UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

HOLLIS M. GREENLAW, TODD F. ETTER, CARA D. OBERT, BENJAMIN L. WISSINK, UMT HOLDINGS, L.P., UDF HOLDINGS, L.P., UNITED DEVELOPMENT FUNDING, L.P., UNITED DEVELOPMENT FUNDING III, L.P., UNITED DEVELOPMENT FUNDING IV, UNITED DEVELOPMENT FUNDING INCOME FUND V, UNITED MORTGAGE TRUST, and UNITED DEVELOPMENT FUNDING LAND OPPORTUNITY FUND, L.P., Plaintiffs, v. DAVID KLIMEK JAMES NICHOLAS BUNCH, CHRISTINE L. EDSON, a/k/a Christy Edson and DOES 1-10, Defendants.	Case No. 4:20-cv-00311-SDJ

PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO DISMISS COMPLAINT

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I. INTRODUCTION

The issue before the Court is whether low level law enforcement officers are free to intentionally violate Plaintiffs' Fourth and Fifth Amendment rights with immunity from suit even where controlling judicial guidance confirms that Defendants' actions are illegal and Plaintiffs have no other available remedy to adequately redress their injuries and deter Defendants' illegal conduct. In Defendants' view, the Judiciary cannot stop them from intentionally presenting false evidence to courts and trampling the Due Process rights of law abiding citizens. To Defendants, "judicial restraint" means complete abdication of the Judiciary's power to protect the integrity of the justice system. Justice Frankfurter, one of the Supreme Court's foremost champions of judicial restraint, expressed the Supreme Court's longstanding position when he rejected the very argument that Defendants advance:

> The federal courts have an obligation to set their face against enforcement of the law by lawless means or means that violate the rationally vindicated standards of justice, and to refuse to sustain such methods by effectuating them.

Sherman v. United States, 356 U.S. 369, 380 (1958) (Frankfurter, J., concurring).

This case cries out for transparency, accountability, and enforcement of the rule of law. Defendants demand, instead, that this Court bury the facts, allow Defendants to evade accountability, and refuse to apply to Defendants the same laws that Defendants swore an oath to enforce. Plaintiffs' complaint illustrates the danger inherent in adopting Defendants' distorted view of checks and balances—a successful billion dollar business run by honorable citizens gets annihilated by a few rogue low level officials who chose to aid and abet a short seller execute an illegal short and distort fraud scheme, netting the short seller $60 million in illegal profits while destroying Plaintiffs' business and reputations. Our Supreme Court has consistently rejected Defendants' argument. Plaintiffs respectfully request that this Court do the same.

II. RESPONSE TO DEFENDANTS' STATEMENT OF ISSUES

1. Low level law enforcement officers like Defendants are not free to intentionally violate an individual's Fourth and Fifth Amendment rights and remain immune from suit where existing judicial guidance confirms that Defendants' actions are illegal and Plaintiffs have no other remedy available that would adequately redress their injuries and deter the Defendants illegal conduct. *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 US. 388, 395–96 (1971); *Carlson v. Green*, 446 U.S. 14, 18–21 (1980).

2. Defendants fail to meet their burden to establish that Plaintiffs claims are time barred because they cite the wrong legal standard and Plaintiffs satisfy the correct standard of review. The accrual rule provides that the two-year limitations period on Plaintiffs' *Bivens* claims did not begin to run until Plaintiffs knew (1) the existence of the injury; and (2) the connection between the injury and Defendants' actions. *Blimline v. Thirty Unknown Employees of the Securities and Exchange Commission*, 757 F. App'x 299, 303 (5th Cir. 2018). Plaintiffs' Complaint contains detailed factual allegations demonstrating that Plaintiffs filed suit within two years of learning about the connection between their injuries and Defendants' illegal actions also establishes that the equitable tolling doctrine applies. Compl. ¶¶ 71–76.

3. Defendants do not qualify for qualified immunity because Plaintiffs have alleged that Defendants intentionally violated Plaintiffs' Fourth and Fifth Amendment rights in a manner that the Supreme Court and Fifth Circuit recognize as illegal and unreasonable. Plaintiffs allege that Defendants violated their Fourth Amendment rights by presenting material false statements and omitting material exculpatory information from a search warrant affidavit to create the illusion of probable cause where probable cause otherwise did not exist. Compl. ¶¶ 5–7, 165–87; *Hale v. Fish*, 899 F.2d 390, 402 (5th Cir. 1990); *Winfrey v. Rogers*, 901 F.3d 483, 493–96 (5th Cir. 2018). Plaintiffs also allege that Defendants violated their Fifth Amendment due process

right to liberty and property by intentionally interfering with Plaintiffs' right to pursue their chosen profession by destroying Plaintiffs' business and reputation—including by participating in illegal short and distort and insider trading fraud schemes with a short seller who made $60 million in illegal profits. Compl. ¶¶ 116–64, 220–43; *United States v. Robel*, 389 U.S. 258, 265 n.11 (1967); *United States v. Briggs,* 514 F.2d 794, 798–99 (5th Cir. 1975)*; Marrero v. City of Hialeah*, 625 F.2d 499, 519–20 (5th Cir. 1980).

III. STATEMENT OF FACTS

This case is about Defendants' violation of Plaintiffs' Fourth and Fifth Amendment rights through Defendants participation in illegal fraud schemes spearheaded by a short seller who sought to destroy Plaintiffs legitimate business and ruin the reputations of its executive team.

United Development Funding ("UDF") was founded in 2003 to provide investors with sound investments in residential real estate. Compl. ¶ 27. UDF enjoyed steady growth and provided consistent returns to investors for over a decade while financing hundreds of millions of dollars in successful residential real estate projects for leading developers in Texas and elsewhere. *Id.* The UDF fund at issue here is UDF IV, which was formed in 2008 to make loans for the acquisition and development of real property. *Id.* ¶ 32. By December 2014, UDF IV had originated or purchased 171 loans totaling over $1 billion, 40 of which had been paid in full. *Id.* From 2012 to 2014, UDF IV's assets grew from $336.5 million to $682.2 million and its income grew from $27.6 million to $87.9 million. *Id.* From inception through September 2015, UDF IV distributed $164 million to its investors and repurchased $41 million of its shares. *Id.* In short, Plaintiffs run a real business with real assets that generate significant distributions to their investors. *Id.* ¶¶ 27–43.

In 2015, Defendant Klimek, an FBI agent, and Defendant Bunch, an Assistant U.S. Attorney, began to investigate UDF at the request of infamous short seller, J. Kyle Bass and his

hedge fund, Hayman Capital Management, L.P. ("Bass/Hayman"), who provided the government false and misleading information about UDF to facilitate the government's investigation. *Id.* ¶¶ 86–101, 115. Defendants relied on that false information and helped Bass/Hayman execute their illegal fraud schemes. *Id.* ¶¶ 116–118, 126–45, 154–99. An objective review of Bass/Hayman's claims would have exposed that information as false. *Id.* ¶¶ 146–52, 190–93, 216–19. Neutral parties quickly recognized that Bass/Hayman was running an illegal short and distort fraud scheme. *Id.* ¶¶ 146–52. But not Defendants—they continued to aid and abet Bass/Hayman's fraud schemes. *Id.* ¶¶ 116–18, 126–45, 154–99.

