelled differently[3] on his license, and that the license did not include the last part of his surname (which he

[3]Vazquez as opposed to Vasquez.

actually shared with the target), should have raised an issue as to whether he was the same person.

Defendants contend that they had probable cause to arrest VAZQUEZ because he had the same name and date of birth as their target, Gerardo Vasquez-Mentado. Defendants' Memorandum at 8. While he had the same date of birth, his license, as noted above, did not show that he had the same name. It has been opined that the risk of misidentification of suspects, based on coincidental similarity of names, dates of birth and descriptions, is "substantial." Baker v. McCollan, 443 U.S. at 155-6 (dissent of Stevens, J.).

It may be that the defendants investigated VAZQUEZ prior to the vehicle stop on September 29, 2009. Complaint ¶12 (VAZQUEZ observed Border Patrol vehicle parked near his residence during the preceding week). If so, this would explain why defendants BUITRON and LORENZO referred to him as Gerardo Vasquez-Mentado when they arrested him, even though his license lacked his second surname. Complaint ¶20 and Exs. A. (naturalization certificate which shows that plaintiff's second surname is Mentado) and B.

If the defendants had undertaken a pre-arrest investigation, their decision to arrest him is even more unreasonable. It is plausible that such an investigation also would have revealed that a naturalized citizen by the name of

Gerardo Vazquez-Mentado, with the same date of birth as their target, existed. Whether the defendants performed such an investigation, what its results were, and why VAZQUEZ was arrested in light of it, requires discovery to ascertain whether probable, and arguable probable, cause existed.

Defendants BUITRON and LORENZO's failure to check the validity of VAZQUEZ' New York driver's license compounds the unreasonableness of their actions. Complaint ¶19-21, 25. VAZQUEZ' license was issued in April, 2004. Complaint Ex. B. Since 2001, a person must have either a valid Social Security number; or a letter from Social Security, with their valid immigration document, which indicates that their document does not make them eligible for a number; in order to obtain a valid New York driver's license . Cubas v. Martinez, 8 N.Y.3d 611, 616-7 (2007). In turn, a person cannot obtain a valid Social Security number unless they are a U.S. citizen, permanent resident, or have some other type of valid immigration status. "Types of Social Security Cards Issued" found at www.socialsecurity.gov . Accordingly, VAZQUEZ' driver's license, on its face, should have alerted the defendants that he was in a valid immigration status.

The defendants' alleged failure to check the validity of VAZQUEZ' license is particularly troubling, given the different spelling of his first surname, the absence of his second surname, and his repeated assertions that he was a U.S.

citizen. Complaint ¶19-22, 25, 41. Panetta v. Crowley, 460 F.3d 388, 395 (2nd Cir. 2006)(an officer may not disregard plainly exculpatory evidence in determining whether probable cause exists for an arrest). The fact that he was apprehended in New York, 16 years after their target was arrested by immigration agents in Texas, adds to the facial unreasonableness of their actions. Complaint ¶41; Rivera v. U.S., 928 F.2d 592, 609 (2nd Cir. 1991)(to determine whether probable cause for the issuance of a warrant exists, magistrate must determine whether the evidence is current or has become stale).

Ultimately, whether defendants BUITRON and LORENZO had probable cause that VAZQUEZ was their target is a matter that can only be resolved through discovery. Discovery would establish whether there were other facts, currently unknown to the plaintiff, which would distinguish him from the defendant's target (such as his country of birth or physical characteristics). One court, confronted by a mistaken identity case in the immigration context, denied a motion to dismiss and held that discovery was warranted. Ramirez v. INS, 998 F.Supp. at 430 (D.N.J. 1998).

Additionally, defendants' conduct after arresting VAZQUEZ has some bearing on whether they continued to possess probable cause to affect his warrantless arrest. Accord Cannon v. Macon County, 1 F.3d 1558, 1563 (11th Cir. 1994) and Sanders v.

