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UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

EASTERN DIVISION

ABDUL R. D. SALEM,

Plaintiff,

v.

UNITED STATES OF AMERICA, *et al.*,

Defendants.

No. ED CV 15-02091 JGB (SPx)

Hearing Date: June 5, 2017
Hearing Time: 9:00 a.m.
Courtroom: 1
3470 12th Street, Riverside, CA 92501

INDIVIDUAL FEDERAL DEFENDANTS' (1) NOTICE OF MOTION AND MOTION TO DISMISS, AND (2) MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

Hon. Jesus G. Bernal

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NOTICE OF MOTION AND MOTION TO DISMISS, OR ALTERNATIVELY, MOTION FOR MORE DEFINITE STATEMENT

PLEASE TAKE NOTICE that on June 5, 2017, at 9:00 a.m., or as soon thereafter as they may be heard, Individual Federal Defendants Bryan McKenrick, Robert Rector, Zoila Flores, Angel Colmenero, and Jeremy Newbold ("Individual Federal Defendants") will, and hereby do, move this Court for an order dismissing the Complaint pursuant to Rules 12(b)(6) of the Federal Rules of Civil Procedure. This motion will be made in Courtroom 1, of the George E. Brown, Jr. Federal Building and Courthouse located at 3470 Twelfth Street, Riverside, CA 92501, before the Honorable Jesus G. Bernal, United States District Judge.

Individual Federal Defendants make the motion to dismiss on the following grounds: (1) the First, Second and Third Causes of Action fail to state a claim under *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971); (2) this Court should not imply a *Bivens* claim in this case; and (3) the Individual Federal Defendants are entitled to qualified immunity.

This motion is made upon this Notice of Motion and Motion, the attached Memorandum of Points and Authorities, all pleadings, records, and other documents on file with the Court in this action, and upon such oral argument as may be presented at the hearing on this motion. This motion is made following the April 12, 2017, conference with Plaintiff's counsel pursuant to Local Rule 7-3.

Dated: April 21, 2017

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MEMORANDUM OF POINTS AND AUTHORITIES

II. STATEMENT OF RELEVANT ALLEGATIONS[1]

Individual Federal Defendants Zoila Flores, Robert Rector, and Angel Colmenero are Customs and Border Protection Officers ("CBPO") employed by the United States Department of Homeland Security ("DHS"). (TAC, ¶ ¶ 10, 20.) Individual Federal Defendants Bryan McKenrick is a Supervisory CBPO employed by DHS. (TAC, ¶ ¶ 10, 20.)

On February 21, 2014, Plaintiff Abdul R.D. Salem was scheduled to travel on British Airways Flight 263 from Los Angeles International Airport ("LAX") to Cairo, Egypt. (Third Amended Complaint ("TAC"), ECF No. 53, ¶ 17.) Plaintiff checked some baggage and also had carry-on baggage. (Id.) After providing his boarding pass to gate personnel, Plaintiff entered the jet way walking towards the aircraft with the intent of boarding the aircraft. (TAC, ¶ 19.) At the time Plaintiff was walking toward the aircraft, CBPOs Flores, Rector, Colmenero, and McKenrick were present in the jet way. (TAC, ¶ ¶ 19-20.) CBPO Flores stopped Plaintiff and asked to see his passport. (TAC, ¶ 19.)

Instead of complying with CBPO Flores' request, Plaintiff became angry asked why he was being singled out. (TAC, ¶ 20.) Plaintiff was led to a nearby table used by CBPOs to search carry-on items. (TAC, ¶ 24.) After his carry-on items were searched, Plaintiff was led to an interview room in the jet way where he was placed in long handcuffs to accommodate him and asked questions. (TAC, ¶ ¶ 28-33.) Plaintiff was then escorted to a second interview room at a different location in the airport where his checked-in baggage was searched. (TAC, ¶ ¶ 33-34.)

When Plaintiff was in the second interview room, he requested medical attention. (TAC, ¶ 36.) The Los Angeles Fire Department ("LAFD") was contacted and four

[1] Defendants present these allegations from the TAC for purposes of this motion only and does not assert that they are true.

paramedics arrived and provided medical attention to Plaintiff. (Id.)

