United States Court of Appeals
for the Fifth Circuit

No. 18-50977

GERARDO SERRANO,

Plaintiff—Appellant,

versus

CUSTOMS AND BORDER PATROL, U.S. CUSTOMS AND BORDER PROTECTION; UNITED STATES OF AMERICA; JOHN DOE 1-X; JUAN ESPINOZA; KEVIN MCALEENAN,

Defendants—Appellees.

Appeal from the United States District Court
for the Western District of Texas
USDC No. 2:17-CV-48

Before CLEMENT, HIGGINSON, and ENGELHARDT, *Circuit Judges.*

PER CURIAM:

Gerardo Serrano filed suit against the United States Customs and Border Protection (CBP) and related parties, alleging constitutional violations after his truck and its contents were seized at the United States-Mexico border. Serrano sought the return of his property pursuant to Federal Rule of Criminal Procedure 41(g), as well as damages under *Bivens v. Six*

Unknown Named Agents, 403 U.S. 388 (1971), alleging violations of his Fourth and Fifth Amendment rights. Additionally, Serrano asserted a purported class-wide due process claim against the United States, CBP, and the CBP Commissioner, seeking declaratory and injunctive relief, directing CBP to provide prompt post-seizure hearings when seizing vehicles for civil forfeiture. The district court granted defendants' motions to dismiss and denied as moot Serrano's motion to certify the class.

On appeal, Serrano contends that the district court erred in dismissing his complaint and should be reversed for three reasons: Serrano argues (1) he properly stated a class claim that defendants must provide prompt, post-seizure hearings when they take property for civil forfeiture based on *Mathews v. Eldridge*, 424 U.S. 319 (1976); (2) he properly stated a class claim that it is unconstitutional to condition a forfeiture hearing on the property owner posting a bond; and (3) he claims he has a cause of action for damages under *Bivens* because his claims do not arise in a new context, nor are there factors counselling against allowing his damages claims to proceed. For the reasons stated herein, we AFFIRM the judgment of the district court.[1]

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[1] Appellees assert that Serrano's class claims were mooted by the return of his property. We disagree. In *Zeidman v. J. Ray McDermott & Co.*, this court extended the concept of relation back in holding that "a suit brought as a class action should not be dismissed for mootness upon tender to the named plaintiffs of their personal claims, at least when . . . there is pending before the

I.

On September 21, 2015, Gerardo Serrano, a U.S. citizen and resident of Tyner, Kentucky, was driving his 2014 Ford F-250 pickup truck to Mexico to meet with his cousin when he was stopped at the Eagle Pass, Texas, Port of Entry.[2] While still in the United States, Serrano began to take pictures of the border crossing with his cell phone.

Two CBP agents objected to Serrano photographing the border facility and, after stopping his truck, physically removed him from it, took possession of his phone, and repeatedly demanded the password to unlock his phone. Invoking his constitutional rights, Serrano refused to provide the password to his phone. The agents searched his vehicle, finding a .380 caliber magazine and five .380 caliber bullets in the truck's center console.[3]

The agents handcuffed Serrano and detained him for several hours, consistently attempting to obtain the password for his phone without success. Serrano explained that he was not aware that the bullets and

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district court a timely filed and diligently pursued motion for class certification." 651 F.2d 1030, 1051 (5th Cir. 1981); *see also Fontenot v. McCraw*, 777 F.3d 741, 750 (5th Cir. 2015) (stating that *Genesis Healthcare Corp. v. Symcyzk*, 569 U.S. 66 (2013), "does not foreclose the broader *Zeidman* approach to the relation back doctrine").

[2] Because Serrano's claims were dismissed on the pleadings, the alleged underlying facts are taken as true.

[3] Serrano has a valid concealed carry permit issued by his home state of Kentucky.

magazine were in the truck. As he had not yet crossed into Mexico, Serrano offered to turn around and leave the border facility or leave the magazine and low-caliber bullets at the border facility. After being detained for about three hours, Serrano was released, but CBP agents seized his vehicle and its contents, including the magazine and the bullets. Serrano left the detention facility on foot.

On October 1, 2015, CBP mailed Serrano a notice of seizure, informing him that the truck, magazine, and bullets were seized and subject to forfeiture because there was probable cause to believe that Serrano had attempted to export "munitions of war" from the United States.[4] The notice advised Serrano of the options that were available to him concerning the seizure: (1) file a remission petition; (2) submit an "offer in compromise" and include a check of the proposed settlement amount along with the offer; (3) abandon any interest in the property; (4) request court action and have his case referred to the U.S. Attorney for institution of judicial forfeiture proceedings; (5) do

[4] The notice stated that the "property was seized and is subject to forfeiture under the provisions of [19 U.S.C. § 1595a(d), 22 U.S.C. § 401, 22 U.S.C. § 2778, and 22 C.F.R. Part 127.1.]" According to 19 U.S.C. § 1595a(d), merchandise attempted to be exported from the United States contrary to law, and property used to facilitate the exporting, shall be seized and forfeited to the United States. The other provisions cited in the notice are as follows: 22 U.S.C. § 401 (providing for seizure and forfeiture of illegally exported war materials and vehicles used to attempt to export such articles); 22 U.S.C. § 2778 (control of arms exports and imports); and 22 C.F.R. § 127.1 (violations for illegal exports from the United States).

nothing; or (6) offer to substitute release of the seized property on payment.

If Serrano chose to have his case referred to the U.S. Attorney (option 4), the notice stated that he must submit to CBP at the address provided a claim and "cost bond in the penal sum of $5,000 or 10 percent of the value of the claimed property, whichever is less, but in no case shall the amount of the bond be less than $250.00."[5] Under this "court action" option, the notice further advised:

> If you file the claim and bond, the case will be referred promptly to the appropriate U.S. Attorney for the institution of judicial proceedings in Federal court to forfeit the seized property in accordance with 19 U.S.C. § 1608 and 19 C.F.R. § 162.47. You may then file a petition for relief with the Department of Justice pursuant to Title 28, Code of Federal Register, Part 9 (28 C.F.R. Pt. 9). Failure to submit a bond with the claim will render the request for judicial proceedings incomplete, and therefore, defective. This means that the case will NOT be referred to the appropriate U.S. Attorney.

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[5] As explained in the notice, if the claimant could not afford to post the bond, he should contact the Fines, Penalties & Forfeitures Officer so that CBP can make a determination of claimant's financial ability to pay the bond. "If a determination of inability to pay is made, the cost of the bond may be waived in its entirety." Serrano does not allege in his complaint either that he applied for the waiver of the bond or that he was unreasonably denied a waiver.

On October 22, 2015, Serrano responded to the notice by letter, demanding the immediate return of his truck or a hearing in court. Along with the letter, he sent a check for $3,804.99 to satisfy the bond requirement. According to Serrano's bank records, CBP promptly deposited the check on or about October 30, 2015.

On four separate occasions, Serrano called defendant Juan Espinoza, a paralegal at CBP and the primary point of contact identified in the notice of seizure, to inquire about the status of his case. During one of these calls, Espinoza told Serrano that his case was taking so long because he had requested to see a judge. Espinoza also informed Serrano that he would have to wait for his case to be referred to an available Assistant United States Attorney.

On December 19, 2016, Serrano submitted a Freedom of Information Act request to CBP asking for information about the seizure and forfeiture of his truck. As of the date of the filing of the complaint, CBP had not responded. For 23 months, defendants failed to institute forfeiture proceedings and Serrano was deprived of his property without a hearing to challenge the seizure or the continued retention of his vehicle.[6]

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[6] Serrano alleges that the truck was held at a CBP seizure lot. While seized, he continued to make monthly loan payments of $672.97, as well as insurance and registration payments for a truck that he could not drive. Serrano also spent thousands of dollars on rental cars.