English, 950 F.2d 1152 (5th Cir. 1992)(failure to release plaintiff after officer knew or should have known of misidentification gives rise to claim under 42 U.S.C. §1983). After he was handcuffed, both VAZQUEZ and his wife repeatedly told defendants BUITRON and LORENZO that he was a U.S. citizen. Complaint ¶22. They also told the defendants that VAZQUEZ had a valid N.Y. driver's license. Complaint ¶23. The defendants, without checking on the validity of the license, merely responded that he was illegal. Complaint ¶24-5. Prior to transporting him to the Border Patrol Station, defendants BUITRON and LORENZO did not ask VAZQUEZ any questions to determine if he was a U.S. citizen, nor did they otherwise investigate his claim of citizenship. Complaint ¶35-36. Not even his wife's claim that she was a U.S. citizen[4] caused them to reconsider. Complaint ¶27.

At the Border Patrol station, any notion that probable cause existed became even more illusory. Upon arrival, VAZQUEZ was fingerprinted and photographed. Complaint ¶39. Presumably, a comparison of either with the target's would have revealed that the defendants had the wrong man. Whether the defendants had the target's photo and prints, and if so, whether any comparison was made, can be divined only through discovery.

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[4]This fact is significant to the probable cause equation because U.S. citizens can apply for permanent residence status for their spouses. 8 U.S.C. §§1151(a), (b)(2)(A)(I) and 1154(a)(1)(A)(I). Her assertion further supported the premise that VAZQUEZ was not an alien unlawfully in the U.S.

At the station, VAZQUEZ was shown a writing with his namesake's name and date of birth, and was told he was that person. Complaint ¶41. He then informed the defendants that his name was spelled differently than the target's (as evinced by his license), and that he was already a permanent resident in 1993, and living in Oswego, New York when the target was arrested by the Border Patrol in Texas. Complaint ¶41-3. He also answered questions about his claim to citizenship. Complaint ¶40. Even more telling, VAZQUEZ provided his New York pistol permit, which on its face showed that his nationality was "American." Complaint ¶44 and Ex. C. Nevertheless, he was released, after 90 minutes in custody, only after his wife produced his naturalization certificate and U.S. passport. Complaint ¶45-46. Only through discovery can it be ascertained why the defendants detained him for as long as they did.

Whether or not the defendants continued to possess probable cause after arresting VAZQUEZ also implicates defendants JOHN DOES 1 and 2. At the Border Patrol station, those defendants fingerprinted and questioned him. Complaint 38-44.

Defendants' memorandum asserts that VAZQUEZ' Fourth Amendment claim is premised on the actions of defendants BUITRON and LORENZO. Memorandum at 8-9. However, that claim was brought against all the defendants. Complaint ¶58.

POINT TWO

THE DEFENDANTS DID NOT HAVE ARGUABLE PROBABLE CAUSE TO ARREST VAZQUEZ AND SO DO NOT HAVE QUALIFIED IMMUNITY

Qualified immunity will bar recovery, if the constitutional or statutory right violated by the public official was not clearly established at the time of the alleged injury. Harlow v. Fitzgerald, 457 U.S. 800 (1982). The right claimed by VAZQUEZ, i.e. to be free from arrest without probable cause, is clearly established. Martinez v. Simonetti, 202 F.3d 625, 634 (2nd Cir. 2000).

It is very difficult for the qualified immunity defense to succeed at the pleading stage. McKenna v. Wright, 386 F.3d 432, 436-7 (2nd Cir. 2004). That defense is not applicable to the FTCA claim. Castro v. U.S., 34 F.3d 101, 111 (2nd Cir. 1994).

Qualified immunity, in a false arrest case, will be granted if it can be shown that the officer had "arguable probable cause". Escalera v. Lunn, 361 F.3d 737, 743 (2nd Cir. 2004). Arguable probable cause exists if it was either objectively reasonable for the officer to believe that probable cause exists or if "officers of reasonable competence" could disagree on whether probable cause exists. Id.