III. PROCEDURAL BACKGROUND

Plaintiff filed the original Complaint on October 9, 2015, naming the United States of America and the City of Los Angeles as defendants. (ECF No. 1.) The Complaint was amended three times, with the TAC being filed on January 4, 2017. (ECF No. 53.) Among others, Plaintiff named as defendants the United States of America and CBP Officer Bryan McKenrick, Robert Rector, Zoila Flores, Angel Colmenero, and Jeremy Newbold, in their individual capacities. The United States filed an answer to the TAC on January 18, 2017. (ECF No. 54.)

The TAC alleges three causes of action against the Individual Federal Defendants. The First Cause of Action is for "Unreasonable Search, Seizure, False Arrest, and False Imprisonment in violation of the Fourth Amendment to the U.S. Constitution" and is against SCBPO McKenrick, CBPO Rector, CBPO Newbold, and CBPO Colmenero. The Second Cause of Action is for "Excessive Force in Violation of the Fourth Amendment to the U.S. Constitution" and is also against SCBPO McKenrick, CBPO Rector, CBPO Newbold, and CBPO Colmenero. The Third Cause of Action is for "Equal Protection in Violation of the Fifth Amendment to the United States Constitution" and is against SCBPO McKenrick, CBPO Flores, CBPO Rector, and CBPO Colmenero.

For the reasons set forth below, the Individual Federal Defendants should be dismissed from the TAC.

IV. ARGUMENT

A. Legal Standard For Motion to Dismiss

The Court should dismiss a complaint when its allegations fail to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6). A Rule 12(b)(6) dismissal is proper where the complaint offers nothing more than "labels and conclusions or a formulaic recitation of the elements of a cause of action . . ." *Ashcroft v. Iqbal*, 556 U.S.

662, 678 (2009) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 553 (2007)). To survive a motion to dismiss, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Id.* (citing *Twombly*, 550 U.S. at 570.)

The Court must take a "two-pronged" approach to evaluating a Rule 12(b)(6) motion. *See Iqbal*, 556 U.S. at 679. First, the Court must accept as true all non-conclusory, factual allegations made in the complaint. *See Leatherman v. Tarrant Cnty. Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 164 (1993). After accepting as true all non-conclusory and non-contradicted allegations, and drawing all reasonable inferences in favor of the plaintiff, the Court must then determine whether the complaint alleges a *plausible* claim to relief. *See Iqbal*, 556 U.S. at 679. A claim is facially plausible "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* at 678. Moreover, in determining whether the alleged facts cross the threshold from the possible to the plausible, the Court is required "to draw on its judicial experience and common sense." *Id.*

B. Legal Standard For *Bivens* Claims

A *Bivens* plaintiff must plead and prove "that each Government-official defendant, through the official's own individual actions, has violated the Constitution." *Iqbal*, 556 U.S. at 676; *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971). The plaintiff must allege facts, not simply conclusions, which show that the defendant was personally involved in the deprivation of his constitutional rights. *Barren v. Harrington*, 152 F.3d 1193, 1194 (9th Cir. 1998). Vague and conclusory allegations of official participation in civil rights violations are not sufficient to withstand a motion to dismiss. *Ivey v. Board of Regents*, 673 F.2d 266, 268 (9th Cir. 1982) (civil rights allegations in a complaint not supported by reference to any specific actions or practices of the defendants warrants dismissal); *Johnson v. Duffy*, 588 F.2d 740, 743-44 (9th Cir. 1978);

see also Pellegrino v. United States, 73 F.3d 934, 936 (9th Cir. 1996) (*Bivens* liability is premised on proof of direct personal responsibility); *Chuman v. Wright*, 76 F.3d 292, 294 (9th Cir. 1996) (plaintiff could not hold officer liable because of membership in a group without a showing of individual participation in the unlawful conduct); *Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989)(requiring personal participation in the alleged constitutional violations.

Here, the TAC contains only conclusory allegations that cannot support Plaintiff's claims against the Individual Federal Defendants. Accordingly, the TAC fails to state a plausible claim against any of the Individual Federal Defendants and they should be dismissed from the action.

