UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
DEL RIO DIVISION

GERARDO SERRANO,	§	
Plaintiff,	§	
	§	
v.	§	**Civil Action No.**
	§	**2:17-CV-48–AM–CW**
U.S. CUSTOMS AND BORDER	§	
PROTECTION; UNITED STATES OF	§	
AMERICA, KEVIN McALEENAN,	§	
Acting Commissioner of U.S. Customs	§	
and Border Protection, Sued in His	§	
Official Capacity; JUAN ESPINOZA,	§	
Fines, Penalties, and Forfeiture	§	
Paralegal Specialist, Sued in His	§	
Individual Capacity; JOHN DOE I-X,	§	
Unknown U.S. Customs and Border	§	
Protection Agents, Sued in Their	§	
Individual Capacities,	§	
Defendants.	§	

REPORT AND RECOMMENDATION

To the Honorable Alia Moses, United States District Judge:

On September 6, 2017, Plaintiff Gerardo Serrano filed suit against the above-named defendants, alleging constitutional violations after his truck and its contents were seized at the United States-Mexico border. Plaintiff argues that Defendants denied him his constitutional rights: (1) by requiring him to post a bond to institute forfeiture proceedings; (2) by failing to provide him with a prompt post-seizure hearing to contest the validity of the seizure of his property; and (3) by waiting over twenty-three months without returning his property or instituting forfeiture proceedings. Plaintiff seeks declaratory and injunctive relief against the United States, U.S. Customs and Border Protection, and Kevin McAleenan; return of his property pursuant to Rule 41(g) of the Federal Rules of Criminal Procedure; and damages under *Bivens v. Six Unknown Named Agents*, 403 U.S. 388

(1971), from Defendant Juan Espinoza and other unknown defendants who are employees of the U.S. Customs and Border Protection.

Now pending before the Court are: (1) Plaintiff's Motion to Certify Class (ECF No. 4); (2) Motion to Dismiss of Defendants United States of America, United States Customs and Border Protection, and Kevin McAleenan (ECF No. 49); and (3) Motion to Dismiss of Defendant Juan Espinoza (ECF No. 50). Because all pretrial matters were referred to the undersigned pursuant to 28 U.S.C. § 636, the undersigned hereby issues this report and recommendation, recommending that the motion to certify class be denied and the motions to dismiss be granted.

I. BACKGROUND

On September 21, 2015, Plaintiff Serrano, a resident of Kentucky, drove his 2014 Ford F-250 truck to the United States-Mexico border through Eagle Pass, Texas, with the intent of driving to Mexico. Compl. 4, 6, ECF No. 1 at 4, 6. After paying the toll to enter into Mexico, but while still in the United States, he began using his cell phone to film activity at the border, getting the attention of Customs and Border Protection ("CBP") agents on duty. *Id.* After a tense encounter, the agents handcuffed Plaintiff and searched his vehicle, finding a .380 caliber magazine with five bullets in it. *Id.* at 7-8. The agents detained Plaintiff for several hours, continuously pressuring him to reveal the passcode for his phone without success. *Id.* at 8-10. They then released him but seized his vehicle and its contents, including the magazine and the bullets. *Id.* at 10.

A few days later, Plaintiff received notice in the mail of the seizure, informing him that the truck, magazine, and bullets were seized and subject to civil forfeiture because there was probable

cause to believe that Plaintiff had attempted to export munitions of war from the United States.[1] *Id.* at 11; *see also* Seizure Notice, ECF No. 55-2 at 2.[2] He was informed that if he wished to challenge the seizure, he could request to have the matter referred to a U.S. attorney for the institution of judicial proceedings, if he posted a bond equal to ten percent of the value of the seized property. *Id.* He could also seek remission of the forfeiture, make an offer in compromise, or abandon the property. Seizure Notice, ECF No. 55-2 at 3-4.

Plaintiff timely demanded forfeiture proceedings and posted a ten percent bond in the amount of $3,804.99. Compl. 11, ECF No. 1 at 11. After some time, forfeiture proceedings still had not been instituted, so Plaintiff contacted Defendant Espinoza—a paralegal with CBP and the point person named in the notice—four times, asking about the status of his case. *Id.* Espinoza informed him that his paperwork was in order, but it would take time to proceed with the forfeiture action in court because the forfeiture attorneys were very busy. *Id*. at 11-12. He said that the case had not yet been referred to a U.S. attorney and would not be until an attorney had time to review it. *Id.* at 12.

After twenty-three months of waiting, without (1) the return of his property, (2) a post-seizure hearing, or (3) the institution of a forfeiture action, Plaintiff filed the present cause of action against the United States, seeking return of his property pursuant to Rule 41(g) of the Criminal Rules of

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[1]The parties acknowledge that it is proper for the Court to consider the notice in a motion to dismiss without converting the motion to one for summary judgment because it was referred to in the complaint and is central to Plaintiff's claims. *Collins v. Morgan Stanley Dean Witter*, 224 F.3d 496, 498-99 (5th Cir. 2000) ("We note, approvingly, however, that various other circuits have specifically allowed that '[d]ocuments that a defendant attaches to a motion to dismiss are considered part of the pleadings if they are referred to in the plaintiff's complaint and are central to her claim.'") (quoting *Venture Assocs. Corp. v. Zenith Data Sys. Corp*., 987 F.2d 429, 431 (7th Cir. 1993)).

[2]The notice cites to 19 U.S.C. § 1595a(d) (merchandise attempted to be exported from the United States contrary to law, and property used to facilitate the exporting, shall be seized and forfeited to the United States); 22 U.S.C. § 401 (providing for seizure and forfeiture of illegally exported war materials and vehicles used to attempt to export such articles); 22 U.S.C. § 2778 (control of arms exports and imports); and 22 C.F.R. § 127.1 (violations for illegal exports from the United States).

Federal Procedure, based on violations of the Fourth and Fifth Amendments. He argues that return of his property is proper since he was not provided with a post-seizure hearing, and because the United States waited too long to institute forfeiture proceedings. *Id.* at 20-21. He also argues that his bond money must be returned because the requirement to post a bond as a condition of obtaining a hearing violates due process. *Id.*

Plaintiff also brings two class action claims pursuant to Rule 23 of the Federal Rules of Civil Procedure, seeking class-wide injunctive and declaratory relief under the Fifth Amendment against Defendants United States of America, U.S. Customs and Border Protection, and Acting Commissioner McAleenan, in his official capacity (collectively "Class Defendants"). *Id.* at 23. According to Plaintiff, after seizing vehicles, Class Defendants fail to provide a constitutionally required prompt post-seizure hearing at which a property owner can challenge the legality of the seizure and the continued retention of the property pending the forfeiture proceeding, in contravention of *Krimstock v. Kelly*, 306 F.3d 40 (2d Cir. 2002). *Id.* Plaintiff also alleges that Class Defendants violate due process when they condition the right to a forfeiture hearing on the posting of a bond. *Id.* Simultaneously with his complaint, Plaintiff filed a motion to certify the class. ECF No. 4.

Finally, Plaintiff seeks damages from Defendant Espinoza and other unknown and unserved agents acting in their individual capacities, pursuant to *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971), for violations of his Fourth and Fifth Amendment rights. Compl. 21-23, ECF No. 1 at 21-23. Plaintiff argues that Espinoza deprived him of his constitutional right to a post-seizure hearing, and other unknown agents violated his rights by maintaining custody of his property even though no hearing was provided. *Id.* According to Plaintiff, while his truck was seized, he had to

rent a vehicle, pay insurance on the truck, and pay title fees, all while his vehicle sat unused, continuing to depreciate in value.

Shortly after the suit was filed, Plaintiff's truck was returned to him, but not the bond money, magazine, or bullets. ECF No. 49-1. Class Defendants then filed a motion to dismiss, in which they argue that the return of Plaintiff's truck moots any cause of action under Rule 41(g). ECF No. 49 at 4-5. Class Defendants also argue that due process does not require a post-seizure hearing. *Id.* at 6. In response to the motion for class certification, Class Defendants argue that class action certification is improper because the matter is now moot, since Plaintiff's truck has been returned. ECF No. 51.

