IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

Maria de Belem Martinez-Castro, et al.,	Case No. 3:12 CV 2364
Plaintiffs,	ORDER RE: MOTION TO DISMISS
-vs-	JUDGE JACK ZOUHARY
Village of Wakeman, Ohio, et al.,	
Defendants.	

BACKGROUND

Plaintiffs are four Hispanic individuals. They were all taken into custody following a vehicle stop on the morning of February 23, 2011 on State Route 20 in the Village of Wakeman. Plaintiffs filed suit against the Village of Wakeman, Wakeman's police chief, the United States, and two U.S. Border Patrol Agents (BPA) -- Agent Morgan and Agent Richardson. The pending Motion to Dismiss and/or in the Alternative Motion for Summary Judgment (Doc. 33) concerns only the claims filed against the two BPAs. Those claims are described in the Amended Complaint as Claim 4 -- "*Bivens* Claims for Violation of the Fifth Amendment Right to Equal Protection of Law" (Doc. 5 at ¶¶ 114–18), and as Claim 5 -- "*Bivens* Claims for Violation of the Fourth Amendment Prohibition of Unreasonable Searches And Seizures" (*id.* at ¶¶ 119–23).

Pursuant to a prior Order (Doc. 41), only the Motion to Dismiss under Federal Civil Rule 12 remains to be addressed.

STANDARD OF REVIEW

Under Federal Civil Rule 8(a)(2), a pleading must contain a "short and plain statement of the claim showing that the pleader is entitled to relief." While Rule 8 departs from the hyper-technical, code-pleading requirements, "it does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions." *Ashcroft v. Iqbal*, 556 U.S. 662, 678–89 (2009). Therefore, under Rule 12(b)(6), this Court tests the legal sufficiency of the Amended Complaint, which requires accepting all well-pleaded factual allegations as true and construing the Complaint in the light most favorable to Plaintiffs. *See Dubay v. Wells*, 506 F.3d 422, 426 (6th Cir. 2007). Although a complaint need not contain "detailed factual allegations," it does require more than "labels and conclusions" or "a formulaic recitation of the elements of a cause of action." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). Thus, the complaint survives a motion to dismiss if it "contain[s] sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Iqbal*, 556 U.S. at 678. And "[a] claim has facial plausibility when [plaintiff] pleads factual content that allows the court to draw the reasonable inference that [defendant] is liable for the misconduct alleged." *See Hensley Mfg. v. ProPride, Inc.*, 579 F.3d 603, 609 (6th Cir. 2009) (quoting *Iqbal*, 556 U.S. at 678).

DISCUSSION / ANALYSIS

Bivens Claim Survives Under These Facts

The BPAs' primary argument is that there is no *Bivens* remedy for constitutional tort claims brought by noncitizens for injuries suffered as a result of immigration detention. The BPAs argue the Immigration and Nationality Act (INA) is comprehensive and provides Plaintiffs' only recourse for their complaints about being stopped in their car and later arrested.

The BPAs cite *Mirmehdi v. United States*, 689 F.3d 975 (9th Cir. 2011) in support of their position, but that case is inapposite to the facts here. The plaintiffs challenged the constitutionality

of their detention in connection with deportation proceedings. *Id.* at 980. Here, the challenge is to a coordinated effort by law enforcement incident to a traffic stop. That difference is enough for the *Bivens* claim to continue beyond the pleading stage.

The BPAs also cite a recent case from the Southern District of Ohio -- *Kareva v. United States*, 2013 WL 97966 (S.D. Ohio 2013). That case too is distinguishable. The facts forming the basis of the *Bivens* claim in that case occurred within the administrative immigration removal process. This Court agrees with Plaintiffs that the BPAs have mischaracterized Plaintiffs' *Bivens* claims as claims that arose out of "immigration detention." The INA does not preclude a *Bivens* claim for the actions about which Plaintiffs here complain.

This case is more akin to *Turnbull v. United States*, 2007 WL 2153279 (N.D. Ohio 2007) where the plaintiff brought a *Bivens* claim against federal agents who allegedly failed to stop the removal of plaintiff to Jamaica, even though they had been ordered not to remove him by a federal court. The court rejected defendants' arguments that the immigration removal process precluded a *Bivens* claim, concluding:

> Plaintiff's proposed *Bivens* claims do not challenge the decision to remove him from this country, but rather focus upon the alleged violation of his rights that occurred incident to the administration of the removal process. Because defendants can point to no evidence that Congress intended to preclude review of such a violation, the Court finds that special factors do not counsel hesitation in considering a *Bivens* claim here. *Id.* at *11.

