IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
DEL RIO DIVISION

GERARDO SERRANO, on behalf of Himself and all others similarly situated,	§	
Plaintiff,	§	
v.	§	Civil No. 2:17-CV-00048-AM-CW
U.S. CUSTOMS and BORDER PROTECTION, et al.,	§	
Defendants.	§	

DEFENDANTS' REPLY TO PLAINTIFF'S RESPONSE TO MOTION TO DISMISS OF DEFENDANT JUAN ESPINOZA

Defendant Juan Espinoza (the "Individual Defendant") moves to dismiss Plaintiff Gerardo Serrano's ("Plaintiff") *Bivens* claim against him because Plaintiff has not stated a valid *Bivens* claim and the Individual Defendant is entitled to qualified immunity against Plaintiff's claim. In attempting to expand his asset forfeiture claim into a recognized *Bivens* claim, Plaintiff's Response, (Dkt. # 56), demonstrates that he cannot present a viable *Bivens* claim against the Individual Defendant. As explained in the Individual Defendant's Motion to Dismiss, in the wake of *Ziglar v. Abassi*, 137 S.Ct. 1843, 1855, 1859 (2017), Plaintiff cannot identify any authorities recognizing a *Bivens* claim under the facts in this case because the Supreme Court has never recognized a civil forfeiture violation as the basis of a *Bivens* action. (Dkt. # 50 at 5 – 9). Moreover, the Individual Defendant's Motion to Dismiss explains that Plaintiff's *Bivens* claim should be dismissed because Plaintiff has alternate remedies for pursuing his claims and there are special factors that counsel against recognizing Plaintiff's new *Bivens* claims. (*Id.* at 9 – 14). Even if

Plaintiff could identify sources of authority supporting his *Bivens* claims, the Individual Defendant is entitled to qualified immunity because his actions did not violate any of Plaintiff's constitutional rights and were objectively reasonable given that Plaintiff concedes that the "the government followed the relevant statutes." (*Id*. at 14 – 16; *see also* Plaintiff's Response, Dkt. # 56 at 10.).

Instead, Plaintiff's Response to the Individual Defendant's motion to dismiss invites this Court to be the first to find that the United States' forfeiture statutes violate the Constitution. [1] (Dkt. # 56 at 10). Without support, Plaintiff claims that every vehicle seizure by the Customs and Border Patrol ("CBP") violates the Constitution. (*Id.* at 10-11). The Individual Defendant, herein, replies to particular points made by Plaintiff, but respectfully refers the Court to its Motion to Dismiss. (Dkt. # 50)

A. The CBP's Search and Seizure of Plaintiff's Truck and Ammunition was Lawful

Throughout his Response, Plaintiff repeatedly uses the term "unlawful seizure" as if it were an established fact. While the United States in this matter neither adopts nor accepts as true Plaintiff's factual allegations given the current stage of the litigation and given the extensive jurisdictional defects inherent in Plaintiff's Complaint, there can be no serious allegation that Plaintiff's truck and ammunition were unlawfully searched or seized on September 21, 2015. On that date, officers/agents lawfully inspected Plaintiff's vehicle after seeing him capturing Port activity with his phone camera. Training and experience led them to believe, reasonably, that Plaintiff may have been acting as a scout. Upon the lawful search of his truck, officers/agents concluded that Plaintiff was attempting to transport five .380 caliber bullets and a .380 caliber magazine into Mexico in violation of 19 U.S.C. § 1595a(d) and 22 U.S.C. § 401. Section 1595a(d)

[1] Plaintiff's constitutional challenge to the civil forfeiture statutory scheme appears to violate the notice provisions of Federal Rule of Civil Procedure 5.1.

mandates the seizure of merchandise exported from the United States, as well as property used to facilitate such exportation, contrary to law. As 15 C.F.R. § 30.2(a)(1)(iv)(C) mandates the filing of Electronic Export Information (EEI) with CBP for any good subject to the International Traffic in Arms Regulations (ITAR), Plaintiff was required to file EEI with the Agency. When Plaintiff failed to indicate to the CBP that he was exporting ammunition to Mexico, Plaintiff violated § 30.2(a)(1)(iv)(C) and seizure was appropriate under § 1595a(d). *See also United States v. Flores-Montano*, 541 U.S. 149, 155 (2004) (the "Government's authority to conduct suspicionless inspections at the border includes the authority to remove, disassemble, and reassemble a vehicle's fuel tank"); *United States v. Hoi Yan Ho*, 2009 WL 67431 (W.D.N.Y. Jan. 9, 2009) (stop and seizure of vehicle on U.S. side of border as driver prepared to exit the U.S. did not require probable cause or reasonable suspicion); *United States v. Alinj*, 2007 WL 541830 (E.D. Mich. 2007) ("border exception" allows suspicionless search at U.S. – Canada border; discovery of concealed currency may be used to prove bulk cash smuggling). Therefore, the only issue is whether the continued retention of Plaintiff's truck and ammunition constitutes a new *Bivens* cause of action.

