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14 UNITED STATES DISTRICT COURT
15 CENTRAL DISTRICT OF CALIFORNIA
16 EASTERN DIVISION

17 Abdul R. D. Salem,
18 Plaintiff,
19 vs.
20 United States of America, Los Angeles
21 Fire Department, et al.
22 Defendants.

Civil No. 15cv2091-JGB-SP

Date: June 5, 2017

Time: 9:00 A.M.

Courtroom: 1

**Plaintiff's Response in Opposition to
Individual Federal Defendants'
Motion to Dismiss**

Before the Hon. Jesus G. Bernal

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TABLE OF CONTENTS

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF AUTHORITIES.....iv

INTRODUCTION.....2

STATEMENT OF FACTS.....2

DISCUSSION.....5

I. Plaintiff’s Fourth Amendment claims based on his unreasonable search, seizure, and detention are fully supported by factual allegations and not precluded by the “border search” exception.....5

 A. Plaintiff has made specific factual allegations in support of his Fourth Amendment claims.....6

 B. Plaintiff has established the individual participation of each defendant and is not proceeding on a theory of “team effort”.....7

 C. The “border search” exception does not apply to unreasonable searches and seizures.....8

II. Plaintiff’s Fourth Amendment claims based on excessive force are fully supported by the factual allegations in the complaint.....10

 A. Plaintiff has made specific factual allegations in support of his Fourth Amendment claims.....10

 B. Defendants’ allegations about the merits of Plaintiff’s claims are irrelevant at this stage of the proceedings.....11

III. Plaintiff’s Fifth Amendment claims are fully supported by the factual allegations in the complaint and cognizable under existing caselaw.....12

 A. Plaintiff has made specific factual allegations in support of his Fifth Amendment claims.....12

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

B. There is no need for this Court to “extend” *Bivens* or “imply a *Bivens* remedy” in this case.....13

IV. Defendants are not entitled to qualified immunity.....14

CONCLUSION.....15

CERTIFICATE OF SERVICE

TABLE OF AUTHORITIES

Cases

Ashcroft v. al-Kidd,
 563 U.S. 731 (2011).....14,15

Ashcroft v. Iqbal,
 556 U.S. 662 (2009).....5,7,13

Anderson v. Creighton,
 483 U.S. 635 (1987).....15

Barren v. Harrington,
 152 F.3d 1193 (9th Cir. 1998).....8

Bell Atl. Corp. v. Twombly,
 550 U.S. 544 (2007).....5

Bivens v. Six Unknown Agents of Federal Bureau of Narcotics,
 403 U.S. 388 (1971).....passim

Chuman v. Wright,
 76 F.3d 292 (9th Cir. 1996).....7

Davis v. Passman,
 442 U.S. 228 (1979).....13,14

Flores v. Pierce,
 617 F.2d 1386 (9th Cir. 1980).....14

Homedics, Inc. v. Valley Forge Ins. Co.,
 315 F.3d 1135 (9th Cir. 2003).....5

Ivey v. Board of Regents of University of Alaska,
 673 F.2d 266 (9th Cir. 1982).....8

Johnson v. Duffy,
 588 F.2d 740 (9th Cir. 1978).....8

Jones v. Williams,
 297 F.3d 930 (9th Cir. 2002).....7

1 *Mendia v. Garcia*,
2 165 F.Supp. 3d 861 (N.D. Cal 2016).....14
3 *Pellegrino v. United States*,
4 73 F.3d 934 (9th Cir. 1996).....8
5 *Silvas v. E*Trade Mortg. Corp.*,
6 514 F.3d 1001 (9th Cir. 2008).....5
7 *Taylor v. List*,
8 880 F.2d 1040 (9th Cir. 1989).....7,8
9 *United States v. Duncan*,
10 693 F.2d 971 (9th Cir. 1982).....8,9
11 *United States v. Windsor*,
12 133 S.Ct. 2675 (2013).....14
13 *Weber v. Dep’t of Veterans Affairs*,
14 521 F.3d 1061 (9th Cir. 2008).....5

15
16 **Constitutional Provisions**
17
18 U.S. Const. Amend. IV.....passim
19 U.S. Const. Amend. V.....passim

20
21 **Statutes**
22
23 31 U.S.C. § 5317.....8
24 Fed. R. Civ. P. 12.....passim

25
26
27
28

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2
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Before the Hon. Jesus G. Bernal

INTRODUCTION

Plaintiff, Abdul R. D. Salem, respectfully submits his response in opposition to the individual federal defendants’ motion to dismiss. For the reasons that follow, defendants’ motion should be denied in its entirety.

