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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

RENÉ QUIÑONEZ and MOVEMENT INK LLC,

Plaintiffs,

v.

UNITED STATES OF AMERICA; and JEFF AGSTER, EVA CHAN, STEPHEN FAJARDO, MARK HODGES, ROBIN LEE, and DOES 1 through 2, United States Postal Service and United States Postal Inspection Service officials in their individual capacities,

Defendants.

3:22-cv-3195-WHO

PLAINTIFFS' CONSOLIDATED OPPOSITION TO DEFENDANTS' MOTIONS TO DISMISS THE SECOND AMENDED COMPLAINT (ECF 64, 65)

Hon. William H. Orrick
June 21, 2023
2:00 p.m.

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ISSUES TO BE DECIDED[1]

1. Have Plaintiffs plausibly pleaded at least one of the four claims the Court granted them leave to replead in the Second Amended Complaint (SAC)? Answer: Yes.

   a. At the pleading stage, are Plaintiffs required to prove their plausibly pleaded factual allegations and negate possible alternative explanations to survive a motion to dismiss? Answer: No.

   b. As revealed for the first time in an attachment to Defendants' present motion, Defendant Lee (1) admitted to knowing Mr. Quiñonez and (2) admitted that he seized and diverted Plaintiffs' packages without any given or articulable factual basis for suspicion of criminality. Does that admitted conduct, coupled with Plaintiffs' allegations regarding (1) Lee's familiarity with Plaintiffs' politically activist business and their prior shipments and (2) Lee's knowledge that the shipments at issue here were economic shipments by Movement Ink, plausibly plead that Lee's seizure and diversion was substantially certain to interfere with Plaintiffs' prospective economic relations, so that Count 3 of the SAC may proceed? Answer: Yes.

   c. Defendants' notes (both the originals incorporated into the complaint and the altered versions now attached to Defendants' motion) show that Defendants knew Plaintiffs' packages contained "BLM MASKS." Does that knowledge, coupled with Plaintiffs' detailed allegations regarding Defendants' misconduct—including but not limited to Defendant Lee's knowledge of Plaintiffs' politically activist business and the lack of any lawful basis for any

[1] Only Counts 1, 3, 4, and 7 are currently at issue, but Plaintiffs continue to preserve for appellate review the cognizability and viability of all fifteen of their counts. In response to Defendants' motions to dismiss the First Amended Complaint (FAC), Plaintiffs conceded but preserved for appellate review Counts 2, 6, 9, 10, and 12; Plaintiffs continue to preserve those counts, which remain pleaded in the SAC. Ruling on Defendants' motions to dismiss the FAC, the Court dismissed with prejudice, over Plaintiffs' opposition, Counts 5, 8, 11, 13, 14, and 15; Plaintiffs maintain that dismissal of those counts, which remain pleaded in the SAC, was erroneous for the reasons stated in their prior opposition (*see* ECF 57), and Plaintiffs preserve those counts and arguments for appellate review.

Defendant to seize or detain Plaintiffs' packages—plausibly plead that one or more Defendants opened and searched at least one of the packages, so that Counts 1 and 7 of the SAC may proceed? Answer: Yes.

d. Have Plaintiffs plausibly pleaded clearly established Fourth Amendment violations in Defendants' baseless, inconsistent, pretextual, and uninvestigated seizures and detentions of their packages, so that Count 4 of the SAC may proceed? Answer: Yes.

e. If the Court remains unsure whether at least one of Plaintiffs' claims is plausibly pleaded or cognizable, should it grant one final leave to amend or order limited jurisdictional and/or merits discovery? Answer: Yes.

2. Does the Federal Tort Claims Act's (FTCA) "discretionary function exception" apply to the obviously and egregiously tortious and unconstitutional misconduct that Plaintiffs plausibly plead in Count 1 (tortious and unconstitutional search) and Count 3 (interference with economic relations, in concurrent violation of the First Amendment) of the SAC? Answer: No.

3. Is *Bivens* liability and its critical deterrent function foreclosed for the obvious, egregious, and rare Fourth Amendment seizure, detention, and search violations that Plaintiffs plausibly plead in Counts 4 and 7 of the SAC? Answer: No.

4. If no damages remedy is cognizable in federal or state court (under federal or state law) for federal officials' misconduct in the scope of their employment under the circumstances of this case, then are the FTCA and the Westfall Act unconstitutional as applied because Congress's foreclosing of all judicial remedies is unconstitutional? Answer: Yes.

INTRODUCTION

Following the Court's prior order, *see* ECF 62, the plausibility and cognizability of just four of Plaintiffs' fifteen pleaded counts are currently before the Court: Count 1 (trespass to chattels, limited to whether a search is plausibly pleaded, as the Court held that trespass under seizure and detention theories is barred by the FTCA's detention of goods exception); Count 3 (interference with prospective economic relations, by seizing and diverting known ongoing corporate shipments);

Count 4 (*Bivens* claims for unconstitutional seizures and detentions of Plaintiffs' packages, based on baseless, uninvestigated, pretextual, contradictory, politically retaliatory, and economically disruptive reasons); and Count 7 (*Bivens* claims for warrantless searches of Plaintiffs' packages).

As detailed below, the plausibility of at least Counts 3 and 4 has become undeniable: For the first time over two years of piecemeal revelations, Defendants have unredacted in an attachment to their present motions (1) the identity of the Defendant who initially seized and diverted Plaintiffs' political mask packages (Defendant Lee) and (2) the reason (or, more accurately, lack thereof) he gave for doing so, *see* ECF 64-3 at 3, thereby (3) confirming that Plaintiffs have accurately alleged that Defendant Lee knew Plaintiffs, knew the politically activist nature of Plaintiffs' business, knew the completely lawful nature of Plaintiffs' business, knew the corporate sender of the packages, had in front of him the names and addresses of all the packages' recipients, and had absolutely no lawful reason to seize or divert the packages. In short, Defendant Hodges's finally-unredacted narrative itself explains (and completely validates Plaintiffs' allegations) that Defendant Lee gave (and had) zero factual bases for suspecting the innocuous packages, their corporate senders (whom he knew well), or their named recipients of *any* articulable suspicion of criminality. Under these circumstances, Plaintiffs have met their burden of pleading at least (1) substantial certainty of disrupting Plaintiffs' economic relations, for purposes of Count 3 (part I.B below) and (2) a seizure and diversion of property without reasonable suspicion, for purposes of Count 4 (part I.D below).

Plaintiffs have also plausibly pleaded much more, including: (1) Defendants knew the packages contained, in Defendants' words, "BLM MASKS" because one or more Defendants opened and searched at least one of Plaintiffs' packages, for purposes of Counts 1 and 7, demonstrating the inapplicability of the FTCA's discretionary function exception as to Count 1 (parts I.C and II below)[2]; (2) Defendant Lee's baseless seizure and diversion of Plaintiffs' packages with knowledge of Plaintiffs' politically activist business (based on his regular interactions with

[2] As explained in part I.C below, Defendants have attached to their present motion an altered and unincorporated version of the Parcel Detail Worksheets in an improper effort to have the Court decide in their favor at the pleading stage a hotly disputed and crucial question of fact regarding whether a search of Plaintiffs' packages occurred. The Court must reject this gambit.

them) was politically retaliatory and economically disruptive in violation of the First Amendment, for purposes of the inapplicability of the FTCA's discretionary function exception as to Count 3 (parts I.B and II below); (3) the Defendants who continued Lee's baseless seizure of the packages also gave no articulable suspicion of criminality sufficient to seize or detain the packages, but did so and left them languishing without any investigation or explanation for delay for over 24 hours, all in violation of clearly established Fourth Amendment law and in apparent continuation of Lee's politically retaliatory and economically disruptive misconduct, for purposes of Count 4 (part I.D below); and (4) such baseless, pretextual, politically retaliatory, and economically disruptive seizures, detentions, and searches are sufficiently rare and egregious that a *Bivens* remedy is cognizable—indeed, necessary for its crucial deterrent function, as recognized by Congress (part III below). If the Court believes that any one of Plaintiffs' claims may be plausible but that the precise facts surrounding that claim need to be revealed—including for purposes of its cognizability—the Court should order limited jurisdictional and/or merits discovery (part I.E below).

Finally, if the Court holds that Plaintiffs have plausibly pleaded at least one tort or one constitutional violation, but that all courthouse doors are closed by virtue of the FTCA's exceptions, the Westfall Act's evisceration of state tort claims against federal officials, the Court's limited reading of 28 U.S.C. § 2679(b)(2)(A), and the unavailability of a *Bivens* cause of action in these circumstances, the Court should hold that the FTCA and the Westfall Act are unconstitutional as applied because Congress may not constitutionally close every courthouse door under every source of law to a person whose rights have been violated by a federal official (part IV below).