On September 6, 2017, Serrano filed a complaint for return of property, compensatory damages, and class-wide injunctive and declaratory relief, naming as defendants the U.S. Customs and Border Protection (CBP), the United States, Kevin McAleenan[7] in his official capacity as the Acting Commissioner of CBP, Juan Espinoza in his individual capacity, and John Doe 1-X (unidentified responsible CBP agents). Serrano sought the return of his "truck and all its contents, his magazine, five bullets, and the $3,804.99 that he posted as bond" under Federal Rule of Criminal Procedure 41(g), alleging that the seizure and continued retention of his property violated his Fourth and Fifth Amendment rights (Count I). Serrano also asserted an individual *Bivens* claim for damages against Espinoza and other unknown and unserved agents acting in their individual capacities for the violation of his Fourth (Count II) and Fifth (Count III) Amendment rights. Additionally, Serrano sought injunctive and declaratory relief on behalf of a putative class against CBP's policy or practice of holding seized vehicles without providing a prompt, post-seizure forfeiture hearing, in violation of the class's due-process rights (Count IV). Serrano simultaneously moved to certify a class consisting of "all U.S. Citizens whose vehicles are or will be seized by CBP for civil forfeiture and held without a post-seizure hearing."

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[7] On July 7, 2019, Mark A. Morgan was appointed to serve as Acting Commissioner of U.S. Customs and Border Protection. Under Federal Rule of Appellate Procedure 43(c), Acting Commissioner Morgan is automatically substituted as a party.

The following month, on October 19, 2017, CBP returned Serrano's truck. However, the remainder of Serrano's property was not returned for several more months: Serrano filed a notice on February 26, 2018, notifying the court that his $3,804.99 in bond money had been returned and another notice on May 29, 2018, that his seized bullets and magazine were returned "without apology or explanation."[8]

On December 13, 2017, defendants United States, CBP, and the CBP Commissioner (Class Defendants) moved to dismiss Serrano's individual and class claims as moot and for failure to state a claim, arguing that the claims are moot because Serrano's property was returned, and, in any event, due process does not require a post-seizure hearing. Class Defendants also filed a response in opposition to the motion to certify. The same day, Espinoza filed a Rule 12(b)(6) motion to dismiss Serrano's *Bivens* claim, seeking dismissal because Serrano failed to allege a viable *Bivens* claim under existing law and contending that no *Bivens* claim is available in this new context.[9] *See* Fed. R. Civ. P. 12(b)(6). Alternatively, Espinoza argued that he is

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[8] Ultimately, Serrano was never charged with a crime and his property was returned prior to forfeiture proceedings.

[9] The motion to dismiss was filed on behalf of defendant Juan Espinoza, but noted: "The John Doe defendants have not been identified by Plaintiff, nor have they been served. Because this motion raises threshold defenses relating to Plaintiff's ability to state a *Bivens* claim against Defendant Juan Espinoza, it is likely that a ruling for Espinoza would also entitle the unidentified John Doe Defendants to a judgment in their favor."

entitled to qualified immunity because he did not violate any clearly established constitutional right.

Serrano conceded that the return of his property mooted his individual claim for return of property (Count I), but otherwise opposed both motions to dismiss.

On July 23, 2018, the magistrate judge issued a report and recommendation. The magistrate judge concluded that Serrano's remaining claims were not moot, but recommended dismissal because Serrano failed to state a claim upon which relief could be granted. Serrano filed written objections to the report and recommendation.

On September 28, 2018, after de novo review of the report's factual findings and legal conclusions, the district court overruled Serrano's objections and adopted the magistrate judge's recommendations based on reasons it provided in its order. The district court dismissed Serrano's class-wide and individual claims under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief could be granted. In dismissing Serrano's class claims, the district court reasoned: "Because this Court finds a weighing of the *Mathews* factors indicates that due process does not require a prompt post-seizure, pre-forfeiture hearing, the Plaintiff has failed to state a claim for which relief can be granted."

Additionally, the district court dismissed Serrano's *Bivens* claims. The district court concluded that both of Serrano's claims (under the Fourth and Fifth

Amendments) arise in a "new context" that is significantly different from any of the three *Bivens* claims the Supreme Court has recognized in the past. The district court further concluded that special factors counseled against expanding the *Bivens* remedy in this case. The district court explained that the remedial forfeiture scheme under the customs laws is analogous to the statutory schemes that the Supreme Court found preclusive of a judicially created *Bivens* remedy in *Bush v. Lucas*, 462 U.S. 367 (1983), and *Schweiker v. Chilicky*, 487 U.S. 412 (1988).

Serrano timely appealed. On appeal, Serrano contends that the district court erred in dismissing his complaint and should be reversed for three reasons: (1) he "properly stated a class claim that Defendants must provide prompt, post-seizure hearings when they take property for civil forfeiture" based on *Mathews*, 424 U.S. at 319; (2) he "properly stated a class claim that it is unconstitutional to condition a forfeiture hearing on the property owner posting a bond;" and (3) he has a cause of action for damages under *Bivens*, 403 U.S. at 388, because his claims do not arise in a new context, nor are there factors counselling against allowing his damages claims to proceed.

II.

We review a district court's dismissal under Federal Rule of Civil Procedure 12(b)(6) de novo, "accepting all well-pleaded facts as true and viewing those facts in the light most favorable to the plaintiff." *Stokes v. Gann*, 498 F.3d 483, 484 (5th Cir. 2007). "To survive

a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, 'to state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.*

While the factual allegations need not be detailed, they must be enough to raise a right to relief above the speculative level. *Twombly*, 550 U.S. at 555. "The court's review is limited to the complaint, any documents attached to the complaint, and any documents attached to the motion to dismiss that are central to the claim and referenced by the complaint." *Lone Star Fund V (U.S.), L.P. v. Barclays Bank PLC*, 594 F.3d 383, 387 (5th Cir. 2010).

III.

Due Process Claims

The main focus of Serrano's due process challenge is to the Government's continued retention of seized property without a prompt judicial hearing to determine whether the government can retain possession of the seized property pending judicial forfeiture proceedings. Because he claims the district court erred in concluding that CBP's practices do not violate due process as a matter of law, Serrano maintains that the district court erred both in dismissing Count IV for failure to

state a claim and denying as moot his motion for class certification. Contrary to the district court's finding, Serrano argues that due process requires a prompt, post-seizure hearing as evidenced by a "long line of authority requiring prompt hearings to contest even temporary deprivations of property" and a proper weighing of the *Mathews v. Eldridge* due process factors.

The Due Process Clause of the Fifth Amendment guarantees that "[n]o person shall be . . . deprived of life, liberty, or property, without due process of law." U.S. CONST. amend. V. "The essence of due process is the requirement that a person in jeopardy of serious loss (be given) notice of the case against him and opportunity to meet it." *Mathews*, 424 U.S. at 348–49 (quoting *Joint Anti-Fascist Comm. v. McGrath*, 341 U.S. 123, 171–72 (Frankfurter, J., concurring)). "[D]ue process is flexible and calls [only] for such procedural protections as the particular situation demands." *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972). As the Supreme Court explained in *Mathews*, in identifying the "specific dictates of due process," courts must consider three factors: (1) "the private interest that will be affected by the official action;" (2) "the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards;" and (3) "the Government's interest, including the function involved and the fiscal and administrative burdens that the

additional or substitute procedural requirement would entail."[10] 424 U.S. at 335.

The first factor we consider in the *Mathews* analysis is "the private interest that will be affected by the official action." *Id.* "The deprivation of real or personal property involves substantial due process interests." *Krimstock v. Kelly*, 306 F.3d 40, 61 (2d Cir. 2002) (Sotomayor, J.) (citing *United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 53–54 (1993)).[11] An individual has an important interest in the possession of his or her motor vehicle, particularly because of its "use as a mode of transportation, and, for some, the means to earn a livelihood." *Id.* Because the seizure of a vehicle implicates an important private interest, the main points of contention are with respect to the balancing of the second and third *Mathews* factors.