STATEMENT OF FACTS

Plaintiff is a native citizen of Egypt and a naturalized citizen of the United States.¹ Third Amended Complaint (“TAC”) ¶ 8. He has lived in the United States for more than 40 years and earned a Ph.D. from the University of California, Los Angeles. TAC ¶ 14. At the time of the incident in this case, he was 77 years old. *Id.* He is five-feet-five inches tall, weighs approximately 175 pounds, suffers from osteoporosis and high blood pressure. TAC ¶ 15. Plaintiff has no criminal record in the United States or in Egypt. TAC ¶ 16.

On February 21, 2014, Plaintiff was scheduled to travel to Cairo from Los Angeles International Airport. TAC ¶ 17. At approximately 7:30 p.m., Plaintiff submitted his boarding pass and United States passport to TSA officials at the security checkpoint. TAC ¶ 18. Because the names on these documents did not match, TSA officials would not allow Plaintiff to pass through the checkpoint. Plaintiff then provided TSA officials with his Egyptian passport, which lists his full legal name, as an alternate identification. *Id.* After reviewing these documents, TSA allowed Plaintiff to continue to his gate. *Id.*

Plaintiff’s flight began boarding at around 8:15 p.m. TAC ¶ 19. Plaintiff waited in line, submitted his boarding pass to the airline personnel, and entered the “bridge” leading to the aircraft with his two screened carry-on bags. *Id.* At that

¹ The following facts are summarized from the Third Amended Complaint. As discussed below, in the context of a Rule 12(b)(6) motion, the Court must take these facts as true and construe them in the light most favorable to Plaintiff.

1 point, Customs and Border Protection Officer (“CBP”) Zoila Flores waiver her
2 hand at Plaintiff and demanded to see his passport. *Id.*

3 Plaintiff asked Flores why he was being singled out while other passengers
4 were permitted to board the plane, but Flores ignored him. TAC ¶ 20. Plaintiff
5 attempted to comply with Flores’s instructions by providing her with his boarding
6 pass and passport. *Id.* Before Plaintiff could provide the documents to Flores, CBP
7 Officers Bryan McKenrick, Robert Rector, and Angel Colmenero intercepted him.
8 The officers yelled at Plaintiff that he was a “bad man” and accused him of trying
9 to physically strike defendant Flores, despite Plaintiff having made no verbal or
10 non-verbal indication that he intended to do so. TAC ¶¶ 21-22.

11 After intercepting Plaintiff, one of the officers tightly grabbed Plaintiff’s
12 right arm. The other tightly grabbed Plaintiff’s left arm, and the third grabbed
13 Plaintiff by the neck. TAC ¶ 22. Plaintiff made no attempt to flee or resist the
14 officers’ restraints, and spoke only to ask why he was being restrained and to plead
15 for the officers to stop hurting him. TAC ¶ 23. Officers McKenrick, Rector, and
16 Colmenero searched Plaintiff’s person at that point, and found no evidence of
17 contraband, weapons, or illegal activity. *Id.*

18 After the search, the officers instructed Plaintiff to place his carry-on
19 luggage on a table that stood 10 feet away from the aircraft but still within the
20 bridge area. TAC ¶ 24. Plaintiff again asked why he was being detained while
21 other passengers were allowed to board the airplane, but the officers ignored his
22 questions, and forcefully told him to keep quiet. *Id.* One of the officers told
23 Plaintiff that he would not be boarding his flight that day. TAC ¶ 25. The officers
24 then spent between 15 and 20 minutes searching through Plaintiff’s carry-on bags,
25 and found no contraband, weapons, or any evidence of illegal activity. TAC ¶ 26.