BACKGROUND

The salient facts of this case are simple but egregious: Postal officials seized, detained, and searched innocuous political packages containing protest apparel without any investigation and for no lawful reason, and then proceeded to let the packages languish, again without any investigation into the propriety of their seizure or detention, causing predictable and unjustifiable delays in the packages' arrival and predictably derailing the senders' existing and future business relationships.

After years of piecemeal revelations, Defendants have finally unredacted in an attachment

to their present motion the part of this story that validates Plaintiffs' allegations about the baseless, politically retaliatory, and economically disruptive nature of the packages' seizure, search, and detention. Currently identified at SAC ¶¶ 63–66 as a Doe Defendant, it turns out Defendant Lee was the person who initially seized, "overlabeled," and diverted Plaintiffs' packages. *See* ECF 64-3 at 3. Defendant Hodges's finally-unredacted notes explain: (1) "Lee was the clerk who conducted the retail window transactions on all four parcels"; (2) Lee "sent the parcels to the Inspection Service"; and (3) Lee "recognized the sender as a mailer who had mailed multiple suspicious parcels in the past." ECF 64-3 at 3. In other words, Lee was the "postal official[] at [Mr. Quiñonez's local post office] who know[s] [Mr. Quiñonez] and his business." SAC ¶ 31. Lee was the official who used to be "friendly with" Mr. Quiñonez and "joke about . . . Movement Ink's last-minute rush shipments and the high prices [Mr. Quiñonez] paid for next-day deliveries." SAC ¶ 31. Lee was an official with whom Mr. Quiñonez shipped his screen-printed activist apparel "using similar packaging methods . . . for years on behalf of Movement Ink," including just days before. SAC ¶¶ 29–30. And Lee was the official who, "after the seizures and searches at issue . . . became standoffish and quiet whenever [Mr. Quiñonez] entered." SAC ¶ 31. The reason? Lee was the official who "baselessly diverted the four packages at issue in this case from the mail stream, knowing the packages' political messages, knowing [Mr. Quiñonez's] and Movement Ink's social activism, and knowing that [Mr. Quiñonez] and Movement Ink were shipping their political packages for ongoing economic gain, just as they had done days before," and for years prior. SAC ¶¶ 29–32.

Lee's admissions that he (1) knew Mr. Quiñonez and (2) seized and diverted Plaintiffs' packages without a single fact giving rise to an articulable suspicion of criminality, coupled with (3) Plaintiffs' detailed allegations about Lee's extensive knowledge of their politically activist and ongoing business, form the crucial basis of Plaintiffs' claims of interference with economic relations (Count 3) and unconstitutional initial seizure of the packages without reasonable suspicion (Count 4). Lee's conduct also plausibly gives rise to a First Amendment violation, as alleged in Counts 10–15 of the complaint. *See* SAC ¶ 65 ("Given the utter lack of any lawful reason for [Lee] to divert the packages (of which [he] knew the contents, and which [he] knew were like [Plaintiffs'] other

shipments) . . . on information and belief, [he] did so (1) based on the political messages on the masks inside the packages and [Plaintiffs'] political activism and (2) knowing it would disrupt [Plaintiffs'] ongoing and future economic relations."); *see also* SAC ¶ 277 (the protests for which Plaintiffs' mask shipments were intended were "controversial," and "governmental attitudes and responses to the protestors' messages—including 'Black Lives Matter' and 'Defund the Police'—were highly critical and often violent"); SAC ¶ 279 ("Covid-protective masks, which all four of Plaintiffs' seized and searched packages contained, were also controversial and subject to governmental and societal disdain"). And Lee plausibly searched the packages. SAC ¶ 66.

From Defendant Lee's misconduct flowed many additional Fourth Amendment violations by the other Defendants. First, unnamed members of "the CI2 team" (a group finally unredacted for the first time in an attachment to Defendants' present motion, *see* ECF 64-3 at 2, and now identified by Plaintiffs as the complaint's Doe Defendants) continued Lee's seizure and diversion of the packages *with no reason given at all*. ECF 64-3 at 2. Next, Defendant Chan received these diverted packages, was given no reason for their seizure by either Defendant Lee or the CI2 team Doe Defendants, did not inquire as to why those Defendants diverted the packages, but kept the packages detained because they were "big boxes" with "green handwriting" and she had an out-of-the-blue hunch that they might have been "sent from Eureka." SAC ¶ 67. Of course, the sole hunch that could even approach an articulable basis for suspecting criminality (the packages' potential provenance from Eureka) could have been immediately dispelled by Chan, and the packages immediately released. SAC ¶¶ 68, 73–74. Indeed, it took Defendant Hodges less than ten minutes to confirm, in his words, that "it was *not possible* the parcels were sent from Eureka." SAC ¶ 74 (emphasis added).

Instead of doing that, Defendant Chan kept the packages detained and left them to languish for over 24 hours without any investigation and not a single reason given for the delay. SAC ¶¶ 73–75. After that unexplained delay, Defendant Hodges proceeded to try to backfill the other Defendants' non-reasons and anodyne explanations for the seizures, diversions, searches, and detentions of the packages. SAC ¶¶ 76–77. But the manufactured bases for his post hoc attempts at reasonable suspicion were just as anodyne as those given before (to the extent any were given

before); they were also self-contradictory, and they were absurdly based in part on Plaintiffs' compliance with the postal service's own packaging guidelines. SAC ¶¶ 76–84.

Hodges's notes also explain that Defendants knew the packages contained, in their words, "BLM MASKS." That admission, coupled with the lack of legitimate reasons (or, in the case of Lee and the CI2 team, no reasons) given for seizing and detaining Plaintiffs' packages, plausibly indicates that one or more of Defendant Lee, the CI2 team Doe Defendants, and Defendant Chan opened and searched at least one of the packages. SAC ¶ 61; *see* SAC ¶¶ 66, 71, 85, 87, 88, 89, 90.a.

And as the complaint explains, it is plausible that Lee, a member of the CI2 team, and/or Chan searched the packages even if Hodges and other members of the Inspection Service unconstitutionally abandoned the masks and did not know what they contained until the story made national news. SAC ¶ 90.a ("If one infers, based on the Inspection Service's letter to Rep. Lee, that no *Inspection* Service Defendant knew the packages' contents until June 5 (after they were left to languish for over 24 hours), that does nothing to dispel the *Postal* Service's knowledge of the contents sooner. And, as explained above, the Postal Service Defendants' conduct plausibly suggests knowledge of the contents, based on their familiarity with [Mr. Quiñonez's] and Movement Ink's business and their opening of the packages. In short, the letter does nothing to dispel Plaintiffs' allegation that Postal Service Defendants . . . seized and searched the packages for retaliatory, disruptive, and pretextual reasons.").

As summed up in the complaint, and supported by (1) a through explanation of each Defendant's lack of any lawful basis to seize, divert, detain, or search Plaintiffs' packages, (2) Defendant Lee's admission that he knew Plaintiffs and seized their packages without any articulated factual basis for suspicion, ECF 64-3 at 3, and (3) Plaintiffs' explanation that Lee knew the politically activist and economic nature of their shipments, Plaintiffs reasonably and plausibly conclude: "Given the utter lack of any lawful reason for the packages' seizure or detention based on the characteristics listed in Defendant Hodges's worksheets or the reasons given by Defendant Chan, coupled with the fact that the worksheets expressly stated that Defendants knew the packages contained 'BLM MASKS,' on information and belief, one or more . . . Defendants (1) opened and

searched the packages and (2) continued the retaliatory, disruptive, and pretextual seizures and searches initiated by" Defendant Lee. SAC ¶ 87.

To be thorough—"The retaliatory, disruptive, and pretextual nature of Defendants' seizures and searches of the packages is evinced by: Defendants' knowledge of [Mr. Quiñonez's] and Movement Ink's politically motivated business; the change in relationship between [Mr. Quiñonez] and the postal officials following the packages' seizure; the lack of any facts, individually or together, amounting to reasonable suspicion to seize, detain, or search the packages; the decision to search and divert the packages notwithstanding a lack of reasonable suspicion; the decision to keep the packages detained for over 24 hours and search them, instead of immediately dispelling the notion that the packages might have come from Eureka and releasing them; the post hoc attempt to justify the packages' baseless seizure, detention, and search, based on purported factors that again did not amount to reasonable suspicion; the internally contradictory nature of that post hoc attempt, by asserting that the packages came from a business that 'frequently mailed parcels from the same sender/address' in Oakland (a completely innocuous fact) while also purportedly coming from Eureka (also a completely innocuous fact, but in any event an immediately dispellable hunch); the post hoc decision to purportedly deem it suspicious that René and Movement Ink complied with the Postal Service's own public guidance for securely taping packages; and Defendants' admitted knowledge that the packages contained 'BLM MASKS.'" SAC ¶ 89.