Defendant Espinoza also filed a motion to dismiss based on two grounds. ECF No. 50. First, he argues that the Supreme Court has never recognized a *Bivens* causes of action in the asset forfeiture context, and it would be improper to extend *Bivens* to the facts here. Second, he argues that he is entitled to qualified immunity because he did not violate any clearly established constitutional right.

Since then, Plaintiff's bond money, magazine, and bullets were returned. *See* Pl.'s Notice Regarding Return of Bond Money, ECF No. 62; Pl.'s Notice Regarding Return of Seized Prop., ECF No. 63. Plaintiff acknowledges that the Rule 41(g) motion is now moot. ECF No. 63 at 1. However, Plaintiff maintains that his class action claims and his *Bivens* action are not moot. *Id*. at. 2.

II. ANALYSIS

A. Rule 41(g) Motion for Return of Property

The first question is whether Plaintiff's Rule 41(g) motion for return of property should be

dismissed. Under Rule 41(g) of the Federal Rules of Criminal Procedure,

> A person aggrieved by an unlawful search and seizure of property or by the deprivation of property may move for the property's return. The motion must be filed in the district where the property was seized. The court must receive evidence on any factual issue necessary to decide the motion. If it grants the motion, the court must return the property to the movant, but may impose reasonable conditions to protect access to the property and its use in later proceedings.

Fed. R. Crim. P. 41(g). As Plaintiff now concedes, the matter is moot because all of his property has been returned to him. ECF No. 63 at 1. Accordingly, the claim should be dismissed for lack of subject matter jurisdiction, pursuant to Rule 12(b)(1).[3]

B. Class Action Claims Under the Fifth Amendment

The next question is how to resolve Plaintiff's claims brought on behalf of himself and others similarly situated. Plaintiff's class action claims are premised upon two arguments. First, Plaintiff argues that Class Defendants' failure to provide a prompt post-seizure, pre-forfeiture hearing after every vehicle seizure violates the Fifth Amendment's Due Process Clause. Compl. 23, ECF No. 1 at 23. Second, Plaintiff asserts that requiring a bond in order to initiate forfeiture proceedings violates due process. *Id.*

Plaintiff seeks to proceed on behalf of a class of all U.S. citizens, likely hundreds a year, "whose vehicles are or will be seized by CBP for civil forfeiture and held without a post-seizure hearing." *Id*. at 17-18. Plaintiff seeks declaratory and injunctive relief, including (1) a declaration that Class Defendants' "policy or practice of failing to provide prompt post-seizure hearings to U.S.

[3]The undersigned notes that because no criminal proceeding is pending, Rule 41(g) motion is an improper mechanism for seeking the return of seized property. *See Bailey v. United States*, 508 F.3d 736, 738 (5th Cir. 2007). The Court, however, could have exercised its general equity jurisdiction under 28 U.S.C. § 1331. *Id.* Regardless, the matter is now moot.

citizens whose vehicles have been seized for civil forfeiture" is unconstitutional under the Due Process Clause of the Fifth Amendment, and (2) an injunction prohibiting Class Defendants "from continuing to seize vehicles from U.S. citizens for civil forfeiture without providing a prompt post-seizure hearing." *Id.* at 25.

Class Defendants, in turn, have filed (1) a motion to dismiss these claims (ECF No. 49), and (2) a response in opposition to the motion to certify (ECF No. 51), arguing in both that the claims are moot since Plaintiff's property has been returned. Class Defendants also argue that due process does not require a post-seizure hearing.

1. Mootness

The Court must first determine whether Plaintiff's class action claims are moot now that all of his property (and bond money) has been returned to him. Article III jurisdiction is contingent upon the presence of a live case or controversy, or a legally cognizable interest in the outcome. *In re Scruggs*, 392 F.3d 124, 128 (5th Cir.2004). "If a case has been rendered moot, a federal court has no constitutional authority to resolve the issues that it presents." *Envtl. Conservation Org. v. City of Dallas*, 529 F.3d 519, 525 (5th Cir.2008). A case becomes moot when "'there are no longer adverse parties with sufficient legal interests to maintain the litigation' or 'when the parties lack a legally cognizable interest in the outcome' of the litigation." *Id*. at 527 (quoting *In re Scruggs*, 392 F.3d at 128).

Plaintiff's personal stake in the class claims is now extinguished, since Plaintiff has received all the relief that he is entitled from Class Defendants. He has received all of his property and bond money, and is not entitled to compensatory damages. *See Lane v. Pena*, 518 U.S. 187, 192 (1996) ("A waiver of the Federal Government's sovereign immunity must be unequivocally expressed in

statutory text, and will not be implied.") (internal citations omitted). The declaratory judgment issue is also moot. The question of mootness for declaratory judgments becomes "whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issue of a declaratory judgment." *Connell v. Shoemaker*, 555 F.2d 483, 486 (5th Cir. 1977). Plaintiff's claims do not meet this test of immediacy, where his property and bond money have already been returned to him.

This is also not a situation where the claim on the merits is "capable of repetition, yet evading review," creating a mootness exception. *See Gerstein v. Pugh*, 420 U.S. 103, 110 n.11 (1975).[4] Nothing suggests that Plaintiff "will likely again prove subject to the [Government's] seizure procedures" so that Plaintiff should be allowed to continue with his claims despite a current lack of a personal stake. *Alvarez v. Smith*, 558 U.S. 87, 93 (2009);[5] *U.S. Parole Comm'n v. Geraghty,* 445 U.S. 388, 398 (1980). The only continuing dispute "is an abstract dispute about the law, unlikely to affect [Plaintiff] any more than it affects other . . . citizens." *Alvarez,* 558 U.S. at 93. "And a dispute solely about the meaning of a law, abstracted from any concrete actual or threatened harm, falls outside the scope of the constitutional words 'Cases' and 'Controversies.'" *Id.*

However, one other possible exception to mootness might save Plaintiff's class action claims—the "inherently transitory" mootness exception, which applies only to Rule 23 class action claims. *United States v. Sanchez-Gomez*, 138 S. Ct. 1532, 1538 (2018) (noting that a certified class

[4] "When the claim on the merits is 'capable of repetition, yet evading review' the named plaintiff may litigate the class certification issue despite loss of his personal stake in the outcome of the litigation" so long as "the claim may arise again with respect to that plaintiff." *U.S. Parole Comm'n v. Geraghty,* 445 U.S. 388, 398 (1980).

[5] Even if the United States were to institute a forfeiture action at this point, he currently has possession of his truck, and would not lose possession of his truck until at least after a hearing.

"acquires a legal status separate from the interest asserted by the named plaintiff") (internal quotations omitted). "The 'inherently transitory' rationale was developed to address circumstances in which the challenged conduct was effectively unreviewable, because no plaintiff possessed a personal stake in the suit long enough for litigation to run its course." *Genesis Healthcare Corp. v. Symczyk*, 569 U.S. 66, 76 (2013). In such a situation, "certification could potentially 'relate back' to the filing of the complaint," before the named plaintiff's claim became moot, allowing the named plaintiff to proceed on behalf of the class. *Id.*

In *Zeidman v. McDermott & Co.*, 651 F.2d 1030, 1050,1051 (5th Cir. Unit A 1981), the Fifth Circuit extended the "inherently transitory" approach even further, holding that "a suit brought as a class action should not be dismissed for mootness upon tender to the named plaintiffs of their personal claims" (i.e. picking off a plaintiff's claim to effectively "prevent any plaintiff in the class from procuring a decision on class certification"), at least when "there is pending before the district court a timely filed and diligently pursued motion for class certification."[6]

This is not a classic inherently transitory situation under *Alvarez*. The present scenario, however, falls squarely under *Zeidman*. Plaintiff filed the motion to certify class simultaneously with his complaint and vigorously pursued it. Shortly after, Class Defendants returned Plaintiff's truck, then immediately moved for dismissal of Plaintiff's class action claims based on mootness. In other words, after a twenty-three month initial delay of doing nothing, Class Defendants suddenly decided to act promptly once Plaintiff filed suit. This "picking off" of Plaintiff's claims before the

[6]It is clear that had the Court ruled on the motion for certification in Plaintiff's favor prior to mootness of Plaintiff's claims, the class claims would not have been rendered moot. *See Sosna v. Iowa*, 419 U.S. 393, 402 (1975) (an Article III case or controversy "may exist . . . between a named defendant and a member of the class represented by the named plaintiff, even though the claim of the named plaintiff has become moot."). It is also fairly well settled that had Plaintiff filed the motion for class certification after his claims became moot, then the class claims would have been rendered moot. *See Fontenot v. McCraw*, 777 F.3d 741 (5th Cir. 2015).

class action could be certified makes the claims inherently transitory under *Zeidman*.[7] [8]

2. Rule 12(b)(6) or Class Certification

Now that it has been determined that Plaintiff's class claims are not moot, the next question is whether the Court should first address Plaintiff's motion for class certification, or Class Defendants' Rule 12(b)(6) motion to dismiss for failure to state a claim. Rule 23 of the Federal Rules of Civil Procedure permits class certification only if the party seeking certification demonstrates that:

> (1) the class is so numerous that joinder of all members is impracticable;
>
> (2) there are questions of law or fact common to the class;
>
> (3) the claims or defenses of the representative parties are typical of the claims or defense of the class; and
>
> (4) the representative parties will fairly and adequately protect the interests of the class.