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[10] As the district court noted, Serrano's asserted class claims argue that due process requires a prompt, post-seizure hearing in a court of law to determine whether the Government can retain possession of the seized property pending judicial forfeiture proceedings. Importantly, Serrano does not challenge the validity of the initial seizure nor does he allege that the administrative delays in referring his case to the United States Attorney in this instance violate due process. *See United States v. Eight Thousand Eight Hundred and Fifty Dollars ($8,850) in U.S. Currency*, 461 U.S. 555, 564 (1983) (applying the speedy trial balancing test identified in *Barker v. Wingo*, 407 U.S. 514 (1972), to determine whether the Government's delay in filing a forfeiture action was reasonable). Accordingly, both parties' arguments focus on the application of the *Mathews* factors.

[11] *Good* involved the seizure of real property. Property that is capable of being moved and concealed involves different concerns from the forfeiture of real property. *See* 510 U.S. at 52–53.

Under the second *Mathews* factor, we consider "the risk of erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards." *Mathews*, 424 U.S. at 335. Serrano disagrees with the district court's finding that the federal scheme at issue affords multiple alternative remedial processes, lowering the risk of erroneous deprivation. To the contrary, Serrano asserts that CBP's forfeiture procedures create a high risk of erroneous deprivation because none of the processes available afford property owners the protection of a neutral decision maker, as required by due process.

The risk is minimal under the second *Mathews* factor when we consider the remedial procedures available that permit a claimant to contest the deprivation of his vehicle. *Cf. United States v. One 1971 BMW 4-Door Sedan*, 652 F.2d 817, 820 (9th Cir. 1981) ("The pervasive statutory scheme . . . evidences substantial concern on the part of Congress with respect to what process is due owners of vehicles seized under the narcotics laws and regulations. Great weight must be given to its judgment." (citing *Mathews*, 424 U.S. at 349)). Under the current customs laws, if the value of the seized property is below $500,000, CBP sends written notice to each party that has an interest in the claim or seized property.[12] 19 U.S.C. § 1607; 19 C.F.R.

[12] The notice identifies, among other things, the provisions of law alleged to have been violated, a description of the specific acts or omission alleged, and additional details about the seized property.

§ 162.31. The notice informs the claimant of a number of available options to address the seized property, which include filing a petition for remission; filing an offer in compromise; abandoning the property; or requesting the matter be referred to the U.S. Attorney for institution of judicial forfeiture proceedings.

A petition for remission offers an expedited administrative procedure to contest the forfeiture. *See United States v. Von Neumann*, 474 U.S. 242, 250 (1986) ("Remission proceedings supply both the Government and the claimant a way to resolve a dispute informally rather than in judicial forfeiture proceedings."). "The purpose of the remission statutes is to grant the executive the power to ameliorate the potential harshness of forfeitures." *In re Sixty Seven Thousand Four Hundred Seventy Dollars*, 901 F.2d 1540, 1543 (11th Cir. 1990).

In the petition for remission, the claimant has an opportunity to explain why he believes he warrants relief from forfeiture. Notably, testimony may be taken in connection with a remission petition. 19 U.S.C. § 1618. Serrano's notice of seizure states that if he is dissatisfied with the petition decision or at any point prior to the forfeiture of the property, he may request a referral to the U.S. Attorney for judicial action by filing a claim and cost bond. In the past, the statutory administrative remission procedure was a popular and effective tool for obtaining the return of property. *See Von Neumann*, 474 U.S. at 249 n.8 (In "90% of all seizures, the claimant files a petition for remission or

mitigation," and at least partial relief was granted in an estimated 75% of the petitions).

Further, the fourth option, which Serrano selected, allows for an independent evaluation and determination by the U.S. Attorney regarding forfeiture proceedings. If the claimant elects this proceeding and properly files a claim and bond,[13] the notice states that the "case will be referred *promptly* to the appropriate U.S. Attorney for the institution of forfeiture proceedings."[14] *See* 19 U.S.C. § 1603(b) (requiring a "customs officer to report promptly [a] seizure [made for violation of customs laws] . . . to the United States attorney for the district in which such violation has occurred, or in which such seizure was made"); *see also* 19 U.S.C. § 1604 ("It shall be the duty of the Attorney General of the United States immediately to inquire into the facts of cases reported to him by customs officers and the laws applicable thereto, and if it appears probable . . . to cause the proper proceedings to be commenced and prosecuted, without delay, for the recovery of such fine, penalty, or forfeiture."). Thus, referral may result in

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[13] Recall that the statute provides for a potential waiver of the bond in its entirety.

[14] "Since October of 1978 the constitutional requirement of promptness has been incorporated into the Customs statutes." *United States v. One 1976 Mercedes 450 SLC*, 667 F.2d 1171, 1175 n.3 (5th Cir. Unit B 1982). The parties agree that the processing timeline provisions of the Civil Asset Forfeiture Reform Act of 2000 (CAFRA) are not applicable to the challenged forfeiture proceeding. *See* 18 U.S.C. § 983(i)(2)(A).]

return of the property and any bond without further delay.

Indeed, Serrano concedes that the forfeiture proceeding itself would provide the post-seizure hearing required by due process if it were held promptly. An unreasonably long retention without instituting a forfeiture proceeding can constitute a denial of due process. *See*, *e.g.*, *United States v. $23,407.69 in U.S. Currency*, 715 F.2d 162, 165–66 (5th Cir. 1983). In the event there is a prolonged delay in initiating forfeiture proceedings, a claimant can challenge the reasonableness of the delay under *Barker*. *See United States v. Eight Thousand Eight Hundred and Fifty Dollars ($8,850) in U.S. Currency*, 461 U.S. 555, 564 (1983) (applying the four-factor balancing test of *Barker*, to determine whether the Government's delay in filing a forfeiture action was reasonable); *see also Shults v. Texas*, 762 F.2d 449, 453 (5th Cir. 1985) (considering *$8,850* the "seminal case" addressing "whether a delay in a post-seizure hearing offended the Fifth Amendment right against deprivation of property without due process of law").

Importantly, as is evidenced in this case, the property owner may file a motion under Federal Rule of Criminal Procedure 41(g) for the return of seized property.[15] *See United States v. Sims*, 376 F.3d 705, 708 (7th

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[15] Federal Rule of Criminal Procedure 41(g), formerly Rule 41(e), provides:

> A person aggrieved by an unlawful search and seizure of property or by the deprivation of property may move for the property's return. The motion must be filed in

Cir. 2004); *cf. Krimstock*, 306 F.3d at 52 n.12 (distinguishing forfeiture under the customs law and noting that under the customs law applicable in *Von Neumann*, the claimant could file a motion under Federal Rule of Criminal Procedure 41(g) "for return of the seized vehicle if he or she 'believe[d] the initial seizure was improper'" (quoting *Von Neumann*, 474 U.S. at 244 n.3) (brackets in *Krimstock*)). Although a Rule 41(g) motion is generally available in the context of an ongoing criminal proceeding, the court can properly construe it as a civil complaint under the court's general equity jurisdiction. *See*, *e.g.*, *Bailey v. United States*, 508 F.3d 736, 738 (5th Cir. 2007); *United States v. Robinson*, 434 F.3d 357, 361 (5th Cir. 2005); *accord United States v. Craig*, 694 F.3d 509, 512 (3d Cir. 2012); *United States v. Search of Music City Mktg., Inc.*, 212 F.3d 920, 923 (6th Cir. 2000); *Floyd v. United States*, 860 F.2d 999, 1002–03, 1006–07 (10th Cir. 1988). Thus, Rule 41(g) provides an additional avenue to challenge the seizure before a neutral decision maker and is "an action frequently taken to force the government agency to act expeditiously." *Muhammed v. Drug Enf't Agency, Asset Forfeiture Unit*, 92 F.3d 648, 651–52 (8th Cir. 1996). Serrano argues that Rule 41(g) is insufficient to protect the interest of his purported class because it only allows the movant to challenge the legality of the

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> the district where the property was seized. The court must receive evidence on any factual issue necessary to decide the motion. If it grants the motion, the court must return the property to the movant, but may impose reasonable conditions to protect access to the property and its use in later proceedings.

underlying seizure, not the interim retention of the property pending judicial proceedings. But the availability of a prompt merits determination minimizes any need for an interim hearing.