In December 2015, Bass/Hayman representatives communicated with Defendants Bunch and Klimek about launching an ***anonymous*** negative media blitz against Plaintiffs where Bass/Hayman would ***anonymously*** post negative accusations about UDF, including falsely stating that UDF operated a "Ponzi scheme" to influence unsuspecting investors who had no idea that the negative information was published by a biased short seller who stood to make millions if UDF IV's stock price crashed. *Id.* ¶¶ 126–45. After previewing the ***anonymous*** article to Defendants Bunch and Klimek, Bass/Hayman went ahead and published the false and misleading negative information under the phony name "Ernest Poole" to deceive UDF IV's unsuspecting investors. *Id.* That day, UDF IV's stock lost over $250 million in shareholder value and Plaintiffs confronted a severe crisis with their customers, lenders, and business partners. *Id.*

It is well known in law enforcement and investing circles that it is illegal for a short seller to ***anonymously*** publish negative information about a stock to tank its share price so the short seller can profit. *Id.* ¶¶ 81–85. No reasonable FBI agent or federal prosecutor would fail to recognize that (a) it is illegal for a short seller to ***anonymously*** publish negative information about a stock they have shorted, and (b) this illegal tactic is a standard strategy by a short seller

executing an illegal short and distort fraud scheme. *Id.* In early 2016, Defendant Edson communicated with Bass/Hayman about another false media attack on UDF. *Id.* ¶¶ 154–64. Defendant Edson knew that Bass/Hayman was shorting UDF IV when she reviewed the negative material before Bass/Hayman published it to the investing public. *Id.* After publication, UDF IV's stock took another hit, losing another $150 million in innocent shareholder value. *Id.*

In February 2016, Defendants Edson and Bunch prepared a search warrant affidavit, built with information that Defendant Klimek obtained from Bass/Hayman in 2015. *Id.* ¶ 165–68. Some of the false information that Defendants Edson and Bunch presented to the Court was plagiarized directly from Bass/Hayman's false and misleading media campaigns against UDF. *Id.* ¶¶ 5, 167–68. Defendants Edson and Bunch also refused to disclose other material exculpatory evidence in their possession that would have demonstrated to the Court that the government lacked probable cause to search UDF's headquarters. *Id.* On February 12, 2016, Defendants Edson and Bunch obtained the warrant but actually waited another six days to execute it. *Id.* ¶¶ 169–76. On February 18, 2016, approximately 100 FBI agents raided UDF's headquarters in Grapevine, Texas as the broadcast media reported the raid over the national airwaves in real time. *Id.* Not surprisingly, UDF IV's share price took another severe hit, costing innocent investors approximately $129 million in share value. *Id.* Plaintiffs also suffered another severe credit crisis with their sources of capital and lost business opportunities due to the damage the unlawful FBI raid imposed on their reputation. *Id.*

Defendants knew that they did not need to collect this information by executing a search warrant. *Id.* ¶¶ 177–87. Plaintiffs had previously produced more than 800,000 documents to the government without incident. *Id.* In addition, Plaintiffs had informed Defendant Bunch that Plaintiffs would voluntarily comply with any additional requests for documents. *Id.* Defendant

Bunch actually sent subpoenas to two other UDF office locations at the same time he obtained the search warrant in February 2012—confirming that Defendants understood they could have simply proceeded by a non-public, less intrusive, subpoena. *Id.* Instead, Defendants sought the search warrant to generate a huge media splash and trigger widespread panic among Plaintiff UDF IV investors thereby crippling UDF, crushing UDF IV's share price, and allowing Bass/Hayman to begin the process of collecting about $60 million on their short position. *Id.*

In their Motion, Defendants suggest, without citing any authority, that Plaintiffs have not identified Defendants' motive. While Plaintiffs have no obligation to plead motive because it is not an element of their claims,[1] Attorney General William Barr recently spoke on this very topic. AG Barr described his grave concerns about line prosecutors who put career advancement ahead of the search for the truth by committing misconduct in high profile matters. AG Barr's experience led him to observe that "[i]ndividual prosecutors can sometimes become headhunters, consumed with taking down their target." He elaborated on his concern:

> When a prosecution becomes '***your*** prosecution'—particularly if the investigation is highly public, or has been acrimonious, or if you are confident early on that the target committed serious crime—there is always a temptation to will a prosecution into existence even when the facts, the law, or the fair handed administration of justice do not support bringing charges.[2]

IV. ARGUMENT

A. Legal Standard for a Motion to Dismiss under Fed. R. Civ. P. 12(b)(6)

"A motion to dismiss under rule 12(b)(6) is [still] viewed with disfavor and is rarely granted." *Harrington v. State Farm Fire & Cas. Co.,* 563 F.3d 141, 147 (5th Cir. 2009). In

[1] *Whirl v. Kern*, 407 F.2d 781, 789 (5th Cir. 1968) (motive not a required element in a § 1983 suit).

[2] Remarks by William P. Barr at Hillsdale College Constitution Day Event, September 16, 2020 available at https://www.justice.gov/opa/speech/remarks-attorney-general-william-p-barr-hillsdale-college-constitution-day-event

deciding whether dismissal is appropriate, this Court must "construe[] the complaint liberally in favor of the plaintiff, and take[] all facts pleaded in the complaint as true." *Id*. "This strict standard of review may be summarized as … whether in the light most favorable to the plaintiff and with every doubt resolved on [its] behalf, the complaint states any valid claim for relief." *Id*.

A claim passes muster at the 12(b)(6) stage if it "may be supported by showing any set of facts consistent with the allegations in the complaint." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 563 (2007). "A claim may not be dismissed based solely on a court's supposition that the pleader is unlikely 'to find evidentiary support for [its] allegations or prove [its] claim to the satisfaction of the factfinder.'" *Id*. at 563 n.8. Rather, a complaint will survive an attack under Rule 12(b)(6) so long as it "raise[s] a right to relief above the speculative level." *Id*. at 555.

B. Analyzing a Motion to Dismiss a *Bivens* Claim

1. The Supreme Court's Holding in *Bivens*

In *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 US. 388, 395–96 (1971), the Supreme Court held that a plaintiff could bring a claim for monetary damages against federal agents who violated the plaintiff's Fourth Amendment right against unreasonable searches and seizures. The Supreme Court emphasized that "where federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the ***necessary*** relief." *Id.* at 392 (emphasis added) (quoting *Bell v. Hood*, 327 U.S. 678, 684 (1946)). As a result, the Supreme Court concluded that Mr. Bivens was "entitled to recover ***money damages*** for ***any injuries*** he has suffered as a result of the agents' violation of the [Fourth] Amendment." *Id.* at 397 (emphases added).

2. The Two-Step Test in *Ziglar v. Abbasi*

This Court should apply the two-step test for recognizing a *Bivens* claim in *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1856–57 (2017). After stating that expanding the *Bivens* remedy is

generally disfavored, the Supreme Court cautioned that its "opinion is 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." *Id*. at 1856. "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." *Id.* at 1857. *Bivens* remedies are often necessary to "deter" federal officials from behavior incompatible with constitutional norms, *id*. at 1860, and provide money damages for "individual instances of ... law enforcement overreach," which are by "their very nature ... difficult to address except by way of damages actions after the fact," *id.* at 1862.

The first of *Abbasi's* two-steps asks whether defendants have demonstrated that the claim "presents a new *Bivens* context" because the claim at issue differs in a meaningful way from previous *Bivens* claims recognized by the Supreme Court. *Abbasi*, 137 S. Ct. at 1859–60. *Abbasi* outlined a robust but non-exhaustive list of "meaningful differences" including: (1) "the rank of the officers involved"; (2) "the constitutional right at issue"; (3) "the generality or specificity of the official action"; (4) "the extent of judicial guidance as to how an officer should respond to the problem or emergency to be confronted"; (5) "the statutory or other legal mandate under which the officer was operating"; (6) "the risk of disruptive intrusion by the Judiciary into the functioning of other branches"; or (7) "the presence of potential special factors that previous cases did not consider." *Id.* at 1860. If the claim does not present a new context, a plaintiff's claim survives.

Only if the case presents a new context, the court proceeds to step two, denying the motion to dismiss if the plaintiff lacks an "***adequate*** alternative remedy" and there are no "special factors" that lead the Court to believe that Congress should be the entity to authorize a suit for money damages. *Ioane v. Hodges*, 939 F.3d 945, 951–52 (9th Cir. 2018) (emphasis added) (citations omitted). While the Supreme Court has yet to define the term "special factors," "the inquiry must

concentrate on whether the Judiciary is well suited, absent congressional action or instruction, to consider and weigh the costs and benefits of allowing a damages action to proceed. *Id*. (quoting *Abbasi*, 137 S. Ct. at 1857–58). Here, Plaintiffs' Fourth Amendment claim does ***not*** present a new context under *Bivens* and survives step two of the inquiry even if it did. Plaintiffs' Fifth Amendment claim arises in a new *Bivens* context, but also easily passes step two.

