

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

GERARDO SERRANO, on behalf of	§	
Himself and all others similarly	§	
situated,	§	
	§	
Plaintiff,	§	
	§	
v.	§	Civil No. 2:17-CV-00048-AM-CW
	§	
U.S. CUSTOMS and BORDER	§	
PROTECTION,	§	
UNITED STATES of AMERICA,	§	
KEVIN McALEENAN, JUAN ESPINOSA,	§	
and John Doe 1-X.,	§	
	§	
Defendants.	§	

**MOTION TO DISMISS OF DEFENDANTS UNITED STATES OF AMERICA, UNITED STATES CUSTOMS AND BORDER PROTECTION, AND KEVIN McALEENAN**

Pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure, Defendants United States of America, U.S. Customs and Border Protection (“CBP”), and Kevin McAleenan, in his official capacity as Acting Commissioner of CBP, (collectively “Defendants”), respectfully request that the Court dismiss all of Plaintiff’s claims for lack of jurisdiction and/or for failure to state any claims upon which relief can be granted. For the reasons stated below, Defendants respectfully request that the Court grant this Motion, and that it dismiss with prejudice all of Plaintiff’s claims.

**MEMORANDUM IN SUPPORT**

**I. STATEMENT OF FACTS**

For purposes of this Motion only, Defendants assume that the allegations in Plaintiff’s Complaint are true. The relevant allegations are as follows:

Plaintiff is an adult United States citizen and a resident of Tyner, Kentucky. (Dkt. # 1 at 4). Defendants have been sued in their official capacity. *Id.* Defendants are allegedly responsible for holding Plaintiff's truck for approximately two years in violation of Plaintiff's Fifth Amendment due process rights. (*Id.* at 13-15).

On September 21, 2015, Plaintiff attempted to travel into Mexico through the border station in Eagle Pass, Texas. (*Id.*). Driving a 2014 Ford F-250 pickup truck, Plaintiff approached the border and began taking photos of the border crossing using his smartphone. (*Id.*) Two border agents stopped Plaintiff's vehicle before he crossed into Mexico. (*Id.*) The two border agents searched Plaintiff's truck and located five .380 caliber bullets and a .380 caliber magazine in the truck's center console. (*Id.* at 8). Plaintiff was released three hours later, but his truck was seized because it is illegal to carry munitions into Mexico under 19 U.S.C. § 1595a(d) and 22 U.S.C. § 401.<sup>1</sup> (*Id.* at 9).

On or about October 1, 2015, CBP sent Plaintiff a notice of seizure, informing Plaintiff that CBP intended to forfeit the truck, bullets, and magazines seized at the border station. (*Id.* at 10). The notice identified Defendant Juan Espinoza as the CBP employee responsible for processing forfeiture or release of Plaintiff's seized property. (*Id.* at 5). Ultimately, CBP returned Plaintiff's truck to him on or about October 16, 2017. (Exhibit A, 10/16/17 e-mail to Plaintiff's Counsel).

## II. NATURE AND STAGE OF THE PROCEEDINGS

Plaintiff filed this individual claim for return of seized property under Federal Rule of Criminal Procedure 41(g) on September 6, 2017 alleging that the Defendants prolonged seizure of

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<sup>1</sup> Section 1595a(d) mandates the seizure of merchandise exported from the United States, as well as property used to facilitate such exportation, contrary to law. As 15 C.F.R. § 30.2(a)(1)(iv)(C) mandates the filing of Electronic Export Information (EEI) with CBP for any good subject to the International Traffic in Arms Regulations (ITAR), Plaintiff was required to file EEI with the Agency. When Plaintiff failed to indicate to the CBP that he was exporting ammunition to Mexico, Plaintiff violated § 30.2(a)(1)(iv)(C) and seizure was appropriate under § 1595a(d).

his truck violated his Fourth and Fifth Amendment rights. (Dkt. # 1 at 3, 13-15). Furthermore, as part of his Class Action Allegations, Plaintiff accuses the Defendants of engaging “in a policy or practice of seizing vehicles for civil forfeiture without providing a prompt post-seizure hearing to contest the validity of the seizure and/or the retention of the property pending a final forfeiture decision.”<sup>2</sup> (*Id.* at 16). On November 15, 2017, this Court allowed Defendants until on or before December 13, 2017 to respond Plaintiff’s Complaint. (Dkt. # 47). Defendants deny Plaintiff’s allegations and submit that all of his claims should be dismissed as they are now moot.