Finally, the packages were released and arrived at their destinations more than two days (and multiple protests) late. SAC ¶ 43. Defendants' misconduct caused grievous harm to Mr. Quiñonez's and Movement Ink's reputations, and nearly decimated the business (and labor of love) Mr. Quiñonez and his family have spent a decade building. SAC ¶¶ 14–25, 38–57, 91.[3]

[3] Defendants have, throughout this case, falsely insisted that they refunded Mr. Quiñonez his shipping costs. "That is not true; [Mr. Quiñonez] and Movement Ink did not receive refunds." SAC ¶ 92. And, of course, a refund "could and would do nothing to account for any of the harms described in [SAC] paragraphs 38 through 57 and paragraph 91, which remain and will remain entirely unremedied." SAC ¶ 93. But, again in an eleventh-hour unredaction, Defendants have finally shown that if they did refund the shipping costs to anyone, it was not to Mr. Quiñonez or anyone else associated with Movement Ink, but apparently someone who answered at the phone number listed in the *recipients* section of the packages' shipping labels. *See* 64-3 at 2–3, 5.

STANDARD OF REVIEW

In evaluating Defendants' motions to dismiss under Rules 12(b)(1) and 12(b)(6), the Court must "accept as true all facts alleged in the complaint and construe them in the light most favorable to" Plaintiffs. *Snyder & Assocs. Acquisitions LLC v. United States*, 859 F.3d 1152, 1156–57 (9th Cir. 2017). The Court resolves a "facial attack" under Rule 12(b)(1) by "determin[ing] whether the allegations are sufficient as a legal matter to invoke the court's jurisdiction." *Leite v. Crane Co.*, 749 F.3d 1117, 1121 (9th Cir. 2014). Plaintiffs are "master of [the] complaint for jurisdictional purposes." *Hawaii ex rel. Louie v. HSBC Bank Nev., N.A.*, 761 F.3d 1027, 1040 (9th Cir. 2014). The Court must deny Defendants' Rule 12(b)(6) arguments if the complaint contains "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 *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). This is a "low bar." *Wisk Aero LLC v. Archer Aviation Inc.*, 2021 WL 8820180, at *1 (N.D. Cal. Aug. 24, 2021) (Orrick, J.). Plaintiffs may plead "alternatively," "hypothetically," and "[i]nconsistent[ly]." Fed. R. Civ. P. 8(d). They do "not need to prove [their] case at the pleadings stage." *Hough v. Big Heart Pet Brands, Inc.*, 2020 WL 7227198, at *4 (N.D. Cal. Dec. 8, 2020) (Orrick, J.).

ARGUMENT

Counts 1, 3, 4, and 7 of the SAC are plausibly pleaded. *See* part I below. Counts 1 and 3 are cognizable becaufse the FTCA's discretionary function exception does not bar them. *See* part II below. And Counts 4 and 7 are cognizable under *Bivens*. *See* part III below.

If Plaintiffs have plausibly pleaded at least one tort or constitutional violation, but all courthouse doors are closed by virtue of the FTCA's exceptions, the Westfall Act's evisceration of state tort claims against federal officials, the Court's limited reading of 28 U.S.C. § 2679(b)(2)(A), and the unavailability of a *Bivens* cause of action in these circumstances, then the FTCA and the Westfall Act are unconstitutional as applied. *See* part IV below.

I. Plaintiffs have plausibly pleaded Counts 1, 3, 4, and 7.

A. Plaintiffs do not need to prove their case at the pleading stage, only plausibly plead at least one claim.

As this Court recently said, "[i]t should be obvious that a possible alternative explanation

does not destroy the plausibility of" claims that, with every reasonable inference drawn in Plaintiffs' favor, should survive the pleading stage. *Hough*, 2020 WL 7227198, at *4. Plaintiffs do "not need to prove [their] case at the pleadings stage." *Id.* To the contrary, Plaintiffs get "the benefit of all reasonable inferences drawn in [their] favor and the low bar of plausible pleading." *Wisk Aero*, 2021 WL 8820180, at *1.

In conjunction with that low bar, Plaintiffs also get the benefit of Rule 8(d)'s explicit endorsement of "alternative" and even "hypothetical" or "[i]nconsistent" pleadings. *See* SAC ¶ 90. So, unsurprisingly, the Supreme Court has cautioned that "a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and that a recovery is very remote and unlikely." *Twombly*, 550 U.S. at 556 (quotation marks omitted). The mere fact that Defendants "may ultimately prevail on [a contested] issue on summary judgment or at trial" does not mean dismissal is appropriate; it means they must make their case at those subsequent stages, with Plaintiffs' allegations actually tested for truth or falsity in adversarial discovery and presentation to a neutral factfinder. *Hough*, 2020 WL 7227198, at *4.

Assessed through the lens of these bedrocks and safeguards of civil litigation, it is plain that at least one of the four claims the Court granted Plaintiffs leave to replead is plausibly pleaded, for the reasons detailed below. Indeed, only by taking Defendants up on their invitation to draw inferences and resolve disputes in Defendants' favor could the Court hold that *all* of Counts 1, 3, 4, and 7 fail to clear the low bar of plausibility.

B. Plaintiffs have plausibly pleaded at least Defendant Lee's interference with prospective economic relations (Count 3).

After years of gratuitously redacting it, the Government has finally revealed, in a document attached to its present motion, (1) the identity of the Defendant who initially seized and diverted Plaintiffs' political mask packages, (2) the reason (or, more accurately, lack thereof) he gave for doing so, and (3) that Plaintiffs have accurately alleged that the seizing official knew Plaintiffs, knew the politically activist nature of Plaintiffs' business, knew the completely lawful nature of Plaintiffs' business, knew the corporate sender of the packages, and had in front of him the names and addresses of all the packages' recipients. As explained in more detail below, that Defendant's

conduct plausibly gives rise to at least two of the four claims the Court granted Plaintiffs leave to replead in the SAC: interference with prospective economic relations (Count 3, addressed here) and seizure and detention of property without reasonable suspicion (Count 4, addressed in part I.D below). It also plausibly pleads Plaintiffs' search and First Amendment claims. SAC ¶¶ 65–66.

As finally revealed for the first time in an attachment to the Government's present motion, *see* ECF 64-3 at 3, the person who baselessly seized and diverted Plaintiffs' packages was Defendant Lee, who is one of the "postal officials at [Mr. Quiñonez's local post office] who know [Mr. Quiñonez] and his business." SAC ¶ 31. Lee was the official who used to be "friendly with" Mr. Quiñonez and "joke about . . . Movement Ink's last-minute rush shipments and the high prices [Mr. Quiñonez] paid for next-day deliveries." SAC ¶ 31. Lee was an official with whom Mr. Quiñonez shipped his screen-printed activist apparel "using similar packaging methods . . . for years on behalf of Movement Ink," including just days before. SAC ¶¶ 29–30. And Lee was the official who, "after the seizures and searches at issue . . . became standoffish and quiet whenever [Mr. Quiñonez] entered." SAC ¶ 31. The reason? Lee was the official who "baselessly diverted the four packages at issue in this case from the mail stream, knowing the packages' political messages, knowing [Mr. Quiñonez's] and Movement Ink's social activism, and knowing that [Mr. Quiñonez] and Movement Ink were shipping their political packages for ongoing economic gain, just as they had done days before," and for years prior. SAC ¶¶ 29–32.

When he filed the SAC, Mr. Quiñonez knew that one or two postal officials fit the descriptions just quoted. What he did not yet know for certain was that Lee—whose *name* was previously disclosed, but whose *conduct* was inexplicably redacted from Defendant Hodges's notes, *compare* ECF 64-2 at 3, *with* ECF 64-3 at 3—was the one who "diverted the four packages from the mail stream by 'overlabeling' them (i.e., putting new labels atop the ones affixed by [Mr. Quiñonez]) so the packages went to the Postal Inspection Service Division Headquarters ('DHQ') instead of their intended protest destinations." SAC ¶ 63. With the Government's selective redaction of Lee's conduct, Mr. Quiñonez plausibly alleged that this baseless seizure and diversion was conducted by Doe Defendant postal officials at his regular post office. SAC ¶¶ 63–65. But finally,

the Government has attached the unredacted narrative, in which Defendant Hodges explains that the Doe Defendants to whom the SAC attributes the initial seizure and diversion of the packages, *see* SAC ¶¶ 63–66, was actually Defendant Lee. As Defendant Hodges's now-unredacted notes explain: (1) "Lee was the clerk who conducted the retail window transactions on all four parcels"; (2) Lee "sent the parcels to the Inspection Service"; and (3) Lee "recognized the sender as a mailer who had mailed multiple suspicious parcels in the past." ECF 64-3 at 3.