C. Step One—Plaintiffs' Fourth Amendment Claim Does Not Arise in a New *Bivens* Context

1. Plaintiffs Allege a Fourth Amendment Claim Against Low Level Employees Running a Standard Law Enforcement Operation

Modern *Bivens* jurisprudence permits courts to intervene when low level law enforcement officers present false information to courts in violation of the Fourth Amendment. The Judicial Branch must protect the integrity of the justice system when law enforcement officers present false evidence to Courts. This bedrock legal principle, firmly established in generations of Supreme Court jurisprudence, continues to thrive post-*Abbasi*. As eloquently explained in a recent decision denying the government's motion to dismiss a similar Fourth Amendment *Bivens* claim:

> It is no exaggeration to say that this right [to be free from prosecution based on false evidence]—which stems from the legal system's unflagging obligation to pursue truth and justice—lies near the core of what the Judicial Branch is entrusted with securing.

Powell v. United States, No. 19-CV-11351, 2020 WL 5126392, at *11 (S.D.N.Y. Aug. 31, 2020) (citing *Sherman,* 356 U.S. at 380 (Frankfurter, J., concurring)).

In *Jacobs v. Alam*, the plaintiff sued U.S. Marshal's task force officers for shooting him. 915 F.3d 1028, 1033–34 (6th Cir. 2019). Plaintiff's claims included a Fourth Amendment *Bivens* claim for fabricating evidence because the police planted a bullet from the plaintiff's gun at the scene of the shooting to falsely validate their defense that they only shot the plaintiff after he fired his gun at them. *Id.* at 1033–35 & n.2. The court concluded that plaintiff's fabrication-of-evidence

claim did not present a new context under *Bivens*. *Id.* at 1038. The court held that the Supreme Court's decisions in *Abbasi* and *Hernandez v. Mesa*, 140 S. Ct. 735 (2020), "are not the silver bullets defendants claim them to be" because "plaintiff's claims are run-of-the-mill challenges to 'standard law enforcement operations' that fall well within *Bivens* itself." *Id.* at 1038. The court emphasized that *Jacobs* did not involve "overarching challenges to federal policy in claims brought against top executives, but with claims against three individual officers for their alleged 'overreach' in effectuating a 'standard law enforcement operation.'" *Id*. (quoting *Abbasi*, 137 S. Ct. at 1861–62). Indeed, *Abbasi* confirmed that "the purpose of *Bivens* is to deter the ***officer*** … for his or her own acts, not the acts of others." *Abbasi*, 137 S. Ct. at 1860 (emphasis in original).[3]

Plaintiffs have not sued the Attorney General, the Director of the FBI, or any other high ranking official. Plaintiffs do not challenge the constitutionality of any high level policy at DOJ—we do not argue that DOJ has a policy that encourages prosecutors to submit false information to courts to secure probable cause for warrants. Nor do Plaintiffs' claims implicate foreign policy, national security, or international borders, unlike those in *Abbasi*, 137 S. Ct. at 1861–62, *Hernandez*, 140 S. Ct. at 746, and *Cantú v. Moody*, 933 F.3d 414, 424 (5th Cir. 2019). Plaintiffs' claim simply challenges the actions of low level federal law enforcement officers in a standard law enforcement operation—obtaining and executing a search warrant—which does not present a new context under *Abbasi*. Indeed, the planning and execution of a search warrant "hits the sweet spot of Fourth Amendment search and seizure principles that enforce the training of every law enforcement officer in America." *Greiner,* 2020 WL 996860, at *3.

[3] *See also Iaone v. Hodges*, 939 F.3d 945, 951–52 (9th Cir. 2018) (IRS agent for excessive search); *Powell*, 2020 WL 5126392, at *6 (DEA task force officers for an overbroad search); *Bueno Diaz v. Mercurio*, 442 F. Supp. 3d 701, 707–709 (S.D.N.Y 2020) (DEA agents for using excessive force); *Prado v. Perez*, No. 18-CV-9806, 2020 WL 1659848, at *1, 5 (S.D.N.Y. Apr. 3, 2020) (ICE agents for conducting an unreasonable search); *Greiner v. Wall*, No. C14-5579, 2020 WL 996860, at *3 (W.D. Wa. Mar. 2, 2020) (IRS agents for executing an unreasonable search); *Lehal v. Central Falls Det. Facility Corp.*, 2019 WL 1447261, *11–12 (S.D.N.Y. 2019) (U.S. Marshal's for excessive force).

2. Defendants Fail to Establish Any "Meaningful Difference" That Demonstrates a New Context

Defendants concede that there are parallels between Plaintiffs' Fourth Amendment claim and *Bivens* but assert that two facts generate a "meaningful difference." Defendants observe that (1) this case involves an ongoing and complex securities fraud investigation, and (2) the unlawful search here was executed at a business, not a home, with a warrant. Motion at 2, 9. Neither of these minor distinctions are meaningful. First, the fact that this case arises from a securities investigation, as opposed to the narcotics investigation in *Bivens*, is not a meaningful difference. In *Brunoehler v. Tarwater,* 743 F. App'x 740, 743–44 (9th Cir. 2018), the court held that the plaintiff's arrest for securities violations, as opposed to drug crimes, was not a "meaningful difference" under *Abbasi* because the Supreme Court "does not require that there be perfect factual symmetry between a proffered *Bivens* claim and *Bivens* itself."

Second, neither the commercial location of the search nor the use of a warrant presents a "meaningful difference" in the *Abbasi* analysis. The Fourth Amendment's protection against unreasonable searches and seizures extends to commercial property.[4] In the post-*Abbasi* context, courts continue to hold that the difference between a house and a business in evaluating an unreasonable search for purposes of a Fourth Amendment *Bivens* claim is not meaningful.[5]

Defendants' reliance on *Cantú v. Moody*, 933 F.3d 414 (5th Cir. 2019), to support the existence of a new context is also misplaced. In *Cantú*, the plaintiff was a member of the violent Texas Mexican Mafia who sought money damages for claims arising from a drug bust where he

[4] *Mancusi v. DeForte*, 392 U.S. 364, 367 (1968) (the Fourth Amendment extends to commercial property).

[5] *See Bueno Diaz v. Mercurio*, 442 F. Supp. 3d 701, 709 (S.D.N.Y. 2020) (rejecting defendant's argument that an arrest in a public location, as opposed to in a residence, constitutes a meaningful difference from Bivens); *Lehal*, 2019 WL 1447261, at *12 (the location of the arrest and the existence of a warrant do not equate to a meaningful difference in the *Abbasi* analysis); *Prado,* 2020 WL 1659848, at *5 (presence of administrative warrant not a meaningful difference); *Powell*, 2020 WL 5126392, at *7 (exceeding scope of warrant not a meaningful difference).

was arrested with two kilograms of cocaine. *Id.* at 417. Cantú claimed that, right before the agents arrested him, an informant suddenly surprised him by placing cocaine in Cantú's car. *Id.* The Court emphasized that, unlike the facts here, the FBI agents had submitted affidavits directly contradicting Cantú's version of events. *Id.* Against that rare factual backdrop, the Court focused on three potential "meaningful differences" in *Abbasi*: (1) the rank of the officers involved; (2) the generality or specificity of the official action; and (3) the extent of judicial guidance as to how an officer should respond to the problem or emergency to be confronted. *Id.* at 423. While Cantú failed on these factors, Plaintiffs satisfy all three.