In assessing the risk of erroneous deprivation, we consider the agency's pecuniary interest in the outcome of the forfeiture proceedings. As observed by the Supreme Court, greater procedural safeguards are "of particular importance . . . where the Government has a direct pecuniary interest in the outcome of the proceeding." *Good*, 510 U.S. at 55–56. Serrano alleges that CBP retains forfeited property or its proceeds to fund its law-enforcement operations, giving the agency and its officers a direct financial stake in seizing and forfeiting property. However, taking these allegations as true, the option to elect judicial forfeiture proceedings and/or file a Rule 41(g) motion in district court are existing safeguards to counter CBP's alleged interest in forfeiture proceeds.

Given the remedial processes available, the second *Mathews* factor weighs in favor of the Government.

Finally, the third factor under *Mathews* requires a consideration of "the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Mathews*, 424 U.S. at 335. Serrano disagrees with the weight the district court attributed to the third factor, based on its conclusion that the Government has an important interest in enforcing customs laws and the potential administrative

burden that providing prompt hearings would place on the Government.

The third factor weighs in favor of the Government. We cannot ignore the context of the underlying seizure. The Government's interest in preventing the unlawful exportation of munitions, drugs, and other contraband is significant. *See*, *e.g.*, *Hernandez v. Mesa*, 140 S. Ct. 735, 746 (2020) ("One of the ways in which the Executive protects this country is by attempting to control the movement of people and goods across the border."); *Lee v. Thornton*, 538 F.2d 27, 31 (2d Cir. 1976) ("There is an extremely important government interest in policing the passage of persons and articles into the country across its borders."). Further, Serrano's property was subject to forfeiture because the agents believed that the truck was used in an attempt to illegally export munitions from the United States, in violation of federal law.[16] The Government's retention protects its interest in the seized vehicle. Additionally, a significant administrative burden would be placed on the Government if it was required to provide prompt post-seizure hearings in every vehicle seizure.

Given the broad allegations in the complaint and our balancing of the *Mathews* factors, we conclude that Serrano has failed to state a claim for a procedural due process violation. As identified in the CBP's seizure

[16] There is no dispute that Serrano's vehicle contained the magazine and bullets when he attempted to exit the United States and enter Mexico. Nor does Serrano dispute that the seizure was pursuant to a statutory grant of authority under the customs laws.

notice, a claimant is notified of the seizure and provided options for challenging the CBP's action, both administratively and judicially. Serrano has not sufficiently alleged the constitutional inadequacy of the existing procedures, nor has he shown that the available processes are unavailable or patently inadequate.

Moreover, our conclusion that the additional process Serrano seeks is not constitutionally required in this context is consistent with *Von Neumann*. There, the Supreme Court recognized that "implicit" in its "discussion of timeliness in *$8,850* was the view that the forfeiture proceeding, *without more*, provides the postseizure hearing required by due process to protect [claimant's] property interest in the car." 474 U.S. at 249 (emphasis added). The parties dispute the relevance of *Von Neumann*. *Compare* Red Br. 22 (*Von Neumann* forecloses plaintiff's argument) *with* Reply Br. 13 ("[A]s the district court correctly recognized, *Von Neumann* does not govern [Serrano's] claim."). We agree that *Von Neumann* is not dispositive of Serrano's due process challenge; however, the Court's reasoning is pertinent to our due process analysis.

Von Neumann specifically notes that a claimant's "right to a forfeiture proceeding meeting the *Barker*[17]

[17] The Supreme Court in *$8,850* and *Von Neumann* applied the *Barker* test to a due process challenge to the Government's delay in instituting a civil forfeiture proceeding. *Barker v. Wingo*, 407 U.S. 514 (1972), which addressed a defendant's right to a speedy trial, propounded a four-part test to be used as a guide "in balancing the interests of the claimant and the Government to

test satisfies any due process right with respect to the car and the money." *Von Neumann*, 474 U.S. at 251; *see also Gonzales v. Rivkind*, 858 F.2d 657, 661–62 (11th Cir. 1988); *LKQ Corp. v. U.S. Dep't of Homeland Sec.*, 369 F. Supp. 3d 577, 589–90 (D. Del. 2019). And neither the Supreme Court nor the Fifth Circuit has held that the Due Process Clause requires an additional post-seizure, pre-forfeiture judicial hearing.

Moreover, the cases Serrano cites do not dictate a different result under *Mathews*. Serrano primarily relies on the Second Circuit's decision in *Krimstock*, 306 F.3d at 40, to support his position that a prompt, post-seizure hearing is constitutionally required while awaiting the forfeiture hearing.[18] In *Krimstock*, plaintiffs challenged the constitutionality of the seizure and retention of motor vehicles under the city's Civil Administrative Code, a forfeiture statute that permitted, on the basis of a first offense, seizure of "a motor vehicle following an arrest for the state-law charge of driving while intoxicated . . . or any other crime for which the vehicle could serve as an instrumentality." 306 F.3d

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assess whether the basic due process requirement of fairness has been satisfied in a particular case." *$8,850*, 461 U.S. at 565. Courts have expressed confusion about whether to analyze a due process challenge to a forfeiture procedure under *Barker* or *Mathews*. *See*, *e.g.*, *Ford Motor Credit Co. v. NYC Police Dep't.*, 503 F.3d 186, 194 (2d Cir. 2007). We agree with the parties that *Mathews* is more applicable here because the harm alleged is the lack of an interim hearing rather than delay preceding an ultimate hearing on the merits.

[18] Unlike *$8,850* and *Von Neumann, Krimstock* analyzed a forfeiture due process challenge under the *Mathews* factors.

at 44. Having identified special due process concerns and applying the three *Mathews* factors, the court in *Krimstock* concluded that the New York administrative code provisions at issue did not pass constitutional muster. *Id.* at 67.

Krimstock does not constrain our balancing of the *Mathews* factors in this case. Of particular importance, *Krimstock* is limited to the specific New York City statute at issue, which is materially distinguishable from the forfeiture scheme Serrano challenges.[19] "[D]ue

[19] Applying the three *Mathews* factors, the court in *Krimstock* concluded that the New York administrative code provisions at issue did not pass constitutional muster because they failed to include a provision for a prompt post-seizure, prejudgment hearing before a neutral judicial or administrative officer to determine whether the city was likely to succeed on the merits of the forfeiture action and whether means short of retention of the vehicle could satisfy the city's need to preserve it from destruction or sale during the pendency of proceedings. 306 F.3d 40 (2d Cir. 2002). In *Ferrari v. County of Suffolk*, a man had his vehicle seized in connection with his arrest for driving while intoxicated, pursuant to the county's DWI seizure statute. 845 F.3d 46, 49, 59 n.18 (2d Cir. 2016). Our sister circuit held that a district court erred in concluding that *Krimstock* prevented a county or municipality from relying on public safety concerns as the basis for retention *pendente lite*, and that the Due Process Clause of the Fourteenth Amendment permitted the county, after making out a prima facie case that retention was necessary to protect its interests, to shift the burden of going forward onto the title owner to identify an alternative measure that satisfied the municipality's interests. *Id.* The New York forfeiture statutes in *Ferrari* and *Krimstock* are materially distinguishable from the forfeiture scheme in the present case. The statute in *Ferrari* permitted forfeiture only when the vehicle was an instrumentality of a specifically enumerated, serious crime, and the driver involved had at least one prior conviction for such a crime. *Id.* at 49. The statute was "aimed

process is flexible and calls for such procedural protections as the particular situation demands." *Morrissey*, 408 U.S. at 481.