B. The Supreme Court Rejects Treating *Bivens* on an Amendement-by-Amendment Basis

In arguing that Plaintiff's *Bivens* claim does not arise in a new context, Plaintiff cites no Supreme Court case finding a *Bivens* claim stemming from an alleged violation of civil forfeiture laws. Indeed, there is no such Supreme Court case. Plaintiff argues that his case is not predicated on an "asset forfeiture context" by analogizing between the Fourth and Fifth Amendment violations he allegedly endured and the facts in *Bivens* and other purely criminal law enforcement cases. (Dkt. # 56 at 5-7 citing *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403, U.S. 388 (1971) (involving search of a home, not civil forfeiture); *Groh v. Ramirez*, 540 U.S. 551, 563-64 (2004) (recognizing *Bivens* claim challenging a deficient warrant under the

Fourth Amendment, not civil forfeiture); *Ashcroft v. al-Kidd*, 563 U.S. 731, 743 (2011) (no discussion of *Bivens* and no discussion of civil forfeiture); *Anderson v. Creighton*, 483 U.S. 635, 636-37 (1987) (assuming *Bivens* claim when challenging warrantless search of home, not civil forfeiture); *Davis v. Passman*, 442 U.S. 228, 245 (1979) (employment law case recognizing *Bivens* claim under the Fifth Amendment, nothing to do with civil forfeiture); *Ashcroft v. Iqbal*, 556 U.S. 662, 675 (2009) (no discussion of civil forfeiture). He, therefore, equates civil forfeiture actions with federal criminal law enforcement by taking an amendment-by-amendment approach to finding a basis for his alleged *Bivens* claim.

The Supreme Court and the Fifth Circuit have rejected Plaintiff's "amendment-by-amendment" approach. *De La Paz v. Coy*, 786 F.3d 367, 372 (5th Cir. 2015) (comparing *Davis v. Passman*, 442 U.S. 228 (1979) (finding *Bivens* remedy for a congressional employee's Fifth Amendment claim) with *Schweiker v. Chilicky*, 487 U.S. 412 (1988) (rejecting a *Bivens* remedy for Social Security recipient's Fifth Amendment claim)). "Instead of an amendment-by-amendment ratification of *Bivens* actions, courts must examine each new context – that is, each new 'potentially recurring scenario that has similar legal and factual components.'" *Id.* (quoting *Arar v. Ashcroft*, 585 F.3d 559 (2d Cir. 2009)). Here, Plaintiff's claim alleges a violation of his Fourth and Fifth Amendment rights because of an underlying civil forfeiture claim. Such a claim has never been the basis of a *Bivens* action that has been recognized by the Supreme Court.

C. Plaintiff Incorrectly Relies on Circuit Court Cases to Support His *Bivens* Claim

Unable to cite necessary Supreme Court cases to establish an existing *Bivens* claim stemming from an asset forfeiture context, Plaintiff attempts to rely on a handful of circuit court cases to argue that this is not a new context. (Dkt. # 56 at 7-8, citing *States Marine Lines, Inc. v. Schultz*, 498 F.2d 1146 (4th Cir. 1974); *Seguin v. Eide*, 720 F.2d 1046 (9th Cir. 1983); *Acadia*

Tech., Inc. v. United States, 458 F.3d 1327 (Fed. Cir. 2006). However, reliance on circuit court cases is impermissible under *Ziglar v. Abassi*, 137 S.Ct. 1843, 1855, 1859 (2017). ("The proper test for determining whether a case presents a new *Bivens* context is as follows. If the case is different in a meaningful way from previous *Bivens* cases decided by ***this Court***, then the context is new") (emphasis added). Therefore, the circuit court cases cited by Plaintiff cannot form the basis of a new *Bivens* remedy.