As to the rank of the officers involved, the Supreme Court draws a clear distinction between cases against low ranking officers—which routinely survive motions to dismiss—versus cases against high ranking officials like the Attorney General. In *Abbasi,* the Supreme Court dismissed a claim against Attorney General Ashcroft and other high ranking executive officials and emphasized that "[t]he purpose of *Bivens* is to deter the ***officer*** … not to hold officers responsible for acts of their subordinates." 137 S. Ct. at 1860 (emphasis in original). By contrast, *Bivens* recognized a claim against low level law enforcement officials like Defendants. *See Bivens*, 403 U.S. at 389. Numerous other courts recognize that *Abbasi's* analysis of "rank" focuses *vertically*, namely whether the defendants are low level law enforcement officials or high ranking agency executives.[6] In *Cantú*, the Court includes only a single sentence that states, without analysis, that Cantú's claim involved different officers from a different agency. *Cantú,* 933 F.3d 414. Respectfully, this does not analyze "rank" as instructed by the Supreme Court—which places significance only on the defendant's *vertical* position in the chain of command, as opposed to

[6] *See, e.g.*, *Jacobs*, 915 F.3d at 1038 (denying motion to dismiss where the claims related to three individual officers for their alleged overreach, not with overarching challenges to federal policy brought against top executives); *Helvig v. United States,* No. 18-CV-7939, 2019 WL 8108720, at *8 (C.D. Cal. 2019) (denying motion to dismiss claims against low level law enforcement officials where case was not about policies or policymakers).

horizontal differences between agents from the FBI, DEA, ICE, or ATF. The Supreme Court in *Abbasi* confirmed this approach by reiterating that its "opinion is 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." 137 S. Ct. at 1856. That statement makes sense only if the Supreme Court views "rank" vertically, not horizontally, because the agents in *Bivens* worked for the Federal Bureau of Narcotics, ***which has not existed since 1968***. The rank of Defendants here—which is vertically comparable to the rank of the low level officers in *Bivens*—does not imperil Plaintiffs' claim.

As to the generality or specificity of Defendants' actions, the Court stated that Cantú's allegations were too general because Cantú's lack of specific factual allegations and the contradictory evidence in the officers' affidavits required the court to take "intellectual leaps" it was not willing to take. *Id.* Here, by contrast, Plaintiffs have submitted a detailed, 72-page complaint based on (a) emails and documents obtained in discovery in another litigation, and (b) a review of the search warrant affidavit. Compl. ¶¶ 12–16. The Complaint describes in detail the Fourth Amendment claim, including four specific false statements in the search warrant affidavit and another sixteen (16) specific material omissions left out of the affidavit. Compl. ¶¶ 167–68. Those detailed, fact-based allegations draw a direct line from Defendants' misconduct to Plaintiffs' injury: (a) Defendants Bunch and Edson knowingly omitted material exculpatory information from the affidavit and also inserted false information to obtain probable cause where it otherwise did not exist; (b) Defendants should have proceeded by subpoena, not a search warrant; and (c) Defendants knew that the media coverage of a FBI raid of the publicly traded UDF IV would make Plaintiffs radioactive to their business partners and thereby destroy Plaintiffs' reputation and ability to conduct business, which is precisely what happened. Complaint ¶¶ 5–7, 166–87.

The Court in *Cantú* also raised concerns about the "judicial guidance" factor. In *Abbasi*, the Supreme Court stated that courts should assess "the extent of judicial guidance as to how an officer should respond to the problem or emergency to be confronted." 137 S. Ct. at 1859–60. Here, published decisions notified Defendants that providing false information in a search warrant affidavit violates the Fourth Amendment—as does omitting material information. In *Hale v. Fish*, 899 F.2d 390 (5th Cir. 1990), in circumstances strikingly similar to those here, the Fifth Circuit affirmed an award of damages against officers in a § 1983 lawsuit who inserted false information, and omitted material information, from a warrant affidavit. The Fifth Circuit confirmed that officers are obligated to disclose information about a witness' reliability if the witness provides information to support probable cause and has a motive to lie. *Id*. at 399. The Fifth Circuit also held that an FBI agent who did not sign, prepare, assist in preparing, or even read the affidavit at issue can still be liable for violating a plaintiff's Fourth Amendment rights given his other involvement in the matter. *Id.* at 401. Here, Plaintiffs allege that Defendants improperly presented materially false and misleading information they obtained from Bass/Hayman, a source with a $60 million motive to lie, to obtain the search warrant. Compl. ¶¶ 5, 167–68, 171. While Defendant Edson signed the search warrant, Defendant Bunch knew the affidavit contained false information and omitted exculpatory information at the time they presented it to the Court. Compl. ¶¶ 4–7, 166–67. Defendant Klimek, as the lead case agent through December 2015, would have procured much of the false information and omitted exculpatory information.

Thus, judicial guidance alerted Defendants that their actions would violate Plaintiffs' Fourth Amendment rights.[7] Defendants offer no cases to the contrary. *Cantú* is distinguishable

[7] *See also United States v. Alvarez*, 127 F.3d 372, 375 (5th Cir. 1997) (reversing conviction due to Fourth Amendment violation regarding false statement in search warrant affidavit); *United States v. Namer*, 680 F.2d 1088, 1092–95 (5th Cir. 1982) (reversing conviction due to Fourth Amendment violation where prosecutor omitted material exculpatory information from search warrant affidavit); *Salmon v. Schwarz*, 948 F.2d 1131 (10th Cir. 1991) (rejecting qualified

because Plaintiffs satisfy these factors. Plaintiffs' Fourth Amendment claim does not present a new context, and the Court should not dismiss that claim on that basis alone.

D. Step Two—Defendants Fail to Identify "Special Factors" That Counsel Against Extending Plaintiffs' *Bivens* Claims

The "special factors" analysis asks whether "***defendants*** [have] demonstrate[d] 'special factors counseling hesitation'" before allowing a damages action to proceed. *Carlson v. Green*, 446 U.S. 14, 18–19 (1980) (emphasis added) (quoting *Bivens,* 403 U.S. at 396)); *see also, Abbasi,* 137 S. Ct. at 1858. No special factors counsel hesitation here.

1. The Judiciary is Well Suited to Address Plaintiffs' Claims

As post-*Abbasi* cases recognize, judges are particularly well suited to weigh the costs and benefits of allowing a damages action to proceed against three low level defendants for conduct that threatens the integrity of our judicial system—presenting false evidence to the Court and aiding and abetting a criminal scheme directed at destroying Plaintiffs' business. *See Lanuza v. Love*, 899 F.3d 1019, 1032–33 (9th Cir. 2018). In *Lanuza*, an attorney for ICE forged a document, which had the effect of barring the plaintiff from obtaining lawful permanent resident status. *Id.* at 1021. The court rejected the government's arguments regarding special factors and alternative remedies because "[t]he consequences of allowing the submission of false evidence by government attorneys without repercussion extends beyond its effect on [the plaintiff]." *Id*. at 1033.

Moreover, in *Lanuza* the ***Department of Justice*** acknowledged that presenting false and fabricated evidence inflicts real harm both on society—which loses faith that its government plays fair—and on the individual directly harmed. *See id.* Defendants must acknowledge the same truth here—like in *Lanuza,* Plaintiffs have adequately alleged that Defendants presented false evidence

immunity claim of FBI agent where plaintiff alleged the agent inserted false information and omitted exculpatory information from a warrant affidavit); *Johnson v. Hayden*, 67 F. App'x 319, 323–24 (6th Cir. 2003) (motion to dismiss denied where *Bivens* complaint alleged agent inserted false information in warrant affidavit to secure arrest warrant).

to the Court to illegally obtain a search warrant, among other dubious actions which threaten the integrity of the judicial system. Compl. ¶¶ 1–22, 86–199. Thus, this Court is particularly well suited to preserve the integrity of our judicial system by overseeing this litigation.[8]

2. Defendants' Alternative Remedies Are Neither Available Nor Adequate to Redress the Harm Defendants Inflicted on Plaintiffs

The Supreme Court in *Bivens* held that "damages may be obtained for injuries consequent upon a violation of the Fourth Amendment by federal officials should hardly seem a surprising proposition." *Bivens*, 403 U.S. at 395. As Justice Harlan stated in his concurrence, "for people in Bivens shoes, it is damages or nothing." *Id*. at 409–10 (Harlan, J., concurring). Thus, the Supreme Court held that Mr. Bivens was "entitled to recover ***money*** damages for ***any*** injuries he has suffered as a result of the agents' violation of the [Fourth] Amendment." *Id*. at 397 (emphases added).