Wholly consistent with and in validation of Plaintiffs' allegations, that same finally-unredacted narrative explains that: (1) Lee gave "no reason," SAC ¶ 64, for his conclusory assertion of "suspicious parcels" coming from Movement Ink; (2) Lee decided not to tell Hodges that no past Movement Ink packages had ever been seized or diverted, despite dealing with Mr. Quiñonez regularly and knowing the lawful and politically activist nature of his business, *see* SAC ¶¶ 29–39—indeed, Lee misled Hodges into thinking that Mr. Quiñonez had not recently "submit[ed] additional parcels," ECF 64-3 at 3, even though he had, all of which were delivered without incident, *see* SAC ¶¶ 29–30, 35–36; and (3) Lee inexplicably misled Hodges into thinking that Mr. Quiñonez told Lee the day after the seizures that the packages "contained t-shirts" instead of masks, ECF 64-3 at 3.

In short, Defendants' unredacted narrative and Plaintiffs' allegations (which are wholly validated by that narrative) together make clear that: (1) Defendant Lee knew Mr. Quiñonez, Movement Ink, the lawful and politically activist nature of their business, and that the packages at issue in this case were part of ongoing economic shipments in that lawful and politically activist business, SAC ¶¶ 29–39; (2) Defendant Lee seized and diverted Plaintiffs' packages, ECF 64-3 at 3; (3) Defendant Lee gave no reason for doing so except a misleading statement about the nature of Mr. Quiñonez's past packages (which Lee processed, and which did not experience seizures or delays), ECF 64-3 at 3; and (4) Defendant Lee additionally misled Hodges about the circumstances surrounding his conduct not just by failing to reveal his knowledge of the actual circumstances surrounding Movement Ink's past shipments, but also by falsely telling Hodges that Mr. Quiñonez identified the packages as t-shirts instead of masks, ECF 64-3 at 3.

This sequence of events by Lee directly supports at least two of the four claims the Court

granted Plaintiffs leave to replead in the SAC: interference with prospective economic relations (Count 3) and a suspicionless seizure of property (Count 4, discussed in part I.D below). Indeed, this sequence of events *also* plausibly pleads trespass to chattels (Count 1), both on a seizure theory and a search theory (the latter of which is the only one the Court granted leave to replead, holding that the former is barred by the FTCA's detention of goods exception). SAC ¶¶ 63–66 (explaining the plausibility that the initial seizer of the packages searched them); *see also* part I.C below (addressing Plaintiffs' search allegations more fully). Moreover, this sequence of events plausibly pleads a First Amendment violation by Defendant Lee—who knew Plaintiffs and the politically activist nature of their business, and proceeded to seize their packages for no lawful reason. Accordingly, the Court should reconsider its prior holding that Plaintiffs have failed to plausibly plead a First Amendment violation. That reconsideration is important, even though the Court has held that none of Plaintiffs' claims arising directly under the First Amendment (SAC Counts 10–15) are currently cognizable, for two reasons: (1) Lee's First Amendment violation is relevant to the inapplicability of the FTCA's discretionary function exception, as discussed in part II below, and (2) Plaintiffs seek appellate recognition of the cognizability of their First Amendment claims.

Contrary to Defendants' mischaracterizations of the law, for the interference claim (Count 3) to survive, the "specific identity or name" of the parties to the economic relationships need not be pleaded. *Ramona Manor Convalescent Hosp. v. Care Enters.*, 177 Cal. App. 3d 1120, 1133 (1986). In any event, Defendants' argument fails even on its own incorrect terms: The shipping labels that Defendant Lee processed for Plaintiffs' packages contained the *corporate shipper's name and address*, *see* SAC ¶ 37 ("all of the political mask shipments were marked or identified with Movement Ink as the sender"), *as well as all four recipients' names and addresses*, ECF 64-3 at 2.

And, again contrary to Defendants' misunderstanding of the law, the California Supreme Court has made clear that "specific intent is not a required element of the tort of interference with prospective economic advantage. . . . [A] plaintiff may alternately plead that the defendant knew that the interference was certain or substantially certain to occur as a result of its action." *Korea Supply Co. v. Lockheed Martin Corp.*, 29 Cal. 4th 1134, 1154 (2003). That is exactly what Plaintiffs'

pleading about their interactions with Lee, coupled with Defendants' unredacted narrative of Lee's admissions, makes (more than) plausible. Because (1) Defendant Lee knew Plaintiffs, knew their ongoing business, knew that Movement Ink (a corporation that would likely have *no non-economic reason to ship anything*) was identified as the sender, and knew that these packages were just like other commercial packages Movement Ink shipped regularly without incident, yet (2) Lee proceeded to seize and divert the packages with no articulated basis to suspect anyone of criminality, accordingly (3) Plaintiffs have plausibly pleaded that Lee knew that his seizure and diversion of Plaintiffs' packages was at least substantially certain to interfere with Plaintiffs' economic relations (specifically, the economic relations between *listed corporate sender* Movement Ink and the four recipients whose names and addresses were staring Lee in the face—at least before he "overlabeled" all this information in order to ensure that these masks, unlike the other equally anodyne but politically activist packages he processed for Movement Ink before, *see* SAC ¶¶ 29–30, went to the Inspection Service instead of to protestors' mouths and noses).

C. Plaintiffs have plausibly pleaded that one or more Defendants opened and searched at least one of their packages (Counts 1 and 7).

Plaintiffs explain in explicit and unambiguous terms that a plausible explanation for how Defendants knew that their packages contained, in Defendants' words, "BLM MASKS," is that "[o]n information and belief based on Defendants' internal notes describing the events" of this case, one or more Defendants "knew the contents of the packages because [they] opened and searched them." SAC ¶¶ 71, 87; *see also* SAC ¶¶ 54, 55, 61, 66, 76, 77, 85, 88, 90.a (all explaining the facts, contextual bases, and reasonable inferences in these paragraphs and their surrounding ones that support the plausibility of one or more Defendants having opened and searched at least one of Plaintiffs' packages). These many paragraphs of factual allegations are not bare conclusory legal assertions; they are thorough explanations of the reasons *why*, at this pleading stage when Plaintiffs necessarily have imperfect knowledge of what happened behind the scenes, they are drawing the good faith and reasonable inference that a search occurred to satisfy the "low bar of plausible pleading." *Wisk Aero*, 2021 WL 8820180, at *1 (Orrick, J.). Accordingly, a search is plausibly pleaded for purposes of Counts 1 and 7.

It should be "obvious" that the mere existence of "a possible alternative explanation" (i.e., that Defendants unconstitutionally abandoned the masks for 24 hours until their misconduct made national news, *see* arguments regarding Count 4 and detention in part I.D below[4]) "does not destroy the plausibility," *Hough*, 2020 WL 7227198, at *4 (Orrick, J.), that "[g]iven the utter lack of any lawful reason for" any Defendant to seize or detain the packages at any point, at least one Defendant did so because a search revealed the packages' contents and at least one Defendant was retaliating against Plaintiffs' government-protestive speech, *see* SAC ¶¶ 62–89. The most likely Defendants to have done so are Defendant Lee (*see* SAC ¶¶ 63–66, describing the conduct of the person that Plaintiffs now know to be Lee), Defendant Chan (*see* SAC ¶¶ 67–71), or a Doe Defendant whose hands the packages passed through between Lee and Chan (*see* ECF 64-3 at 2, finally un-redacting that one or more unnamed persons at "the CI2 team" received the packages after Lee baselessly diverted them, and that that team kept the packages detained without any explanation).

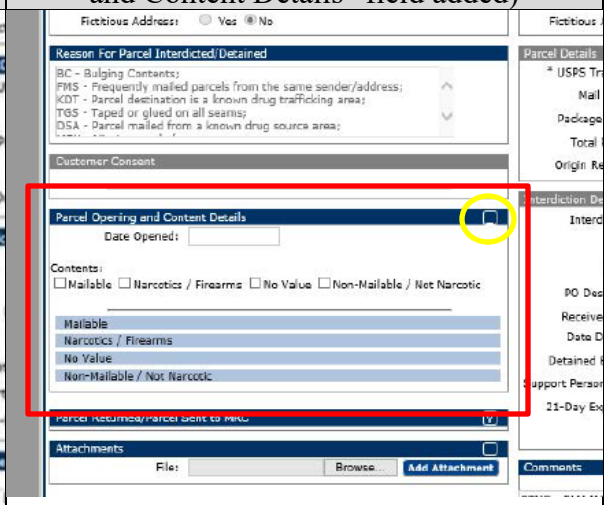
In short, multiple Defendants detained the packages for no lawful reason, and their Parcel Detail Worksheets make clear that they knew the packages contained "BLM MASKS." At this nascent stage, Plaintiffs only need to plead the plausibility that one or more of those people opened and searched the packages—they need not prove it or negate alternative explanations. Plaintiffs have met their forgiving burden. To hold otherwise would eviscerate the plausibility standard and replace it with a proof requirement—before Plaintiffs could force Defendants to answer a single question.