Accordingly, Serrano's complaint fails to state a claim upon which relief can be granted.

Serrano also alleges that it is unconstitutional to condition a forfeiture hearing on the property owner posting a bond

As a threshold matter, Serrano failed to object to the magistrate judge's findings with regard to his class claims challenging the bond requirement to institute judicial forfeiture proceedings. Reviewing for clear error, the district court found none and adopted the magistrate judge's report in full. [*Id.*] Because Serrano failed to object, our review is limited to plain error. *Douglass v. United Servs. Auto. Ass'n*, 79 F.3d 1415, 1429 (5th Cir. 1996) (en banc), *superseded by statute on other grounds*, 28 U.S.C. § 636(b)(1).

The district court did not plainly err in holding that Serrano failed to state a claim that the bond requirement violates due process. *See Faldraga v. Carnes*, 674 F. Supp. 845, 850 (S.D. Fla. 1987); *see also Brown v. Dist. of Columbia*, 115 F. Supp. 3d 56, 72 (D.D.C. 2015). Claimants who elect to judicially challenge the forfeiture are generally required to post a

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specifically at repeat offenders of New York's drunk driving laws," and afforded owners a prompt, post-seizure hearing to determine if the county may retain the vehicle (unavailable with the statute at issue in *Krimstock*). *Id.* at 50.

cost bond in the penal sum of $5,000 or 10 percent of the value of the claimed property, whichever is less, but in no case shall the amount of the bond be less than $250. 19 U.S.C. § 1608.

The bond serves to "deter those claimants with frivolous claims" and "to cover the costs and expenses of the proceedings." *Arango v. U.S. Dep't of the Treasury*, 115 F.3d 922, 925 (11th Cir. 1997) (quotations omitted). "If the outcome of the judicial proceeding is in the claimant's favor, the bond is returned." *Id.* (citation omitted). Additionally, to ensure that the bond requirement does not deny indigent claimants an opportunity to contest the forfeiture in court, CBP provides by regulation that the bond requirement shall be waived "upon satisfactory proof of financial inability to post the bond." 19 C.F.R. § 162.47(e). The notice of seizure explicitly advises the claimant that if he cannot afford to post the bond, he should contact the Fines, Penalties and Forfeitures Officer in order for CBP to determine claimant's financial ability to pay: "If a determination of inability to pay is made, the cost of the bond may be waived in its entirety."[20] Thus, the district court did not err in dismissing the claim.

Because we affirm the district court's dismissal under Rule 12(b)(6) of Serrano's due process class claims for failure to state a claim, we also affirm the denial of his motion for class certification as moot.

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[20] Serrano has not requested such a waiver, nor does he contend that he was or is unable to afford the bond payment.

Bivens Claim

Serrano additionally argues that dismissal was inappropriate because he properly asserted an individual claim for damages under *Bivens* to vindicate his Fourth and Fifth Amendment rights.

In *Bivens*, the Supreme Court "broke new ground by holding that a person claiming to be the victim of an unlawful arrest and search could bring a Fourth Amendment claim for damages against the responsible agents even though no federal statute authorized such a claim." *Hernandez*, 140 S. Ct. at 741 (citing *Bivens*, 403 U.S. at 388). This holding was issued at a time when, "as a routine matter," the Court "would imply causes of action not explicit in the statutory text" on the assumption that courts could properly "provide such remedies as [were] necessary to make effective" the statute's purpose. *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1855 (2017) (quoting *J.I. Case Co. v. Borak*, 377 U.S. 426, 433 (1964)). The Supreme Court has since adopted a more cautious approach, honoring separation-of-powers principles and stressing that whether a damages remedy should be created requires consideration of "a number of economic and governmental concerns." *Id.* at 1856. Because of these considerations, Congress is "better position[ed]" than the judiciary "to consider if the public interest would be served by imposing a new substantive legal liability." *Id.* at 1857 (quoting *Schweiker*, 487 U.S. at 426–427). "The Court has made clear that expanding the *Bivens* remedy is now a 'disfavored' judicial activity." *Id.* (quoting *Iqbal*, 556 U.S. at 675).

Assuming without deciding that a *Bivens* remedy is available in this context, Serrano's complaint fails to state a claim. Serrano's *Bivens* claims are premised on the theory that unnamed CBP officers and a CBP paralegal, Espinoza, violated his constitutional rights by seizing his truck and keeping it for 23 months without giving him an opportunity to contest the seizure in a post-seizure judicial hearing.

At minimum, Serrano failed to plausibly allege that any individual federal defendant has violated clearly established law sufficient to overcome qualified immunity. Qualified immunity shields government officials from "liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Pearson v. Callahan*, 555 U.S. 223, 231 (2009) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). In order for an official to lose the protections of qualified immunity, "existing precedent must have placed the statutory or constitutional question beyond debate." *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011). The Supreme Court has held that "qualified immunity protects 'all but the plainly incompetent or those who knowingly violate the law.'" *Abbasi*, 137 S. Ct. at 1867 (quoting *Malley v. Briggs*, 475 U.S. 335, 341 (1986)). "[I]f a reasonable officer might not have known for certain that the conduct was unlawful—then the officer is immune from liability." *Id.*

Espinoza is entitled to qualified immunity. Serrano fails to set forth any facts specifically identifying what Espinoza or any unnamed Customs officers did

to violate his rights. Instead, Serrano admits that the defendants acted within their authority: Serrano "alleges that the government followed the relevant statutes but that the statutes themselves violate the Constitution." In other words, Serrano concedes that the individual defendants were following the relevant statutes governing the seizure of his truck. Even if we assume that the Constitution required CBP's employees to follow additional or more expedited procedures, there is no existing precedent clearly establishing as much, and thus, the individual defendants are entitled to qualified immunity. *See Kelm v. Hyatt*, 44 F.3d 415, 421 (6th Cir. 1995); *CHS Indus., LLC v. U.S. Customs & Border Prot.*, 653 F. Supp. 2d 50, 57 (D.D.C. 2009).

IV.

For these reasons, we AFFIRM the judgment of the district court.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
DEL RIO DIVISION

GERARDO SERRANO, Plaintiff,	§	
	§	
v.	§	**Cause No. DR-17-CV-00048-AM**
U.S. CUSTOMS AND BORDER PROTECTION; UNITED STATES OF AMERICA, KEVIN McALEENAN, Acting Commissioner of U.S. Customs and Border Protection, Sued in His Official Capacity; JUAN ESPINOZA, Fines, Penalties, and Forfeiture Paralegal Specialist, Sued in His Individual Capacity; JOHN DOE I-X, Unknown U.S. Customs and Border Protection Agents, Sued in their Individual Capacities, JUAN ESPINOZA, Defendants.	§	

ORDER

(Filed Sep. 28, 2018)

Pending before the Court is the Report and Recommendation of the Honorable Collis White, United States Magistrate Judge. (ECF No. 64.) In his report,

Judge White recommends that this Court deny the Plaintiffs Motion to Certify Class (ECF No. 4); grant the Motion to Dismiss filed by Defendants United States of America, U.S. Customs and Border Protection, and Kevin McAleenan (ECF No. 49); and grant the Motion to Dismiss filed by Defendant Juan Espinoza (ECF No. 50). The Plaintiff filed his objections to Judge White's report within the fourteen days specified in Rule 72 of the Federal Rules of Civil Procedure. (ECF No. 65.) The Court **OVERRULES** the Plaintiffs objections and **ADOPTS** Judge White's overall recommendations for the reasoning described herein.