C. The First Cause of Action Fails to State a *Bivens* Claim Against Any of the Individual Federal Defendants for Violation of the Fourth Amendment – Unlawful Search and Seizure / False Arrest or Imprisonment

Plaintiff alleges in the First Cause of Action that SCBPO McKenrick and CBPOs Rector, Newbold and Colmenero violated his Fourth Amendment rights by detaining him without reasonable suspicion or probable cause that he had committed a crime. (TAC, ¶ 46.) Plaintiff, however, fails to allege facts, and not mere conclusions, showing that each named defendant was personally involved in the deprivation of his constitutional rights. *Barren*, 152 F.3d at 1194. For example, Plaintiff alleges, "The officers then physically directed Plaintiff approximately ten feet away from the aircraft but within the bridge area" (TAC, ¶ 24), "The officers continued to physically restrain Plaintiff" (TAC, ¶ 25), "Plaintiff was forcefully escorted out of the bridge and into two separate interrogation rooms" (TAC, ¶ 28), and "[Plaintiff was] physically battered and assaulted over the course of several hours" (TAC, ¶ 28). None of these allegations specify which officer(s) did these alleged acts. The Ninth Circuit has held that applying "a 'team effort' standard [to *Bivens* cases] is impermissible because it 'allows the jury to

lump all the defendants together, rather than require it to base each individual's liability on his own conduct'." *Jones v. Williams*, 297 F.3d 930, 936 (9th Cir. 2002); *Chuman v. Wright*, 76 F.3d at 295 (district court erred in giving jury instruction for a "team effort" standard); *Pellegrino v. United States*, 73 F.3d at 936 ("district court properly ruled that *Bivens* liability is premised on proof of direct personal responsibility"). Moreover, all of these alleged acts are vague and conclusory. Plaintiff does not allege how he was "physically directed," "physically restrained," "forcefully escorted" or "physically battered and assaulted." These are mere conclusory allegations that are insufficient to constitute the basis of a *Bivens* claim. *Ivey*, 673 F.2d at 268.

In addition, Plaintiff's claim is barred as a matter of law by the "border exception" doctrine. Under the "border exception" doctrine, customs officials may conduct routine searches of persons and effects crossing the border in the absence of individualized suspicion, probable cause, or a warrant. *United States v. Duncan*, 693 F.2d 971, 977 (9th Cir. 1982). "For purposes of ensuring compliance with the requirements of [31 U.S.C. § 5316 – the currency reporting statute], a customs officer may stop and search, at the border and without a search warrant, any vehicle, vessel, aircraft, or other conveyance, any envelope or other container, and any person entering or departing from the United States." 31 U.S.C. § 5317(b). International airports are the functional equivalent of an international border. *See Almeida-Sanchez v. United States*, 413 U.S. 266, 273 (1973).

Here, CBP Officers stopped Plaintiff in an international airport after he provided his boarding pass to airline personnel and entered the jet way intending to board an international flight. (TAC, ¶ 19.) Thus, because the search of Plaintiff and his baggage took place at the border, the CBP Officers were not required to have probable cause, warrants, or even a suspicion that Plaintiff had engaged in illegal activity. Accordingly, the search of Plaintiff and his baggage was not illegal or unconstitutional, and therefore, cannot constitute the basis of a *Bivens* claim. *Duncan*, 693 F.2d at 977; *see also United States v. Ezeiruaku*, 936 F.2d 136, 139-40 (9th Cir. 1991).

Accordingly, because Plaintiff has not, and cannot, allege a claim for unconstitutional search and seizure, the First Cause of Action should be dismissed.

D. The Second Cause of Action Fails to State a Claim Against Any of the Individual Federal Defendants For Violation of the Fourth Amendment - Use of Excessive Force.