26 Despite finding nothing during the search, defendants McKendrick, Rector,
27 and Colmenero removed Plaintiff from the bridge to an interrogation room. TAC
28 ¶¶ 28, 29. Plaintiff, because of his age, has limited flexibility. Despite Plaintiff’s

1 physical limitations, within the interrogation room, defendants McKendrick and
2 Rector, along with CBP Officer Jeremy Newbold, grabbed Plaintiff and forced him
3 to bend his back at a 90-degree angle to the table. TAC ¶ 30. One of the officers
4 pushed Plaintiff’s head against the table and forcibly pulled Plaintiff’s arm behind
5 his back to handcuff him. TAC ¶ 31. Plaintiff cried out in pain and begged officers
6 to stop hurting him. *Id.* He told officers that he was a 75-year-old man and pleaded
7 for them to stop hurting him. TAC ¶ 32. Officers ignored Plaintiff’s cries and
8 continued to twist his arm behind his back until a loud sharp crack emanated from
9 Plaintiff’s arm. TAC ¶ 31. Plaintiff screamed in pain, nearly fainted, and began
10 inconsolably sobbing. *Id.*

11 Once Plaintiff’s arm broke, one of the officers instructed the use of “long
12 handcuffs” to accommodate Plaintiff’s lack of flexibility. *Id.* Even after breaking
13 Plaintiff’s arm, officers removed Plaintiff to a second interrogation room. TAC ¶
14 34. There, officers searched through Plaintiff’s checked luggage in hopes of
15 finding contraband. Again, officers found nothing. *Id.*

16 Plaintiff requested medical attention for his fractured right arm. TAC ¶ 36.
17 Upon arriving, paramedics informed CBP officers that Plaintiff required further
18 medical attention. TAC ¶ 37. None was provided. *Id.* Instead, after a nearly four-
19 hour detention, defendants summarily released Plaintiff at 1:00 a.m. TAC ¶ 38.

20 Following the incident, Plaintiff filed an amended complaint alleging several
21 causes of action under *Bivens v. Six Unknown Named Agents of Federal Bureau of*
22 *Narcotics*, 403 U.S. 388 (1971), against, *inter alia*, the individual CBP officers.
23 *See* Docket 53. The officers moved to dismiss on April 21, 2017. *See* Docket 72.
24 This response follows.

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DISCUSSION

1
2 It is well-settled that in considering a motion to dismiss under Fed. R. Civ.
3 P. 12(b)(6), this Court “must take all allegations of material fact as true and
4 construe them in the light most favorable to the nonmoving party.” *Silvas v.*
5 *E*Trade Mortg. Corp.*, 514 F.3d 1001, 1003 (9th Cir. 2008). A complaint must
6 not be dismissed unless it appears beyond doubt that the plaintiff can prove no set
7 of facts in support of the claim that would entitle the plaintiff to relief. *Homedics,*
8 *Inc. v. Valley Forge Ins. Co.*, 315 F.3d 1135, 1138 (9th Cir. 2003). Indeed, “a
9 complaint need not contain detailed factual allegations; rather, it must plead
10 ‘enough facts to state a claim to relief that is plausible on its face,’” *Weber v. Dep’t*
11 *of Veterans Affairs*, 521 F.3d 1061, 1065 (9th Cir. 2008) (quoting *Bell Atl. Corp. v.*
12 *Twombly*, 550 U.S. 544, 570 (2007)). “A claim has facial plausibility when the
13 plaintiff pleads factual content that allows the court to draw the reasonable
14 inference that the defendant is liable for the misconduct alleged.” *Ashcroft v. Iqbal*,
15 556 U.S. 662, 678 (2009); see also *Twombly*, 550 U.S. at 556. “The plausibility
16 standard is not akin to a ‘probability requirement,’ but it asks for more than sheer
17 possibility that a defendant acted unlawfully.” *Iqbal, supra*. Applying these
18 principles here requires defendants’ motion to be denied.