### **III. STANDARD OF REVIEW**

#### **A. Rule 12(b)(1)**

In deciding a Rule 12(b)(1) motion, the Court may review matters outside the pleadings without converting the motion into one for summary judgment. *Robinson v. TCI/US West Communications Inc.*, 117 F.3d 900, 904 (5th Cir. 1997). If the Court bases its decision on the allegations in the Complaint, supplemented by undisputed facts, plus the Court’s resolution of disputed facts, then the Court’s factual findings will be reviewed for “clear error.” *Id.* The Court has no jurisdiction over Plaintiff’s claims because his claims have been mooted by the fact that the CBP returned the truck to Plaintiff.

#### **B. Rule 12(b)(6)**

To survive a Rule 12(b)(6) motion, a Complaint must contain “more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). The “[f]actual allegations must be enough to raise a right to relief above the speculative level.” *Id.* A plaintiff must plead facts sufficient to “state a claim to relief that is plausible on its face.” *Id.* at 570. “A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that

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<sup>2</sup> In a separate filing, Defendants oppose Plaintiff’s Motion for Class Certification (Dkt. # 4).

the defendant is liable for the misconduct alleged.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Here, Plaintiff has not stated any actionable claims. CBP is not constitutionally required to provide post-seizure hearings.

#### **IV. ARGUMENT**

Plaintiff’s Fourth and Fifth Amendment Due Process claims against the Defendants should be dismissed for lack of jurisdiction because they are moot and barred by sovereign immunity. Even if the Court had jurisdiction over his claims, Plaintiff has no claim for declaratory or injunctive relief because none of his rights were violated.

##### **A. The Court Has No Jurisdiction Over Plaintiff’s Claims Because The Return of His Truck Moots Them**

The United States is immune from suit except to the extent it consents to be sued, and the terms of its consent defines the Court’s jurisdiction over the suit. *F.D.I.C. v. Meyer*, 510 U.S. 471, 475 (1994). Plaintiff has the burden of proving this Court’s jurisdiction over his claims. *Ramming v. U.S.*, 281 F.3d 158, 161 (5th Cir. 2001). Here, Plaintiff’s claims against the Defendants have the following jurisdictional foundation: “Plaintiff brings his individual claim for return of seized property under Federal Rule of Criminal Procedure 41(g). Plaintiff is entitled to the immediate return of his property because it is currently being held in violation of the Fourth Amendment. . . .” (Dkt. # 1 at 3). Defendants returned Plaintiff’s truck to him on or about October 16, 2017. (Exh. A). With the return of his truck, there is no longer any case or controversy between the parties about ownership or possession of the underlying property.<sup>3</sup> See *Alvarez v. Smith*, 558 U.S. 87, 92 (2009) (“An ‘actual controversy must be extant at all stages of review, not merely at the time the complaint is filed.’”).

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<sup>3</sup> In a separate filing, the Individual Defendants moved to dismiss Plaintiff’s *Bivens* action against them.

The Supreme Court's decision in *Alvarez* is instructive on why a Plaintiff that seeks injunctive relief and class certification must still have a live case or controversy:

The parties, of course, continue to dispute the lawfulness of the State's [forfeiture] hearing procedures. But that dispute is no longer embedded in any actual controversy about the plaintiffs' particular legal rights. Rather, it is an abstract dispute about the law, unlikely to affect these plaintiffs any more than it affects other Illinois citizens. 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.* at 580-81.

Therefore, the fact that Plaintiff seeks class certification to challenge the Defendant's forfeiture hearing procedures is not enough to create jurisdiction where he has been given the damages that he sought: the return of his truck.

**B. Plaintiff's Claims For Damages For Defendant's Alleged Constitutional Deprivations Are Barred By Sovereign Immunity**

Even if Plaintiff's claims against the Defendants had not been mooted by the return of his truck, Plaintiff's Complaint sues the Defendants for alleged acts that were taken in their *official* capacity. (Dkt. # 1 at 4-6) The Supreme Court has stated that "an official-capacity suit is, in all respects other than name, to be treated as a suit against the entity." *Kentucky v. Graham*, 473 U.S. 159, 166 (1985). Thus, a suit against a federal official in her official capacity is a suit against the United States. *Id.*; *Brandon v. Holt*, 469 U.S. 464, 471-472 (1985). "Absent a waiver, sovereign immunity shields the Federal Government and its agencies from suit." *F.D.I.C. v. Meyer*, 510 U.S. 471, 475 (1994); *see also Boudreau v. U.S.*, 53 F.3d 81, 83 (5th Cir. 1995) ("no action lies against the United States unless the legislature has authorized it").

Plaintiff's damages claim against the Defendants is barred because the United States has not waived its sovereign immunity from suit for damages that are based on a federal official's violation of the Constitution. *Meyer*, 510 U.S. at 483-486; *see also Jackson v. George W. Bush*, 448 F.Supp.2d 198, 201 (D.D.C. 2006) (damages claim against President Bush in his official

capacity was barred by sovereign immunity). Accordingly, Counts One and Four should be dismissed for lack of subject matter jurisdiction.