Plaintiff alleges in the Second Cause of Action that SCBPO McKenrick and CBPOs Rector, Newbold, and Colmenero violated his Fourth Amendment rights by using excessive force. (TAC, ¶¶ 49-50.) Similar to the First Cause of Action, however, Plaintiff fails to allege facts, and not mere conclusions, showing that each named defendant was personally involved in the deprivation of his constitutional rights. *Barren*, 152 F.3d at 1194. In addition to the allegation examples cited above, Plaintiff alleges, "One of the officers forcibly pushed his head against the table and forcibly pulled Plaintiff's right arm behind his back to place handcuffs on Plaintiff" (TAC, ¶ 32), and "[Plaintiff was] physically battered and assaulted over the course of several hours" (TAC, ¶ 28). None of these allegations specify which officer(s) did these alleged acts.[2] As discussed above, vague allegations using the "team effort" approach is impermissible in a *Bivens* action. *Jones v. Williams*, 297 F.3d at 936. Moreover, the allegations are vague and conclusory and thus insufficient to constitute the basis of a *Bivens* claim. *Ivey*, 673 F.2d at 268.

No less important, the allegations made by Plaintiff are insufficient to constitute an excessive force claim. A claim that law enforcement officers used excessive force is analyzed under the Fourth Amendment's reasonableness standard. *Graham v. Connor*, 490 U.S. 386, 395 (1989). Determining whether the force used to effect a particular

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[2] Plaintiff includes CBPO Colmenero as a defendant in the excessive force claim yet CBPO Colmenero is not alleged to have been "hands on" the Plaintiff. (TAC, ¶ 30.) CBPO Colmenero cannot be held responsible for the acts of another. Plaintiff must assert specific allegations as to each defendant. *Jones v. Williams*, 297 F.3d 930, 934-35 (9th Cir. 2002) (the claims against each officer must be construed as to his own individual conduct).

seizure is reasonable under the Fourth Amendment requires a careful balancing of the nature and quality of the intrusion on the individual's Fourth Amendment interests against the countervailing governmental interests at stake. *Id*. at 396. In doing so, the Supreme Court has repeatedly cautioned that the test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application; instead, the analysis requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight. *Bell v. Wolfish*, 441 U.S. 520, 559 (1979); *Graham*, 490 U.S. at 396.

The reasonableness of force used must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight. *Id.* Not every push or shove, even if it may seem unnecessary, violates the Fourth Amendment. *Id.*; *see also Johnson v. Glick*, 481 F.2d 1028, 1033 (2nd Cir. 1973). Law enforcement officers are often forced to make split-second judgments, in circumstances that are tense, uncertain, and rapidly evolving, about the amount of force that is necessary in a particular situation. *Graham* at 397. Thus, in the Fourth Amendment context, the reasonableness inquiry in an excessive force case is whether the officer's actions are objectively reasonable in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation. *Id.*; *see also Terry v. Ohio*, 392 U.S. 1, 21 (1989); *Scott v. United States*, 436 U.S. 128, 137-139 (1978).

In the instant case, even when viewing the allegations in the light most favorable to Plaintiff, none of the alleged actions taken by the CBP Officers were objectively unreasonable. When balancing the intrusion on the rights of Plaintiff against the government interests at stake,[3] *Graham*, 490 U.S. at 39, it is clear that the alleged tight

[3] The purpose of 31 U.S.C. §§ 5311 et seq. (except section 5315) is to require certain reports or records where they have a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings, or in the conduct of intelligence or

grabbing of Plaintiff's arms (TAC, ¶ 22), directing him away from the aircraft (TAC, ¶ 24), escorting him to the detention room (TAC, ¶ 28), bending his back down putting his head on the table in order to handcuff him (TAC, 31), and using long handcuffs on him as an accommodation (TAC, ¶ 31), were reasonable.

"An officer's authority to detain incident to a search is categorical; it does not depend on the 'quantum of proof justifying detention or the extent of the intrusion to be imposed by the seizure'." *Muehler v. Mena*, 544 U.S. 93, 99 (2005), quoting *Michigan v. Summers*, 452 U.S. 692, 705 (1981). Legitimate law enforcement interests provide substantial justification for detaining a person while a search takes place, including (1) preventing flight, (2) minimizing risk of harm to officers (and others), and (3) facilitating orderly completion of the search. *Id.* at 98. Inherent in the authorization to detain is the authority to use reasonable force to effectuate detention. *Id.* at 99.