Defendants argue that they had arguable probable cause to arrest VAZQUEZ because he had the same name and date of birth

as their target. Defendants' Memorandum at 12. However, he does not have the same name. Plaintiff's Memorandum at 4-5.

Defendants did not have probable cause to arrest VAZQUEZ. Memorandum at 4-9. Qualified immunity cannot be made out in this case for other reasons. First, the defendants did not have a warrant for VAZQUEZ when they arrested him. Complaint ¶47. An internal manual of Customs and Border Protection (the parent agency of the Border Patrol[5])indicates that the use of a warrant is strongly favored. Inspector's Field Manual (IFM) §18.3(a)(1) (found at http://foia.cbp.gov/streamingWord.asp?j=238); also see Illinois v. Gates, 462 U.S. 213, 236 (1983)(criminal arrest). The IFM notes that a warrant is not required if the agent has reason to believe or probable cause that a suspected unlawful alien is likely to escape before it can be procured. IFM §18.3(a)(1); also see 8 U.S.C. §1357(a)(2) and 8 C.F.R. 287.8(c)(2)(ii). Without discovery, it cannot be ascertained whether the defendants had probable cause to believe that VAZQUEZ would escape.[6] If they did not, their arrest of VAZQUEZ was unlawful. Westover v. Reno , 202 F.3d 475, 479-480 (1st Cir. 2000).

[5]Customs and Border Protection Organizational Chart found at http://cbp.gov/linkhandler/cgov/about/organization/orgcha1.ctt/orgcha1.pdf.

[6]One of the factors showing likelihood of escape is lack of family ties. IFM 18.3(a)(1). The complaint alleges that VAZQUEZ was with his wife and two children, who are U.S. citizens, when he was apprehended. Complaint §15-16, 21.

Secondly, a Border Patrol agent cannot arrest a U.S. citizen for being unlawfully in the U.S. 8 U.S.C. §§1101(a)(3) and §1357(a)(2)(only non-citizens or aliens can be arrested for being unlawfully in the U.S.). Naturalized U.S. citizens such as VAZQUEZ are not required to carry proof of their citizenship. Complaint ¶30; accord Boustani v. Blackwell, 460 F.Supp. 2d 822, 825 (N.D. Ohio 2006)(naturalized citizens do not normally carry with them their 8 ½ by 11" naturalization certificate).

Accordingly, a Border Patrol agent who encounters a person claiming to be a U.S. citizen must review any documents he presents to establish nationality. IFM 12.2 (found at http://foia.cbp.gov/streamingWord.asp?i=910 at 30). If there is any question regarding the subject's citizenship, "close scrutiny" of the document is required to ensure that it is valid and belongs to the bearer. According to a memo from Immigration and Customs Enforcement (ICE), the Border Patrol's sister agency,[7] an officer must fully investigate a person's claim that he is a U.S. citizen before arresting them as an unlawful alien. November 6, 2008 Memo of James T. Hayes, Director, Office of Detention and Removal Operations, U.S. Immigration and Customs Enforcement (attached hereto as Exhibit 1). No examination of VAZQUEZ' documents occurred here, and neither did any "full"

[7]Whether a similar memo exists, specifically applicable to the Border Patrol, is another subject of discovery.

investigation of his citizenship claim. Memorandum at 4-9.

Perhaps the defendants had never encountered a person claiming to be a U.S. citizen who they believed to be an alien. Even if that was the case, they did not possess arguable probable cause. Border Patrol agents are instructed that novel situations call for research prior to making a decision. IFM 4.1 (found at http://foia.cbp.gov/streamingWord.asp?i=910 at 21). That research requires cross-searching between different databases, including the NCIC, which includes information on driver's licenses. IFM 4.4 (found at http://foia.cbp.gov/streamingWord.asp?i=910 at 23) and 33.1.(a)(found at http://foia.cbp.gov/streamingWord.asp?j=241 at 44). Had VAZQUEZ' license been checked with the NCIC, it, and his corresponding claim of citizenship, would have been promptly authenticated.