I. BACKGROUND

On September 21, 2015, the Plaintiff, a resident of Kentucky, drove his 2014 Ford F-250 truck to the United States–Mexico border through Eagle Pass, Texas, with the intent of driving to Mexico. (ECF No. 1 at 4, 6.) After paying the toll to enter Mexico, but while still in the United States, the Plaintiff began using his cellular telephone to film activity at the border, which garnered the attention of the U.S. Customs and Border Protection (CBP) agents on duty. (*Id.*) After a tense encounter, the agents handcuffed the Plaintiff and searched his vehicle, finding a .380 caliber magazine and five bullets in it. (*Id* at 7–8.) The agents detained the Plaintiff for several hours, continuously pressuring him to reveal the passcode for his phone without success. (*Id.* at 8–10.) They then released him, but seized his vehicle and its contents, including the magazine and the bullets. (*Id.* at 10.)

A few days later, the Plaintiff received notice of the seizure in the mail, informing him that the truck, magazine, and bullets were seized and subject to civil forfeiture because there was probable cause to believe that the Plaintiff had attempted to export munitions of war from the United States.[1] (*Id.* at 11; ECF No. 55–2 at 2.[2]) The Plaintiff was informed that if he wished to challenge the seizure, he could request to have the matter referred to a U.S. attorney for the institution of judicial proceedings if he posted a bond equal to ten percent of the value of the seized property. (ECF No. 1 at 11.) The notice also informed the Plaintiff of his rights to seek remission of the forfeiture, make an offer in compromise, or abandon the property. (ECF No. 55–2 at 3–4.)

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[1] The parties acknowledge that it is proper for the Court to consider the notice in a motion to dismiss without converting the motion to one for summary judgment because the notice was referred to in the Complaint and it is central to the Plaintiff's claims. *Collins v. Morgan Stanley Dean Witter*, 224 F.3d 496, 498–99 (5th Cir. 2000) ("We note, approvingly, however, that various other circuits have specifically allowed that '[d]ocuments that a defendant attaches to a motion to dismiss are considered part of the pleadings if they are referred to in the plaintiff's complaint and are central to her claim.'") (quoting *Venture Assocs. Corp. v. Zenith Data Sys. Corp*, 987 F.2d 429, 431 (7th Cir. 1993)).

[2] The notice cites to 19 U.S.C. § 1595a(d) (merchandise attempted to be exported from the United States contrary to law, and property used to facilitate the exporting, shall be seized and forfeited to the United States); 22 U.S.C. § 401 (providing for seizure and forfeiture of illegally exported war materials and vehicles used to attempt to export such articles); 22 U.S.C. § 2778 (control of arms exports and imports); and 22 C.F.R. § 127.1 (violations for illegal exports from the United States).

The Plaintiff timely demanded forfeiture proceedings and posted a ten-percent bond in the amount of $3,804.99. (ECF No. 1 at 11.) After some time, forfeiture proceedings still had not been instituted, so the Plaintiff contacted Defendant Espinoza—a CBP paralegal and the point person named in the notice —four times, asking about the status of his case. *Id.* Espinoza informed the Plaintiff that his paperwork was in order, but it would take time to proceed with the forfeiture action in court because the forfeiture attorneys were very busy. (*Id.* at 11–12.) Espinoza also allegedly told the Plaintiff that his case had not yet been referred to a U.S. attorney and would not be until an attorney had time to review it. *Id.* at 12.

After twenty-three months of waiting, without (1) the return of his property; (2) a post-seizure hearing, or (3) the institution of a forfeiture action, the Plaintiff filed the present cause of action against the United States, seeking return of his property pursuant to Rule 41(g) of the Federal Rules of Criminal Procedure based on violations of the Fourth and Fifth Amendments. The Plaintiff argues that return of his property is proper because he was not provided with a post-seizure hearing and because the United States waited too long to institute forfeiture proceedings. (*Id.* at 20–21.) The Plaintiff also argues that his bond money must be returned because the requirement to post a bond as a condition of obtaining a hearing violates due process. (*Id.*)

The Plaintiff also brings two class action claims pursuant to Rule 23 of the Federal Rules of Civil Procedure, seeking class-wide injunctive and declaratory relief under the Fifth Amendment against Defendants United States of America, U.S. Customs and Border Protection, and Acting Commissioner McAleenan, in his official capacity (Class Defendants). (*Id.* at 23.) According to the Plaintiff, after seizing vehicles, the Class Defendants fail to provide a constitutionally required prompt post-seizure hearing at which a property owner can challenge the legality of the seizure and the continued retention of the property pending the forfeiture proceeding, in contravention of *Krimstock v. Kelly,* 306 F.3d 40 (2nd Cir. 2002). (*Id*.) The Plaintiff also alleges that the Class Defendants violate due process when they condition the right to a forfeiture hearing on the posting of a bond. *(Id)* Simultaneously with his Complaint, the Plaintiff also filed his Motion to Certify the Class. (ECF No. 4.)

Finally, the Plaintiff seeks damages from Defendant Espinoza and other unknown and unserved agents acting in their individual capacities, pursuant to *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971), for violations of his Fourth and Fifth Amendment rights. (ECF No. 1 at 21–23.) The Plaintiff argues that Espinoza deprived him of his constitutional right to a post-seizure hearing, and other unknown agents violated his rights by maintaining custody of his property even though no hearing was provided. (*Id.*) According to the Plaintiff, while his truck was seized, he had to rent a vehicle on multiple occasions, pay

insurance on the truck, and pay title fees, all while his vehicle sat unused, continuing to depreciate in value.

The Plaintiff's truck was returned to him shortly after he filed this lawsuit; however, at the time, the bond money, magazine, or bullets still had not been returned. (ECF No. 49–1.) The Class Defendants then filed a motion to dismiss, in which they argue that the return of the Plaintiff's truck moots any cause of action under Rule 41(g). (ECF No. 49 at 4–5.) The Class Defendants also argued that due process does not require a post-seizure hearing. (*Id.* at 6.) In response the motion for class certification, the Class Defendants argue that certification is improper because the matter is now moot following the return of the Plaintiff's vehicle. (ECF No. 51.)

Defendant Espinoza also filed a motion to dismiss based on two grounds. (ECF No. 50.) First, Defendant Espinoza argues that the Supreme Court has never recognized a *Bivens* cause of action in the asset forfeiture context, and it would be improper to extend *Bivens* to the facts alleged here. Second, Defendant Espinoza argues that he is entitled to qualified immunity because he did not violate any clearly established constitutional right.

Subsequently, the Plaintiff's bond money, magazine, and bullets were returned. (ECF Nos. 62–63.) Thus, Plaintiff now acknowledges that his Rule 41(g) motion is moot. (ECF No. 63 at 1.) Nevertheless, the Plaintiff maintains that his class action claims and his *Bivens* actions are not moot. (*Id.* at 2.)

II. STANDARD OF REVIEW

When a party files an objection to any portion of a magistrate judge's report and recommendation, the district court must undertake a de novo review of the conclusions to which the party properly objects. Fed. R. Civ. P. 72(b)(3) ("The district judge must determine de novo any part of the magistrate judge's disposition that has been properly objected to."); 28 U.S.C. § 636(b)(1) ("A judge of the court shall make a de novo determination of those portions of the report or specified findings or recommendations to which objection is made."). In conducting a de novo review, a district court must conduct its own analysis of the applicable facts and legal standards and is not required to give any deference to the magistrate judge's findings. *See United States v. Raddatz*, 447 U.S. 667, 690 (1980) ("The phrase 'de novo determination' has an accepted meaning in the law. It means an independent determination of a controversy that accords no deference to any prior resolution of the same controversy."); *Shiimi v. Asherton Indep. Sch. Dist.*, No. 92-5562, 1993 WL 4732, at *2 n.18 (5th Cir. Jan. 8, 1993) (stating that a de novo review "means that the district court independently reviews the matters in the record"). On the other hand, the Fifth Circuit has recognized the requirement that parties filing objections must specifically identify those findings objected to, and district courts need not conduct a de novo review when the objections are frivolous, conclusive, or general in nature. *Battle v. United States Parole Commission*, 834 F.2d 419, 421 (5th Cir. 1987).