Defendants try to contest the plausibility of Plaintiffs' search claims by attaching to the present motion (for the first time) what they claim are copies of the Parcel Detail Worksheets that Plaintiffs have incorporated into the complaint. *See* ECF 64-3 at 6–9. Defendants point out that their attached worksheets (which contain the "BLM MASKS" notation) have a "Parcel Opening and Content Details" field in which the line for "Date Opened" is left blank. That, of course, does not actually prove anything; it just creates a fact dispute.

But there is a more fundamental problem: Defendants' attachments are altered documents; they are not the Parcel Detail Worksheets that Plaintiffs incorporated into the complaint. Rather, as

[4] As explained in SAC ¶ 90.a, it is plausible that the packages were searched *and* abandoned.

the complaint makes clear, Plaintiffs' allegations are based on the documents they received through FOIA. SAC ¶¶ 61–62. And *those* worksheets had no "Parcel Opening and Content Details" field. To be clear: That field was not redacted from those original, incorporated worksheets; that field simply *did not exist* in those contemporaneously created versions of the worksheets. In the original worksheets, there was a nondescript *checked box* for "Parcel Disposition," whereas the altered worksheets now contain an *unchecked box* for "Parcel Opening and Content Details." To compare:

Contemporaneous, incorporated Parcel Detail Worksheet (no "Parcel Opening and Content Details" field)	Altered, unincorporated Parcel Detail Worksheet ("Parcel Opening and Content Details" field added)
	

Compare Tsitsuashvili Decl., Ex. A (contemporaneous, incorporated worksheet on the left), *with* Keough Decl., Ex. B (ECF 64-3) (altered, unincorporated worksheet on the right).

As these stark differences make clear, Defendants are seeking to sow confusion and improperly resolve fact disputes by attaching unincorporated, altered documents. This gambit—which asks the Court to resolve a crucial disputed fact in Defendants' favor at the pleading stage—must be rejected as an "unscrupulous use of extrinsic documents to resolve competing theories against the complaint"; it "risks premature dismissals of plausible claims that may turn out to be valid after discovery." *Khoja v. Orexigen Therapeutics, Inc.*, 899 F.3d 988, 998–99 (9th Cir. 2018).

At the Ninth Circuit's direction, this Court just last month rejected such a gambit as an improper attempt "to insert [a defendant's] 'own version of events into the complaint,' which is

impermissible." *Weston v. DocuSign, Inc.*, 2023 WL 3000583, at *11 (N.D. Cal. Apr. 18, 2023) (Orrick, J.) (quoting *Khoja*, 899 F.3d at 1002). The Court should do the same here. Indeed, even if Defendants' altered worksheets are deemed incorporated (which they should not be, because the complaint makes clear that it incorporates only the original FOIA versions *that had no "Parcel Opening and Content Details" field*), it remains "improper to assume the truth of [Defendants'] incorporated document if such assumptions only serve to dispute facts stated in a well-pleaded complaint." *Id.* at *10 (quoting *Khoja*, 899 F.3d at 1003). That is especially true where there are two competing versions of what the Government has purported to be the same internal agency worksheet. This dispute cannot be resolved at this stage, and certainly not in Defendants' favor.

The Court should "decline[] to consider [Defendants'] extraneous materials outside the pleadings," and should hold that Plaintiffs have "plead[ed] sufficient factual content that allows the Court to draw the reasonable inference that [at least one Defendant] is liable for the misconduct alleged. Subsequent fact discovery will reveal whether [the] claims . . . will pass muster, at which point these arguments may be revisited." *Shreves v. Frontier Rail Corp.*, 2019 WL 7833139, at *2 (E.D. Wash. June 12, 2019); *accord Hough*, 2020 WL 7227198, at *4 (Orrick, J.) (merely because Defendants "may ultimately prevail on [a contested] issue on summary judgment or at trial" does not mean dismissal is appropriate). At the very least, as explained more fully below, these circumstances warrant limited jurisdictional or merits discovery to get to the bottom of this crucial fact dispute, which the Court has already recognized may be a deciding factor in the scope of the Court's jurisdiction under the FTCA and Plaintiffs' ability to get their day in court. Indeed, the "sheer fact that the parties dispute" this crucial fact "is an indication that discovery is necessary." *Shreves*, 2019 WL 7833139, at *2 n.2.

D. Plaintiffs have plausibly pleaded that multiple Defendants unconstitutionally seized and detained their packages (Count 4).

Whether Plaintiffs have plausibly pleaded clearly established Fourth Amendment violations arising from the seizures and detentions of their packages for purposes of Count 4 is the easiest question before the Court. Defendants' own notes explain that no one ever claimed anything approaching reasonable suspicion to seize or detain Plaintiffs' packages, and Defendants cannot

hide behind qualified immunity for their egregious misconduct.

The complaint plausibly pleads that Defendants seized the packages without reasonable suspicion. "Postal authorities may seize and detain packages if they have a reasonable and articulable suspicion of criminal activity." *United States v. Aldaz*, 921 F.2d 227, 229 (9th Cir. 1990). The "reasonable and articulable" standard is not, as Defendants apparently understand it, meaningless. It is a fact intensive, case by case inquiry based on the "totality of the circumstances—the whole picture." *United States v. Sokolow*, 490 U.S. 1, 8 (1989).

And it is clearly established that that picture must be one of criminality—not mere unusualness. *Id.* at 8–10. Accordingly, the seizing officials must not only show their work, but also justify it; they "must be able to articulate something more than an inchoate and unparticularized suspicion or hunch." *Id.* at 7 (cleaned up). They must show "some minimal level of objective justification." *Id.* That means officials may not proceed blindly; any reliance on a purported mistake of fact must be justified. *United States v. Miguel*, 368 F.3d 1150, 1154 (9th Cir. 2004), *overruled on other grounds*. "Not all errors in perception or judgment, however, are reasonable. . . . [W]e ask whether a reasonable officer would have or should have accurately perceived that fact." *Torres v. City of Madera*, 648 F.3d 1119, 1124 (9th Cir. 2011) (cleaned up). And the inquiry is based on "the information available to" the seizing official. *Aldaz*, 921 F.2d at 229. So a "post hoc rationale" may not backfill a narrative of insufficient facts or unverified hunches, or replace the actual facts relied on at the time of seizure. *United States v. Brown*, 925 F.3d 1150, 1154–55 (9th Cir. 2019); *United States v. Taylor*, 2022 WL 5125182, at *8 (N.D. Cal. Oct. 4, 2022).

Under these clearly established standards, the seizures of Plaintiffs' packages by Defendant Lee, by the CI2 team Doe Defendants,[5] and by Defendant Chan were obviously unconstitutional.

First, Defendant Lee seized, "overlabeled," and diverted the packages with *no* reason or

[5] Because a clear picture of what happened did not emerge until the Government finally unredacted Defendant Hodges's narrative in an attachment to its present motion, the Doe Defendants described in the SAC as having conducted the initial seizure of the packages (SAC ¶¶ 63–66) were actually Defendant Lee. Plaintiffs only learned of the "CI2 team" and its role in the narrative from Defendants' newly unredacted attachments; those team members remain unnamed, so they are the ones now described as the Doe Defendants in this brief. As discussed herein, they were the intermediate seizers and searchers of the packages between Defendant Lee and Defendant Chan.

explanation given. SAC ¶¶ 63–65. That was the first Fourth Amendment violation. The only post hoc explanation he gave for doing so (now suddenly unredacted) alters nothing; it actually confirms the unconstitutionality of Lee's conduct. According to Defendant Hodges, Lee said—with not a single fact in support of this purported hunch—that Lee "recognized the sender as a mailer who had mailed multiple suspicious parcels in the past." ECF 64-3 at 3. Not only does this baseless, conclusory assertion of unexplained suspicion (about unidentified past packages) come nowhere close to the Fourth Amendment's articulable, objective justification standard; it also likely misled Hodges into believing that past Movement Ink packages faced criminal or other scrutiny, when in fact they were all mailed and delivered without incident—including by Lee himself. *See* SAC ¶¶ 29–31, 39. Given the facts available at this stage, Defendant Lee (who, recall, knew Plaintiffs and the nature of their lawful politically activist business well) cannot hide behind qualified immunity. Every reasonable official knows that a seizure conducted for no reason is unreasonable. And, as discussed above, Lee's knowledge and conduct plausibly suggest that his seizure and detention of the packages was not just baseless, but intended to be retaliatory for speech and disruptive of Mr. Quiñonez's and Movement Ink's economic relations. SAC ¶ 65; *see* part I.B above.