To the contrary, and in spite of the evidence known to them, defendants BUITRON and LORENZO told VAZQUEZ that he was illegal and that they had to take him to their office. Complaint ¶20, 24, 32. Not until he arrived at the Border Patrol station was he asked any questions about his claim of U.S. citizenship. Complaint ¶21, 25, 29, 35-6, 40. Even after answering questions at the station through which he distinguished himself from the defendants' target; being printed and photographed (which also presumably would have distinguished him); and providing his pistol permit which noted he was American, VAZQUEZ was not

released until his wife produced his U.S. passport and naturalization certificate. Complaint ¶39-45.

Such actions were not the mark of reasonable law enforcement officers, who cannot disregard plainly exculpatory evidence. Panetta v. Crowley, 460 F.3d at 395. The defendants' failure to conduct even a minimal investigation of VAZQUEZ' claim, which would have confirmed his U.S. citizenship, removes their cloak of qualified immunity. Lyttle v. U.S., 867 F.Supp. 2d 1256, 1284 (M.D. Ga. 2012); also see Olivera v. Mayer, 23 F.3d 642, 647 (2nd Cir. 1994)(citing to cases discussing duty to investigate).

The defendants' alleged disregard of their aforesaid procedures compounds the unreasonable nature of their actions. Complaint ¶29; Memorandum at 12-14. In Lyttle, a case which also dealt with the arrest of a U.S. citizen by immigration officers, the court noted the failure of the officers to follow applicable procedures in holding that they did not have arguable probable cause to arrest. Lyttle v. U.S., 867 F.Supp. 2d at 1287-8 (also citing to the Hayes memo, noted herein at 13). Accordingly, at the pleading stage of this litigation, it cannot be said that plaintiff's Bivens and FTCA claims are not plausible.

Defendants cite Ortega v. Cloyd, 2012 WL 5835519(W.D. Kentucky 2012) in support of their claim of qualified immunity. However, Ortega is factually distinguishable. It involved an

action brought by a U.S. citizen against an ICE agent who, believing Ortega was an unlawful alien with a very similar name and birthdate, issued a detainer to local law enforcement requiring that they hold him. Ortega v. Cloyd, 2012 WL 5835519 at 1. The agent apparently never confronted Ortega directly, but merely acted on information in the government's database.

Here, the defendants were immediately presented with VAZQUEZ' claim of U.S. citizenship, along with his license showing he was not an alien. Furthermore, it is unclear whether the ICE agent in Ortega had any information in his database pointing to the existence of Ortega, a U.S. citizen whose pedigree information was very similar to that of his target's.

POINT THREE

A BIVENS ACTION MAY BE BROUGHT AGAINST FEDERAL EMPLOYEES ACTING WITHIN THE SCOPE OF THEIR EMPLOY

Defendants contend that a Bivens action does not lie where, as here, the individual defendants are alleged to have acted within the scope of their employment. Defendant's Memorandum at 9-10. They contend that that allegation is tantamount to an official capacity suit. Ibid. However, the supporting case they cite does not stand for that proposition. Robinson v. Overseas Military Sales Corp., 21 F.3d 502, 510 (2nd Cir. 1994). Robinson merely held that a Bivens action cannot be brought against federal officials in their official capacities,

as opposed to their individual ones. Ibid. VAZQUEZ' Bivens action has been brought only against the defendants in their individual capacities. Complaint ¶58.

The federal law enforcement defendants in Robinson, sued by a military contractor who they investigated, clearly were acting within the scope of their employment. Robinson v. Overseas Military Corp., 21 F.3d at 505-6. So were the defendants in Bivens, federal narcotics officers who, acting under color of law, arrested the plaintiff for a drug offense and searched his house. Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388, 389 (1971).