In their motion, Defendants suggest that Plaintiffs can turn to alternative processes, even where those processes do not provide for money damages, are not ripe, and exclude Defendants. Motion at 11. The Supreme Court cases on this issue, including cases Defendants cite for other purposes, demonstrate that any proposed alternative remedial procedure weighs against the extension of a *Bivens* claim only where it is both available and adequate to redress Plaintiffs' harm.

In assessing adequacy, the Supreme Court focuses on whether an alternative remedy provides both ***deterrence*** and ***compensation*** that is "***equally effective***" to the *Bivens* remedy. *Carlson v. Green*, 446 U.S. 14, 18–19 (1980) ("[D]efendants [must] show that Congress has provided an alternative remedy which it explicitly declared to be a substitute for recovery directly under the Constitution and viewed as equally effective," including providing the "deterrent

[8] *See also Powell*, 2020 WL 5126392, at *12 (denying the defendant's special factors/alternative remedies argument where a federal law enforcement officer fabricated evidence); *Jerra*, 2018 WL 1605563, at *5–6 (rejecting the government's argument regarding special factors/alternative remedies); *Helvig v. United States*, 2019 WL 810720, at *6–9 (C.D. Cal. 2019) (same); *Bueno Diaz v. Mercurio*, 442 F. Supp. 3d 701, 710–12 (S.D.N.Y. 2020) (same).

purpose" of a *Bivens* remedy); *Minineci v. Pollard*, 565 U.S. 118, 120, 130 (2012) (focusing on whether the proposed alternative remedy provided both "*significant deterrence and compensation*," and whether the available compensation would be "roughly similar").

In particular, only money damages are adequate to redress "individual instances of discrimination or law enforcement overreach." *Abbasi*, 137 S. Ct. at 1863. Thus, while the amount of the monetary damages need not be precisely identical to that available for a *Bivens* claimant, monetary damages must still provide ***roughly similar compensation*** and an ***equally effective deterrent*** effect. *See Carlson*, 446 U.S. at 18–19.

a. Defendants' Alternative Remedy #1 – Motion for Return of Property

Defendants claim that a motion for return of property to recover the material seized during the FBI raid at UDF provides an adequate remedy. Motion at 10. Defendants are wrong for four reasons. First, Defendants' argument has been rejected by post-*Abbasi* courts. *See Lanuza*, 899 F.3d at 1032 (holding that "the criminal law is not an alternative remedial structure designed by Congress for individuals" suing an individual government attorney for presenting false information to the Court). Second, Plaintiffs are not seeking the return of tangible property in this action; the harm to Plaintiffs' reputation and livelihood can be remedied only through money damages. Compl. ¶¶ 220–35. Thus, the return of property would not redress the alleged harm in Plaintiffs' Complaint. *See Bistrian v. Levi*, 912 F.3d 79, 93 (3rd Cir. 2018) (rejecting defendants' proposed alternative remedies because they could not redress Bistrian's alleged harm). Third, a motion for return of property does not address the facts underlying Plaintiffs' Fifth Amendment claim related to improper actions taken by Defendants that are separate and distinct from the facts surrounding the search of UDF in February 2016. *See, e.g.,* Compl. ¶¶ 86–163. Fourth, Defendants' cases are

readily distinguishable because the plaintiff in both cases brought a *Bivens* claim to specifically seek the return of documents seized in a government search.[9]

b. Defendants' Alternative Remedy #2 – Motion to Suppress

Defendants also suggest that, if indicted, Plaintiffs can move to suppress evidence or move to dismiss the indictment. Motion at 10. Defendants' argument fails because a motion to suppress does not provide money damages to remedy the injuries caused by Defendants' conduct. Plaintiffs' complaint does not seek to suppress evidence or terminate the government's investigation. Even more fundamentally, given that there is no indictment, a motion to dismiss or suppress is not ripe—and may never be ripe—so the proposed relief is not available. Finally, Defendants' cases are either inapposite or readily distinguishable. In *De La Paz v. Coy,* 786 F.3d 367, 369–70, 376 (5th Cir. 2015), the Court did not even address whether a motion to suppress constituted an adequate alternative remedy. In *Vennes v. An Unknown Number of Unidentified Agents of United States*, 26 F.3d 1448, 1453 (8th Cir. 1994), the plaintiff filed a *Bivens* lawsuit after he pled guilty and served five years in prison, seeking damages related to the time he spent in prison. Not surprisingly, the court was not impressed by an ex-convict's *Bivens* claim for damages after he pled guilty to crimes five years earlier. That is not our case. Finally, in *Farah v. Weyker,* 926 F.3d 492, 501–02 (8th Cir. 2019), the plaintiffs had already been charged. Putting aside that *Farah* misreads *Abbasi*, *Carlson,* and *Minneci* regarding the availability and adequacy of damages, Plaintiffs do not have access to, and are not seeking, the relief available in *Farah*.

[9] *See Leyland v. Edwards*, 797 F. Supp. 2d 7, 9–10 (D.D.C. 2011); *Omran v. United States*, 1:14-CV-13881, 2016 WL 4158556, at *10-11 (D. Mass. June 22, 2016).

c. Defendants' Alternative Remedy #3 – Hyde Amendment and Unjust Conviction and Imprisonment Statute

Defendants also argue that the Hyde Amendment and Unjust Conviction and Imprisonment Statute represent adequate alternative remedies. Motion at 11–12. The Hyde Amendment merely provides reasonable attorneys' fees to criminal defendants who qualify as a "prevailing party" in a criminal matter and also show the government's prosecution was vexatious, frivolous, or in bad faith. *United States v. Chapman*, 524 F.3d 1073, 1089 (9th Cir. 2008). Similarly, the Unjust Conviction and Imprisonment Statute provides post-conviction relief to criminal defendants who are able to prove their factual innocence. 28 U.S.C. §§ 1495 and 2513.

These statutes do not qualify as adequate alternative remedies for three reasons. First, neither remedy is available because the government has not charged any Plaintiff with any crime. Second, even if ripe, the remedies available under these statutes do not provide roughly similar compensation to Plaintiffs as *Bivens* claims. The Hyde Amendment is limited to attorneys' fees. The Unjust Conviction Statute caps recovery at no more than $50,000 for each year served in prison. Third, public policy mandates rejecting these proposed alternatives. Defendants advocate that Plaintiffs must pressure the government to indict them for the opportunity to try to defeat the government in a criminal trial so they can possibly recover only their attorneys' fees incurred defending that criminal matter—but nothing else. Or Plaintiffs could go to jail and prove their innocence post-conviction so they could then seek to obtain a modest amount for each year served. Neither option makes any sense. In addition, the government controls whether the remedy will ever be available. Like the prior "alternatives" Defendants' propose, the government can simply choose to "investigate" Plaintiffs forever and never file any charges thereby ensuring Defendants are never held accountable for falsifying evidence and manipulating the market in Plaintiff UDF IV's stock. This is bad public policy—rights without remedies provide cold comfort.

d. Defendants' Alternative Remedy #4 – Federal Tort Claims Act ("FTCA")

Defendants assert that the FTCA is an adequate alternative remedy and rely on *Cantú* and *Oliva v. Nivar,* No. 19-50795, 2020 WL 5227472 (5th Cir. 2020). Motion at 12–13. While those cases might initially look relevant, the real answer lies buried in Defendants' footnote on page 13—the Supreme Court's decision in *Carlson* controls here. *Carlson* rejected the precise argument that Defendants make here, holding that the FTCA "is ***not*** a sufficient protector of the citizens' constitutional rights." 446 U.S. at 23 (emphasis added).[10] *Carlson* remains the law of the land. Defendants do not cite any Supreme Court case where the Court reversed itself on this issue, and the Court certainly knows how to do so if it so intended.[11] In addition, Congress agrees with *Carlson*. Congress has indicated that a plaintiff may pursue both FTCA and *Bivens* claims. *See* 28 U.S.C. § 2679(b)(2)(A) (the exclusiveness of a remedy under the FTCA "does not extend or apply to a civil action against an employee of the Government … which is brought for a violation of the Constitution of the United States). Congress has declined to change the law.

