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UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

GUSTAVO ESCAMILLA, et al.,

Plaintiffs,

v.

DEPARTMENT OF HOMELAND SECURITY, et al.,

Defendants.

No. CV 17-7748 ODW (MRWx)

DEFENDANTS' REPLY IN SUPPORT OF MOTION TO DISMISS PLAINTIFFS' COMPLAINT

Hearing Date: March 5, 2018
Hearing Time: 1:30 p.m.
Location: First Street Courthouse
350 W. 1st Street
Courtroom 5D, 5th Floor

Hon. Otis D. Wright II

In their Opposition to Defendants' Motion to Dismiss (Dkt. 10, "Opp'n"),[1] plaintiffs Greenway Nutrients ("Greenway") and Gustavo Escamilla ("Escamilla") (collectively, "plaintiffs") "concede their missteps in hastily filing their Complaint,"[2] (id. at 2), but nevertheless assert that they should be given leave to amend.[3] While the court "should freely give leave [to amend] when justice so requires," Fed. R. Civ. P. 15(a)(2), in this instance, amendment would be futile, and plaintiffs' Complaint should be dismissed without leave to amend.

Plaintiffs assert that "a Bivens claim, as well as the state tort claims, based on the same facts can survive against the federal officers identified in the Complaint if granted leave to amend." (Dkt. 10, Opp'n at 2). In other words, instead of asserting state law tort and § 1983 claims against the United States and DHS, plaintiffs seek leave to assert the same state law tort claims and Bivens claims against federal officers Russell Simons and

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[1] Plaintiffs filed their Opposition one day after the February 12, 2018, deadline. See L.R. 7-9 (opposition must be filed "not later than twenty-one (21) days before the date designated for the hearing of the motion"). "The Court may decline to consider any memorandum or other document not filed within the deadline set by order or local rule." L.R. 7-12; see Christian v. Mattel, Inc., 286 F.3d 1118, 1129 (9th Cir. 2002) ("The district court has considerable latitude in managing the parties' motion practice and enforcing local rules that place parameters on briefing.").

[2] Somewhat contradictorily, plaintiffs contend that despite their "haste" and "missteps," (Dkt. 10, Opp'n at 1, 2), their Complaint complies with Rule 8(a) of the Federal Rules of Civil Procedure. (See id. at 2, 3). But as explained in defendants' Motion to Dismiss Plaintiffs' Complaint (Dkt. 9, "Motion"), the Complaint does not address even the most basic requirements of Rule 8, (see id. at 6, 7), such as whether each of plaintiffs' state tort claims and § 1983 claims are asserted against defendant the United States of America ("United States"), defendant the Department of Homeland Security ("DHS"), or both (collectively, "defendants"). (See id. at 6).

[3] Nothing precludes plaintiffs from filing an amended complaint by February 20, 2018. See Fed. R. Civ. P. 15(a)(1)(B) ("A party may amend its pleading once as a matter of course within [] 21 days after service of a motion under Rule 12(b)"); (Dkt. 9, Motion) (filed January 29, 2018). So plaintiffs' contention that "[t]his entire exercise in motions practice could have been avoided by Defendants delaying the filing of the motion until Plaintiffs amended their Complaint," (Dkt. 10, Opp'n at 1), lacks merit. Moreover, plaintiffs have not given defendants (or the court) enough time to accommodate their requests. Plaintiffs for the first time offered defendants a 30-day extension to respond to an amended complaint (which has not yet been filed), on the Saturday morning before the Monday deadline for filing defendants' Motion. (See Dkt. 9-2, Declaration of Grace Y. Park ("Park Decl.") at ¶ 3 & Exh. 2).