POINT FOUR

A BIVENS ACTION CAN BE BASED
UPON A CLAIM OF FALSE ARREST

Defendants argue that VAZQUEZ does not possess a Fourth Amendment claim for false arrest for three reasons. They contend that he is impermissibly attempting to elevate a common law tort to a constitutional one. Defendant's Memorandum at 9. Second, they state that his allegations merely give rise to a claim of negligence. Ibid. Third, they aver that his FTCA claim, as pled, cannot be distinguished from his Bivens claim, because a Bivens action requires "direct involvement in a knowing violation of Plaintiff's Fourth Amendment rights." Ibid (citing no authority).

Defendant is mistaken on all counts. A Bivens claim for

false arrest is based upon the Fourth Amendment right to be free from unreasonable searches and seizures. Williams v. Young, 769 F.Supp. 2d 594, 602 (S.D.N.Y. 2011); accord Weyant v. Okst, 101 F.3d at 852 (42 U.S.C. §1983 action) and Tavarez v. Reno, 54 F.3d 109, 110 (2nd Cir. 1995)(same substantive standards used for Bivens and for §1983 actions). A §1983 action for false arrest is substantially the same as a claim for false arrest under New York law. Weyant v. Okst, 101 F.3d at 852.

Defendants correctly assert that a claim premised upon negligence is not one of constitutional dimension. Daniels v. Williams, 474 U.S. 327, 333-3 (1986)(due process). However, left open by Daniels is the question of whether something less than intentional conduct, such as recklessness or gross negligence, will suffice. Daniels v. Williams, 474 U.S. at 334 n. 3; County of Sacramento v. Lewis, 523 U.S. 833, 863 (1998). In this circuit, it has been held that deliberate or wilful indifference is sufficient, and that where actual deliberation is possible, indifference will give rise to constitutional liability. Pabon v. Wright, 459 F.3d 241, 251 (2nd Cir. 2006); Morales v. NYS Department of Corrections, 842 F.2d 27, 30 (2nd Cir. 1988); Gill v. Mooney, 824 F.2d 192, 195 (2nd Cir. 1987). Deliberate indifference is clearly a higher standard of scienter than negligence. County of Sacramento v. Lewis, 523 U.S. at 850.

VAZQUEZ has alleged that the defendants arrested him

without probable cause and detained him unlawfully for ninety minutes, in violation of the Fourth Amendment. Complaint ¶46-49, 58. It has been held in this Circuit that allegations of an unlawful search under the Fourth Amendment, without a warrant or probable cause, cite "a potential abuse of power that rises above mere negligence." Castro v. U.S., 34 F.3d at 113. Their disregard of his claims of citizenship amount to deliberate or willful indifference.

The fact that VAZQUEZ' Bivens and FTCA claims are substantively similar does not obviate his Bivens claim. Bivens and FTCA claims are designed to be parallel and complementary, making it possible to sue both the U.S. government and its employees individually for the same actions. Carlson v. Green, 446 U.S. 14, 18-23 (1980).

POINT FIVE

THE BIVENS CLAIM AGAINST DEFENDANT OAKS, BASED ON SUPERVISORY LIABILITY, WAS SUFFICIENTLY PLED TO WITHSTAND THIS MOTION

Defendant OAKS seeks dismissal of the Bivens action as brought against him. Defendants' Memorandum at 13-18. He argues that the complaint does not allege specific actions he committed that led to the violations VAZQUEZ complains of. Id. He also contends, and VAZQUEZ concedes, that he is not vicariously liable for the actions of the four Border Patrol agent defendants.

Defendant's Memorandum at 14.

The complaint is sufficiently specific to sustain the Bivens claim against defendant OAKS. He was the Chief Border Patrol agent for the Buffalo, New York Border Patrol sector at the time of this incident. Complaint ¶10. In that capacity, he was responsible for training and supervising the four defendant agents, and for promulgating and establishing applicable rules, policies, procedures, orders and customs. Ibid. During his tenure, it is alleged that a pattern and practice existed of arresting U.S. citizens in the Buffalo sector. Complaint ¶50. The manner of his training and supervision of the four defendant agents either encouraged the arrest of VAZQUEZ, or failed to prevent it. Complaint ¶51. Policies, customs and orders he established led to VAZQUEZ' arrest, and he knew or should have known that his actions would have resulted in VAZQUEZ' arrest. Complaint ¶52-53.