Oliva and *Cantú* is further misplaced. Motion at 13. In *Oliva*, the plaintiff brought claims against police officers at a VA hospital. 2020 WL 5227472, at *1. Plaintiff claimed that three VA police officers suddenly attacked him without provocation as he simply attempted to walk through a metal detector. *Id.* Unlike here, the VA police officers provided sworn affidavits detailing the

[10] The Supreme Court in *Carlson* noted several significant differences between the remedies available under *Bivens* and the FTCA: (1) a *Bivens* remedy serves a deterrent purpose that the FTCA cannot because the *Bivens* claim is filed against the individual law enforcement officer where, by contrast, the FTCA claim is limited to the United States; (2) a *Bivens* remedy includes potential punitive damages but the FTCA remedy does not; and (3) a *Bivens* plaintiff can opt for a jury trial whereas a FTCA plaintiff cannot. *See Carlson*, 446 U.S. at 20–22.

[11] Numerous courts have analyzed this issue in depth and also reject Defendants' argument. *See, e.g.*, *Bistrian*, 912 F.3d at 92; *Bueno Diaz*, 442 F. Supp. 3d at 710–12; *Powell*, 2020 WL 5126392, at *10; *Helvig*, 2019 WL 8108720, at *7; *Jerra*, 2018 WL 1605563, at *5; *Lopez-Flores v. Ibarra*, 2018 WL 6579180, at *9 n. 13 (S.D. Tex. 2018). *But see Abdoulaye v. Cimaglia*, No. 15-CV-4921, 2018 WL 1890488, at *7 (S.D.N.Y. 2018) (concluding that FTCA is an alternative remedy to *Bivens*).

incident and contradicting plaintiff's version of events. *Id.* The Court was also able to consider videotaped footage of the incident, which—the Court emphasized—was inconsistent with Oliva's account. *Id.* Against that unique factual backdrop, the Court dismissed Oliva's case, in part, because Oliva was also pursuing an FTCA claim. *Id.* The opinion, however, contains no analysis of the Supreme Court's holding in *Carlson* because the parties failed to raise *Carlson* to the Court's attention.[12] We do. *Carlson* remains binding Supreme Court precedent on this point—it is the law of the land. The parties' treatment of the FTCA issue was similar in *Cantú*. Neither party included *Carlson* and its progeny in their briefs.[13]

e. Defendants' Alternative Remedy #5 – State Court Action Against Other Parties

Defendants also propose a state court action against Bass/Hayman. Motion at 13. The Westfall Act prohibits Plaintiffs from suing Defendants, who are all federal employees, in state court. *See Osborn v. Haley,* 549 U.S. 225, 229 (2007); *Jerra v. United States*, No. 12-cv-01907, 2018 WL 1605563, at *5 (C.D. Cal. Mar. 29, 2018). Defendants cite no case holding that a lawsuit against a private third party, as opposed to the officer who actually violated the Plaintiffs' constitutional rights, qualifies as an available and adequate remedy. *Carlson* addresses this exact issue and holds otherwise because there is no deterrent impact if Defendants are not parties to the lawsuit. *See* 446 U.S. at 19–21. So does *Minneci*, on which Defendants rely. *See* 565 U.S. at 120 (finding the alternative remedy adequate only because it provided "both significant deterrence and

[12] The briefs in *Oliva* show that the officers' opening brief mentioned the FTCA only in passing, without citing *Carlson* or any other cases holding that the FTCA is a complementary, not alternative, remedy to *Bivens*. *See* Brief of Appellants at 9, *Oliva*, 2020 WL 5227472 (No. 19-50795). Thus, Oliva did not cite *Carlson* or argue the point other than to state that the FTCA does not extend to general constitutional excessive force claims, citing 18 U.S.C. § 2679(b)(2)(A). *See* Brief of Appellee at 27, *Oliva*, 2020 WL 5227472 (No. 19-50795).

[13] Indeed, the appellants in *Cantú* did not address the issue of whether the FTCA is an adequate alternative to *Bivens*. *See* Plaintiff-Appellant's Opening Brief, *Cantú*, 933 F.3d 414 (No. 18-40434). And the appellees merely mentioned the existence of the FTCA remedy without citation to ***any*** case law, much less *Carlson*. *See* Federal Defendants-Appellees' Brief, *Cantú*, 933 F.3d 414 (No. 18-40434).

compensation"). *Minneci* does not support Defendants' position here, because it involved a *Bivens* claim against a private contractor who, unlike Defendants here, could be sued in state court. *Id.* at 126. Defendants' repeated attempts to dodge responsibility for their misconduct is disturbing because it contradicts a core driver of *Bivens*—"to deter the ***officer***." *Abbasi*, 137 S. Ct. at 1860 (emphasis in original) (quoting *Meyer,* 510 U.S. at 485).

f. Defendants' Alternative Remedy #6 – SEC action

Defendants also suggest that "to the extent that plaintiffs' case rests on the premise they have done no wrong, an action with the SEC provided an alternative remedy." Motion at 13. Defendants' argument misses the mark for two reasons.[14] First, a *Bivens* action is about litigating Defendants' misconduct. Any process with the SEC would not address the unconstitutional conduct of an AUSA and two FBI Agents nor would it provide monetary damages based on Defendants' illegal behavior. Thus, Defendants again offer up a "remedy" where Defendants would not be parties to the lawsuit and Plaintiffs could not recover money damages—which fails for the reasons described above. Second, the SEC matter only involved some of the Plaintiffs here and was resolved in July 2018 with UDF not admitting any wrongdoing. Thus, the resolution did not involve every Plaintiff and happened before Plaintiffs obtained access to the search warrant affidavit in February 2019, which exposed the presentation of false evidence to the Court. As a result, this "alternative" was never really available to Plaintiffs.

3. No Special Factor Counsels Hesitation in Implying a *Bivens* Remedy

a. Defendants' Special Factor #1 – Checks and Balances

Defendants claim that a special factor counseling hesitation is the need to avoid having the Judiciary intrude on the Executive Branch's exclusive authority to make charging decisions and

[14] Plaintiffs object to Defendants' attempt to introduce evidence from outside the record with their motion to dismiss and move to strike it.

run a secret grand jury investigation. Motion at 15. Defendants' argument misinterprets Plaintiffs' complaint. Defendants suggest that Plaintiffs are asking the Court to take a sledgehammer to the entire Justice Department—their executive authority, their charging discretion, their ability to call witnesses to the grand jury. That is not the case. Plaintiffs simply ask the Court to take a scalpel to a very rare, but troubling, set of facts involving deliberate unconstitutional actions of three low level employees because those actions threaten the integrity of the justice system. Plaintiffs do not ask this Court to referee whatever decision the Executive Branch might make regarding any charging decision. Nor do Plaintiffs request that this Court oversee the presentation of any evidence to any grand jury. There is a significant difference between Defendants' misguided interpretation of "separation of powers" and how our system of constitutional checks and balances has operated for generations to preserve the integrity of our justice system. Defendants' view contradicts the fundamental principles emphasized by Justice Frankfurter and subsequent courts:

> [S]ome truths are self-evident.... [I]f any concept is fundamental to our American system of justice, it is that those charged with upholding the law are prohibited from deliberately fabricating evidence and framing individuals for crimes they did not commit.

Hernandez-Cuevas v. Taylor, 723 F.3d 91, 100 (1st Cir. 2013) (internal quotation omitted).