Fed. R. Civ. P. 23(a). Furthermore, certification is appropriate only if certain additional criteria laid out in Rule 23(b) are met.

A motion for class certification should be ruled on at an early practicable time, usually before the resolution of any dispositive motion. *Schwarzschild v. Tse*, 69 F.3d 293, 295 (9th Cir.1995);

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[7] *Genesis Healthcare* appears to be at odds with *Zeidman*, with the Court noting that the "inherently transitory" doctrine "has invariably focused on the fleeting nature of the challenged conduct giving rise to the claim, not on the defendant's litigation strategy." 569 U.S. at 76-77. In *Fontenot*, in fact, the Fifth Circuit questioned the continued viability of *Zeidman*, at least for monetary damages cases, noting that the Supreme Court's rationale in *Genesis Healthcare* undermined "*Zeidman's* analogy between the 'inherently transitory' exception to mootness and the strategic 'picking off' of named plaintiffs' claims." 777 F.3d at 750. But until *Zeidman* has been explicitly overruled by either the Fifth Circuit en banc or the Supreme Court, *Zeidman* is binding precedent. *Soc'y of Separationists, Inc. v. Herman*, 939 F.2d 1207, 1211 (5th Cir. 1991).

[8] For other forfeiture cases allowing a class action claim to proceed, despite resolution of the named plaintiff's claim, *see Krimstock v. Kelly*, 306 F.3d 40 (2d Cir. 2002); *Washington v. Marion Cty. Prosecutor*, 264 F. Supp. 3d 957 (S.D. Ind. 2017).

see also Hyman v. First Union Corp., 982 F. Supp. 8, 11 (D.D.C.1997). "Courts apply this general rule because 'a plaintiff who files a proposed class action cannot legally bind members of the proposed class before the class is certified.'" *Hartley v. Suburban Radiologic Consultants, Ltd.*, 295 F.R.D. 357, 367–69 (D. Minn. 2013) (quoting *Standard Fire Ins. Co. v. Knowles*, 568 U.S. 588, 593 (2013)); *see also Smith v. Bayer Corp*., 564 U.S. 299 (2011) ("Neither a proposed class action nor a rejected class action may bind nonparties. What does have this effect is a class action approved under Rule 23.").

However, advisory committee notes for Rule 23 indicate that "[o]ther considerations may affect the timing of the certification decision. The party opposing the class may prefer to win dismissal or summary judgment as to the individual plaintiffs without certification and without binding the class that might have been certified." Fed. R. Civ. P. 23(c)(1)(A) advisory committee's note to 2003 amendment. Thus, a court does not abuse its discretion in ruling on a dispositive motion before ruling on a motion for class certification. *See Toben v. Bridgestone Retail Operations, LLC*, 751 F.3d 888, 896 (8th Cir. 2014); *Wright v. Schock*, 742 F.2d 541, 543-44 (9th Cir.1984); *Hartley*, 295 F.R.D. at 367–69; *Hyman*, 982 F. Supp. at 10–11. This is especially true where a defendant essentially waives the protections of Rule 23 by seeking a ruling on the merits of the class action claims prior to certification. *Curtin v. United Airlines, Inc*., 275 F.3d 88, 92-93 (D.C. Cir.2001) (reversing the usual order of disposition where rendering an easy decision on an individual claim avoid[s] an unnecessary and harder decision on the propriety of certification).

The undersigned recommends ruling on the motion to dismiss first. Even though it might have been to their advantage to bind a class of plaintiffs, Class Defendants essentially waived that right by filing the present motion to dismiss. Also, because ruling on the merits is a relatively simple

inquiry, while the certification process is not, and because the merits of Plaintiff's claims inevitably come into play in the certification analysis as well, *see Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350-51 (2011), it would be wise to begin with the Rule 12(b)(6) motion.

3. Rule 12(b)(6)

The next issue then is whether Plaintiff's class claims should be dismissed under Rule 12(b)(6). Rule 12(b)(6) authorizes the dismissal of a complaint that "[fails] to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). A Rule 12(b)(6) motion to dismiss, however, "is viewed with disfavor and is rarely granted." *Kaiser Alum. & Chem. Sales, Inc. v. Avondale Shipyards, Inc.*, 677 F.2d 1045, 1050 (5th Cir. 1982) (internal quotations omitted). Accordingly, the complaint must be liberally construed in the plaintiff's favor, all reasonable inferences must be drawn in favor of the plaintiff's claims, and the factual allegations of the complaint must be taken as true. *Campbell v. Wells Fargo Bank, N.A.,* 781 F.2d 440, 442 (5th Cir. 1986).

In determining whether a complaint fails to state a claim, the Court must look to Rule 8 of the Federal Rules of Civil Procedure, which requires pleadings to include a "short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). To comply with Rule 8, a plaintiff must include enough facts to give a defendant fair notice of the claims against it. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (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.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 570). "A claim has facial plausibility 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.* To meet this standard, "[f]actual allegations must be enough to raise a right to relief above the

speculative level . . . ." *Twombly*, 550 U.S. at 555.

a. Applicable Laws

As background, Plaintiff's seized truck and property were subject to the customs forfeiture procedures found at 19 U.S.C. §§ 1602–1619. *See* 19 U.S.C. § 1600 ("The procedures set forth in sections 1602 through 1619 of this title shall apply to seizures of any property effected by customs officers under any law enforced or administered by the Customs Service unless such law specifies different procedures."); *see also* 18 U.S.C. § 983(i) (exempting offenses under Title 19 from CAFRA and its provisions). If the value of property is less than $500,000, the government can seek to use administrative forfeiture procedures after providing proper notice. *See* § 1607(a) (describing notice requirements). If no party files a claim within twenty days, the property is summarily forfeited to the Government. § 1609. However, if a person files a claim and gives a bond to the United States in the "penal sum" of ten percent of the value of the claimed property, the customs officer "shall transmit such claim and bond, with a duplicate list and description of the articles seized, to the United States attorney for the district in which seizure was made, who shall proceed to a condemnation of the merchandise or other property in the manner prescribed by law." § 1608. A party may also offer to pay the value of the seized vehicle for its return (§ 1614), make an offer in compromise (§ 1617), or seek remission or mitigation of forfeiture (§ 1618).

When action by the United States attorney is required, the customs officer must "report promptly" to the United States attorney and include "a statement of all the facts and circumstances of the case within his knowledge, with the names of the witnesses and a citation to the statute or statutes believed to have been violated, and on which reliance may be had for forfeiture or conviction." § 1603(b). The Attorney General must then inquire immediately into the facts of the

case, and if it appears probable that a forfeiture has occurred, must institute judicial proceedings "without delay," unless such proceedings can not probably be sustained" or "the ends of justice do not require" it. § 1604. A designated customs agent shall maintain custody of the property "to await disposition according to law." § 1605.

b. Failure to Provide a Post-seizure Pre-forfeiture Hearing

Plaintiff first alleges that the failure of Class Defendants to provide a prompt post-seizure hearing to contest the initial seizure violates due process. In procedural due process claims, "the deprivation by [governmental] action of a constitutionally protected interest in 'life, liberty, or property' is not in itself unconstitutional; what is unconstitutional is the deprivation of such an interest *without due process of law*." *Zinermon v. Burch*, 494 U.S. 113, 125 (1990). Due process "requires, at a minimum, that absent a countervailing state interest of overriding significance, persons forced to settle their claims of right and duty through the judicial process must be given" notice and a "meaningful opportunity to be heard." *Boddie v. Connecticut*, 401 U.S. 371, 377-78 (1971). The proper inquiry to determine whether due process has been satisfied requires a court to ask two questions: (1) what process the government has provided, and (2) whether it was constitutionally adequate. *Zinermon*, 494 U.S. at 126.