**C. Plaintiff's Claims For Declaratory And Injunctive Relief Should Be Dismissed**

Plaintiff has not stated actionable claims for injunctive and/or declaratory relief because the Defendants' actions were not unlawful in any way. CBP is not constitutionally obligated to provide post-seizure hearings. As explained in the companion response to Plaintiff's *Bivens* claim (Dkt. # 50), "there is no constitutional basis for a claim that respondent's interest in the case, or in the money put up to secure the bond, entitles him to a speedy answer to his remission petition." *United States v. Von Neumann*, 474 U.S. 242, 249-50 (1986). Seizures under § 1595a(d) have been held to be comparable to those described in 19 U.S.C. § 1947. *Id.* In *Von Neumann*, the Customs Service seized a 1974 Jaguar Panther for failure to declare under § 1947. Von Neumann filed a petition for remission of the vehicle prior to the initiation of forfeiture proceedings and later contested the constitutional validity of the post-seizure remedies. In finding no violation of Von Neumann's rights to due process, the Court noted:

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 care, or in the money put up to secure the bond, entitles him to a speedy answer to his remission petition.

*Id.* at 250. As the Supreme Court further noted, a "forfeiture proceeding, without more, provides the post-seizure hearing required by due process." *Von Neumann*, 474 U.S. at 249. Therefore, the Supreme Court has clearly articulated that post-seizure hearings are not constitutionally-required for seizures under Title 19. In this case, the truck has already been returned to Plaintiff. That is precisely the relief Plaintiff could have hoped for had he prevailed during any forfeiture proceeding and/or had he received the speedy post-seizure hearing he believes he was entitled to.

Finally, Plaintiff has no claim for injunctive relief because he has not shown (and he cannot show) a substantial likelihood of future injury by Defendant. *Fabian v. Dunn*, 2009 WL

2567866, \*5 (W.D. Tex. 2009). Plaintiff, therefore, cannot state a claim for injunctive or declaratory relief upon which relief can be granted.

**V. CONCLUSION**

Defendants respectfully request that the Court grant this Motion, and that it dismiss with prejudice all of Plaintiff's claims against them.

Dated: December 13, 2017

Respectfully submitted,

JOHN F. BASH  
United States Attorney

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ATTORNEYS FOR DEFENDANT

**CERTIFICATE OF SERVICE**

I hereby certify that on the 13th day of December 2017, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will send notification of such filing to the following:

Anna Bidwell, Esq.  
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816 Congress Ave., Suite 960  
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/s/ Sean O'Connell  
SEAN O'CONNELL  
Assistant U.S. Attorney

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UNITED STATES of AMERICA,	§	
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	§	
Defendants.	§	

**ORDER**

On this day the Court considered the Motion to Dismiss of Defendants United States of America, U.S. Customs and Border Protection (“CBP”), and Kevin McAleenan, in his official capacity as Acting Commissioner of CBP. After reviewing the parties’ submissions, the applicable law, and the record in this case, the Court grants Defendant’s motion for each of the reasons set forth therein. Accordingly, all of Plaintiff’s claims are dismissed with prejudice because he has stated no actionable claims against Defendant.

It is so Ordered.

Signed this \_\_\_\_\_ day of \_\_\_\_\_, 201\_\_\_\_.

\_\_\_\_\_  
**UNITED STATES DISTRICT JUDGE**

**O'Connell, Sean (USATXW)**

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**From:** THORNTON, RYAN W (OCC) <ryan.w.thornton3@cbp.dhs.gov>  
**Sent:** Monday, October 16, 2017 2:52 PM  
**To:** abidwell@ij.org  
**Cc:** rjohnson@ij.org  
**Subject:** Ford F-250; 2015-2303-0-00136-07

Ms. Bidwell,

As discussed this morning, the Agency has arranged to return Mr. Serrano's Ford F-250 on Thursday October 19, 2017 at 10 am CST. The vehicle may be picked up the following address:

Apple Towing  
6555 State Highway 359  
Laredo, Texas 78043  
(832) 795-3584

To process the release of the vehicle, the Agency needs Mr. Serrano's address. According to our records, Mr. Serrano's address is in Tyner, Kentucky. To the extent that has changed, please provide the Agency with updated information. As we also discussed this morning, Mr. Serrano will be required to present identification when picking up the vehicle but will not be required to sign anything. If Mr. Serrano will not be picking up the vehicle personally, please provide the Agency with the person who will be acting on Mr. Serrano's behalf so that the Agency can release the vehicle to Mr. Serrano's agent on Thursday.

Please contact me if you have any questions.

Regards,

Ryan W. Thornton  
Attorney, Office of Assistant Chief Counsel  
109 Shiloh Drive, Suite 300  
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(956) 753-1781