When no party files objections to a part of a magistrate judge's report and recommendation, the district court need only review that portion of the report to determine whether it is erroneous or clearly contrary to law. *Douglas v. United Servs. Automobile Ass'n*, 79 F.3d 1415, 1429 (5th Cir. 1996); *United States v. Wilson*, 864 F.2d 1219, 1221 (5th Cir. 1989). Because the Plaintiff has timely filed objections in this case, the Court will review those portions of the report to which the Plaintiff objects de novo.

Here, the Plaintiff has asserted numerous objections, thus triggering a de novo review of those factual findings and legal conclusions contained within the report.

III. DISCUSSION

The Plaintiff objects to the report's factual findings and legal conclusions with respect to the following: (1) Judge White's analysis, but not his overall conclusion, in finding that the Plaintiff's class claims fall under the "inherently transitory" exception to class action mootness; (2) Judge White's recommendation that the Plaintiff has failed to state a claim with respect to the class defendants; (3) Judge White's recommendation that the Plaintiff's Motion for Class Certification should be dismissed; and (4) Judge White's recommendation that the Individual Defendants' Motion to Dismiss should be granted. The Plaintiff's objections are overruled.

A. Class Action Claims under the Fifth Amendment

Judge White first addressed the Plaintiff's class action claims brought on behalf of himself and others similarly situated. Judge White summarized the Plaintiff's class claims as follows: (1) the Class Defendants' failure to provide a prompt post-seizure, pre-forfeiture hearing after every vehicle seizure violates the Due Process Clause of the Fifth Amendment; and (2) that the requirement of a bond in order to initiate forfeiture proceedings similarly violates due process. (ECF No. 64 at 6.)

The Plaintiff seeks to proceed on behalf of a class of all U.S. citizens, likely hundreds a year, "whose vehicles are or will be seized by CBP for civil forfeiture and held without a post-seizure hearing." (ECF No. 1 at 23.) The Plaintiff seeks declaratory and injunctive relief, including (1) a declaration that the Class Defendants' "policy or practice of failing to provide prompt post-seizure hearings to U.S. citizens whose vehicles have been seized for civil forfeiture" is unconstitutional under the Due Process Clause of the Fifth Amendment, and (2) an injunction prohibiting Class Defendants "from continuing to seize vehicles from U.S. citizens for civil forfeiture without providing a prompt post-seizure hearing." (*Id.* at 25.)

The Class Defendants, in turn, have filed (1) a motion to dismiss these claims (ECF No. 49), and (2) a response in opposition to the motion to certify (ECF No. 51), arguing that the claims are moot because the

Plaintiff's property has been returned, and, in any event, due process does not require a post-seizure hearing.

Judge White found that the Plaintiff's class-wide claim falls within the "inherently transitory" exception to class mootness despite the fact that all of his property has now been returned to him; however, Judge White nonetheless recommended that the Plaintiff's class-wide claim should be dismissed because it fails on the merits. (ECF No. 64 at 8–9, 14–23.)

1. Inherently Transitory Exception to Mootness

In a footnote, the Plaintiff "agrees with [Judge White's] bottom-line conclusion that the class claims are not moot," but "does object to a portion of the Report's reasoning in reaching that conclusion." (ECF No. 65 at 3 n.1.) Specifically, the Plaintiff argues, the class-wide claims fell within the "inherently transitory" exception to class mootness both because (1) the claims naturally become moot whenever the seizure ends or a hearing is provided, and (2) the Government has the ability to "pick off" named plaintiffs by voluntarily returning their property. The Plaintiff argues that both the exceptions apply and objects that Judge White's report "endorses the second of these two rationales, but . . . could be read to reject the first." (*Id.*)

In *Genesis Healthcare Corp. v. Symczyk*, 569 U.S. 66, 75–77 (2013), the Supreme Court discussed the inherently transitory exception to mootness in class actions, which in turn has its roots in *Sosna v. Iowa*, 419

U.S. 393 (1975). In *Sosna*, the Court held that a class action is not rendered moot when the named plaintiff's individual claim becomes moot *after* the class has been duly certified. 419 U.S. at 399. However, *Sosna* also suggested that, where a named plaintiff's individual claim becomes moot before the district court has an opportunity to rule on the certification motion and the issue would otherwise evade review, the certification might "relate back" to the filing of the complaint. *Id.* at 402 n.11. The Supreme Court "has since held that the relation-back doctrine may apply in Rule 23 cases where it is 'certain that other persons similarly situated' will continue to be subject to the challenged conduct and the claims raised are 'so inherently transitory that the trial court will not have even enough time to rule on a motion for class certification before the proposed representative's individual interest expires.'" *Genesis Healthcare*, 569 U.S. at 76 (quoting *County of Riverside v. McLaughlin*, 500 U.S. 44, 52 (1991) (in turn quoting *United States Parole Comm'n v. Geraghty*, 445 U.S. 388, 399 (1980) (in turn citing *Gerstein v. Pugh*, 420 U.S. 103, 110 n.11 (1975))). The "inherently transitory" rational was developed to address circumstances in which the challenged conduct "was effectively unreviewable, because no plaintiff possessed a personal stake in the suit long enough for litigation to run its course." *Genesis Healthcare*, 569 U.S. at 76. Where the transitory nature of the conduct giving rise to the suit would effectively insulate defendants' conduct from review, class certification could potentially "relate back" to the filing of the complaint. *Id.* To be sure, "this doctrine has invariably focused on the fleeting nature of

the challenged conduct giving rise to the claim, not on the defendant's litigation strategy." *Id.* (internal citations omitted). Thus, for example, a plaintiff seeking to bring a class action challenging the constitutionality of temporary pretrial detentions "would face a considerable challenge of preserving his individual claim from mootness, since pretrial custody likely would end prior to the resolution of his claim." *Id.* (internal citations omitted).

In his report, Judge White explains that a previously decided Fifth Circuit decision, *Zeidman v. McDermott & Co.*, 651 F.2d 1030, 1050–51 (5th Cir. Unit A 1981), extended the *Sosna*-created concept of relation back under the inherently transitory doctrine to cases that would otherwise be rendered moot by the defendants' ability to "pick off' claims to prevent any plaintiff in the class from procuring a decision on class certification. *Id.* at 1050. Since then, the Fifth Circuit has recognized that "[t]he current status of *Zeidman* may be in doubt" in light of *Genesis Healthcare. See Fontenot v. McCraw*, 777 F.3d 741, 750–51 (5th Cir. 2015) (noting that the Supreme Court's rationale in *Genesis Healthcare* undermined "*Zeidman's* analogy between the 'inherently transitory' exception to mootness and the strategic 'picking off' of named plaintiff's claims."). However, in that case the Fifth Circuit ultimately declined to decide whether *Zeidman* has in fact been overruled. *Id.* Thus, Judge White found that *Zeidman* remains technically binding precedent. (ECF No. 64 at 10 n.7.)

Judge White therefore concludes that, while Plaintiff's class action claim does not present a classic inherently transitory exception to class action mootness, the present scenario "falls squarely under *Zeidman*."[3] (ECF No. 64 at 9.) The Plaintiff's footnote objects to Judge White's finding that this is not a classic inherently transitory exception and, in support, refers this Court to the decisions in *Krimstock*, 306 F.3d at 70 n.34, and *Cty. of Riverside v. McLaughlin*, 500 U.S. 44, 52 (1991). However, both of those cases were decided prior to the Supreme Court's clarification of the inherently transitory exception doctrine in *Genesis Healthcare* and are otherwise distinguishable.