As noted above, the customs laws do not provide for any sort of prompt post-seizure, pre-forfeiture hearing. Nor does CBP provide for a hearing. Instead, a claimant demanding forfeiture must await referral of his case by a customs agent to a U.S. attorney for possible institution of forfeiture proceedings. The agent must "report promptly," and if forfeiture is warranted, the U.S. attorney must proceed without "unreasonable delay." *United States v. $8,850 in U.S. Currency*, 461 U.S. 555, 565 (1983). Class Defendants, citing to *United States v. Von Neumann*, 474 U.S. 242

(1986), argue that this is all that due process requires. Plaintiff, citing to *Krimstock v. Kelly*, 306 F.3d 40 (2d Cir. 2002), and other similar cases, argues that an additional hearing is required.[9]

A good starting point in the analysis is *Mathews v. Eldridge*, 424 U.S. 319 (1976), which set forth three factors to determine whether an individual has received the "process" that the Constitution finds "due": "First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." 424 U.S. at 335. By weighing these concerns, courts can determine whether a government has met the "fundamental requirement of due process," which is "the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *Id*. at 333 (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)).

In *United States v. $8,850 in U.S. Currency*, 461 U.S. 555 (1983), the Supreme Court looked to whether an eighteen-month delay in instituting a forfeiture action of money seized pursuant to 31 U.S.C. § 1101 violated due process. Similar to here, the Court looked to customs laws, which do not provide a specific time frame for forfeiture, only a requirement of reasonableness. The Court then applied the balancing test of *Barker v. Wingo*, 407 U.S. 514 (1972)—which also applies to speedy trials—to determine if the eighteen-month delay violated the claimant's due process right to a meaningful forfeiture hearing at a meaningful time. Barker instructs a court to weigh four factors: "length of delay, the reason for the delay, the [claimant's] assertion of his right, and prejudice to the

[9]It is well settled that no pre-seizure hearing was required. *See Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 680 (1974) (seizure under similar customs statutes "presents an 'extraordinary' situation in which postponement of notice and hearing until after seizure did not deny due process").

[claimant]." *$8,850*, 461 U.S. at 564. The Court did not explicitly discuss whether any additional pre-forfeiture hearing is required to satisfy due process and did not discuss the *Mathews* factors.

In *Von Neumann*, 474 U.S. 242, the Court addressed whether the Constitution requires a prompt disposition of remission proceedings. The claimant experienced a 36-day delay after he filed a petition for remission when his car was seized for a customs violation under 19 U.S.C. § 1497. The Court, again without addressing the *Mathews* factors, held that "remission proceedings are not *necessary* to a forfeiture determination, and therefore are not constitutionally required. Thus there is no constitutional basis for a claim that respondent's interest in the car, or in the money put up to secure the bond, entitles him to a speedy answer to his remission petition." 474 U.S. at 250. Importantly, the Court addressed *$8,850*, stating, "Implicit in this Court's discussion of timeliness in *$8,850* was the view that the forfeiture proceeding, without more, provides the postseizure hearing required by due process to protect Von Neumann's property interest in the car." *Id.* at 249. The Court also reiterated that "we have already noted that [a claimant's] right to a forfeiture proceeding meeting the *Barker* test satisfies any due process right with respect to the car. *Id*. at 251.

Despite the clear indication of *Von Neumann* that no additional hearing is required to satisfy due process, Plaintiff argues that *Krimstock* holds otherwise. In *Krimstock*, 306 F.3d 40, the Second Circuit addressed a New York forfeiture statute that applied to DWI arrests. The court held that a post-seizure, pre-forfeiture hearing was required in order to allow a claimant to challenge the validity of the seizure. In reaching a determination that a prompt hearing was necessary to satisfy due process, the court addressed the *Mathews* factors. For the first factor, the court noted that the deprivation of a person's vehicle "involves substantial due process interests," thus weighing in favor of the claimant. 306 F.3d at 61. As for the second factor, the court found that it weighed in favor

of the city, since "the risk of erroneous seizure and retention of a vehicle is reduced in the case of a DWI owner-arrestee, because a trained police officer's assessment of the owner-driver's state of intoxication can typically be expected to be accurate." *Id.* at 62-63. However, the court noted that the city's victory on this point was narrow, "in light of the comparably greater risk of error that is posed to innocent owners, the City's direct pecuniary interest in the outcome of forfeiture proceedings, and the lack of adequate recompense for losses occasioned by erroneous seizure of vehicles." *Id.* at 64. For the third factor, the court discounted the city's reasoning that it has an interest in (1) protecting the property from "being sold or destroyed before a court can render judgment in future forfeiture proceedings," (2) maintaining custody in order to preserve in rem jurisdiction, and (3) preventing the seized vehicle from being used as an instrumentality in future DWI acts. *Id*. at 64-67.

After balancing the factors, the court found that the Fourteenth Amendment guarantee that deprivations of property be accomplished only with due process of law demands "that plaintiffs be afforded a prompt post-seizure, pre-judgment hearing before a neutral judicial or administrative officer." *Id.* at 67. Such a hearing would allow a claimant "an early opportunity to test the probable validity of further deprivation, including probable cause for the initial seizure, and to ask whether other measures, short of continued impoundment, would satisfy the legitimate interests of the City in protecting the vehicles from sale or destruction *pendente lite*." *Id.* at 68.

The court also briefly discussed the application of *$8,850* and *Von Neumann*. Concerning *$8,850*, the court held that the balancing test of *Barker v. Wingo* did not displace the balancing test of *Mathews v. Eldrige*, finding that the Constitution "distinguishes between the need for prompt review of the propriety of continued government custody, on the one hand, and delays in rendering

final judgment, on the other." *Id*. According to the Second Circuit, "[t]he application of the speedy trial test presumes prior resolution of any issues involving probable cause to commence proceedings and the government's custody of the property or persons *pendente lite*, leaving only the issue of delay in the proceedings." *Id*. As for the applicability of *Von Neumann*, the court distinguished the case because (1) the Supreme Court "was addressing the different issue of what process was due in proceedings for remission or mitigation under U.S. customs laws when a claimant could challenge the seizure of his or her property in judicial forfeiture proceedings;" (2) under federal law, a claimant could file a motion under Federal Rule of Criminal Procedure 41 for return of seized property if he believed the initial seizure was improper; and (3) the claimant's vehicle was released to him after he posted a bond. *Id.* at 52 n.12.

With these cases in mind, there is some support to the idea that a prompt post-seizure hearing is required when state, municipal, or district statutes allow for seizures for violations of law, especially where seized property is not subject to replevin. *See, e.g., Krimstock*, 306 F.3d 40; *Smith v. City of Chicago*, 524 F.3d 834 (7th Cir. 2008) (following the reasoning of *Krimstock* in addressing a Chicago forfeiture statute; however, the decision was vacated and remanded for dismissal by the Supreme Court because of mootness); *Brown v. District of Columbia*, 115 F. Supp. 3d 56 (D.D.C. 2015) (requiring a prompt hearing for automobile seizures but not cash seizures under D.C. law); *Simms v. District of Columbia*, 872 F. Supp. 2d 90 (D.D.C. 2012) (requiring hearing after automobile seizure under D.C. law). Plaintiff, however, has not pointed to any case in support of an argument that a hearing is required after a seizure under federal law.[10]

[10]Plaintiff cites to *United States v. $23,407.69 in U.S. Currency*, 715 F.2d 162 (5th Cir. 1983). But that case simply weighed the *Barker* factors laid out in $8,850 in finding that a "the government must explain and justify substantial delays in seeking forfeiture of seized property." *Id*. at 166. It did not hold that a post-seizure, pre-forfeiture

The only cases the undersigned can find that could theoretically support Plaintiff's contention are *Lee v. Thornton*, 538 F. 2d 27 (2d Cir. 1976), and *Pollgreen v. Morris*, 496 F. Supp. 1042, 1051-54 (S.D. Fla. 1980), two cases that predate *$8,850* and *Von Neumann*. In *Lee*, the court balanced the *Mathews* factors and held:

> [W]hen vehicles are seized for forfeiture or as security, action on petitions for mitigation or remission should be required within 24 hours, with notice of the charge, and with opportunity to file a written response and to make an oral appearance and that, if requested, some kind of hearing on probable cause for the detention before an officer other than the one making the charge should be provided within 72 hours if the petition is not granted in full.