Perhaps the most startling omission herein was defendants' failure to check the validity of VAZQUEZ' driver's license. That failing was contrary to Border Patrol policy. Memorandum at 12. Either the agent defendants willfully violated that policy, or they were not trained or adequately supervised on it by defendant OAKS. Which it was can only be resolved through discovery. The same is true with respect to the other policies they did not follow. Memorandum at 11-13.

In Lyttle, the court denied a motion to dismiss a claim of supervisory liability against the Field Office Director of Immigration and Customs Enforcement, a position comparable to a Chief Border Patrol Agent. It held that allegations that that defendant was aware of a substantial risk of wrongfully detaining and deporting U.S. citizens, and that he was responsible for training subordinates to minimize that risk and for implementing the Hayes memo, sufficiently pled that claim. Lyttle v. U.S., 867 F.Supp. 2d at 1291. It also denied his qualified immunity defense, finding that he should have been on notice that the failure to train his charges would result in a constitutional violation. Ibid.

Defendants' memorandum attempts to discount any potential liability defendant OAKS may have by averring that he was a "fifth line supervisor" who was located, at all relevant times, at sector headquarters in Buffalo, New York. Defendants' Memorandum at 13-14. This court should disregard those statements, which are not contained in the complaint, nor in any affidavit submitted by OAKS.

POINT SIX

PLAINTIFF'S BIVENS ACTION
SHOULD NOT BE DISMISSED
AGAINST DEFENDANT AGENT
JOHN DOES ONE AND TWO
ON LIMITATIONS GROUNDS

The government's motion seeks to dismiss the Bivens

action, on limitations grounds, against defendant Border Patrol Agents JOHN DOES 1 and 2. Defendants' Memorandum at 18-19. However, that request is premature, since neither JOHN DOE defendant has been served to date. Also, since they have been sued in their individual capacities, it is not certain that they will be represented by government counsel. 28 C.F.R. 50.15(a)(government employees sued in their individual capacities are entitled to representation by the U.S. Attorney if they request such representation, if their actions are found to be within the scope of their employment and if providing representation "would otherwise be in the interest of the United States"). Thus, it is unclear whether government's counsel has standing to represent them at this time and to seek dismissal.[8]

Should the court entertain this request, VAZQUEZ asserts that this action is not barred on limitations grounds as to JOHN DOES 1 and 2. He can utilize the "relation back" doctrine of Federal Rule of Civil Procedure 15(c)(1)(c), which states that a pleading amendment, which changes the party or the naming of the party, relates back to the date of the original pleading where, within 120 days from the date of filing of the complaint:

1) the party received notice of the action so that it will not be prejudiced in defending the matter on the merits and

[8]In fact, the docket text for this motion (#33) indicates it is being filed by defendants BUITRON, LORENZO, OAKS and the United States.

2) knew or should have known the action would have been brought against it, but for a mistake in their identity and

3) the amendment sets forth a claim that arose out of the original pleading.

Defendant argues that under Tapia-Ortiz v. Doe, 171 F.3d 150 (2nd Cir. 1999), the Bivens claim against the John Doe defendants must be dismissed because it was not brought against the actual defendants within the three year limitations period. Tapia-Ortiz rejected the use of the relation back doctrine against anonymous defendants, on the strength of Barrow v. Wethersfield Police Department, 66 F.3d 466, 470 (2nd Cir. 1995). Barrow explained that lack of knowledge of a party's true identity does not constitute a "mistake" as to their identity, within the meaning of FRCP 15(c)(1)(C)(ii). Barrow v. Wethersfield Police Department, 66 F.3d at 469-470.