Second, as finally revealed by Defendants' now-unredacted documents, Doe Defendants from the "CI2 team" kept the packages seized and diverted them further to Defendant Chan *with no reason or explanation given anywhere for why they did so*. ECF 64-3 at 2. These Doe Defendants also cannot claim the cover of immunity because, again, every reasonable official knows that a seizure conducted for no reason is unreasonable. Given the utter lack of any lawful basis for their conduct, it is plausible that the CI2 team was not just acting baselessly, but also continuing Defendant Lee's politically retaliatory and economically disruptive conduct. *See* SAC ¶ 89.

Third, the only reasons Defendant Chan (who received no reason from Lee or the CI2 team as to why the packages were diverted to her, and apparently did not care to inquire) gave for keeping the packages seized were: they were "four big boxes" with "green handwriting" that were "overlabeled with DHQ's address" and may have been "sent from Eureka." SAC ¶ 67. For starters, none of Defendants' cited authority, *see* ECF 65 at 12–14, suggests that those anodyne

characteristics are sufficient to clear the reasonable suspicion threshold. In all of those cases, such common characteristics were *in combination with* a tip or an individualized, articulable basis to suspect that the particular sender or recipient of the packages was engaged in criminal behavior (which Defendants' own newly revealed records show was not true of Mr. Quiñonez, Movement Ink, or the packages' recipients). The Supreme Court clearly established the need for such individualized corroboration of potentially unusual characteristics in *United States v. Van Leeuwen*, 397 U.S. 249 (1970). The Court permitted the seizure and temporary detention of postal packages in that case based not on a hunch that they were "suspicious," but a bevy of additional facts making that suspicion individualized and articulable. *Id.* at 250–53; *see id.* at 251 ("It has long been held that first-class mail such as letters and sealed packages subject to letter postage . . . is free from inspection by postal authorities, except in the manner provided by the Fourth Amendment.") (citing *Ex parte Jackson*, 96 U.S. 727, 733 (1878)).

Neither Defendant Chan nor the seizers before her had such articulable suspicion. Her out-of-the-blue hunch that the packages may have come from Eureka is the only one that even purports to show "some minimal level of objective justification." *Sokolow*, 490 U.S. at 7. But it remained a baseless and inchoate hunch or an unreasonable mistake of fact, because even a cursory attempt at verification would have immediately dispelled it. That is, she "*should* have accurately perceived that" her hunch was wrong. *Torres*, 648 F.3d at 1124. Instead, she chose to proceed blindly. Just a glance at the packages' labels or system profiles would have confirmed the packages' actual origin. Indeed, it took Defendant Hodges less than ten minutes to confirm, in his words, that "it was *not possible* the parcels were sent from Eureka." SAC ¶ 74 (emphasis added). Moreover, Plaintiffs' "regular practice was to write on each box that it came from Movement Ink and what it contained, such as 'masks.'" SAC ¶ 33; *see also* SAC ¶ 37 ("As usual, all of the political mask shipments were marked or identified with Movement Ink as the sender, and likely had their contents handwritten on the side, in accordance with René's and Movement Ink's regular practice.").

In short, Defendant Chan was the only one who gave any actual reason for the packages' seizure, but because her reasons (1) were individually and collectively anodyne and (2) could and

should have been immediately dispelled anyway, Defendant Chan's decision to keep the packages detained was, at best, obviously unreasonable. At worst (and plausibly under these circumstances): "Given the utter lack of any lawful reason for Defendant Chan to detain the packages, on information and belief based in part on her decision to detain them notwithstanding the obvious fact they did not come from Eureka, Defendant Chan was continuing [Defendant Lee's and/or the CI2 team Doe Defendants'] intentional disruption of the packages' delivery and of [Mr. Quiñonez's] and Movement Ink's ongoing economic relations, because of the masks' political messages." SAC ¶ 69; SAC ¶ 70 ("Defendant Chan's detention of the packages was, like [Defendant Lee's and/or the CI2 team Doe Defendants'] seizure of the packages, retaliatory, disruptive, and pretextual because a cursory glance would have dispelled the possibility that the packages came from Eureka and should have resulted in the packages' immediate release. Instead, Defendant Chan kept them detained."); *see* part I.B above, discussing the plausibility of Plaintiffs' First Amendment claims.

Defendants are not saved by Defendant Hodges's attempt to backfill the non-reasons, anodyne characteristics, and inchoate hunch that formed the basis for the packages' unjustifiable seizures by Defendant Lee, the CI2 team Doe Defendants, and Defendant Chan. Defendant Hodges contends in the Parcel Detail Worksheets that the packages were suspicious because of (1) "bulging contents," (2) "frequently mailed parcels from the same sender/address," (3) "parcel destination is a known drug trafficking area," (4) "taped or glued on all seams," and (5) "parcel mailed from a known drug source area." SAC ¶ 78. First—as discussed at length above—those are not the facts actually relied on for the packages' seizure by any one of Lee, the CI2 team, or Chan, so they are irrelevant to the reasonable suspicion analysis. *Aldaz*, 921 F.2d at 229; *Brown*, 925 F.3d at 1154–55; *Taylor*, 2022 WL 5125182, at *8.

Second, Hodges's manufactured, post hoc justifications are not only just as anodyne as Chan's, but they are *self-contradictory*. *Compare* SAC ¶ 67 (packages may have come from unknown shipper in Eureka), *with* SAC ¶ 78 (packages came from known frequent shipper). And with Defendant Lee's admission that he knew who the packages came from, their removal from the mail stream based on the identity of those senders (whom neither Lee nor anyone else ever had any

articulated reason to suspect of anything unlawful) is even more unreasonable and unjustifiable. It cannot be an "objective justification." *Sokolow*, 490 U.S. at 7. If anything, Movement Ink's "frequent" mailings from the same address and the same post office *without ever having done anything unlawful* indicated a ho-hum screen-printing business, *not* a basis for reasonable suspicion.

Finally, why Mr. Quiñonez's compliance with USPS's own publicly posted packaging guidelines (regarding sealing packages on all edges) could or should form a basis for reasonable suspicion is anyone's guess, and Defendant Hodges made no attempt to reconcile this absurdity in his off-the-cuff attempt to manufacture reasonable suspicion after the fact where clearly none ever existed. *See* SAC ¶ 84 ("One of Defendant Hodges's post hoc assertions purporting to justify the packages' seizures, detentions, and searches—i.e., that the packages were 'taped or glued on all seams'—deems it suspicious if a shipper complies with the Postal Service's *own public guidance*, which advises: 'If you are mailing a very heavy or very dense item, start with a sturdy box, pack the contents securely with a strong material for bracing to prevent shifting, and *tape all the edges with reinforced tape*' (emphasis added).").

For these reasons, when assessing either the actual (non)reasons given for the packages' seizures or the post hoc justifications, Plaintiffs' allegations plausibly plead that Defendants took the packages out of the mail stream based at best on anodyne characteristics and inchoate hunches and at worst on retaliation and pretext, not—as the Fourth Amendment requires—some combination of suspicious characteristics and knowledge about particular unlawful acts of sender or recipient.

The complaint plausibly pleads that Defendants kept the packages detained for over 24 hours without any investigation or justification for their delay, which is a separate Fourth Amendment violation. Even where reasonable suspicion exists to justify an investigatory package seizure, it is clearly established that the subsequent detention may not exceed the time *actually and reasonably necessary* to conduct the investigation and confirm or dispel suspicion. *United States v. Dass*, 849 F.2d 414, 414–16 (9th Cir. 1988). That means officials must show they "acted diligently *and offered a reasonable explanation for any delay*." *United States v. Ivers*, 430 F. App'x 573, 575 (9th Cir. 2011) (emphasis added). Indeed, officials have an obligation to "minimize[] the intrusion

on . . . Fourth Amendment interests." *United States v. Place*, 462 U.S. 696, 709 (1983). And the investigation may not be conducted at a "leisurely pace." *United States v. Gill*, 280 F.3d 923, 929 (9th Cir. 2022). So it is clearly unreasonable for officials to seize packages and then proceed to do *nothing* to verify or justify the need for their detention for over 24 hours. SAC ¶¶ 73–75, 90; *see Place*, 462 U.S. at 699, 709–10 (detention as short as 90 minutes violates the Fourth Amendment if the record contains no specific, articulated reasons actually justifying the duration of the detention).