538 F.2d at 33. Without such procedures, the court held that the seizures were unlawful and the property must be returned. *Id.* *Pollgreen*, in turn, addressed different seizure and forfeiture laws, ones that did not impose any time period for the resolution of an owner's claims. 496 F. Supp. at 1053.

Other courts who have addressed the adequacy of federal law have found that no such hearing is required. For example, in *United States v. One 1971 BMW 4-Door Sedan*, 652 F.2d 817, 821 (9th Cir. 1981), the court looked to the *Mathews* factors and held no hearing was required, noting, "The interest of the appellant in the uninterrupted use of his vehicle is not so compelling as to outweigh the substantial interest of the government in controlling the narcotics trade without being hampered by costly and substantially redundant administrative burdens." The court distinguished *Lee* based on the fact that "the claimants were afforded neither the independent evaluation by the United States Attorney that prosecution was warranted, nor judicial review to determine whether the forfeiture was just." *Id.* at 820. *See also United States v. Aldridge*, 81 F.3d 170, at *2 (9th Cir. 1996) (unpublished

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hearing must be held.

opinion) ("Aldridge's due process right to contest the government's authority to forfeit the weapons was satisfied by the availability of the administrative claim and remission procedures."); *In re Seizure of Any and All Funds on Deposit in Wells Fargo Bank, NA*, 25 F. Supp. 3d 270, 279-80 (E.D.N.Y. 2014); *United States v. All Funds on Deposit in Dime Sav. Bank*, 255 F. Supp. 2d 56, 72 (E.D.N.Y 2003) (finding *Krimstock* inapplicable); *Krimstock v. Safir*, No. 99 Civ. 12041-MBM, 2000 WL 1702035, at *5 (S.D.N.Y. Nov. 13, 2000) (rev'd on other grounds) (holding that in light of *$8800* and *Von Neumann*, *Lee* had been implicitly overruled).

After reviewing existing precedent, the undersigned finds that no prompt post-seizure hearing is required. Even assuming *Von Neumann* does not provide a clear answer—which the undersigned finds that it does—a weighing of the *Mathews* factors firmly supports a finding that no hearing is required to satisfy due process. Unquestionably the seizure of a vehicle implicates an important private interest in being able to travel and to go to work. *See Krimstock*, 306 F.3d at 61; *Brown*, 115 F. Supp. 3d at 66. The government, however, also has a strong interest in preventing the exportation of munitions of war and preserving items capable of escaping the grasps of forfeiture, such as a truck, which can easily be disposed of or sold.[11]

The risk of erroneous deprivation is also minimal. At the border, a person has diminished privacy rights and is subject to "[r]outine searches of the persons and effects" without "any requirement of reasonable suspicion, probable cause, or warrant." *United States v. Montoya de Hernandez*, 473 U.S. 531, 538 (1985). Thus, there are minimal Fourth Amendment or probable

[11] *See Calero-Toledo*, 416 U.S. 663, 676-80 (1974) (Seizure permits the government "to assert in rem jurisdiction over the property in order to conduct forfeiture proceedings, thereby fostering the public interest in preventing continued illicit use of the property and in enforcing criminal sanctions. Second, preseizure notice and hearing might frustrate the interests served by the statutes since the property seized . . . will often be of a sort that could be removed to another jurisdiction, destroyed, or concealed, if advance warning of confiscation were given.")

cause concerns. And certainly CBP agents are well trained in identifying customs violations, so their assessment "can typically be expected to be accurate." *Krimstock*, 306 F.3d at 62-63.

"The risk of an erroneous seizure [is further] minimized by the duty of the United States Attorney immediately after notification of the seizure to investigate the facts and laws and independently to determine whether initiation of forfeiture proceedings [is] warranted." *One 1971 BMW*, 652 F.2d at 821.[12] And even though the risk of an erroneous seizure is already minimal, a claimant still has various options available to seek the return of property, including filing a motion pursuant to Rule 41(g) (or, if no criminal proceeding is pending, seeking equitable relief) to immediately challenge the legality of a seizure.

Finally, the United States government simply does not have the capability of providing a prompt post-seizure hearing in every case. As Plaintiff notes, personal property is routinely seized at the border, amounting to thousands of cases a year. To require an immediate post-seizure hearing in every case, even if just for vehicle seizures, would strain resources beyond capacity. *Cf. City of Los Angeles v. David*, 538 U.S. 715, 716-17 (2003) (considering, for example, the volume of cases, preparation time, resources, organizing hearings, the number of courtrooms and presiding officials available, arranging the appearance of those involved, and covering responsibilities while employees make appearances); *see also One 1971 BMW*, 652 F.2d at 821 (calling such potential hearings "costly and substantially redundant administrative burdens").

In all, the *Mathews* factors do not weigh in favor of requiring a prompt post-seizure, pre-

[12] *Compare Brown*, 115 F. Supp. 3d at 66-67 (quoting *Simms*, 872 F. Supp. 2d at 101-02) (finding that "there is at least some risk of erroneous deprivation when a seizure is based on a traffic stop, which most of the seizures here were. That is so because the validity of traffic stops 'rests solely on the arresting officer's unreviewed probable cause determination.'").

forfeiture hearing to satisfy due process. Because Plaintiff has failed to state a claim for which relief can be granted, this claim should be dismissed.

c. Bond Requirement

There is likewise no merit to Plaintiff's contention that requiring the posting of a bond to institute forfeiture procedures violates due process. Plaintiff has not cited to any cases that support this view, and in fact, courts have long approved of the constitutionality of requiring bonds, even in the forfeiture context.[13] At most, case law establishes that due process prohibits the government from denying access to some courts based on the inability to pay a court fee. *See Boddie v. Connecticut*, 401 U.S. 371 (1971); *Arango v. U.S. Dep't of the Treasury*, 115 F.3d 922, 929 (11th Cir. 1997); *Wren v. Eide*, 542 F.2d 757, 763 (9th Cir. 1976) (holding that "the fifth amendment prohibits the federal government from denying the opportunity for a hearing to persons whose property has been seized and is potentially subject to forfeiture solely because of their inability to post a bond"). Here, though, customs regulations provide claimants an opportunity to proceed without prepayment of costs, which is all that is necessary to satisfy due process. *See* 19 C.F.R. § 162.47(e); *Brown*, 115 F. Supp. 3d at 71 (noting that indigence "is not a suspect constitutional classification," and so long as indigent claimants can obtain a waiver or reduction, the bond requirement does not burden their fundamental right to challenge the seizure of their

[13] *See, e.g., Schlib v. Kuebel*, 404 U.S. 357 (1971) (holding that Illinois's retention of a percentage of the amount of bail, returned to those not convicted and designed to curtail abuses by bail bondsmen, was an acceptable administrative cost and not violative of due process.); *Cohen v. Beneficial Indus. Loan Corp*., 337 U.S. 541 (1949) (upholding bond for stockholder cases); *Arango v. Dep't of the Treasury*, 115 F. 3d 922, 929 (11th Cir. 1997) (holding that the bond requirement in the federal asset forfeiture statute was designed to promote "more efficient and less costly administrative forfeitures"); *Gladden v. Roach*, 864 F.2d 1196, 1200 (5th Cir. 1989) (determining that the payment of a bond as a precondition for release following arrest for a non-jailable offense does not constitute a due process violation); *Brown*, 115 F. Supp. 3d at 72 ("The statute's bond requirement easily survives rational-basis review because it serves the legitimate purposes of weeding out frivolous claims and promoting summary administrative proceedings.").

property")(internal citations omitted). Because requiring a bond under these circumstances is not unconstitutional, Plaintiff has failed to state a claim for which relief can be granted, and this claim should likewise be dismissed.