Shawn Gibson.[4]

Asserting state law tort claims of negligent and intentional infliction of emotional distress and violation of the Bane Act, Cal. Civ. Code § 52.1, (see Dkt. 1, Complaint at ¶¶ 97-109), against Simons and Gibson – rather than the United States and DHS – would be futile. The Federal Tort Claims Act ("FTCA"), 28 U.S.C. §§ 1346(b), 2671, et seq., is the exclusive remedy for common law tort claims arising out of the acts or omissions of a federal employee, see 28 U.S.C. § 2679(b)(1), "and it only allows claims against the United States." F.D.I.C. v. Craft, 157 F.3d 697, 706 (9th Cir. 1998). As such, the court lacks subject matter jurisdiction to consider such state law tort claims asserted against Simons and Gibson. See Kennedy v. U.S. Postal Serv., 145 F.3d 1077, 1078 (9th Cir. 1998) (dismissing FTCA claim against U.S.P.S. employee acting within scope of his employment "[b]ecause the United States is the only proper party defendant in an FTCA action."). Accordingly, plaintiffs' proposed assertion of state law tort claims against federal officers Simons and Gibson would be futile.[5]

In light of the Supreme Court's decision in Ziglar v. Abbasi, 137 S.Ct. 1843 (2017), and the Ninth Circuit's decision in Vega v. United States, No. 13-35311, 2018 WL 740184 (9th Cir. Feb. 7, 2018), asserting claims against Simons and Gibson pursuant to Bivens v. Six Unknown Named Agents, 403 U.S. 388, 91 S.Ct. 1999 (1971) ("Bivens") would also

[4] Defendants still do not understand why plaintiffs have not simply refiled their civil infringement claims in the District of Colorado. (See Dkt. 9, Motion at 2); Nasious v. Two Unknown B.I.C.E. Agents, at Arapahoe Cty. Justice Ctr., 492 F.3d 1158, 1162 (10th Cir. 2007) ("Employing Rule 41(b) to dismiss a case without prejudice [] allows the plaintiff another go."); Gonzales v. Bernalillo Cty. Dist. Ct., 640 Fed. App'x 759, 763 (10th Cir. 2016) ("[A] Rule 41(b) dismissal without prejudice is not an extreme sanction because the remedy is simply to cure the defect and refile the complaint.") (internal quotation marks omitted). Notably, plaintiffs' counsel in this action, Mainak D'Attaray, served as counsel for Greenway in the Colorado action, (see Dkt. 9-2, Park Decl., Exh. 3 at p. 2 & Dkt. 143), so it is unclear why plaintiffs insist on filing suit against the United States and DHS, and now for the first time – federal officers Simons and Gibson – rather than the "criminal usurpers," (Dkt. 10, Opp'n at 3), themselves.

[5] Moreover, plaintiffs' proposed assertion of state law tort claims against Simons and Gibson (rather than the United States or DHS) does not overcome the fact that plaintiffs failed to administratively exhaust their claims, (see Dkt. 9, Motion at 8-9), nor does it overcome the discretionary function exception, which bars plaintiffs' proffered state law claims. (See id. at 9-13).

be futile.

In Abbasi, the Supreme Court noted that "three cases [] represent the only instances in which the Court has approved of an implied damages remedy under the Constitution itself," 137 S.Ct. at 1855, which are: "(1) police search and seizure in violation of the Fourth Amendment, see Bivens, 403 U.S. 388, 91 S.Ct. 1999; (2) gender discrimination by a congressman in violation of the Fifth Amendment for an employee not covered by Title VII, see Davis v. Passman, 442 U.S. 228, 99 S.Ct. 2264 (1978); and (3) deliberate indifference toward a prisoner in violation of the Eighth Amendment, see Carlson v. Green, 446 U.S. 14, 100 S.Ct. 1468 (1980)." Arvizu v. Acosta, No. 1:17-CV-219-LJO-EPG, 2017 WL 3421976, at *7 n. 7 (E.D. Cal. Aug. 9, 2017). "[E]xpanding the Bivens remedy [beyond these three instances] is [] a 'disfavored' judicial activity," Abbasi, 137 S.Ct. at 1857, which the Supreme Court "has consistently refused to extend [] to any new context or new category of defendants . . . for the past 30 years." Id. (internal quotation marks and citation omitted).

