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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

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| FRED KENNETH MACDONALD,<br><br>Plaintiff,<br><br>vs.<br><br>UNITED STATES OF AMERICA, et al.,<br><br>Defendants. | Case No. 11cv1088 IEG (BLM)<br><br>DATE: December 5, 2011<br>TIME: 10:30am<br>CTRM: 1<br><br>DEFENDANTS' REPLY<br><br>RE: DEFENDANTS' MOTIONS TO DISMISS OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT |

Within days after Defendants filed the instant motion, the Ninth Circuit ruled in Mirmehdi v. United States, -- F.3d --, No. 09-55846, 2011 WL 5222884, at *4 (9th Cir. Nov. 3, 2011), that Bivens claims for unlawful detention incident to removal proceedings, the same claim that Plaintiff MacDonald has brought, are not cognizable. The Ninth Circuit concluded that the Mirmehdis were precluded from bringing Bivens claims against "federal agents for wrongful detention pending deportation given the extensive remedial procedures available to and invoked by them and the unique foreign policy considerations implicated in the immigration context." Id. at *4. This Court may therefore dismiss MacDonald's Bivens claims against Defendants on the basis of the Mirmehdi decision alone.

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MacDonald argues that the Mirmehdi ruling applies only to "illegal aliens." However, the Ninth Circuit specifically stipulated that "deportation proceedings constitute the relevant 'environment of fact and law' in which to 'decide whether to recognize a *Bivens* remedy.'" Id. at *4 (emphasis added) (quoting Arar v. Ashcroft, 585 F.3d 559, 572 (2d Cir. 2009) (en banc)). In so framing the context, and in its analysis, the Ninth Circuit did not suggest that a Bivens cause of action remains available to aliens who prevail against deportability charges in removal proceedings. Such a distinction would contradict the Ninth Circuit's reasoning that Bivens claims are precluded given the availability of other remedies in the context of removal proceedings. Such other remedies are available to all respondents in removal proceedings, not just to "illegal aliens." MacDonald undermines his attempt to limit the application of Mirmehdi, as well as his contention that habeas relief was not a viable remedy, by citing Flores-Torres v. Mukasey, 548 F.3d 708 (9th Cir. 2008), in which the Ninth Circuit held that habeas relief is available pending removal proceedings when the government lacks detention authority. [Response at 27:11-12.]

MacDonald also attempts to distinguish the preclusive effect of Section 1252(g) by arguing that Canadian Indians are "not subject to the immigration laws" or even to U.S. laws in general. [Response at 1:23, 17:14-15.] The argument should be rejected at the outset because Section 1252(g) addresses only subject matter jurisdiction over aliens' claims and does not address the responsibility of government or the right of American Indians to travel freely within their own territory, apart from the existence of the U.S.-Canada border.

Apart from this fundamental defect in MacDonald's argument, he supports his argument by overstating court rulings on the preclusive effect of Section 1252(g). He cites the decision in McCandless v. Diabo, 25 F.2d 71, 71 (3rd Cir. 1928), to support his argument that "general acts of Congress do not apply to [Canadian-born American Indians], unless worded to clearly manifest an intention to include them in their operation." [Response at 15:4-6.] MacDonald fails to note that the McCandless court was referring to the application of U.S. laws to "our own native Indians." Id. at 71. Likewise, MacDonald overstates the holding of Akins v. Saxbe, 380 F. Supp. 1210 (D. Me. 1974), to argue that he is "exempt from US immigration law" in its entirety. [Response at 17:11.] In Akins, as in other cases, the court was addressing immigration laws that would restrict

"the aboriginal right of these Indians to move freely within their own territory without regard to the International Boundary," id. at 1220 (emphasis added), not all immigration law.

The "immunity" that MacDonald enjoys under 8 U.S.C. § 1359 concerns only his right "to pass the borders of the United States." As MacDonald points out in his Response, the Board of Immigration Appeals ("BIA") ruled in Matter of Yellowquill, 16 I. & N. Dec. 576 (BIA 1978), that U.S. immigration laws shall not "be construed to apply to the right of American Indians born in Canada to pass the borders of the United States." Matter of Yellowquill at 577 (emphasis added). Neither Section 1359, nor McCandless, nor Akins, nor Matter of Yellowquill hold that, in general, immigration laws do not apply to Canadian or American Indians. As stated above, Section 1252(g) concerns only subject matter jurisdiction over claims, not the right to pass the borders of the United States. Further, as noted in Mirmehdi, other remedies are available to persons who are improvidently placed in removal proceedings, and MacDonald never pursued those.

MacDonald also argues that 8 U.S.C. § 1252(g) does not apply because it does not include the decision to detain. [Response at 19:7-8.] MacDonald fails to address the rest of the language in Section 1252(g), which provides that the preclusive effect applies to "any cause or claim . . . arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien." Id. (emphasis added). At any rate, MacDonald's argument is controlled by the Ninth Circuit's rulings in Mirmehdi and Sissoko v. Rocha, 509 F.3d 947, 950 (9th Cir. 2007)). The Mirmehdi decision holds that Section 1252(g) precludes a Bivens claim for unlawful detention because of its "context," namely removal proceedings, and the Sissoko decision holds that Section 1252(g) precludes claims of false arrest, false imprisonment, and malicious prosecution in the context of removal proceedings.