C. Motion for Class Certification

The next question is how to resolve Plaintiff's Motion for Class Certification. ECF No. 4. As previously discussed, Plaintiff has failed to state a claim on behalf of the class members. Accordingly, there is nothing to base class certification upon, and the motion should be dismissed as moot.

D. *Bivens* Claim

The final issue is whether Plaintiff's *Bivens* claim should be dismissed. Plaintiff brings two claims under *Bivens*—a Fourth Amendment claim and a Fifth Amendment claim. First, he argues that Defendant Espinoza violated his Fourth and Fifth Amendment rights by processing Plaintiff's case for civil forfeiture without providing for any kind of post-seizure judicial process or instituting forfeiture proceedings. Compl. 15, 21, 22, ECF No. 1 at 15, 21, 22. As for the unknown defendants, he argues that they are the ones with authority to hold or release the truck and are therefore responsible for violating his Fourth and Fifth Amendment rights, as they maintained custody of Plaintiff's truck for over twenty-three months without judicial process. *Id*. at 15, 21, 22-23. He further alleges that a reasonable official in the *Bivens* Defendants' shoes would have understood that holding property for such an unreasonable period of time without a post-seizure hearing and without commencing forfeiture proceedings violates due process and constitutes an unreasonably prolonged seizure in violation of the Fourth Amendment. *Id.* at 15-16, 21.

1. *Bivens* Framework

A *Bivens* cause of action is a judicially created cause of action arising under the Constitution for money damages against federal officials sued in their individual capacities who have violated the plaintiff's constitutional rights while acting in the course and scope of employment. *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 66 (2001). Qualified immunity, however, shields government officials from monetary damages unless the official violated a statutory or constitutional right that was clearly established at the time of the challenged conduct. *Ashcroft v. al-Kidd*, 563 U.S. 731, 735 (2011). If a defendant "properly invokes the defense of qualified immunity, the plaintiff bears the burden of proving that the defendant is not entitled to the doctrine's protection." *Howell v. Town of Ball*, 827 F.3d 515, 525 (5th Cir. 2016).

To be clearly established, a right must be sufficiently clear "that a reasonable official would understand that what he is doing violates that right." *Anderson v. Creighton*, 483 U.S. 636, 640 (1987). "Because 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." *Brosseau v. Haugen*, 543 U.S. 194, 198 (2004). Case law need not be exactly on point, but "existing precedent must have placed the statutory or constitutional question beyond debate." *al-Kidd*, 563 U.S. at 741. This means being able "to point to controlling authority—or a 'robust consensus of cases of persuasive authority'—that defines the contours of the right in question with a high degree of particularity." *Morgan v. Swanson*, 659 F.3d 359, 371-72 (5th Cir. 2011) (quoting *al-Kidd,* 563 U.S. at 742). "Where no controlling authority specifically prohibits a defendant's conduct, and when the federal circuit courts are split on the issue, the law cannot be said to be clearly established." *Id*. at 372.

It is also a defense to a cause of action under *Bivens* that (1) the alleged constitutional violations extend beyond the types that have been recognized under *Bivens* and its progeny, and (2) there are "'special factors counseling hesitation" of implying a private damages action "in the absence of affirmative action by Congress.'" *Carlson v. Green*, 446 U.S. 14, 18 (1980) (quoting *Bivens*, 403 U.S. at 396). Generally, a court should resolve the *Bivens* application issue first before addressing the constitutional question. *Hernandez v. Mesa*, 137 S. Ct. 2003, 2006 (2017). However, "disposing of a *Bivens* claim by resolving the constitutional question, while assuming the existence of a *Bivens* remedy—is appropriate in many cases," unless the question at issue "is sensitive and may have consequences that are far reaching." *Id.*[14]

2. Is Plaintiff's Fifth Amendment Claim Cognizable Under *Bivens*?

Following the standard procedure, the first question the Court should address is whether Plaintiff's claims are cognizable under *Bivens*. A *Bivens* cause of action is disfavored. *Iqbal*, 556 U.S. at 675. Indeed, the Supreme Court has only recognized a *Bivens* cause of action under the Constitution in three contexts: (1) Fourth Amendment unreasonable searches and seizures; (2) a Fifth Amendment Due Process Clause violation for gender discrimination, *see Davis v. Passman*, 442 U.S. 228 (1979); and (3) an Eighth Amendment Cruel and Unusual Punishment claim for failure to provide adequate medical care, *see Carlson v. Green*, 446 U.S. 14 (1980). Since *Bivens*, *Passman*, and *Carlson*, the Supreme Court has "adopted a far more cautious course before finding

[14]For example, *Hernandez* raised a sensitive issue with potential far reaching consequences. 137 S. Ct. 2003. The question was whether the family of a decedent who was killed on Mexican soil could bring a *Bivens* cause of action against a Border Patrol agent who fired shots from the United States. Without deciding the *Bivens* question, the Court of Appeals found that the agent did not violate a clearly established constitutional right. The Supreme Court remanded the case for a determination of the *Bivens* question first.

implied causes of action." *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1855 (2017).[15]

In determining if *Bivens* applies, the first question the Court must address is whether Plaintiff's *Bivens* claims arise in a new context. If the case is different in a meaningful way from previous *Bivens* cases *decided by the Supreme Court*, then the context is new. *Id.* at 1859. "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.'" *De La Paz v. Coy,* 786 F. 3d 367, 372 (5th Cir. 2015) (quoting *Arar v. Ashcroft*, 585 F.3d 559, 572 (2d Cir. 2009)). The Supreme Court has provided an instructive non-exhaustive list of examples where differences are meaningful enough to make a given context a new one, including: "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." *Ziglar*, 137 S. Ct. at 1860.

If a *Bivens* claim arises in a new context, a *Bivens* remedy "will not be available if there are 'special factors counseling hesitation in the absence of affirmative action by Congress.'" *Id*. at 1857 (quoting *Carlson*, 446 U.S. at 18). For example, "*Bivens* remedies may be foreclosed by congressional action where an 'alternative, existing process for protecting the interest amounts to

[15]For examples of cases where the Court has refused to recognize an implied cause of action, *see, e.g., Wilkie v. Robbins*, 551 U.S. 537 (2007) (no Fifth Amendment claim for landowners seeking damages from government officials who unconstitutionally interfere with their exercise of property rights); *Malesko*, 534 U.S. 61 (2001) (no Eighth Amendment-based suit against a private corporation that managed a federal prison); *Bush v. Lucas*, 462 U.S. 367 (1983) (no First Amendment claim for retaliatory demotion because of the comprehensive civil service remedies available).

a convincing reason for the Judicial Branch to refrain from providing a new and freestanding remedy in damages.'" *Butts v. Martin*, 877 F.3d 571, 587–88 (5th Cir. 2017) (quoting *Wilkie v. Robbins*, 551 U.S. 537, 550 (2007)).

a. Plaintiff's Claims Arise in a New Context

1. Fifth Amendment Claim

The undersigned finds that Plaintiff's Fifth Amendment claim arises in a new context. The Supreme Court has not recognized a *Bivens* cause of action in the asset forfeiture context under the Fifth Amendment. In fact, the only explicit recognition of a Fifth Amendment claim was in *Passman*, 442 U.S. 228, which involved gender-based employment discrimination and is wholly dissimilar to the facts here.

Plaintiff, however, argues that cases need not be identical to prior *Bivens* cases and cites to *Iqbal*, 556 U.S. 662, where the Court impliedly recognized a Fifth Amendment *Bivens* claim. *Iqbal* involved allegations that the defendants subjected a detainee to harsh conditions of confinement, solely on account of his religion, race, and /or national origin and for no legitimate penological interest, in violation of the Equal Protection component of the Fifth Amendment Due Process Clause. *Ziglar*, however, indicates that similarities to a prior *Bivens* case must indeed be significant, strongly indicating that not only must a previously recognized *Bivens* case have actually arisen in the asset forfeiture context, *but also* have other additional aspects in common. An equal protection claim challenging conditions of confinement has nothing in common with an asset forfeiture case, other than the fact that both claims arise under the Fifth Amendment.[16]

[16]Even assuming Fifth Circuit cases apply to the analysis, they likewise provide Plaintiff with no help. The Fifth Circuit has routinely recognized the existence of a *Bivens* cause of action under similar circumstances to those here, with one significant difference—the seized property was missing or destroyed and thus unreturnable. *See United States v.*

Plaintiff also cites to footnote 22 in *Passman*, which, in turn, cites favorably to *States Marine Lines, Inc. v. Shultz*, 498 F.2d 1146 (4th Cir. 1974), a *Bivens* case legally and factually similar to the one here.[17] However, a 1979 Supreme Court footnote citing a circuit opinion not before the Court is dicta and hardly grounds to conclude that the Supreme Court has recognized a *Bivens* claim in the same context as here.[18] Thus, Plaintiff's Fifth Amendment claim arises in a new context.