19
20 **I. Plaintiff’s Fourth Amendment claims based on his unreasonable search,**
21 **seizure, and detention are fully supported by factual allegations and not**
22 **precluded by the “border search” exception.**

23 Defendants argue that Plaintiff’s first cause of action fails to state a claim for
24 violation of his Fourth Amendment rights. See Docket 72 at 4. They argue that
25 “Plaintiff fails to allege facts, and not mere conclusions, showing that each named
26 defendant was personally involved in the deprivation of his constitutional rights.”
27 *Id.* They also claim that “Plaintiff’s claim is barred as a matter of law by the
28 ‘border search’ exception doctrine.” *Id.* Defendants are mistaken.

1 **A. Plaintiff has made specific factual allegations in support of his**
2 **Fourth Amendment claims.**

3 Plaintiff has made specific factual allegations in support of his Fourth
4 Amendment unreasonable search, seizure, and detention claims against defendants
5 McKenrick, Rector, Newbold, and Colmenero. He has specifically alleged that
6 McKenrick, Rector, and Colmenero: 1) forcefully restrained him on the bridge to
7 the airplane by grabbing him by the arms and neck, despite the fact that Plaintiff
8 was fully cooperating with their requests, and searched his person (TAC ¶ 22-23);
9 2) moved Plaintiff to a separate area of the bridge where they searched through his
10 carry-on luggage for 15-20 minutes while instructing him keep quiet (TAC ¶ ¶22-
11 24); 3) removed Plaintiff to an interrogation room even after finding nothing on his
12 person or in his carry-on luggage (TAC ¶¶ 26-29); 4) with the assistance of
13 defendant Newbold, continued to forcefully restrain Plaintiff inside the room,
14 breaking his arm while attempting to handcuff him (TAC ¶¶ 30-32); 5) even after
15 hearing an audible crack in Plaintiff's arm, and while ignoring Plaintiff's cries and
16 pleas for help, removed Plaintiff to a second interrogation room (TAC ¶¶ 31-33);
17 6) searched through Plaintiff's checked luggage—again finding nothing—while
18 continuing to threaten him with arrest and incarceration; (TAC ¶ 34); 7) finally
19 released Plaintiff nearly four hours after his initial detention at the bridge (TAC ¶
20 38).

21 These facts more than suffice to support Plaintiff's Fourth Amendment
22 claims for unreasonable search and seizure, false arrest, and false imprisonment,
23 particularly when interpreted and construed in the light most favorable to Plaintiff.
24 Defendants unreasonably detained and restrained Plaintiff for nearly four hours,
25 repeatedly searching and seizing his person and his possessions without any reason
26 for doing so. From these allegations, the Court can—at the very least—draw a
27 reasonable inference that defendants are liable for a violation of Plaintiff's Fourth
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1 Amendment rights. That is all that *Iqbal* requires. Defendants’ motion to dismiss
2 should be denied accordingly.

3
4 **B. Plaintiff has established the individual participation of each**
5 **defendant and is not proceeding on a theory of “team effort.”**

6 None of defendants’ arguments to the contrary should be well-taken. First,
7 defendants attempt to argue that Plaintiff’s Fourth Amendment claim should be
8 dismissed because “none of these allegations specify which officer(s) did these
9 alleged acts.” Docket 72 at 4. But defendants have not cited to any authority in
10 support of the proposition that Fourth Amendment claims under *Bivens* must be
11 dismissed unless a plaintiff specifically attributes each act of misconduct by name
12 to a specific defendant. Defendants’ cases hold only that in the context of civil
13 rights’ actions against individual officers, “a plaintiff could not hold an officer
14 liable because of his membership in a group without a showing of individual
15 participation in the unlawful conduct.” *Jones v. Williams*, 297 F.3d 930, 935 (9th
16 Cir. 2002), quoting *Chuman v. Wright*, 76 F.3d 292, 294 (9th Cir. 1996). But
17 Plaintiff is not holding McKenrick, Rector, Newbold, and Colmenero liable
18 because of their “membership in group,” but instead because of their specific acts
19 of misconduct as outlined in the complaint. Plaintiff has made concrete allegations
20 about their individual participation in his unreasonable search and seizure, whether
21 by restraining him on the bridge, repeatedly searching through his person and
22 belongings, forcing him into the interrogation room, breaking his arm while
23 unreasonably attempting to handcuff him, or keeping him detained for four hours.
24 The complaint makes it clear that McKenrick, Rector, Newbold, and Colmenero
25 were personally present and engaged in all or part that misconduct. Dismissal,
26 then, is not appropriate.