In light of this, the Supreme Court has articulated a two-part test as to whether a plaintiff can assert a Bivens claim. "[T]he first question a court must ask [] is whether the claim arises in a new Bivens context, i.e., whether the case is different in a meaningful way from previous Bivens cases decided by this Court." Abbasi, 137 S.Ct. at 1864 (internal quotation marks omitted). "[T]he new-context inquiry is easily satisfied," id. at 1865, even when the meaningfulness of the differences are "small. . . in practical terms." Id. A non-exhaustive list of meaningful differences that a court may consider, include: "the rank of the officers involved; the constitutional right at issue; the generality or specificity of the official action; the extent of judicial guidance as to how an officer should respond to the problem or emergency to be confronted; the statutory or other legal mandate under which the officer was operating; the risk of disruptive intrusion by the Judiciary into the functioning of other branches; or the presence of potential special factors that previous Bivens cases did not consider." Id. at 1860.

If the answer to the first question is in the affirmative, the second question is whether

"there are special factors counselling hesitation in the absence of affirmative action by Congress." Id. at 1857. "The answer most often will be [that] Congress" – rather than the courts – "should decide whether to provide for a damages remedy" under the Constitution. Id. (internal quotation marks omitted).

Here, plaintiffs seek leave to assert Bivens claims against Simons and Gibson for "declin[ing] to investigate the criminal usurper of Plaintiffs' trademarks," (Dkt. 10, Opp'n at 3), and declining to consider purportedly newly discovered evidence of infringement, (see id. at 4), thus "depriv[ing] Plaintiffs of their most basic fundamental civil rights of Due Process under the Fifth and Fourteenth[6] Amendments of the United States Constitution." (Id.).

Plaintiffs' proposed Bivens claim involves a "new category of defendants," agents from U.S. Immigration and Customs Enforcement ("ICE"), (see Dkt. 10, Opp'n at 3-4; Dkt. 1, Complaint at ¶¶ 6, 14), as opposed to the police officers, congressman, or prison guards implicated in previously recognized Bivens cases. And to the extent plaintiffs' proposed Bivens claim is grounded on Fifth Amendment Due Process grounds in the prosecutorial investigation context, it is meaningfully different from previous Bivens claims. See, e.g., Vega, 2018 WL 740184, at * 5 (Fifth Amendment procedural due process claims arising out of a prison disciplinary process "plainly present[s] a 'new context' under Abbasi"). Because "the new-context inquiry is easily satisfied," where even differences that are "small . . . in practical terms," are "meaningful," Abbasi, 137 S.Ct. at 1865, the first factor under Abbasi is satisfied.

The second factor of the Abbasi inquiry favors defendants as well. See Abbasi, 137

[6] Because plaintiffs propose claims against federal employees, their due process claims arise, if at all, under the Due Process Clause of the Fifth, rather that the Fourteenth, Amendment. See Davis, 442 U.S. at 230, 99 S.Ct. at 2269-70 (discussing equal protection claims under the Fifth Amendment); Consejo de Desarrollo Economico De Mexicali, A.C. v. United States, 482 F.3d 1157, 1170 n.4 (9th Cir. 2007) (holding Fifth Amendment "subjects the federal government to constitutional limitations that are the equivalent of those imposed on the states by the Equal Protection Clause of the Fourteenth Amendment.") (citing Bolling v. Sharpe, 347 U.S. 497, 74 S.Ct. 693 (1954)). Accordingly, plaintiffs' proposed Bivens claims based on Fourteenth Amendment violations fails as a matter of law.

S.Ct. at 1857 ("a Bivens remedy will not be available if there are special factors counselling [judicial] hesitation in the absence of affirmative action by Congress"). "[I]f 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." Id. at 1858.