2. Fourth Amendment

The undersigned likewise finds that Plaintiff's Fourth Amendment claim arises in a new context. The Fourth Amendment prohibits "unreasonable searches and seizures." U.S. Const. amend. IV. This protection extends to "seizures conducted for purposes of civil forfeiture." *United States v. James Daniel Good Real Prop*., 510 U.S. 43, 49 (1993). "A 'seizure' of property occurs when there is some meaningful interference with an individual's possessory interests in that property." *United States v. Jacobsen*, 466 U.S. 109, 113 (1984).

Bivens of course involved a Fourth Amendment violation, and the Supreme Court has continuously recognized Fourth Amendment *Bivens* actions in various contexts. Plaintiff, citing to a string of Fourth Amendment *Bivens* cases, argues that they present a classic Fourth Amendment

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Bacon, 546 F. App'x 496, 499 (5th Cir. 2013) ("Bacon has no remedy available under Rule 41(g) because the government has already destroyed all of his property."); *Jaramillo-Gonzalez v. United States*, 397 F. App'x 978 (5th Cir. 2010); *Bailey v. United States*, 508 F.3d 736 (5th Cir. 2007); *Pena v. United States*, 157 F.3d 984 (5th Cir. 1998). In other words, there was no other form of relief for the claimant except for a *Bivens* remedy.

This "damages or nothing" approach was the basis of *Bivens* and *Davis* and is sometimes employed by the Fifth Circuit where a *Bivens* remedy will be available if it is the only recourse. Plaintiff here though had other options, and indeed recovered his property. Notably, too, the Fifth Circuit has never actually upheld personal liability in an actual *Bivens* case or controversy in this context and has never clarified who a proper defendant might be; instead, the court merely recognized the existence of a cause of action and allowed a plaintiff to amend his complaint to add a *Bivens* cause of action. It will be interesting to know if the Fifth Circuit will continue to do so in light of *Ziglar*.

[17]Plaintiff also cites to *Seguin v. Eide*, 645 F.2d 804 (9th Cir. 1981), another similar *Bivens* case not cited by the Supreme Court.

[18]Moreover, *Shultz* is extremely outdated, called into question by *Bivens* progeny, and likely overruled.

pattern similar to the facts here. *See Ashcroft v. al-Kidd*, 563 U.S. 731 (2011) (pretextual detention under the federal material witness statute); *Groh v. Ramirez*, 540 U.S. 551 (2004) (search pursuant to a deficient warrant); *Anderson v. Creighton*, 483 U.S. 635 (1987) (warrantless search of a home to find a robbery suspect); *United States v. Place*, 462 U.S. 696, 710 (1983) (holding that the 90-minute detention of luggage "went beyond the narrow authority possessed by police to detain briefly luggage reasonably suspected to contain narcotics."); *see also United States v. Portillo-Aguirre*, 311 F.3d 647, 653 (5th Cir. 2002) (quotations omitted) (holding that the detention of a bus at an immigration checkpoint for an additional three to five minutes to investigate whether the defendant was carrying illegal drugs violated the Fourth Amendment because the seizure extended past the "time reasonably necessary to determine the citizenship status of the persons stopped.").

These cases, however, are meaningfully distinct from the present case. Again, "[i]nstead 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.'" *De La Paz,* 786 F. 3d at 372 (quoting *Arar,* 585 F.3d at 572). And again, none of the Fourth Amendment cases arise in the asset forfeiture context.

Moreover, all of the cited cases involve an unlawful seizure of property, or the continued seizure of property once the initial justification for the seizure expired, thus implicating the Fourth Amendment. In contrast, Plaintiff only conclusorily suggests that the underlying seizure of his property was unlawful.[19] And looking at the facts in the light most favorable to Plaintiff, the initial justification for the seizure of Plaintiff's vehicle, magazine, and bullets was indeed valid, and the

[19]He in fact never alleges that seizure was unlawful. Rather, he contends that if he were provided a hearing, he would have argued that "CBP lacked a lawful basis to seize his vehicle, that the vehicle is not subject to forfeiture, and that forfeiture of the vehicle would violate the Constitution." Compl. 13, ECF No. 1 at 13.

justification never expired.

The true premise of Plaintiff's argument is that the delay in processing the forfeiture claim made the *forfeiture*, not the seizure, unconstitutional. Such allegations establish a potential Fifth Amendment Due Process Clause violation, not a Fourth Amendment violation. *See James Daniel Good*, 510 U.S. at 48–49 ("Here the Government seized property not to preserve evidence of wrongdoing, but to assert ownership and control over the property itself. Our cases establish that government action of this consequence must comply with the Due Process Clauses of the Fifth and Fourteenth Amendments."); *see also Brown*, 115 F. Supp. 3d at 63.[20] Plaintiff's simple reframing of his Fifth Amendment claim as a Fourth Amendment claim is to no avail. And because the distinctions here are meaningful enough from prior Supreme Court cases (and Fifth Circuit cases), Plaintiff's *Bivens* claims arise in a new context.[21]

b. Special Factors Counsel Against Expanding *Bivens*

Because Plaintiff's claims arise in a new context, the next question is whether special factors counsel against expanding *Bivens*. With this second inquiry, a court must make "an assessment of its impact on governmental operations systemwide," including "the burdens on Government employees who are sued personally, as well as the projected costs and consequences to the Government itself when the tort and monetary liability mechanisms of the legal system are used to bring about the proper formulation and implementation of public policies." *Ziglar*, 137 S. Ct. at

[20]The most analogous Fourth Amendment case Plaintiff has identified is *Brewster v. Beck*, 859 F.3d 1194 (9th Cir. 2017), which involved a seizure pursuant to a community caretaking exception to the Fourth Amendment, allowing for a 30-day impoundment of vehicles that "jeopardize public safety and the efficient movement of vehicular traffic." *Id*. at 1196 (quotations omitted). According to the Ninth Circuit, once an innocent owner came forth to claim the seized vehicle, continued possession of her vehicle for the full thirty days violated the Fourth Amendment. However, because *Brewster* was issued by another circuit and not the Supreme Court, it is not relevant to the present *Bivens* analysis.

[21]To clarify, *James Daniel Good* was not a *Bivens* case.

1858. "If the statute does not display an intent to create a private remedy, then a cause of action does not exist and courts may not create one, no matter how desirable that might be as a policy matter, or how compatible with the statute." *Id*. at 1856 (internal quotations omitted).

The undersigned finds that special factors counsel against expanding *Bivens* here. Of great importance is whether Congress has already implemented procedural protections. *Schweiker v. Chilicky*, 487 U.S. 412, 423 (1988). "When the design of a Government program suggests that Congress has provided what it considers adequate remedial mechanisms for constitutional violations that may occur in the course of its administration, [the Supreme Court has] not created additional *Bivens* remedies." *Id.* For example, in *Schweiker*, the Court refused to recognize a *Bivens* cause of action against administrators of the continuing disability review program for due process violations where disabled social security claimants were wrongfully denied benefits. A person seeking disability benefits can pursue various levels of recourse after an initial determination of eligibility, including review by a federal ALJ, a hearing before the Appeals Council, and judicial review. *Id*. at 424. And in *Bush v. Lucas*, 462 U.S. 367 (1983), the Court refused to recognize an implied cause of action for a First Amendment claim against a supervisor because there were comprehensive procedural and substantive provisions for civil service remedies.