Here, even taken as true, the alleged actions of the CBP Officers were minimal intrusions given (1) Plaintiff's initial refusal to comply with CBPO Flores' simple request for his passport, (2) Plaintiff's admitted continued obstinance and verbal tirade repeatedly questioning the officers' authority and intentions, and (3) the fact that the incident took place in a crowded jet way full of men, women, and children boarding the international flight. (TAC, ¶ 19.) Instead of simply complying with CBPO Flores' request and handing her his passport, "Plaintiff asked CBPO Flores why he was being singled out when other passengers were being permitted to board the aircraft without incident." (TAC, ¶ 20.) Plaintiff continued to harass the CBP Officers making "queries as to why he was being treated like a criminal," "again [inquiring] why he was being singled out," "repeatedly [stating] that he was a 75-year-old man and that he had done nothing illegal," and that he had never "been stopped or detained by law enforcement in his life." (TAC, ¶ ¶ 20, 23, 27, 29, 32.)

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counterintelligence activities, including analysis, to protect against international terrorism. 31 U.S.C. § 5311.

Certainly, it was objectively reasonable for CBP Officers to escort Plaintiff, who was on, at the very least, a verbal tirade, away from other passengers and to restrain him with handcuffs to prevent the possibility of injury to others. Plaintiff alleges that the handcuffs placed on him caused him great pain, but he acknowledges that the CBP Officers immediately accommodated him by the use of "long handcuffs" so that "Plaintiff's lack of flexibility could be accommodated." (TAC, ¶ 31.)

The handcuffing of a person during the course of an arrest or detention does not amount to excessive force under the Fourth Amendment. *Muehler v. Mena*, 544 U.S. 93, 99 (2005); *See also Atwater v. City of Lago Vista*, 532 U.S. 318, 354 (2001) (handcuffing even for minor criminal offense does not violate Fourth Amendment); *Rodriguez v. Farrell*, 280 F.3d 1341 (11th Cir. 2002) (handcuffing, even when it seriously aggravated the plaintiff's pre-existing elbow condition and caused twenty-five subsequent surgeries and amputation of the arm below the elbow, did not rise to the level of a constitutional violation).

In the instant case, it was reasonable for the CBP Officers to take preventive action by escorting Plaintiff away from other passengers boarding the aircraft (and away from other passengers in the airport terminal as Plaintiff was escorted to the detention area), and handcuffing him to prevent injury and to help effectuate the CBP Officers' search. Thus, because the allegations in the TAC demonstrate that all of the alleged actions taken by the CBP Officers were objectively reasonable, the Second Cause of Action for excessive force should be dismissed.

E. The Third Cause of Action Fails to State a Claim For Violation of the Fifth Amendment – Equal Protection

In the Third Cause of Action, Plaintiff alleges that Individual Federal Defendants SCBPO McKenrick, CBPO Flores, CBPO Rector, and CBPO Colmenero denied Plaintiff equal protection of the law in violation of the Fifth Amendment. (TAC, ¶¶ 53-54.) Specifically, Plaintiff alleges that the named CBP Officers engaged in "profiling

and discrimination against Plaintiff" because of his Egyptian ethnicity, race, and national origin. (TAC, ¶ 54.) The Third Cause of Action, however fails to state a claim against the CBP Officers for at least two reasons.

First, as discussed above, a *Bivens* plaintiff must plead and prove that each government official, through his or her own individual actions, violated the Constitution. *Iqbal*, 556 U.S. at 676. Here, there are no facts alleged in the TAC that suggest a violation of Plaintiff's Fifth Amendment rights. Plaintiff only asserts that the CBPOs were "not subjecting other boarding passengers of flight, to the same treatment," yet there is no allegation how those passengers were any different from him. (TAC, ¶ 54.). Plaintiff's conclusory statements alone are not enough to state a claim. *Twombly*, 550 U.S. at 553 (plaintiffs have an "obligation to provide the 'grounds' of [their] 'entitlement to relief' requir[ing] more than labels and conclusions."); *Iqbal*, 556 U.S. at 678 (a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face).