27 Defendants’ other cases do not hold or suggest to the contrary. For example,
28 in *Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989), the Court affirmed the grant

1 of summary judgment on behalf of several defendants because the plaintiff “had
2 failed to establish a genuine issue of material fact as to the personal involvement of
3 any of these defendants in the alleged violations.” Aside from the difference in
4 procedural postures—summary judgment as opposed to a Rule 12(b)(6) motion—
5 *Taylor* does not control here because there the Plaintiff simply failed to allege any
6 connection between the defendants and the alleged constitutional violations. *See*
7 *Taylor, supra*, at 1045-1046. As noted above, that is not the case with Plaintiff’s
8 complaint.

9 *Ivey v. Board of Regents of University of Alaska*, 673 F.2d 266 (9th Cir.
10 1982), *Barren v. Harrington*, 152 F.3d 1193, (9th Cir. 1998), *Johnson v. Duffy*,
11 588 F.2d 740 (9th Cir. 1978), and *Pellegrino v. United States*, 73 F.3d 934 (9th
12 Cir. 1996) are all in accord. In those cases, motions to dismiss were granted after
13 the plaintiff made conclusory statements that defendants had acted illegally, but
14 failed to allege specific facts in support of those claims. None of those cases held
15 that dismissal is appropriate simply because a plaintiff alleged joint conduct by
16 some of the defendants without attributing specific actions to everyone.
17 Defendants’ motion should be denied accordingly.

18
19 **C. The “border search” exception does not apply to unreasonable**
20 **searches and seizures.**

21 Defendants’ also err in suggesting that their conduct was sanctioned or
22 authorized by the “border search” exception. Indeed, under 31 U.S.C. § 5317(b)
23 and in the context of compliance with currency requirements, “a customs officer
24 may stop and search, at the border and without a search warrant, any vehicle,
25 vessel, aircraft, or other conveyance, any envelope or other container, and any
26 person entering or departing from the United States.” But the Ninth Circuit has
27 held that a search under that section, and any other border search, must still comply
28 with the requirements of the Fourth Amendment. *See United States v. Duncan*,

1 693 F.2d 97, 978 (9th Cir. 1982). “The search comports with the fourth amendment
2 *unless it violates ‘reasonableness’*...Reasonableness, when used in the context of a
3 border search, is “incapable of comprehensive definition or of mechanical
4 application....” *Id.* *The scope of the intrusion, the manner of its conduct, and the*
5 *justification for its initiation must all be considered in determining whether a*
6 *search comports with reasonableness.”* *Duncan, supra*, at 977 (emphasis
7 provided).

8 Here, Plaintiff’s allegations are sufficient to establish the unreasonableness
9 of the search performed by the defendants in this case. The facts alleged in the
10 complaint show that the search and the subsequent seizure of Plaintiff’s person and
11 belongings were, *inter alia*, excessively intrusive, conducted unreasonably and
12 aggressively, and motivated by Plaintiff’s ethnicity and national origin. Indeed, in
13 *Duncan*, the Ninth Circuit observed that a search performed in public view of other
14 passengers, such as the one performed on Plaintiff and his luggage here,² one that
15 is “longer than necessary to ensure no laws were violated,” such as the four-hour
16 search into the early morning hours that took place here, and one where passengers
17 are “singled out for impermissible reasons,” such as Plaintiff’s ethnicity or national
18 origin here, would be unreasonable under the Fourth Amendment. *Id.* at 978.
19 Plaintiff, then, has pleaded more than sufficient facts to establish the
20 unreasonableness of the search and seizure at issue, establish a violation of his
21 Fourth Amendment rights, and preclude applying the “border search” exception.
22 Defendants’ motions should be denied accordingly.