Justice Frankfurter's approach protects citizens, deters illegal conduct by law enforcement officers, and increases confidence in the integrity of our justice system. By contrast, Defendants' approach exposes citizens to blatant government abuse, destroys confidence in the criminal justice systems, and fosters lawless behavior. Plaintiffs respectfully request that this Court adhere to Justice Frankfurter's righteous view of the criminal justice system.

Defendants also contend that Plaintiffs' lawsuit is a "tactical maneuver" to disrupt their criminal investigation by seeking advance information on a potential criminal case. Motion at 16. At this point, Defendants have been "investigating" for more than five years. Thus, Defendants

have had ample time to interview any potential witnesses and collect a mountain of documents via subpoenas and the FBI raid at UDF's headquarters. What is left to possibly disrupt? Nothing. Defendants offer no specifics in their motion. In addition, by filing suit, the Plaintiffs are voluntarily subjecting themselves to depositions under oath—a signal of what they think of the evidence. Most federal prosecutors and FBI agents would be running forward to take depositions of subjects in a criminal investigation, but Defendants are retreating as fast as possible from anything that would shine any light on their conduct. Why is that?[15]

In addition, allowing these claims to proceed will not "yield a tidal wave of litigation." Motion at 16. The case Defendants cite relates to an immigration challenge impacting 11,000,000 potential claimants. *De La Paz*, 786 F.3d at 379–80. By contrast, allegations of the type of severe government misconduct present here only occur in a very small percentage of criminal investigations. Thus, Defendants' "tidal wave" forecast is grossly overblown.[16]

b. Defendants' Special Factor #2 – Administration of Securities Laws

Defendants argue that this Court "should not wade into the complexities of securities regulation by implying a *Bivens* remedy since 'policy questions' in this arena ha[ve] received careful attention from Congress." Motion at 17. Plaintiffs have sued a federal prosecutor and two FBI agents for violating their constitutional rights. The unconstitutional actions by these low level federal employees—who do not even work at the SEC—do not implicate any "policy question" at the SEC regarding the administration of the SEC or securities laws.[17] Defendants fail to cite to

[15] Defendants' cases are distinguishable. In *Campbell v. Eastland*, 307 F.2d 478, 480 (5th Cir. 1962), and *Degen v. United States*, 517 U.S. 820, 825–26 (1996), the court was simply weighing how to sequence civil discovery where there was also an indicted case between the parties—neither court dismissed the civil case due to the criminal matter.

[16] *See Lanuza*, 899 F.3d at 1033 (rejecting defendants "tidal wave" argument); *Powell*, 2020 WL 5126392, at *11 (same).

[17] Defendants' cases are distinguishable. *Schweiker v. Chilicky*, 487 U.S. 412, 414 (1988) (claim against Cabinet Secretary related to administering the federal Social Security program); *Regnante v. Securities and Exchange Officials*,

any allegation in Plaintiffs' Complaint that implicates any SEC "policy question." Defendants offer no specifics to support their argument. Nothing.

E. Plaintiffs' Claims Are Timely

Defendants refer the Court to an incomplete, self-serving standard that omits the most critical aspect of the accrual rule: The two-year limitations period does not start to run until the "plaintiff knows or has reason to know of … (1) the existence of the injury; ***and (2) the connection between the injury and the defendant's actions***." *Blimline v. Thirty Unknown Employees of the Securities and Exchange Commission*, 757 F. App'x 299, 303 (5th Cir. 2018) (quoting *Brown*, 188 F.3d at 589–90); *see also Piotrowski v. City of Houston*, 237 F.3d 567, 576 (5th Cir. 2001).

Defendants have failed to demonstrate as a matter of law that "it is evident from the pleadings that the action is time-barred, and the pleadings fail to raise some basis for tolling." *Hernandez v. Baylor Univ.*, 274 F. Supp. 3d 602, 615 (W.D. Tex. 2017) (quoting *Texas v. Bailey Tool Mfg. Co.*, 744 F.3d 944, 946 (5th Cir. 2014)). Indeed, Defendants' limitations argument somehow completely ignores the Complaint's aptly titled section "Defendants' Misconduct First Comes to Light,"—which addresses this very issue. Compl. ¶¶ 71–76.

Plaintiffs became aware of Defendants' connection to the injuries that underlie Plaintiffs' Fifth Amendment claim on or about April 12, 2018, when Plaintiffs first received discovery from Bass/Hayman in civil litigation. *Id.* ¶¶ 71–72. This discovery—including emails from Defendants—revealed Defendants critical involvement in the Bass/Hayman fraud scheme. *See,*

134 F. Supp. 3d 749, 753, 764–66 (S.D.N.Y. 2015) (claim against SEC Chairwoman challenging Dodd-Frank Whistleblower program); *Effex Cap., LLC v. Nat'l Futures Ass'n*, 933 F.3d 882, 886–89 (7th Cir. 2019) (claim against self-regulatory organization ("SRO") seeking injunctive relief regarding policies in the Commodities Exchange Act).

e.g., Id. ¶¶ 86–164. Given that Plaintiffs could not connect Defendants' conduct to their injuries before April 12, 2018, the Fifth Amendment claim is timely.[18]

Likewise, until Defendants finally allowed Plaintiffs to read the warrant affidavit on or about February 19, 2019, Plaintiffs did not know—and could not have known—that Defendants injured Plaintiffs by filling the warrant affidavit with material misstatements and omissions. Compl. ¶¶ 74–75, 167–68. Thus, Plaintiffs are well inside the two year limitations period.[19]

In addition to Plaintiffs' claims not accruing until April 12, 2018, and February 19, 2019, Plaintiffs' *Bivens* claims are entitled to equitable tolling based on fraudulent concealment under Texas state law. *See Wallace v. Kato*, 549 U.S. 384, 394 (2007) (underlying state law provides tolling rules in § 1983 and *Bivens* claims). The Supreme Court of Texas recognizes the "fact-specific equitable doctrine" of "fraudulent concealment" by "toll[ing] limitations until the fraud is discovered or could have been discovered with reasonable diligence." *Valdez v. Hollenbeck*, 465 S.W.3d 217, 229 (Tex. 2015). Drawing on Texas law, the Fifth Circuit applies a four-part test examining: (1) the existence of the underlying tort; (2) the defendant's knowledge of the tort; (3) the defendant's use of deception to conceal the tort; and (4) the plaintiff's reasonable reliance on the deception. *See Thompson v. Deutsche Bank Nat. Tr. Co.*, 775 F.3d 298, 307 (5th Cir. 2014) (quotation and citation omitted).

The Complaint here satisfies the Fifth Circuit's requirement on a motion to dismiss that it provide "some basis for tolling." *Bailey Tool Mfg.*, 744 F.3d at 946. Plaintiffs allege Defendants' active concealment of their constitutional violations from Plaintiffs. For the Fifth Amendment

[18] April 12, 2020 fell on a Sunday so the limitations period extends to the following day. *See*, Fed.R.Civ.Proc. 6(a)(1)(c),

[19] *See Piotrowski*, 237 F.3d at 577 (finding plaintiff's § 1983 claim for a 13-year-old injury timely because the connection to defendants was not discovered until a deposition 13 years later); *O'Ferrell v. United States*, 998 F. Supp. 1364, 1373 (M.D. Ala. 1998) (applying the federal accrual standard and denying summary judgment for defendant when plaintiff did not become aware of misrepresentations and falsehoods until the unsealing of affidavit).

claim, Plaintiffs' Complaint details Defendants' knowing violation of Plaintiffs' Fifth Amendment rights by aiding and abetting Bass/Hayman's illegal "short and distort" scheme. Compl. ¶¶ 86–93. Defendants knew Bass/Hayman was shorting UDF and that this scheme would gut UDF's stock price. *Id.* ¶ 93, 159. Defendants actively concealed their communications and involvement with Bass/Hayman under the guise of a criminal investigation by, for example, instructing UDF's auditors to not disclose a meeting with Defendants. *Id.* ¶ 117. Lastly, Plaintiffs relied on Defendants' representations that their investigation was unrelated to Bass/Hayman. *Id.* ¶ 73.