Second, where a claim is for invidious discrimination in contravention of the Fifth Amendment, the Plaintiff must plead that the government officer acted with a discriminatory purpose, i.e. for the purpose of discriminating against the individual on account of his national origin, race, or ethnicity. *Id.* at 676-677 (decision maker's actions were "because of" identity with a particular group); *see also Washington v. Davis*, 426 U.S. 229, 240 (1976) (discriminatory purpose required to establish Fifth Amendment Equal Protection claim). Plaintiff here fails to plead facts in the TAC showing that each of the named CBP Officers, through his or her own individual actions, purposefully discriminated against Plaintiff on account of his Egyptian ethnicity, race or national origin. As a preliminary matter, there are no facts demonstrating that SCBPO McKenrick, CBPO Rector, or CBPO Colmenero took any actions to "single out" Plaintiff for a particular reason, ethnicity, race, national origin or otherwise. The TAC only states that CBPO Flores stopped Plaintiff. (TAC, ¶ ¶ 19-20.) More importantly,

there are no allegations showing that any of the CBPOs knew of Plaintiff's Egyptian ethnicity, race, or national origin. Although Plaintiff alleges that at approximately 7:30 p.m. he provided TSA officials with his Egyptian passport at the airport security checkpoint (TAC, ¶ 18), this does not demonstrate how CBPO Flores, or any other CBP Officer, standing in the jet way of a boarding plane an hour later, knew of Plaintiff's Egyptian ethnicity, his race, or his national origin (TAC, ¶ 19). Thus, Plaintiff has failed to state a claim of purposeful discrimination by any of the CBP Officers and the Third Cause of Action should be dismissed.

F. The Court Should Not Imply a *Bivens* Remedy in this Case

In *Bivens*, the Supreme Court held that the victim of an alleged Fourth Amendment residential search violation could bring suit to recover damages under 28 U.S.C. § 1331 where there were no apparent alternative remedies and "no special factors counseling hesitation in the absence of affirmative action by Congress." *Bivens v. Six Unknown Named Agents*, 403 U.S. 388, 396 (1971). Subsequently, the Court held in *Davis v. Passman*, 442 U.S. 228, 235 (1979), that a congressional employee could maintain a *Bivens*-type suit under the Fifth Amendment arising from termination of her employment, while in *Carlson v. Green*, 446 U.S. 14, 14 (1980), the Court permitted a *Bivens*-type suit by a federal prisoner for alleged violations of the Eighth Amendment resulting in personal injury and death. In all three of these cases the Court found that there were no "special factors counseling hesitation" in the judicial creation of a remedy that Congress had not recognized.

Since *Carlson*, the Supreme Court has "consistently refused to extend *Bivens* liability to any new context or new category of defendants." *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 68 (2001). Indeed, there is no "automatic entitlement" to a "freestanding damages remedy for a claimed constitutional violation." *See Wilkie v. Robbins*, 551 U.S. 537, 550 (2007).

In *Wilkie*, the Supreme Court set out a two-step approach for addressing requests to extend *Bivens* into new contexts. First, the Court explained, "there is the question

whether any alternative, existing process for protecting the interest amounts to a convincing reason for the Judicial Branch to refrain from providing a new and freestanding remedy in damages." *Id.* (citing *Bush v. Lucas*, 462 U.S. 367, 378 (1983)). This first part of the test encompasses remedies provided in statutory schemes, *see Bush*, 462 U.S. at 378 (Civil Service Reform Act); *Schweiker v. Chilicky*, 487 U.S. 412 (1988) (Social Security Act), but it also encompasses contexts in which tort and administrative remedies are available for the same official conduct. *See Wilkie*, 551 U.S. at 550 (citing *Malesko*, 543 U.S. at 72-73) (emphasis added).

Second, "even in the absence of an alternative, a *Bivens* remedy is a subject of judgment: 'the federal courts must make the kind of remedial determination that is appropriate for a common-law tribunal, paying particular heed, however, to any special factors counseling hesitation before authorizing a new kind of federal litigation.'" *Id.* (quoting *Bush*, 462 U.S. at 378).