However, at least one court in this circuit has held that the Barrow holding has been abrogated by the subsequent U.S. Supreme Court decision in Krupski v. Costa Crociere S.p.A., 130 S.Ct. 2485 (2010). Bishop v. Best Buy, Co. Inc., 2010 WL 4159566 (S.D.N.Y. 2010). Bishop permitted the amendment of the complaint to substitute named defendants for their pseudonyms, after the statute of limitations had run. Bishop v. Best Buy, Co. Inc., 2010 WL 4159566 at 3. It did so, on the strength of Krupski, because the individual defendants knew or should have known that

the action would be brought against it, since they were identified by their position, and were represented by the same counsel who represented employees who were initially named. Id.

There is contrary authority from the Eastern District as to whether Barrows survives Krupski with respect to John Doe defendants. Martinez v. City of New York, 2012 WL 4447589 (E.D.N.Y. 2012); Dominguez v. City of New York, 2010 WL 3419677 (E.D.N.Y. 2010). VAZQUEZ contends that this court should follow Bishop.

Alternatively, the fact that the original complaint, timely served, included the John Doe defendants, together with VAZQUEZ' effort to ascertain the names of the John Doe Border Patrol agents, brings this case outside the scope of Barrows. November 6, 2012 Declaration of Walter H. Ruehle (Ruehle) ¶6. The request for their names was made within the period prescribed under FRCP 15(c)(1)(c)). Ruehle ¶6. The failure of government's counsel to respond to the request for their names, prior to the expiration of the limitations period, warrants the use of the relation back doctrine. Ruehle ¶7; Archibald v. City of Hartford, 274 F.R.D. 371, 376-381 (D. Conn. 2011). The Archibald holding is premised upon decisions by several other district courts within this circuit. Archibald v. City of Hartford, 274 F.R.D. at 377.

Since government's counsel is representing the John Doe defendants on this motion, they had timely notice of the

interposition of this action. Constructive notice to them exists through their counsel. Archibald v. City of Hartford, 274 F.R.D. at 379-380; Bishop v. Best Buy, Co. Inc., 2010 WL 4159566 at 3.

Should this Court hold that the federal relation back doctrine is not applicable, it must examine the parallel New York law. Because a New York limitations period is used for Bivens actions, this court can use the New York relation back doctrine to determine whether this action is timely as to the John Doe defendants. Chin v. Bowen, 833 F.2d 21, 23-4 (2nd Cir. 1987)(holding that the limitations period in CPLR 214(5) is applicable in Bivens action); Murphy v. West, 533 F.Supp. 2d 312, 316 (W.D.N.Y. 2008)(using the New York doctrine in a suit under 42 U.S.C. §1983). Several district courts have used the New York law relation back law to allow for the amendment of a complaint, after the expiration of the limitations period, which replaces a named defendant for an anonymous one. Peralta v. Donnelly, 2009 WL 2160776 at 5-6 (W.D.N.Y. 2009); Murphy v. West, 533 F.Supp. 2d at 316-17; Wilson v. City of New York, 2006 WL 2528468 at 2-3 (S.D.N.Y. 2006). VAZQUEZ' attempt to ascertain the names of the John Doe defendants from government's counsel, and the futility of obtaining that information through a Freedom of Information Act, brings him within these holdings. Ruehle ¶6-7; Stevens, Jacqueline, "U.S. Government Unlawfully Detaining and Deporting U.S. Citizens as Aliens," 18:3 Virginia Journal of Social Policy

and the Law (Fall, 2011) 606, 618 at f.n. 35 (found at http://ssrn.com/abstract=1931703) and Taylor, Marisa, "U.S. Citizens Being Detained, Deported," Centre Daily Times (January 25, 2008)(found at 2008 WLNR 1450379)(both noting that ICE does not keep records of U.S. citizens who are detained).

III. CONCLUSION

For the reasons set forth herein, plaintiff respectfully requests that this Court deny defendants' motion to dismiss in its entirety, and grant such other and further relief as it may deem just and proper.

Respectfully submitted,

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DATED: January 9, 2013