As the complaint explains, after seizing the packages, Defendants admit that they did indeed do nothing to investigate or verify the propriety of detaining them. SAC ¶ 90. That is not "act[ing] diligently." *Ivers*, 430 F. App'x at 575. Defendants' own notes contain *no* "explanation for any delay," let alone a "reasonable explanation." *Id.* That ends the inquiry. Indeed, Defendants' notes make clear that they left the packages to languish indefinitely until Plaintiffs' story made national news. SAC ¶ 60 (quoting postal service letter making clear that the packages were ignored until the news story broke). In other words, Defendants certainly did not "minimize[] the intrusion on [Plaintiffs'] Fourth Amendment interests." *Place*, 462 U.S. at 709. If an unexplained detention for 90 minutes is unreasonable, *id.* at 708–10, so is Defendants' detention of Plaintiffs' packages for over 24 hours without even the pretense of an investigation or effort to explain their delay. So, even if the packages' initial seizure was reasonable (which it was not), their subsequent 24-hour-plus detention without any action or explanation for delay was clearly unreasonable. In short, the clearly established seizure and detention violations plausibly pleaded in Count 4 abound.

In the face of all that, Defendants ask the Court to hold that incanting the words "drug package profile" in legal briefing can make Plaintiffs' well-pleaded Fourth Amendment claims disappear. No case permits this sort of magic-words approach to the Fourth Amendment. A "court sitting to determine the existence of reasonable suspicion must require the agent to articulate the factors leading to [a] conclusion" that specific facts fit a drug "profile." *Sokolow*, 490 U.S. at 10. Defendants' own notes make clear they have not done so. Plaintiffs' detailed allegations regarding Defendants' own explanations for their conduct plausibly plead clearly established Fourth Amendment violations at the time of the packages' initial seizure, their subsequent seizures, and

their subsequent detentions. Defendants can try to come forward with actual explanations in the course of discovery, and they can try to convince the Court of the reasonableness of their conduct, or of their entitlement to qualified immunity, again at summary judgment. For now, Count 4's Fourth Amendment claims for unlawful seizures and detentions are plausible and must proceed.

E. If the Court remains unsure whether at least one of Plaintiffs' claims is plausibly pleaded and cognizable, it should grant either one final leave to amend or limited discovery.

Plaintiffs acknowledge that because of the Government's gamesmanship in selectively unredacting piecemeal portions of their records over the last two years—including eleventh hour revelations about who did what and when in attachments to this round of briefing—the allegations of the SAC do not conform precisely with Plaintiffs' descriptions of events in this brief. Specifically, it turns out that the individual who conducted the initial seizure of Plaintiffs' packages was Defendant Lee, while the SAC identifies them as Doe Defendants. *See* SAC ¶¶ 63–64. And, as detailed above, the Doe Defendants whose identities Plaintiffs still do not know are members of the "CI2 team," a phrase just unredacted for the first time. *See* ECF 64-3 at 2. Plaintiffs posit that these minor discrepancies are accounted for, that their complaint is consistent with (indeed, validated by) the newly revealed facts, that their claims are plausibly pleaded and should be allowed to proceed, and that they can simply file an amended complaint at the start of discovery that conforms with the facts as they are now known. But if the Court finds that the confusion introduced by Defendants' piecemeal and last-minute unredactions raises doubt about the sufficiency or plausibility of a claim, especially if that claim is the only one the Court thinks might go forward, Plaintiffs should be granted one last leave to replead and clear up that confusion or deficiency. *See* Fed. R. Civ. P. 15(a)(2) ("The Court should freely give leave [to amend] when justice so requires.").

Alternatively, if the Court finds that the truth or falsity of a few discrete facts will help it ascertain the viability or the cognizability of any outstanding claim, it should order limited jurisdictional and/or merits discovery, as this Court has previously done where a defendant's conduct caused confusion as to the viability of a plaintiff's claim. *See Larson v. Trans Union, LLC*, 2013 WL 5665629, at *3 (N.D. Cal. Oct. 15, 2013) (Orrick, J.) ("Since at least some of Count I's

deficiency is due to the ambiguity of Trans Union's OFAC language in the disclosure to plaintiff, . . . the Court defines limited discovery that Larson may take before amending his Complaint.").

II. The FTCA's discretionary function exception does not apply to the obviously and egregiously tortious and unconstitutional misconduct that Plaintiffs have plausibly pleaded in Counts 1 and 3.

The FTCA's discretionary function exception does not bar Count 1 or Count 3. The Ninth Circuit has long made clear that § 2680(a) (which excludes claims "based upon the exercise or performance or the failure to exercise or perform a discretionary function") is not a license to lawlessness. "Even if the [postal officials'] actions involved elements of discretion, [they] do not have discretion to violate the Constitution." *Nieves Martinez v. United States*, 997 F.3d 867, 877 (9th Cir. 2021) (citing *Galvin v. Hay*, 374 F.3d 739, 758 (9th Cir. 2004)). "[G]overnmental conduct cannot be discretionary if it violates a legal mandate," and "[t]he Constitution can limit the discretion of federal officials such that the FTCA's discretionary function exception will not apply." *Galvin*, 374 F.3d at 758 (quoting *Nurse v. United States*, 226 F.3d 996, 1002 & n.2 (9th Cir. 2000)). Therefore, even if, as the Court previously held, investigations into postal packages involve some judgement or choice, the question remains "whether that judgment is of the kind that the discretionary function exception was designed to shield." *Nieves Martinez*, 997 F.3d at 876. The conduct plausibly pleaded in Counts 1 and 3 fails that standard.

As to Count 1, focusing only on the allegations that one or more Defendants searched at least one of Plaintiffs' packages[6]: Such warrantless searches are exactly the kind of unconstitutional conduct postal officials have known for over 150 years they do not have the discretion to engage in. *Van Leeuwen*, 397 U.S. at 251 ("It has long been held that first-class mail such as letters and sealed packages subject to letter postage . . . is free from inspection by postal authorities, except in the manner provided by the Fourth Amendment.") (citing *Ex parte Jackson*, 96 U.S. at 733).

As to Count 3: As Plaintiffs have explained at length above, Defendant Lee was the one who initially seized and diverted Plaintiffs' packages, and he is also the official who regularly interacted

[6] Plaintiffs skip the questions of seizure and detention because the Court held that the claims in Count 1 arising from those acts are barred by the detention of goods exception. Plaintiffs preserve for appeal the applicability of the detention of goods exception.

with Plaintiffs and processed their commercial shipments, which he knew were political in nature. Under these circumstances, Plaintiffs have plausibly alleged that Lee's seizure and diversion of their packages was not in the performance of a valid investigation (*indeed, no reason was given to think that Lee investigated anything*), but rather for politically retaliatory and economically disruptive reasons. *See* part I.B above. Under our Constitution and laws, such abuse is not in the discretionary purview of any public official.

Plaintiffs reiterate: If Count 3 is the only claim the Court thinks is plausibly pleaded (given Defendant Lee's close familiarity with Plaintiffs and their shipping business), but the Court believes it needs factual development to determine the applicability of the discretionary function exception, the Court should order limited jurisdictional discovery. *See* ECF 64 at 6 (the Government explaining that the waiver or nonwaiver of sovereign immunity under the FTCA is a jurisdictional question); *Hudnall v. Payne*, 2014 WL 524079, at *5 (N.D. Cal. Feb. 6, 2014) (Orrick, J.) ("Jurisdictional discovery 'may appropriately be granted where pertinent facts bearing on the question of jurisdiction are controverted or where a more satisfactory showing of the facts is necessary.'") (citation omitted).

III. *Bivens* liability is not foreclosed for the obvious, egregious, and rare Fourth Amendment seizure, detention, and search violations that Plaintiffs have plausibly pleaded in Counts 4 and 7.

Defendants wrongly argue that Movement Ink cannot bring Bivens claims simply because it is a corporation. Their cited authority does not stand for that proposition. *See* ECF 65 at 11–12 (citing *Life Savers Concepts Ass'n of Cal. v. Wynar*, 387 F. Supp. 3d 989, 999 (N.D. Cal. 2019)). *Life Savers* stressed that it was declining to allow a corporation "to bring *Bivens* suits *on behalf of employees*" because the employees could file their own suits. 387 F. Supp. 3d at 999 (emphasis added). Here, by contrast, Movement Ink's claims arise from its *own* Fourth Amendment rights in personal property and free speech (which no one disputes it has). There is no reason Movement Ink's identity determines whether it can vindicate those rights. *See G.M. Leasing Corp. v. United States*, 429 U.S. 338, 353–54 (1977) (collecting cases establishing corporations' Fourth Amendment rights and discussing contexts where they may be curtailed, none of which apply here); *Citizens United v. FEC*, 558 U.S. 310, 342–43 (2010) (collecting cases establishing corporations' First

Amendment rights and discussing contexts where they may be curtailed, none of which apply here).