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28 ² Indeed, defendants admit that the search “took place in a crowded jetway
full of men, women, and children boarding the international flight.” Docket 72 at 8.

1 **II. Plaintiff’s Fourth Amendment claims based on excessive force are fully**
2 **supported by the factual allegations in the complaint.**

3 **A. Plaintiff has made specific factual allegations in support of his**
4 **Fourth Amendment claims.**

5 Defendants also move for the dismissal of Plaintiff’s second cause of action,
6 which alleges a Fourth Amendment violation for use of excessive force.

7 Defendants argue that “Plaintiff fails to allege facts, and not mere conclusions,
8 showing that each named defendant was personally involved in the deprivation of
9 his constitutional rights.” Docket 72 at 6. And as with the first cause of action,
10 defendants are mistaken.

11 Defendants repeat their argument that Plaintiff’s claims should be dismissed
12 because he allegedly relies on a “team effort” approach. *Id.* As discussed above,
13 that is simply untrue. Plaintiff has alleged multiple specific facts against each
14 individual defendant in support of his excessive-force cause of action. As to
15 defendants McKenrick, Rector, and Colmenero, Plaintiff has specifically alleged
16 that they forcefully grabbed him by the arms and neck to detain and search him at
17 the bridge, and then continued to use that force to remove him to an interrogation
18 room. *See* TAC ¶¶ 20-22. Within that room, Plaintiff has alleged that defendant
19 Newbold joined two of the other defendants, and that together they pinned Plaintiff
20 against a table, pushed his head down against the table, and twisted his arm behind
21 his back until they fractured it. *See* TAC ¶¶ 29-32. In sum, Plaintiff has made
22 specific factual allegations about how each of these defendants used excessive
23 force against him in violation of his Fourth Amendment rights. Defendants’
24 mistaken contentions that Plaintiff is relying on a “team effort” approach should be
25 rejected, and their motion to dismiss should be denied accordingly.

26 //

27 //

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1 **B. Defendants’ allegations about the merits of Plaintiff’s claims are**
2 **irrelevant at this stage of the proceedings.**

3 Defendants also attempt to convince this Court to dismiss the second cause
4 of action through allegations about the merits of Plaintiff’s excessive force claims.
5 *See* Docket 72 at 6-9. Defendants argue that “even when viewing the allegations in
6 the light most favorable to Plaintiff, none of the alleged actions taken by the CBP
7 Officers were objectively unreasonable.” *Id.* They claim that “the alleged actions
8 of the CBP Officials were minimal intrusions given (1) Plaintiff’s initial refusal to
9 comply with CBPO Flores’ simple request for his passport, (2) Plaintiff’s admitted
10 continued obstinance and verbal tirade repeatedly questioning the officers’
11 authority and intentions, and (3) the fact that the incident took place in a crowded
12 jet way full of men, women, and children boarding the international flight.” *Id.* at
13 8.

14 None of those arguments should be well-taken. Plaintiff has alleged that—
15 despite his age, height, and weight—defendants forcibly restrained him by the
16 arms and neck—even though he was attempting to cooperate with their demands—
17 removed him to an interrogation room by force, manhandled him against a table,
18 and ultimately broke his arm. Those facts, if taken as true and drawing all
19 reasonable inferences on Plaintiff’s behalf, are more than enough to support a
20 Fourth Amendment cause of action for excessive force. Defendants’ allegations
21 about the reasonableness of the search and the extent of the intrusion amount to
22 nothing more than factual litigation on the merits of the complaint that is improper
23 at this stage of the proceedings and beyond the scope of a Rule 12(b)(6) motion.
24 Well-established precedent requires this Court to take Plaintiff’s factual allegations
25 as true and resolve all reasonable inferences in Plaintiff’s favor. Defendants, by
26 alleging that Plaintiff “refused to comply” with Flores’s request and launched a
27 “verbal tirade” against officers—ask this Court to make factual findings contrary to
28

1 the face of the complaint. That would be impermissible. Defendants' motion
2 should be denied accordingly.