Regarding Plaintiffs' Fourth Amendment claim, the factual allegations show that Defendants knowingly presented false information and omitted exculpatory material from a search warrant affidavit—a clear violation of the Fourth Amendment. *Id.* ¶¶ 167–68. Defendants concealed their misconduct by keeping the search warrant materials under seal years after they executed the warrant—even though such documents are presumptively public records after the warrant is executed. *United States v. Sealed Search Warrants*, 868 F.3d 385, 390 (5th Cir. 2017). Plaintiffs also relied on Defendant Bunch's representations that the affidavit contained "very little" information from Bass/Hayman. *Id.* ¶ 73.

F. Defendants Are Not Entitled to Qualified Immunity

To analyze Defendants' claims of qualified immunity, the Fifth Circuit applies a three-part test: (1) whether plaintiff's have alleged a violation of a constitutional right; (2) whether the constitutional right was clearly established at the time; and (3) whether defendant's conduct was objectively reasonable. *Pelayo*, 82 F. App'x at 987–88; *see also Winfrey v. Rogers*, 901 F.3d at 493. While the contours of the constitutional right must be sufficiently clear, plaintiffs do not need a case directly on point or holding the "very action in question" unlawful. *Hale*, 899 F.2d at 402 (quoting *Anderson v. Creighton*, 483 U.S. 635, 638 (1987)).

As with their statute of limitations argument, Defendants oratorical calisthenics appear calculated to avoid simple questions with obvious answers regarding qualified immunity. The simple questions and answers on Plaintiffs' Fourth Amendment claim are:

- First, have Plaintiffs alleged a Fourth Amendment violation? ***Yes***.
- Second, do law enforcement officers violate the Fourth Amendment by presenting false statements and omitting exculpatory information from a search warrant affidavit to obtain probable cause where probable cause otherwise does not exist? ***Yes***.
- Third, was Defendants' conduct unreasonable in light of the clearly known prohibition against using false statements or omitting material information in a search warrant affidavit? ***Yes.***

Plaintiffs have adequately alleged a violation of their Fourth Amendment rights. *See* Compl. ¶¶ 5–7, 165–87, 244–55. Those allegations include specific details surrounding four critical false statements and sixteen (16) examples of exculpatory information that Defendants failed to disclose to the Court. *See Id*. ¶¶ 167–68. Without referencing the detailed allegations about the contents of the affidavit in paragraph 167 of the Complaint, Defendants claim that Plaintiffs' allegations are "conclusory and speculative."[20] Motion at 26. Defendants seek dismissal with prejudice based on their contention that Plaintiffs, "without access to the entire *sealed* affidavit" will not be able to plead anything more than "pure speculation" about the affidavit. Motion at 26–28. Defendants' position is flawed because: (a) the allegations in paragraph 167 provide sufficient detail to meet the pleading standard, (b) Plaintiffs' review was "qualified" and "limited" only to the extent Defendant Bunch refused to provide counsel with a hard copy of the actual affidavit after they reviewed the entire affidavit at his office and took

[20] In *Breidenbach v. Bolish,* 126 F. 3d 1288, 1290 (10th Cir. 1997), the plaintiff had one conclusory sentence in his complaint simply stating that the agent knowingly included false information in the affidavit. By contrast, paragraphs 167-68 of Plaintiffs' complaint contain an extraordinary level of detail about the contents of the affidavit that is validated by the other allegations in the Complaint.

detailed notes about its content, and (c) most troubling, Defendants' position directly contradicts the position that Defendant Bunch advanced before another court on a related matter. Decl. of Neal J. Stephens ¶¶ 4–5. Defendants' position here is misleading and Defendant Bunch knows it—so Plaintiffs respectfully request that this argument be precluded by judicial estoppel. [21]

Fifth Circuit case law also recognizes that *Franks v. Delaware*, 438 U.S. 154 (1978), "clearly established that a defendant's Fourth Amendment rights are violated if (1) the affiant, in support of the warrant, includes 'a false statement knowingly and intentionally, or with reckless disregard for the truth' and (2) 'the allegedly false statement is necessary to the finding of probable cause.'" *Winfrey*, 901 F.3d at 494 (citation omitted); *see also Hale*, 899 F.2d at 402. The Fifth Circuit "treats omissions essentially the same as misstatements" in evaluating Fourth Amendment violations. *United States v. Namer*, 680 F.2d 1088, 1094 (5th Cir. 1982).

Regarding the last question, the Fifth Circuit has held that officers who include false statements or omit material information from a search warrant affidavit are not entitled to qualified immunity. In *Hale*, the court affirmed the district court's denial of qualified immunity determining that no reasonable official would submit a search warrant affidavit to a magistrate that contained material misstatements and omissions. 899 F.2d at 402; *see also Winfrey*, 901 F.3d at 495.

The simple questions and answers regarding Plaintiffs' Fifth Amendment claim are:

- First, have Plaintiffs alleged a Fifth Amendment violation? ***Yes***.
- Second, do law enforcement officers violate the Fifth Amendment by intentionally interfering with Plaintiffs' right to pursue their chosen profession by taking improper actions that will damage Plaintiffs' business reputation, such as participating in market manipulation of Plaintiff UDF IV's stock? ***Yes***.
- Third, was Defendants' conduct unreasonable considering the clear prohibition against improperly interfering with Plaintiffs' liberty and property interests? ***Yes.***

[21] *Reed v. City of Arlington*, 650 F.3d 571, 573–74 (5th Cir. 2011).

Plaintiffs Complaint contains detailed allegations regarding how Defendants' actions violated their Fifth Amendment rights. Compl. ¶¶ 3, 13, 93–164, 220–43. In addition, it is well established that the Due Process Clause of the Fifth Amendment protects Plaintiffs' ability to (2) pursue or conduct the lawful business of their choosing and (2) be free from government action that debases their reputation. *United States v. Robel*, 389 U.S. 258, 265 n.11 (1967) (citing *Greene v. McElroy*, 360 U.S. 474, 492 (1949)). The Fifth Circuit explained that "[o]ne's right … to follow a chosen profession free from unreasonable governmental interference comes within the 'liberty' and 'property' concepts of the Fifth Amendment." *United States v. Briggs*, 514 F.2d 794, 798 (5th Cir. 1975); *see also Marrero v. City of Hialeah*, 625 F.2d 499, 519–20 (5th Cir. 1980).

Defendants' actions facilitating Bass/Hayman's illegal "short and distort" fraud and insider trading fraud schemes were unreasonable. All three defendants are experienced white collar law enforcement officials who had to know that "short and distort" and insider trading fraud schemes are illegal and would harm Plaintiffs—since DOJ routinely prosecutes this type of illegal conduct. Compl. ¶¶ 80–85. Additionally, Defendants also knew that it was illegal for Bass/Hayman to publish the Ernest Poole posts ***anonymously*** without disclosing their short position in UDF IV's stock to investors who must be able to accurately assess the bias and credibility of the author.[22] *Id.* ¶¶ 126–53. Accepting the allegations as true, Plaintiffs have shown that any reasonable law enforcement official would have avoided taking the improper actions alleged here.

V. CONCLUSION

For the foregoing reasons, the Court should deny Defendants' motion to dismiss.

[22] *See SEC v. Curshen*, 372 F. App'x 872, 875 (10th Cir. 2010) (court agrees that the defendant's failure to disclose his compensation for promoting the stock makes all of his statements per se misleading because a reasonable investor would consider his compensation as bearing on his objectivity); *SEC v. Contrarian Press, LLC*, No. 16-CV-6964 (VSB), 2019 WL 1172268, at *5 (S.D.N.Y. Mar. 13, 2019) (same); *SEC v. Mandaci*, No. 00-CV-6635, 2004 WL 2153879 (S.D.N.Y. Sept. 27, 2004) (same).

Dated: September 29, 2020

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on September 29, 2020, I filed this document with the Clerk's Office. I further provided an electronic copy of this document on counsel, as listed below, via electronic mail:

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NAI-1514348660v9