To the contrary: *Bivens* is concerned with the identity of the perpetrator, not the victim; its "purpose . . . is to deter the *officer*." *Ziglar v. Abbasi*, 582 U.S. 120, 140–41 (2017) (citation omitted; emphasis in original). Accordingly, Movement Ink's corporate status is a meaningless basis on which to conduct the *Bivens* analysis, at least with respect to the types of claims at issue here: warrantless, offsite seizure, detention, and search of a corporation's personal property, brought on the corporation's own behalf. *Life Savers* is inapposite, as are other cases denying corporations' *Bivens* claims. *Cf. Annappareddy v. Pascale*, 996 F.3d 120 (4th Cir. 2021) (corporation's *Bivens* claims arising from *warrant-based search* of its *real property* not cognizable). And at least one court of appeals has recognized the propriety of Fourth Amendment *Bivens* claims brought by a corporate plaintiff. *See Big Cats of Serenity Springs, Inc. v. Rhodes*, 843 F.3d 853 (10th Cir. 2016).

Plaintiffs' garden-variety Fourth Amendment claims do not present a new Bivens context. The Supreme Court's recent *Bivens* decisions are "not intended to cast doubt on the continued force, or even the necessity, of *Bivens* in the search-and-seizure context in which it arose. *Bivens* does vindicate the Constitution by allowing some redress for injuries, and it provides instruction and guidance to federal law enforcement officers going forward. The settled law of *Bivens* in this common and recurrent sphere of law enforcement, and the undoubted reliance upon it as a fixed principle in the law, are powerful reasons to retain it in that sphere." *Ziglar*, 582 U.S. at 134. If those principles mean anything, it is that everyday drug-law enforcement cases akin to *Bivens* itself—like this one—do not present a new context. Indeed, the Supreme Court's and the Ninth Circuit's recent decisions finding new contexts did not arise in the "common and recurrent sphere of [drug] law enforcement," so they do not support a new context finding as to Plaintiffs' everyday Fourth Amendment claims. *Cf. Ziglar*, 582 U.S. 120 (9/11 response); *Hernández v. Mesa*, 140 S. Ct. 735 (2020) (cross-border shooting implicating international relations); *Egbert v. Boule*, 142 S. Ct. 1793 (2022) (border immigration enforcement); *Mejia v. Miller*, 53 F.4th 501 (9th Cir. 2022) (vehicle chase); *Pettibone v. Russell*, 59 F.4th 449 (9th Cir. 2023) (mass protests). So the Court need not conduct a special factors analysis; Plaintiffs' Fourth Amendment claims should proceed.

Even if Plaintiffs' Fourth Amendment claims present a new context, Defendants' proffered "special factors" do not justify foreclosing a Bivens remedy—which Congress has approved in these circumstances. First, Defendants' invocation of theoretical "system wide consequences" could be levied against any Fourth Amendment *Bivens* claim. *See* ECF 65 at 9. But even the *Egbert* Court recognized that courts may continue to extend *Bivens* remedies for Fourth Amendment violations in the "common and recurrent sphere of law enforcement." 142 S. Ct. at 1805 (quoting *Ziglar*, 582 U.S. at 134). Because, like the officials in *Bivens* itself, Defendants here invoke their authority to enforce drug laws (despite no Defendant ever articulating a reason to think that is what they were actually doing), the violation of Plaintiffs' Fourth Amendment rights in the course of that endeavor present "garden-variety" abuse that the federal judiciary has adjudicated for more than 50 years under the *Bivens* regime (and for more than 150 years generally), including *Bivens* claims brought by corporate plaintiffs. *Big Cats*, 843 F.3d at 864 (Fourth Amendment *Bivens* claims by corporate plaintiff; *see Ex parte Jackson*, 96 U.S. 727 (Fourth Amendment protection against unreasonable postal inspections); *accord Ioane v. Hodges*, 939 F.3d 945 (9th Cir. 2018) (Fourth Amendment claims against IRS agents did not even present new *Bivens* context).

Crucially, the types of claims Plaintiffs bring here—in particular their search claims under Count 7—do not actually threaten systemwide consequences, because misconduct so egregious is rare. As the Ninth Circuit has explained, in circumstances of a rare type of misconduct, recognizing a *Bivens* claim is proper. *Lanuza v. Love*, 899 F.3d 1019, 1033 (9th Cir. 2018). In the absence of the sort of politically and economically retaliatory targeting of particular individuals at issue here (which we have no reason to think is common), postal officials are not regularly seizing or detaining mail for no articulable reason, and certainly not opening and searching mail without a warrant. So "[r]ecognizing a *Bivens* action here will produce widespread litigation only if [postal officials] routinely" conduct either retaliatory and pretextual seizures or warrantless searches, "which no party argues is the case. And if this problem is indeed widespread, it demonstrates a dire need for deterrence, validating *Bivens*'s purpose." *Id.*

It is against these background principles that Congress authorized, through the Westfall Act,

a "civil action against an employee of the Government . . . for a violation of the Constitution." 28 U.S.C. § 2679(b)(2)(A). Moreover, it is "'crystal clear' that Congress intended the FTCA and *Bivens* to serve as 'parallel' and 'complementary' sources of liability." *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 68 (2001) (quoting *Carlson v. Green*, 446 U.S. 14, 19–20 (1980)). Therefore, Congress's decision to create an express but narrow "postal exception" to the FTCA, *see* 28 U.S.C. § 2680(b)—and take no other action in that sphere except to generally authorize civil actions against federal officials under the Westfall Act—is best understood as leaving to the *Bivens* regime the vindication of constitutional rights against individual postal officials. *See* Carlos Manual Vázquez & Stephen I. Vladeck, *State Law, the Westfall Act, and the Nature of the Bivens Question*, 161 U. Pa. L. Rev. 509, 571 & n.327 (2013) (House Report "makes clear that the [Westfall] Act 'would not affect the ability of victims of constitutional torts to seek personal redress from Federal employees who allegedly violate their constitutional rights'") (citation omitted).

In short, Congress has "weigh[ed] . . . the costs and benefits," *see* ECF 65 at 9, and created a system in which (1) the Government assumes liability for a subset of torts committed by postal officials while (2) leaving individual *Bivens* suits to vindicate postal officials' constitutional violations. Contrary to Defendants' arguments, Congress did not create a system in which the only recourse for individuals harmed by federal postal officials is a black box OIG complaint system that (1) makes clear that it "generally does not handle individual issues, except for whistleblower reprisal complaints and related executive investigations," (2) has no authority to provide any monetary compensation, and (3) *expressly disclaims any obligation to even investigate any given complaint*. SAC ¶ 96. Defendants are asking the Court to hold that an alternative remedy exists for Defendants' destruction of Plaintiffs' business and reputation in the form of a hotline that amounts to little more than a sign that reads "the garbage bin is the complaint box."

IV. The FTCA and the Westfall Act are unconstitutional as applied if Plaintiffs' damages claims arising from the misconduct of federal officials in the scope of their employment are not cognizable in any court under any source of law.

Plaintiffs acknowledge that the Court rejected their argument that if no claim is cognizable in any court under any source of law for a plausibly pleaded tort or constitutional violation, then the

FTCA and the Westfall Act are unconstitutional as applied. *See* ECF 62 at 26. For the reasons discussed at length above, Plaintiffs think (and this Court expressed its openness to the possibility) that at least one of Counts 1, 3, 4, and 7 are both plausibly pleaded and cognizable (while other counts, such as Plaintiffs' First Amendment claims, are plausibly pleaded but not currently cognizable). But if Plaintiffs have indeed plausibly pleaded at least one tort or one constitutional violation in the course of their fifteen-count complaint, yet none can be heard, Plaintiffs urge the Court to reconsider its holding that such a scheme comports with the Constitution, for all of the reasons argued at length in Plaintiffs' prior opposition brief and preserved here for reconsideration and appellate review.

Respectfully, the Court seemingly misconstrued the nature of Plaintiffs' argument. The Court held that "there is no indication that Congress intended for every violation of a right to be compensated by money damages." ECF 62 at 26 (quotation marks and citation omitted). But Plaintiffs' contention (and the contention of the many jurists and scholars they rely on) is that the right to be compensated in some judicial forum, whether federal or state, for every violation committed by federal officials in the scope of their employment either under the Constitution or under state tort law is *constitutionally compelled*—meaning Congress need not approve of it and *cannot eviscerate it*. ECF 57 at 27–30; *see generally* Stephen I. Vladeck, *The Disingenuous Demise and Death of Bivens*, 2020 Cato Sup. Ct. Rev. 263 (arguing that congressional and judicial evisceration of all judicial remedies for rights violations by federal officials is unconstitutional, in violation of due process). If such evisceration is what Congress has done under the facts of this case, its acts are unconstitutional as applied.

CONCLUSION

The Court should enter Defendant Fajardo's default, deny the other Defendants' motions to dismiss as to Counts 1, 3, 4, and 7, and order the parties to begin discovery. Alternatively, if the Court holds that no damages remedy is cognizable in either federal or state court (under federal or state law) for the misconduct of federal officials in the scope of their employment under the facts of this case, the Court should hold that the FTCA and the Westfall Act are unconstitutional as applied.

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Respectfully submitted,

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