Also, to avoid the preclusive effect of Section 1252(g), and to invoke remedies available under 18 U.S.C. § 4001(a) (the Non-Detention Act), MacDonald argues that, although he is an alien, his unique status is, as a matter of law and practice, the equivalent of a U.S. citizen under immigration law and that immigration law "does not explicitly define him as a US citizen." [Response at 29:17-18.] There is simply no legal authority to support MacDonald's argument, and he cites none. MacDonald is clearly an alien and not a U.S. citizen as a matter of statutory

definition. See 8 U.S.C. §§ 1101(a)(3) (definition of alien), 1401 et seq. (definition of U.S. citizens at birth), 1421 (naturalized U.S. citizens). At any rate, respondents in removal proceedings often raise U.S. citizenship claims as a defense to charges of deportability, and such claims are within the jurisdiction of an Immigration Judge ("IJ") to decide in removal proceedings. Likewise, American Indian status is a defense that MacDonald could have raised, but did not, in removal proceedings.

Regarding his due process claims, MacDonald argues only that he "was denied due process by virtue of the fact that he was afforded notice and a right to a hearing under a legal system inapplicable to him." [Response at 26:13-14.] Apparently, then, MacDonald concedes that he was afforded notice and opportunity to respond. As stated above, Immigration Court constitutes an appropriate forum for the adjudication of U.S. citizenship claims, as well as claims of American Indian status. Both are defenses to charges of deportability. MacDonald raises a new argument that he was afforded inadequate notice because the IJ had a duty "to inform [him] of what his S13 status meant." [Response at 26:26-27.] This Court should reject the claim/argument, because it is not contained in the complaint, and no IJ has been named as a defendant in this case.

Regarding Defendant Hughes, who is not and was not an ICE employee, MacDonald does not explain how a misrepresentation, if any, after the fact constitutes a Fourth or Fifth Amendment violation. Hughes' actions simply had no bearing whatsoever on MacDonald's arrest, detention, removal proceedings and/or execution of the removal order. Therefore, in the alternative, MacDonald's Bivens claim against Hughes should be dismissed for failure to state a claim upon which relief can be granted.

Regarding Defendant Garzon, MacDonald makes no attempt whatsoever to explain his personal involvement. Accordingly, in the alternative, MacDonald's Bivens claim against Garzon should be dismissed.

In response to Defendant Baker's contention that MacDonald had failed to allege any personal involvement, MacDonald now alleges that Defendant Baker's involvement was to sign a Form I-205 (Warrant of Removal/Deportation). [Response at 32:26-27; Pavone Declaration, Ex. J.] MacDonald states in his Response that Baker "signed the removal order" [Response at 32:26-

27], but of course it was the IJ, not Defendant Baker, who signed the removal order. As can be seen from the language of the warrant itself, the warrant simply authorizes execution of an IJ's anticipated removal order. Defendant Baker therefore continues to assert, in the alternative, that MacDonald has failed to allege personal involvement that led to MacDonald's arrest and detention. If this Court were to deem that Defendant Baker's signing of the Form I-205 constituted participation in the prosecution of removal proceedings against MacDonald, Baker would assert absolute prosecutorial immunity in addition to other defenses he has raised in the instant motion.

Regarding Defendant Haroldsen, MacDonald questions, without citing any authority, whether a non-lawyer's issuing and filing charging documents constitutes the actions of a prosecutor [Response at 33:16], and he appears to concede that, if they do, Hardoldsen enjoys absolute prosecutorial immunity [id. at 34:7-8], since he cannot identify any other actions that Haroldsen took. [Id. at 34:11-16.] As fully explained in Defendants' initial motion papers, prosecutorial immunity applies to non-attorneys whose roles are an integral part of the quasi-judicial process, and MacDonald does not contest that the initiation of removal proceedings constitutes an integral part of the process. MacDonald's request for further discovery to determine whether Haroldsen had other personal involvement in his arrest and detention fails to recognize the pleading requirements set forth in Ashcroft v. Iqbal, 556 U.S. 662 (2009).

MacDonald appears to argue that, whereas an administrative decision (Matter of Yellowquill) does not constitute sufficient existing precedent to defeat a qualified immunity motion, one district court decision (Akins) does. [Response at 36:13-14.] First, Akins is not binding authority so it cannot defeat a qualified immunity motion. See Boyd v. Benton County, 374 F.3d 773, 781 (9th Cir. 2004). And second, Akins did not concern whether the deportability provisions of immigration law applied to Canadian Indians. Furthermore, when Akins was decided, the BIA had taken the position that Canadian Indians could be deported. See Matter of A, 1 I. & N. Dec. 600 (BIA 1943). In sum, MacDonald has failed to address the absence of judicial decisions holding that Canadian Indians may not be removed from the United States.

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Finally, MacDonald contends that Defendant Haroldsen's mistake of fact was unreasonable, yet he excuses his own failure to bring his unique status to the attention of DHS officials and the IJs. The administrative record indicates that MacDonald had failed to assert his immunity from removal, and his sworn declaration now confirms that fact. [MacDonald Declaration, para. 7.] MacDonald's contention that he purposefully remained silent about his unique immigration status defies logic and common sense and, if true, further supports Defendant Haroldsen's contention that his error was reasonable under the circumstances.

For the reasons set forth above and in the Defendants' initial motion papers, MacDonald's Bivens claims should be dismissed as to all Defendants.

DATED: December 15, 2011

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