In this case, Plaintiff asserts a Fifth Amendment equal protection *Bivens* claim against the CBP Officers in their individual capacity. Plaintiff's claim essentially challenges the manner in which CBPO Flores chose Plaintiff in the jet way and the manner in which the other CBP Officers interacted with Plaintiff. With respect to the first step of the *Wilkie* test, Plaintiff has an adequate alternative remedy for what are essentially complaints about the way in which CBP Officers carried out their duties at LAX. Indeed, CBP currently has in place four primary programs to address and respond to customer complaints. They are the Passenger Service Representatives, Comment Cards, CBP INFO Center, and a program where port directors and supervisors personally respond to telephone and verbal complaints.[4]

In addition, the Department of Homeland Security's Traveler Redress Inquiry Program ("DHS TRIP") provides a single point of contact for individuals who have inquiries or seek resolution regarding difficulties they experienced during their travel

[4] "How CBP Handles Traveler Complaints" (last published October 30, 2015), available at: https://www.cbp.gov/travel/customer-service/handle-complaints.

screening at airports or train stations or crossing U.S. borders, including: denied or delayed airline boarding; denied or delayed entry into and exit from the United States at a port of entry; and continuous referral to secondary screening.[5]

Moreover, CBP provides the public with redress should someone have a complaint concerning a violation of civil liberties.[6] These complaint processes operate as effective mechanisms for redressing traveler complaints about the quality and manner of service they receive at Ports of Entry such as LAX.

Finally, Plaintiff has a remedy for potential monetary damages against the United States under the Federal Tort Claims Act - a remedy that Plaintiff is pursuing in this lawsuit. Although some may argue that the above do not provide a complainant with a complete remedy, alternatives to *Bivens* need not furnish complete relief. *See Bush*, 462 U.S. at 388; *Bagola v. Kindt*, 131 F.3d 632, 640-41 (7th Cir. 1997); *Schweiker*, 487 U.S. at 425-26, 428-29.

Here, Plaintiff asks the court to fashion a *Bivens* remedy for injuries Plaintiff allegedly sustained during the course of the CBP Officers' lawful inquiries and detention of Plaintiff at an international border. Should the Court recognize such a cause of action, it would open the flood gates of litigation for every airplane passenger delayed at a port of entry where CBP Officers discharge their duties. Moreover, allowing *Bivens* liability in this context could cause CBP officers to ignore their duties to enforce customs regulations for fear that their choice of person to inquire of, their tone, gestures, or mannerisms, could subject them to personal monetary liability.

"The purpose of *Bivens* is to deter individual federal officers from committing constitutional violations." *Malesko*, 534 U.S. at 70. Yet there is scarce reason to think a general *Bivens* remedy against CBP Officers for failing to use appropriate customer service skills would prevent or deter such missteps more effectively than if the remedy

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[5] See DHS Traveler Redress Inquiry Program at: https://www.tsa.gov/travel/passenger-support/travel-redress-program.

[6] See CBP's Civil Rights and Civil Liberties page at: https://www.cbp.gov/employees/eeo/crcl

were limited to administrative reports. In this context, there exists a "reasonable fear" that a general, unlimited *Bivens* cure could be "worse than the disease." *See Wilkie*, 551 U.S. at 561.

Accordingly, for all the reasons stated above, this court should grant the Individual Federal Defendants' motion to dismiss the First, Second and Third Causes of Action for lack of a *Bivens* remedy as to their alleged conduct.

G. The Individual Federal Defendants are Entitled to Qualified Immunity as to Plaintiff's Claims

Qualified immunity "gives government officials breathing room to make reasonable but mistaken judgments about open legal questions." *Ashcroft v. al-Kidd*, 563 U.S. 731, 742 (2011). Correctly applied, this standard "'gives ample room for mistaken judgment' by protecting 'all but the plainly incompetent or those who knowingly violate the law.'" *Hunter v. Bryant*, 502 U.S. 224, 227 (1991) (quoting *Malley v. Briggs*, 475 U.S. 335, 343 (1986)). The "central purpose of affording public officials qualified immunity is to protect them 'from undue interference with their duties and from potentially disabling threats of liability.'" *Sinaloa Lake Owners Ass'n v. City of Simi Valley*, 70 F.3d 1095, 1099 (9th Cir. 1995) (quoting *Elder v. Holloway*, 510 U.S. 510 (1994)). As an immunity from suit, as opposed to a mere defense to liability, qualified immunity "is effectively lost if a case is erroneously permitted to go to trial." *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985). Because qualified immunity "is designed to protect defendants even from defending the action," *Jeffers v. Gomez*, 267 F.3d 895, 906-07 (9th Cir. 2001), "qualified immunity questions should be resolved at the earliest possible stage of a litigation." *Saucier v. Katz*, 533 U.S. 194, 201 (2001).