3
4 **III. Plaintiff's Fifth Amendment claims are fully supported by the factual**
5 **allegations in the complaint and cognizable under existing caselaw.**

6 **A. Plaintiff has made specific factual allegations in support of his Fifth**
7 **Amendment claims.**

8 Defendants argue that Plaintiff's Fifth Amendment claims as outlined in the
9 third cause of action should be dismissed because "there are no facts alleged in the
10 TAC that suggest a violation of Plaintiff's Fifth Amendment rights." Docket 72 at
11 10. They also claim that the Court would have to "imply a *Bivens* remedy" or
12 otherwise extend *Bivens* to recognize Plaintiff's Fifth Amendment cause of action.
13 Docket 72 at 11-14. Defendants are mistaken.

14 As with his Fourth Amendment causes of action, Plaintiff's Fifth
15 Amendment claims are fully supported by specific allegations in the complaint.
16 Plaintiff has alleged that, upon arriving at the TSA checkpoint on his way to the
17 gate, security officials initially did not allow him passage because the name on his
18 United States passport did not match the name on the boarding pass. TAC ¶ 8.
19 Plaintiff then provided his Egyptian passport as an alternate identification, and was
20 allowed to continue to the gate. *Id.* Once at the gate and on his way down the
21 boarding bridge toward the airplane, defendant Flores intervened with Plaintiff to
22 specifically ask for his passport. TAC ¶ 19. Defendant Flores did not intervene
23 with any other passengers. TAC ¶ 20. As Plaintiff attempted to comply with
24 defendant Flores's demands, defendants McKenrick, Rector, and Colmenero also
25 intervened with Plaintiff, falsely claimed that he was attempting to strike defendant
26 Flores, and angrily accused him of being a "bad man." *Id.* Defendants
27 McKenrick, Rector, and Colmenero did not intervene with any other passengers.
28 TAC ¶¶ 25-29. Defendants never attempted to discuss the situation with Plaintiff

1 or address his concerns. TAC ¶¶ 20-34. Defendants then searched Plaintiff's
2 carry-on luggage and, despite finding nothing, removed Plaintiff to another
3 interrogation room, and despite having no reason to do so, later searched through
4 Plaintiff's checked bags in hopes of finding evidence of illegal activity. TAC ¶¶
5 28-34.

6 These facts and all reasonable inferences that may be drawn from them
7 suffice to establish a violation of Plaintiff's Fifth Amendment rights. Contrary to
8 defendants' claims, the complaint sufficiently establishes that defendants acted
9 with a discriminatory purpose. *Iqbal*, 556 U.S. at 676. This Court may reasonably
10 infer from the complaint that defendants intervened with Plaintiff after learning of
11 his Egyptian nationality from the incident at the TSA checkpoint. After the
12 incident, defendant was the only person singled out on the bridge. Defendants
13 intervened with no other passengers. They also refused Plaintiff's repeated
14 requests for information, accused him of unfounded misconduct, and specifically
15 called him a "bad man." Defendants also went out of their way to embarrass
16 Plaintiff by searching his luggage in front of other passengers, and to detain him
17 for as long as possible in hopes of finding some evidence to charge Plaintiff with a
18 crime. These actions, particularly when construed in the light most favorable to
19 Plaintiff, are indicative of discriminatory purpose and intent. For these reasons
20 too, defendants' motion should be denied.

21
22 **B. There is no need for this Court to "extend" *Bivens* or "imply a *Bivens*
23 remedy" in this case.**

24 Further, and contrary to defendants' claims, this Court does not need to
25 "extend" *Bivens* or "imply a *Bivens* remedy" as to Plaintiff's Fifth Amendment
26 cause of action. Supreme Court precedent and the law in this Circuit specifically
27 recognize and authorize a Fifth Amendment claim for discrimination based on
28 equal protection. The issue was first decided in *Davis v. Passman*, 442 U.S. 228,

