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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**

8
9 TERRENCE BRESSI,

10 Plaintiff,

11 vs.

12 MICHAEL FORD, ERIC O'DELL, AND
13 GEORGE TRAVIOLIA, AND RICHARD
SAUNDERS,

14 Defendants.
15

) Case No. CIV 04-264 TUC-JMR
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) **PLAINTIFF'S RESPONSE TO MOTION TO**
) **DISMISS *BIVENS* CLAIM**

) Assigned to Honorable John M. Roll
)
)

16 Plaintiff Terrence Bressi ("Bressi"), by and through his attorney, responds to the Defendants'
17 motion to dismiss Plaintiff's *Bivens* claim, and asks that this Court DENY the motion, on the grounds
18 that Plaintiff has stated a claim, and provided sufficient facts upon which relief can be granted, that
19 the Defendants were acting in part on behalf of the United States of America at the time this cause of
20 action occurred.
21

22 **MEMORANDUM OF POINTS AND AUTHORITIES**

23 **Background**

24 On January 6, 2005, this Court entered an order which, among other things, asserted
25 jurisdiction over the subject matter of this case, which had been removed by Defendants after the
26 Complaint was filed in Pima County Superior Court. Subsequently, the Court granted Plaintiff's

1 motion for leave to amend the complaint on March 24, 2005 and ordered Plaintiff's Second Amended
2 Complaint to be filed. On April 11, 2005, Defendants filed an Answer to the Second Amended
3 Complaint as well as the Motion to Dismiss the *Bivens* Claim (to which Plaintiff now responds). On
4 May 2, 2005, Defendants filed an Amended Answer to the Second Amended Complaint.

5 On January 31, 2005, the Court granted in part Defendants' motion for reconsideration for the
6 purposes of determining subject matter jurisdiction over the cause of action. Since then, the parties
7 have engaged in lengthy discovery, and Plaintiff's response on the issues to be decided on
8 reconsideration was filed on May 6, 2005.

9
10 **Standard of Review**

11 Under *Evans v. McKay*, 869 F.2d 1341 (9th Cir. 1989), the Court will find that there is state
12 action by tribal police officers if they are cloaked in multiple jurisdictions and do not clearly delineate
13 their actions as purely tribal. "Given this explicit allegation of official state authority, coupled with
14 the 'peculiar' law enforcement situation as it exists on the reservation, we conclude that the
15 appellants have sufficiently pleaded action under color of state law to withstand a Rule 12(b)(6)
16 motion." 869 F.2d at 1348. It can be extrapolated that if Plaintiff can also demonstrate that the
17 "peculiar" law enforcement situation involved Defendants' being cloaked in federal law as well, then
18 Plaintiff can also sufficiently plead an action under color of federal law to withstand dismissal as well
19 as a Rule 56 motion for summary judgment (assuming the facts are sufficiently plead).

20 "When the jurisdictional issue and the substantive issues are so intermeshed that the question
21 of jurisdiction is dependent on decision of the merits," *Metro Industries, Inc. v. Sammi Corp.*, 82 F.3d
22 839, 846 (9th Cir. 1996), then the Court cannot resolve factual issues and instead must treat the matter
23 as with a Rule 56 motion for summary judgment. This is the case here, where the issue of whether
24 Defendants were acting under color of state law "provides the basis for both the subject matter
25 jurisdiction of the federal court and the plaintiff's substantive claim for relief." *Sun Valley Gasoline,*
26 *Inc. v. Ernst Enterprises, Inc.*, 711 F.2d 138, 139-40 (9th Cir. 1983).

1 **Plaintiff alleges sufficient facts that, if proven, state a *Bivens* claim**

2 Plaintiff has provided argument and documentation to the Court, contained on page 13 of the
3 Plaintiff's Amended Response to Motion for Reconsideration (and attached Plaintiff's Statement of
4 Facts and Exhibits), to state a claim that the Defendants were acting under color of federal law and
5 are therefore liable for Constitutional violations committed under color of federal law under *Bivens v.*
6 *Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971). Plaintiff incorporates those statements
7 of fact and exhibits by reference.

8 Defendants infer from the language of the Second Amended Complaint that the jurisdictional
9 basis of Plaintiff's *Bivens* claim lies solely with the certification filed by Acting U.S. Attorney
10 Jennifer Guerin regarding the substitution of the United States of America for the tort claim contained
11 in the First Amended Complaint. If this were Plaintiff's sole basis for the *Bivens* claim, then
12 Defendants would be correct in citing 25 U.S.C. §2804(f) as a bar to a *Bivens* claim.

13 However, Plaintiff has provided evidence to the Court that proves the Defendants were acting
14 under color of federal law because they allowed themselves to be commandeered by agents of the
15 United States Customs Service and United States Border Patrol. The Defendants did not provide the
16 operational plan for the December 20, 2002 roadblock through discovery; but according to the
17 operational plan for the October 3-5, 2003, roadblock, it was performed in conjunction with other
18 agencies, including the Border Patrol. This, along with Plaintiff's testimony that Customs and Border
19 Patrol agents were actively participating in the initial stops of vehicles at the roadblock, lends
20 credence to Plaintiff's claim that Defendant Michael Ford said that the roadblock in this case was
21 conducted by a "joint task force".

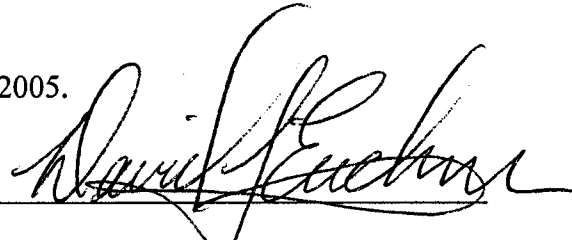
22 If the roadblock in this case was in fact conducted by a joint task force, the invocation of
23 federal law by Lieutenant Ford in this context necessarily means that the Defendants were acting
24 under color of federal law.

25 Plaintiff has raised a genuine issue of material fact as to the jurisdictional basis of the
26 roadblock. This factual issue is so intertwined with the substantive issues in this case that it must be

1 left for the trier of fact to decide upon reaching the merits of the claim. Therefore, Defendants'
2 motion to dismiss the *Bivens* claim, and the implied motion for summary judgment on that claim,
3 must be denied.

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5 Respectfully submitted this 11th day of May, 2005.

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7 BY:


8 David J. Euchner
9 Attorney for Plaintiff

10 Copy of the foregoing mailed
11 This 11th day of May, 2005, to:

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16 *Attorney for Defendants*
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