As the Supreme Court has repeatedly emphasized, qualified immunity "shields government officials from civil damages liability unless the official violated a statutory or constitutional right that was clearly established at the time of the challenged conduct." *Taylor v. Barkes*, 135 S. Ct. 2042, 2044 (2015) (per curiam) (quoting *Reichle v. Howards*, 566 U.S. 658, 664 (2012)). In order to defeat qualified immunity, a plaintiff

must show "first, [that he] suffered a deprivation of a constitutional or statutory right; and second [that such] right was clearly established at the time of the alleged misconduct." *Hamby v. Hammond*, 821 F.3d 1085, 1090 (9th Cir. 2016) (citations omitted).

"To be clearly established, a right must be sufficiently clear that every reasonable official would have understood that what he is doing violates that right." *Taylor*, 135 S. Ct. at 2044 (quoting *Reichle*, 132 S. Ct. at 2093). Because "[t]he dispositive question is 'whether the violative nature of [the defendants'] particular conduct is clearly established,'" the inquiry "must be undertaken in light of the specific context of the case, not as a broad general proposition." *Mullenix v. Luna*, 136 S. Ct. 305, 308 (2015) (per curiam) (first emphasis in original). Although the qualified immunity analysis does "not require a case directly on point, . . . existing precedent must have placed the statutory or constitutional question beyond debate." *al-Kidd*, 563 U.S. 731 at 741. Moreover, the plaintiff bears the burden of proof that the right allegedly violated was clearly established at the time of the alleged misconduct. *Romero v. Kitsap Cnty.*, 931 F.2d 624, 627 (9th Cir. 1991). A plaintiff cannot satisfy this burden with "general conclusory allegations that the defendant[s] violated [his constitutional] rights." *Backlund v. Barnhart*, 778 F.2d 1386, 1389 (9th Cir. 1985). Rather, Plaintiff must demonstrate "that the illegality of the challenged conduct was clearly established in factual circumstances closely analogous to those of [the] case [at bar]." *Richardson v. Oldham*, 12 F.3d 1373, 1381 (5th Cir. 1994). Since the "focus is on whether the officer had fair notice that [his] conduct was unlawful, reasonableness is judged against the backdrop of the law at the time of the conduct." *Id.* This inquiry must be undertaken in light of the specific context of the case, and not as a broad general proposition. *Id.* This case-specific analysis often precludes the right from being designated as "clearly established." *See Ryburn v. Huff*, 565 U.S. 469, 474 (2012) ("No decision of this Court has found a Fourth Amendment violation on facts even roughly comparable to those present in this case.").

Here, each of the CBP Officers is entitled to qualified immunity. Plaintiff cannot establish that any of the CBP Officers violated a clearly established constitutional or statutory right of Plaintiff. To the contrary, both statutory and case law grant the CBP Officers with the authority to detain and search both Plaintiff's person and his baggage at LAX. 31 U.S.C. § 5317(b); *Duncan*, 693 F.2d at 977; *Ezeiruaku*, 936 F.2d at 139-40. Additionally, as part of the detention, the CBP Officers were entitled to use reasonable force including the use of handcuffs. *Muehler v. Mena*, 544 U.S. at 99. Qualified immunity protects law enforcement officers under existing law even if the law is later found to be unconstitutional. *See e.g. Acosta v. City of Costa Mesa*, 718 F.3d 800, 807 (9th Cir. 2013). The CBP Officers here acted in conformity with duly enacted statutory law and existing case law. Thus, the Individual Federal Defendants should be dismissed from this action because they are entitled to qualified immunity.

V. CONCLUSION

For the reasons set forth above, each of the Individual Federal Defendants should be dismissed from the TAC.

Dated: April 21, 2017

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