1 245-248 (1979) and has been repeatedly recognized ever since. Indeed, “the
2 constitutional right to be free from [...] invidious discrimination is so well
3 established and so essential to the preservation of our constitutional order that all
4 public officials must be charged with knowledge of it.” *Flores v. Pierce*, 617 F.2d
5 1386, 1392 (9th Cir. 1980). “[T]he liberty protected by the Fifth Amendment’s
6 Due Process Clause contains within it the prohibition against denying to any
7 person the equal protection of the laws.” *United States v. Windsor*, 133 S.Ct. 2675,
8 2695 (2013). *See also Mendia v. Garcia*, 165 F.Supp. 3d 861, 889-890 (N.D. Cal
9 2016) (denying motion to dismiss where Plaintiff had alleged Fifth Amendment
10 violation based only on officers questioning him due to his foreign birth and/or
11 because his name and appearance indicated foreign descent). Based on this
12 established caselaw, there is no need for this Court to “extend” *Bivens* or imply a
13 *Bivens* remedy where one doesn’t exist. Plaintiff’s third cause of action is fully
14 recognized by existing Supreme Court authority. Defendants’ motions should be
15 denied accordingly.

16 17 **IV. Defendants are not entitled to qualified immunity.**

18
19 Lastly, the defendants claim that they are entitled to qualified immunity for
20 their actions in this case. *See* Docket 72 at 14-16. They argue that “Plaintiff
21 cannot establish that any of the CBP Officers violated a clearly established
22 constitutional or statutory right of Plaintiff... The CBP Officers here acted with
23 conformity with duly enacted statutory law and existing case law.” *Id.* at 16.
24 Defendants are mistaken.

25 Qualified immunity shields federal and state officials from money damages
26 unless a plaintiff pleads facts showing (1) that the official violated a statutory or
27 constitutional right, and (2) that the right was “clearly established” at the time of
28 the challenged conduct. *Ashcroft v. al-Kidd*, 563 U.S. 731, 735 (2011). A

1 Government official’s conduct violates clearly established law when, at the time of
2 the challenged conduct, “[t]he contours of [a] right [are] sufficiently clear” that
3 every “reasonable official would have understood that what he is doing violates
4 that right.” *Id.* at 741, *quoting Anderson v. Creighton*, 483 U.S. 635, 640 (1987).
5 As the Supreme Court stated in *al-Kidd*, “We do not require a case directly on
6 point, but existing precedent must have placed the statutory or constitutional
7 question beyond debate. *Id.*

8 As argued in the preceding sections, Plaintiff’s complaint sufficiently alleges
9 violations of his clearly established Fourth and Fifth Amendment rights.
10 Defendants’ unreasonable search, seizure, and detention of Plaintiff violated
11 clearly established law, and every reasonable official in defendants’ position would
12 have understood as much. The same is true of defendants’ discriminatory profiling
13 of Plaintiff. Those rights have been “beyond debate” for decades and defendants’
14 violated them through their actions in this case. Thus, defendants are not entitled
15 to qualified immunity. Defendants’ motion should be denied accordingly.

16 **CONCLUSION**
17

18 For all these reasons, defendants’ motion to dismiss should be denied in its
19 entirety.
20

21 Dated: May 15, 2017

22 Respectfully Submitted,

23 *s/ Timothy A. Scott*

24 *s/ Nicolas O. Jimenez*

25 _____
26 **TIMOTHY A. SCOTT**
27 **NICOLAS O. JIMENEZ**
28 Attorneys for Plaintiff

1 **CERTIFICATE OF SERVICE**

2
3 I hereby certify that I am over the age of eighteen and am not a party to this
4 action. On today's date, I served **Plaintiff's Response in Opposition to**
5 **Individual Federal Defendants' Motion to Dismiss** to Attorneys for Defendants
6 by the following means:

7
8 EM/ ECF Electronic Service to:

9 Mary Elizabeth Stratton
10 Assistant U.S. Attorney
11 Beth.stratton@usdoj.gov

12
13 John A. Wright
14 Los Angeles City Attorney's Office
15 john.a.wright@lacity.org

16
17 I declare under penalty of perjury that the foregoing is true and correct,
18 dated: May 15, 2017.

19
20 s/ Timothy A. Scott

21 TIMOTHY A. SCOTT