D. The Existence of an Alternate, Remedial Scheme

As explained in the Motion to Dismiss, there is an alternate, remedial process for protecting Plaintiff's rights that prevents this Court from recognizing a new *Bivens* remedy. *See De La Paz*, 786 F.3d at 375-80 (engaging in the two-step analysis required by *Wilkie* in the context of civil immigration enforcement proceedings). The constitutional violation alleged by Plaintiff is that the Individual Defendant violated his Fourth and Fifth Amendment right to due process by failing to provide any kind of post-seizure judicial process to Plaintiff. This is factually incorrect. After CBP Officers lawfully seized Plaintiff's vehicle, bullets, and magazine under 19 U.S.C. § 1595a(d) and 22 U.S.C. § 401, Plaintiff was provided with an alternate remedial scheme to challenge the seizure of his property.[2] CBP issued Plaintiff a Non-CAFRA Notice of Seizure and Information to Claimants on October 1, 2015, outlining that Plaintiff could file an administrative petition under 19 U.S.C. § 1618 seeking remission, submit an offer in compromise under 19 U.S.C. § 1617, abandon the property, or request a referral to the United States Attorney's Office for the institution of judicial forfeiture proceedings. (Dkt. # 50, Exhibit B).

[2] As outlined in 18 U.S.C. § 983(i), forfeiture proceedings under 19 U.S.C. § 1595a and 22 § 401 are exempt from the processing timeline outlined in the Civil Asset Forfeiture Reform Act ("CAFRA").

Moreover, Plaintiff's claim that the existing remedies are not sufficient to protect a Plaintiff's right to a post-seizure hearing is incorrect. *United States v. All Funds on Deposit at Dime Savings Bank*, 255 F.Supp. 2d 56, 72 (E.D.N.Y. 2003) (rejecting notion that *Krimstock* applies to federal forfeiture cases where there are built-in due process protections for property owners such as the innocent owner defense and hardship profession); *In Re: Seizure of Certificate of Deposit*, 2011 WL 744296 (W.D. Okla. Feb. 24, 2011) (claimant's claim that the seizure is causing him a hardship is no reason for the court to exercise equitable jurisdiction under Rule 41(g) because Sec. 983(f) provides an adequate remedy at law). Moreover, in non-CAFRA cases, where no forfeiture action has been commenced during a reasonable time, the Seventh Circuit held that Rule 41 provides Plaintiff an avenue to recover seized property. *See United States v. Sims*, 376 F.3d 705, 708 (7th Cir. 2004) (Rule 41(g) motion may be used to recover seized property if the Government fails to commence a forfeiture action for an unreasonable period of time). Here, Plaintiff brought his individual claim for the return of his seized property under Federal Rule of Criminal Procedure 41(g). (Dkt. # 1 at 3). The existence of the CBP's administrative scheme and Plaintiff's ability to move for the return of his property under Rule 41(g) indicate that there are alternate, remedial processes that are sufficient to deny Plaintiff a *Bivens* remedy. *Ziglar*, 137 S.Ct. at 1858 ("if there is an alternative remedial structure present in a certain case, that alone may limit the power of the Judiciary to infer a new *Bivens* cause of action"); *Wilkie*, 551 U.S. at 551-54 (stating that an opportunity to defend oneself from criminal charges and to pursue appeals may constitute a sufficient, alternate process militating against a *Bivens* remedy, but ultimately deciding the case at step two of the analysis).

E. The Individual Defendant Is Entitled To Qualified Immunity

Even if Plaintiff had a viable *Bivens* remedy available, all of his claims should still be dismissed because the Individual Defendant is entitled to qualified immunity. Government officials are entitled to qualified immunity from liability for civil damages so long as "their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Here, the Individual Defendant is entitled to qualified immunity because Plaintiff "alleges that the government *followed* the relevant statutes but that the statutes themselves violate the Constitution." (Dkt. # 56 at 10, citing Compl. at Para. 117-19) (emphasis in original). By conceding that the Individual Defendant was following the relevant statutes governing the seizure of Plaintiff's truck, Plaintiff necessarily concedes that the Individual Defendant is entitled to qualified immunity.

CONCLUSION

For the foregoing reasons, the Individual Defendant respectfully requests that the Court grant his Motion to Dismiss, (Dkt. # 50) and dismiss all of Plaintiff's claims against him.

Dated: January 19, 2018

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 19th day of January 2018, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will send notification of such filing to the following:

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