

IN THE UNITED STATES DISTRICT COURT  
DISTRICT OF NORTH DAKOTA

RENEE MARTIN, et al.,	)	
	)	
Plaintiffs,	)	Civil Action No. 3:22-cv-
	)	00136-PDW-ARS
v.	)	
	)	<b>THE INDIVIDUAL FEDERAL</b>
	)	<b>DEFENDANTS’ REPLY TO</b>
UNITED STATES OF AMERICA, et	)	<b>PLAINTIFF’S OBJECTION TO</b>
al.,	)	<b>THE RECOMMENDATION OF</b>
	)	<b>DISMISSAL</b>
Defendants.	)	

**INTRODUCTION**

BIA officers Lieutenant Kelan Gourneau; Officer Michael Slater; Officer Evan Parisien; Officer Heather Baker; and Chief Earl Charbonneau, as well as FBI Special Agent Reed Mesman (collectively the “Individual Federal Defendants”), submit this Reply to Plaintiff’s Objection to the Report and Recommendation. *See* Doc. 90. Plaintiff’s response and objection to the Report and Recommendation should be overruled, and the Court should enter an Order adopting the Report and Recommendation, granting the motions to dismiss, and dismissing Plaintiff’s Complaint with prejudice.

Plaintiff’s objection fails to raise new issues of law. Rather than dispute the law contained in the Report and Recommendation or provide more compelling authorities, Plaintiff repeats her previous conclusory allegations and argues for the first time that the Individual Federal Defendants’ motion to dismiss is premature. But a party cannot raise new arguments for the first time in objecting to a Report and Recommendation. Moreover, the federal rules permit a

defendant to move to dismiss a complaint based on that complaint's well-pled allegations, which is precisely what the Individual Federal Defendants did here. Their motion was not premature, and Plaintiff cites no case law suggesting otherwise. In short, the Court should adopt the Report and Recommendation and should dismiss Plaintiff's claims against the Individual Federal Defendants.

## ARGUMENT

### **I. Plaintiff's Allegation that the Individual Federal Defendants' Motion to Dismiss Is Premature Should Be Precluded and Is Without Merit.**

Plaintiff, for the first time, argues that the Individual Federal Defendants' motion to dismiss is premature. However, Plaintiff is precluded from raising this argument as she failed to raise said argument in her opposition papers. "A party cannot, in his objections to an R[eport] & R[ecommendation], raise arguments that were not clearly presented to the magistrate judge." *Hammann v. 1-800 Ideas.com, Inc.*, 455 F. Supp. 2d 942, 947-48 (D. Minn. 2006). Instead, when opposing a motion, "a party must put forth 'not only their best shot but all of their shots.'" *Munt v. Larson*, No. 15-cv-0582 (SRN/SER), 2015 U.S. Dist. LEXIS 127482, at \*41 (D. Minn. Sept. 23, 2015) (citing *Ridenour v. Boehringer Ingelheim Pharm., Inc.*, 679 F.3d 1062, 1067 (8th Cir. 2012) (quotations and citations omitted)); *see also Roberts v. Apfel*, 222 F.3d 466, 470 (8th Cir. 2000). Plaintiff is therefore precluded from now arguing that the Individual Federal Defendants' motion to dismiss was somehow premature.

Moreover, Plaintiff provides no legal support for her newly presented argument. Under Federal Rule of Civil Procedure 12(b)(6), the Individual Federal Defendants were entitled to seek dismissal of the claims against them based on the well-pled factual allegations in the Complaint. Nothing about their motion was premature. In contrast, and to the extent Plaintiff now seeks discovery, any such discovery clearly would be premature, particularly in light of the Individual

Federal Defendants' qualified immunity defense. *See Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985); *Lovelace v. Delo*, 47 F.3d 286, 287 (8th Cir. 1995). This Court should therefore disregard Plaintiff's new—and legally unsupported—argument that the Individual Federal Defendants' motion to dismiss was premature.

**II. A *Bivens* Remedy Is Unavailable in this New Context and Plaintiff Fails to Provide Any Argument to the Contrary.**

Regardless, Plaintiff's objection to the Report and Recommendation is silent on the unavailability of a *Bivens* remedy in this case. Plaintiff therefore effectively concedes that the context here is new and that special factors counsel hesitation. Plaintiff does not dispute the authorities included in the Report and Recommendation or those cited by the Individual Federal Defendants. Nor does she dispute that the context here is new. She never denies that there are special factors counselling hesitation in expanding *Bivens* to these claims, namely, the separation-of-powers concerns and the competing interests of two sovereigns. She never addresses the alternative remedial structures that "*alone*, like any special factor," are "reason enough to limit the power of the Judiciary to infer a new *Bivens* cause of action." *Egbert v. Boule*, 142 S. Ct. 1793, 1804 (2022) (internal quotations and citation omitted). Rather, she mistakenly relies on the location of the incident to support her assertion that "federal jurisdiction" applies and refers to inapposite cases without explaining how they should change this Court's ruling. This Court has recommended a dismissal because Plaintiff's *Bivens* claims arise in a new context. Its recommendation was correct on the law. Given Plaintiff's failure to raise any viable argument on this point, adoption of the Report and Recommendation and dismissal of Plaintiff's *Bivens* claims are warranted.

## CONCLUSION

Plaintiff's objection fails to raise any new issues of law. Her contention that the Individual Federal Defendant's motion practice was premature should be precluded as it was raised for the first time in objection to a Report and Recommendation and in any event is without merit. Thus, for the reasons stated above and in the Individual Federal Defendants' motion to dismiss and related filings, the Individual Federal Defendants respectfully request that the Court grant their motion and dismiss them from the case with prejudice.

Dated: March 20, 2024

Respectfully submitted,

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