Here, multiple alternative remedial structures exist, counseling judicial hesitation in recognizing a Bivens remedy in this instance. First, plaintiffs have "state law claims as an alternative remedy." Vega, 2018 WL 740184, at *6 (declining to recognize a Bivens remedy when plaintiff sought state law and FTCA claims). Plaintiffs have asserted state law claims for negligent and intentional infliction of emotional distress and violation of the Bane Act, Cal. Civ. Code § 52.1. (See Dkt. 1, Complaint at ¶¶ 97-109). Even if plaintiffs' state law tort claims under the FTCA fail, that does not mean plaintiffs may seek Bivens claims in the alternative. "[N]o court has held that the plaintiff's lack of success due to inadequate pleading while pursuing alternative remedies provides a basis for Bivens relief." Vega, 2018 WL 740184, at *6. "To do so would require the court to necessarily prove the plaintiff's alternative remedies for him, or be forced to create a new remedy through Bivens." Id. Second, within DHS, the Office for Civil Rights and Civil Liberties ("CRCL"), "investigate[s] complaints and information indicating possible abuses of civil rights or civil liberties, unless the Inspector General of the Department determines that any such complaint or information should be investigated by the Inspector General." 6 U.S.C. § 345(a)(6). Again, plaintiffs concede that they sought available alternative remedies when they "report[ed] civil rights violations" to the CRCL. (See Dkt. 1, Complaint at ¶ 33 & Exh. 11). In other words, because multiple alternative remedial structures exist to address plaintiffs' grievances, which procedures plaintiffs pursued, the court should hesitate in recognizing a Bivens remedy in this case.

Finally, even if plaintiffs could state a valid Bivens claim, Gibson and Simons are entitled to qualified immunity. Qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law." Malley v. Briggs, 475 U.S. 335, 341, 106 S.Ct. 1092, 1096 (1986). The qualified immunity inquiry involves two questions:

"Taken in the light most favorable to the party asserting the injury, do the facts alleged show the officer's conduct violated a constitutional right?" Saucier v. Katz, 533 U.S. 194, 201, 121 S.Ct. 2151, 2156 (2001). Second, "if a violation could be made out on a favorable view of the parties' submissions, the next [] step is to ask whether the right was clearly established . . . in light of the specific context of the case." Id. Only if the answer to both questions is in the affirmative, then qualified immunity does not apply. See id.; see also Pearson v. Callahan, 555 U.S. 223, 236, 129 S.Ct. 808, 818 (2009) (although following the Saucier protocol sequentially is "often beneficial," it "should not be regarded as mandatory").

Here, as for the first prong, to the extent plaintiffs contend that Simons and Gibson "refused to provide any type of federal law enforcement intervention whatsoever," (Dkt. 10, Opp'n at 4), plaintiffs cite no legal authority that plaintiffs have a constitutional right to federal criminal prosecution to vindicate personal injuries. (See, generally, id.). To the extent plaintiffs contend that Simons and Gibson "refused to investigate plaintiffs' claims," (id. at 3), such contentions are belied by the allegations in the Complaint. Plaintiffs allege that Gibson and Simons made the reasoned, evidence-based decision not to resume their investigation because the dismissal without prejudice of Greenway's trademark infringement suit in the Colorado action leaves plaintiffs' valid ownership of Greenway's trademarks in doubt, (see Dkt. 1, Complaint at ¶¶ 40-42, 44-46), and plaintiffs' purportedly "new" evidence regarding Greenway's former attorney, Michael J. Ryan, is not new. (See id. at ¶¶ 32, 52, 63-70). As far back as June 11, 2013, Escamilla sent threatening and profanity-laced communications to Ryan, his ex-wife, and daughter accusing Ryan of misappropriation of trade secrets, wire fraud, and mail fraud, among other charges. (See, e.g., Dkt. 9-2, Park Decl., Exh. 4 at 4, 11). As for the second-prong, having failed to identify any violated federal constitutional right, plaintiffs cannot plausibly allege that Gibson or Simons violated a "clearly established" constitutional right. Saucier, 533 U.S. at 201, 121 S.Ct. at 2156.

Although plaintiffs contend that their Complaint, containing "75 paragraphs, across

17 pages," (Dkt. 10, Opp'n at 4), can be amended to adequately assert claims against federal officers Gibson and Simons, for the foregoing reasons, it is clear that additional paragraphs and pages will not help plaintiffs, and defendants' motion to dismiss should be granted without leave to amend.

Dated: February 16, 2018

Respectfully submitted,

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