The undersigned sees little overall distinction between the forfeiture system in place here and the review systems in place in *Bush* and *Schweiker*. Congress has invoked a comprehensive forfeiture scheme where an aggrieved party must receive notice and an opportunity to respond, and can seek remission, mitigation, invoke forfeiture proceedings, or file a Rule 41 motion for the return of property. Moreover, no statutory provision allows for monetary damages against either the United States or an officer in his or her individual capacity, thus indicating Congress's reluctance to extend

the availability of monetary damages against individual officers. *See Schweiker* 487 U.S. at 424 (noting how the applicable laws make "no provision for remedies in money damages against officials responsible for unconstitutional conduct that leads to the wrongful denial of benefits").

Recognizing a cause of action would also have significant consequences on the federal government and its employees, with potential claims arising from every seizure against CBP agents of all types (including paralegals, attorneys, and agents maintaining custody over the seized property, just to name a few).[22] "'Congress is in a far better position than a court to evaluate the impact of a new species of litigation'" that would arise and "can tailor any remedy to the problem perceived, thus lessening the risk of raising a tide of suits threatening legitimate initiative on the part of the Government's employees." *Wilkie*, 551 U.S. at 562 (quoting *Bush*, 462 U.S. at 389).

Plaintiff, however, complains that the available seizure and forfeiture remedies are in fact not remedies at all and do not work quickly enough. He also attempts to distinguish his claim, stating, "Whereas the plaintiffs in *Lucas* and *Chilicky* alleged that the government had violated the relevant statute, Gerardo alleges that the government *followed* the relevant statutes but that the statutes themselves violate the Constitution . . . An administrative scheme that itself violates the Constitution cannot possibly provide an 'alternative' remedy for that violation." Pl.'s Resp. 10-11, ECF No. 56 at 16-17. But this argument pertains to Plaintiff's claim regarding the failure to provide him with a post-seizure hearing, not his claim about delays in the forfeiture process. As previously discussed,

[22]Notably, in *Rankin v. United States*, 556 F. App'x 305 (5th Cir. 2014), under a similar statutory scheme under the Civil Asset Forfeiture Reform Act of 2000 ("CAFRA"), 18 U.S.C. § 983, the Fifth Circuit refused to recognize a *Bivens* cause of action for forfeiture violations, noting, "Because CAFRA provides a comprehensive scheme for protecting property interests, no *Bivens* claim is available." *Id.* at 311. In reaching its conclusion, the Fifth Circuit simply cited *Bush* and *Schweiker*. *Id.* No doubt CAFRA has a more comprehensive system in place than customs laws, but *Rankin* reflects the strong significance placed on the existence of a comprehensive statutory scheme, even where unrecompensed damages are inevitable.

there is nothing unconstitutional about the forfeiture scheme itself, on its face or as applied by CBP.

Although it is unfortunate when a statutory scheme fails, resulting in not insignificant damages (rental car, depreciation, insurance, etc...), the proper inquiry here is whether Congress intended for individual liability, not whether the statutory scheme is actually successful. *See, e.g., Schweiker*, 487 U.S. at 428-29 (incomplete relief for damages and hardships suffered because of delays of no consequence); *Spagnola v. Mathis*, 859 F. 2d 233, 227 (D.C. Cir. 1988) (noting that "the *Chilicky* Court made clear that it is the comprehensiveness of the statutory scheme involved, not the 'adequacy' of specific remedies extended thereunder, that counsels judicial abstention"); *Gaspard v. United States*, 713 F.2d 1097, 1105 (5th Cir. 1983) ("It is the *existence* of the [statutory scheme], and not payment in fact, that lessens the justification for a *Bivens* remedy.").

Plaintiff's argument would also foreclose *Bivens* relief in general. In arguing that Defendants were simply following an unconstitutional scheme, he is merely reframing his class action claims as *Bivens* ones, without suggesting that Espinoza's or any other unnamed defendant individual's acts were otherwise unconstitutional. Congress "and not the individual defendants are responsible for creating the remedial scheme," and a plaintiff "cannot avoid dismissal by recasting [his] constitutional claims against the agency as a *Bivens* action." *Knaust v. Digesualdo*, 589 F. App'x 698, 701 (5th Cir. 2014).

III. CONCLUSION

In sum, all of Plaintiff's property has been returned to him; the customs/forfeiture statutes are not unconstitutional on their face or as applied by CBP when Defendants do not provide a prompt post-seizure hearing; the customs/forfeiture statutes are not unconstitutional for requiring a bond; Plaintiff's motion for class action certification is moot; and Plaintiff has failed to state a cognizable

Bivens cause of action. Although insufficient facts are before the Court, it certainly appears plausible that Plaintiff's due process rights were violated when it took over two years to return his property. *Compare United States v. $23,407.69 in U.S. Currency*, 715 F.2d 162 (5th Cir. 1983) (13 month delay unreasonable, thus precluding forfeiture). *But see $8,850*, 461 U.S. 555 (eighteen-month delay not unreasonable under the circumstances). Notwithstanding, Plaintiff's only redress was getting his property and bond money back.

Because Plaintiff now has all the relief to which he is entitled, the undersigned recommends that:

1. Plaintiff's motion for class certification (ECF No. 4) be **DENIED AS MOOT**.

2. The motion to dismiss by Defendants United States Customs and Border Protection, United States of America, and Kevin McAleenan (ECF No. 49) be **GRANTED**, the Rule 41(g) motion **DISMISSED AS MOOT**, and the class claims against them **DISMISSED WITH PREJUDICE** to refiling by Plaintiff, but without prejudice as to any other potential plaintiffs.

3. Defendant Espinoza's motions to dismiss (ECF No. 50) be **GRANTED** and the claims against him **DISMISSED WITH PREJUDICE**.

Finally, the undersigned recommends that the claims against the unknown defendants be **DISMISSED WITHOUT PREJUDICE.** Assuming Plaintiff could identify any of the unknown defendants at a later time, amendment of the complaint pursuant to Rule 15(a)(2) of the Federal Rules of Civil Procedure to name the specific agents would be futile, since a *Bivens* claim against them would have no merit.[23] Courts, however, lack personal jurisdiction over unidentified fictitious

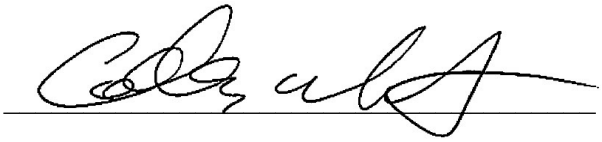
[23]Leave to amend should be allowed unless there is "undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc." *Foman v. Davis*, 371 U.S. 178, 182 (1962).

defendants. *See Cunningham v. Advanta Corp*., 2009 WL 10704752, at *3 (N.D. Tex. Feb. 6, 2009); *Taylor v. Fed. Home Loan Bank Bd.*, 661 F. Supp. 1341, 1350 (N.D. Tex. 1986). Therefore, the claims should be dismissed *without prejudice*, pursuant to Federal Rule of Civil Procedure 12(b)(2). *See Int'l Energy Ventures Mgmt., L.L.C. v. United Energy Grp., Ltd.*, 818 F.3d 193, 213 (5th Cir. 2016) (dismissal for lack of personal jurisdiction must be without prejudice).

IV. NOTICE

The United States District Clerk shall serve a copy of this report and recommendation on all parties either by (1) electronic transmittal to all parties represented by an attorney registered as a filing user with the Clerk of Court pursuant to the Court's Procedural Rules for Electronic Filing in Civil and Criminal Cases; or (2) certified mail, return receipt requested, to any party not represented by an attorney registered as a filing user. Pursuant to 28 U.S.C. § 636(b)(1), any party who wishes to object to this report and recommendation may do so within fourteen days after being served with a copy. Failure to file written objections to the findings and recommendations contained in this report shall bar an aggrieved party from receiving a *de novo* review by the District Court of the findings and recommendations contained herein, *see* 28 U.S.C. § 636(b)(1)(c), and shall bar an aggrieved party from appealing "the unobjected-to proposed factual findings and legal conclusions accepted by the District Court" except on grounds of plain error. *Douglass v. United Servs. Auto. Ass'n*, 79 F.3d 1415, 1429 (5th Cir. 1996).

SIGNED and **ENTERED** on July 23, 2018.



COLLIS WHITE
UNITED STATES MAGISTRATE JUDGE