Failure to State a Fifth Amendment Claim

The BPAs next argue that Claim 4 of the Amended Complaint fails to state a claim for violation of the Fifth Amendment right to equal protection of law:

> Defendants restrained Plaintiffs' liberty. Accordingly, under the Fifth Amendment these restraints must be justified by reasonable suspicion that the person seized has no right to be or remain in the United States.
>
> Restraining and interrogating Hispanics because of their Hispanic appearance is contrary to that standard.
>
> Defendants' actions have caused, are causing, and will cause Plaintiffs irreparable injury in the form of deprivation of their Fifth Amendment rights to equal protection of the law.
>
> Plaintiffs request monetary damages against Richardson and Morgan in their individual capacities. (Doc. 5 at ¶¶ 115–18)

Selective enforcement of the law based on race, commonly referred to as "racial profiling," is a violation of the Equal Protection Clause, because the Clause "prohibits selective enforcement of the law based on considerations such as race." *Whren v. United States*, 517 U.S. 806, 813 (1996). While a stop, detention, and search may be objectively reasonable under the Fourth Amendment, they may be unconstitutional if they are the result of such selective enforcement. *Id.*; *see also Stemler v. City of Florence*, 126 F.3d 856, 873 (6th Cir. 1997).

"To prevail on an equal protection claim in the racial profiling context, Plaintiffs would have to show that the challenged law enforcement practice had a discriminatory effect and [in addition] was motivated by a discriminatory purpose." *Carrasca v. Pomeroy*, 313 F.3d 828, 834 (3d Cir. 2002). To satisfy the first prong of this inquiry, a plaintiff must "show that [he] is a member of a protected class and [in addition] that [he] was treated differently from similarly situated individuals in an unprotected class." *Bradley v. United States*, 299 F.3d 197, 206 (3d Cir.2002). The second prong of this inquiry was examined by the Supreme Court in *Iqbal*, 556 U.S. at 676–77, where the Court pointed out that a plaintiff asserting an equal protection claim "must plead [facts showing] that the defendant acted with a discriminatory purpose [to permit a reasonable inference that the government-official defendant acted] for the purpose of discriminating on account of race."

The BPAs contend Plaintiffs' allegations are lacking because they "allege no facts indicating racial profiling after the BPAs arrived at the traffic scene" (Doc. 33 at 23). The BPAs also contend that to establish a Fifth Amendment *Bivens* claim for violation of the Equal Protection Clause, a plaintiff must plead one of the following: that each defendant acted with discriminatory purpose, direct evidence of explicit racial criteria, an admission of racially motivated decisionmaking, or that similarly situated persons are treated differently.

The Amended Complaint alleges that the Village of Wakeman and the BPAs worked in tandem to racially profile Hispanics in the area (*see, e.g.*, Doc. 5 at ¶¶ 91–96), and that the BPAs do not apprehend illegal aliens attempting to enter the United States at the border, but instead rely on and incentivize the Village of Wakeman Police Department to initiate encounters with individuals who appear Hispanic (Doc. 5 at 96). Effectively, the Village police initiate race-based stops and the BPAs arrive on the scene to finish the encounter. Plaintiffs charge that "the Wakeman Police Department prolonged this detention and contacted the United States Border Patrol solely because Plaintiffs appeared to the Wakeman Police Department Officer to be persons of Hispanic origin based on their complexion and hair color" (Doc. 5 at ¶ 27).

This Court finds that, when the Amended Complaint is read as a whole, Plaintiffs have sufficiently met their burden under *Iqbal* by alleging the BPAs acted with discriminatory intent, in collaboration with the Village of Wakeman Police Department, to target Hispanics.

Failure to State a Fourth Amendment Claim

The BPAs also argue that Plaintiffs failed to plead a Fourth Amendment claim in Claim 5 of the Amended Complaint. Plaintiffs allege they were searched and seized because of their Hispanic appearance (Doc. 5 at ¶¶ 119–23). The BPAs assert that racial profiling claims are not cognizable

under the Fourth Amendment; only cognizable as equal protection claims under the Fifth Amendment. The BPAs are correct on this point. *See Whren*, 517 U.S. at 813. This claim is dismissed.

Qualified Immunity for Another Day

In support of this claim, the BPAs rely on evidence outside the allegations in the Amended Complaint. The BPAs may re-raise this argument after discovery is completed on this issue (*see* Doc. 41).

CONCLUSION

The BPAs' Motion to Dismiss (Doc. 33) is granted in part and denied in part. Claim 5 of Plaintiffs' Amended Complaint alleging violations of the Fourth Amendment is dismissed; the other claims remain.

IT IS SO ORDERED.

s/ *Jack Zouhary*
JACK ZOUHARY
U. S. DISTRICT JUDGE

May 17, 2013