For example, in *Krimstock*, the Second Circuit noted that three of the seven named plaintiffs had recovered their property by the time of oral arguments. 306 F.3d at 70 n.34. Accordingly, along with its decision to remand the case, the Second Circuit instructed the district court to consider whether exceptions to the mootness doctrine preserved the merits of the case for judicial resolution of the unnamed class members'

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[3] The Plaintiff's footnote objects to Judge White's alleged suggestion that the rationale in *Alvarez v. Smith*, 558 U.S. 87, 92–93 (2009) forecloses the applicability of the classic inherently transitory doctrine to the instant case because the plaintiffs in that case had abandoned their class actions claims following the district court's denial of certification. *See also* (ECF No. 64 at 9 ("This is not a classic inherently transitory situation under *Alvarez*.").) The Court agrees to the extent that *Alvarez* involved analysis of the mootness of the named-plaintiffs' individual claims, not their previously abandoned class-wide claims. However, read in context, Judge White appears to be referring to the classic inherently transitory line of cases as outlined in *Genesis Healthcare*.

claims. *Id.* at 70. The *Krimstock* footnote that the Plaintiff cites simply refers the district court to the inherently transitory doctrine and the possibility that "in some cases" the Supreme Court has held that the termination of a class representative's claim does not moot the claims of the unnamed members of the class. *Id.* at 70 n.34. The Second Circuit did not decide whether the inherently transitory doctrine actually applied under the circumstances in that case.

McLaughlin is also readily distinguishable. *McLaughlin* involved a class action challenge to the manner in which the County of Riverside, California provided probable cause determinations to persons arrested without a warrant. *McLaughlin*, 500 U.S. at 47. Citing the inherently transitory exception, the Supreme Court held that the class claims were not mooted by the holding of probable cause determination hearings or the release of the class members. *Id.* at 51–52. Thus, the factual circumstances in *McLaughlin* appear to at least reasonably resemble the hypothetical scenario that the Supreme Court would later use to clarify the classic inherently transitory exception in *Genesis Healthcare.*

Here, the Plaintiff has not persuaded this Court that Judge White erred in his conclusion that the present scenario does not fall under the classic inherently transitory doctrine based on *Krimstock* or *McLaughlin*, particularly in light of the Supreme Court's analysis in *Genesis Healthcare.* For the classic inherently transitory exception to apply, the challenged conduct must be effectively unreviewable due its fleeting nature. The

Plaintiff has failed to show that the Supreme Court's hypothetical constitutional challenge to temporary pretrial detentions in *Genesis Healthcare*, where it is *likely* that such detention will end prior to the resolution of *any* plaintiff's claim, is analogous to the claims here involving the civil forfeiture of property, especially in light of the applicable five-year statute of limitations under the customs laws in this instance. *See* 19 U.S.C. § 1621.

The Plaintiff therefore has not persuaded this Court that the proposed class claims are incapable of review due to their alleged fleeting nature as described in *Genesis Healthcare.* Accordingly, this Court overrules Plaintiff's objection to Judge White's analysis that this case does not present a classic inherent transitory exception to mootness. As outlined above, the Plaintiff does not, however, object to Judge White's conclusion that the Plaintiff's class claim nevertheless falls under *Zeidman.* Because no party has objected to that finding, this Court reviews it for clear error. As Judge White explained, the Fifth Circuit correctly called *Zeidman* into question in light of *Genesis Healthcare*, but *Zeidman* nevertheless remains binding precedent until it is expressly overruled. Thus, having reviewed Judge White's analysis, especially in light of the Plaintiff's agreement with Judge White's conclusion, this Court overrules the Plaintiff's objections and adopts Judge White's finding that the Plaintiff's class claims fall within the inherently transitory exception under *Zeidman.*

2. Class Defendants' Motion to Dismiss Pursuant to Rule 12(b)(6)

The Plaintiff next objects to Judge White's analysis that his class allegations fail to state a claim and recommendation that the Class Defendants' Motion to Dismiss should be granted pursuant to Rule 12(b)(6). (ECF No. 65 at 3–11.) The Plaintiff argues that Judge White's conclusion is based on the following three interconnected errors: (1) Judge White's analysis disregards a series of cases holding that the Government must provide a prompt-post seizure hearing when it seizes vehicles for civil forfeiture; (2) Judge White places undue weight on the Supreme Court's decision in *United States v. Von Neumann*, 474 U.S. 242 (1986); and (3) Judge White errs in his due process analysis under *Mathews v. Eldridge*, 424 U.S. 319 (1976) by underestimating the significance of the private interest at stake and the risk of erroneous deprivation, while overstating the cost of providing a hearing.

a. The Plaintiff's Cited Cases do not Establish that CBP's Failure to Provide a Prompt Post-Seizure Hearing Violates Due Process

The Plaintiff argues that Judge White's analysis errs by disregarding "numerous" federal cases holding that due process requires a prompt post-seizure hearing when the government seizes vehicles for civil forfeiture. (ECF No. 65 at 4–5 (citing *Krimstock*, 306 F.3d at 44; *Smith v. City of Chicago*, 524 F.3d 834, 838, *vacated as moot*, 558 U.S. 87 (2009); *Washington v.*

Marion Cty. Prosecutor, 264 F. Supp. 3d 957, 978–79 (S.D. Ind. 2017); and *Brown v. District of Columbia*, 115 F. Supp. 3d 56, 60 (D.D.C. 2015).) The Plaintiff's objection is overruled.

Courts use the three-factor balancing test set out by the Supreme Court in *Mathews*, 424 U.S. 319, to determine what procedures are required when the government seeks to take or retain a private interest. The *Mathews* test weighs (1) the nature and weight of the "private interest that will be affected by the official action"; (2) "the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards;" and (3) "the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedure would entail." *Id.* at 335.

Following his review of existing precedent, Judge White found that "there is some support to the idea that a prompt post-seizure hearing is required when state, municipal, or district statutes allow for seizures for violations of law, especially where seized property is not subject to replevin." (ECF No. 64 at 18.) However, on balance, Judge White concluded that the Plaintiff has not pointed to any case in support of the argument that a hearing is required after a seizure under federal law and, following a weighing of the *Mathews* factors, that no prompt post-seizure hearing is required under these circumstances. (*Id.* at 18–21.) The Plaintiff objects to Judge White's distinction between the state, municipal, or district statutes in the cases the Plaintiff

cites and the federal laws at issue here. The Plaintiff further notes that the Second Circuit's analysis in *Krimstock*—the decision on which his argument heavily relies —in turn relies on the Supreme Court's decision in *United States v. James Daniel Good Real Property*, 510 U.S. 43, 62 (1993), finding that the federal government must provide a hearing *before* it seizes *real* property. Having reviewed the applicable case law, this Court agrees with Judge White's conclusion that the Plaintiff's citations do not sufficiently establish that a prompt post-seizure hearing is required under these circumstances when considered alongside existing precedent.

In *Krimstock*, the Second Circuit applied the *Mathews* test in a constitutional challenge to a New York law permitting police to seize vehicles following drunk driving arrests. 306 F.3d at 46. Then-Judge Sotomayor wrote that the *Mathews* factors weighed in favor of the requirement of an early opportunity to challenge the seizure and retention of their vehicles. The *Krimstock* court placed great weight in the first factor, the owner's interest in the property, because an "'individual has an important interest in the possession of his [or her] motor vehicle'" given the "particular importance" that cars have "as a mode of transportation and, for some, the means to earn a livelihood." *Id.* at 61. (citing *Lee v. Thornton*, 538 F.2d 27, 31 (2nd Cir. 1976)). The court then found that the second factor, the risk of erroneous deprivation, favored the city because "a trained police officer's assessment of the owner-

driver's state of intoxication can typically be expected to be accurate." *Id.* at 62–63.

With respect to the third factor, the court found that a weighing of the government's interests favored the car owners because "the need to prevent forfeitable property from being sold or destroyed during the pendency of proceedings [did] not necessarily justify continued retention of all vehicles when other means of accomplishing those goals are available." *Id.* at 65. The court suggested that the availability of alternative measures, such as a bond, is "in some respects a superior form of security" to satisfy the government's interest. *Id.* Moreover, the court discounted the government's interest in maintaining possession of the *res* for the purposes of establishing *in rem* jurisdiction in forfeiture proceedings because the government need only maintain possession until the initiation of such proceedings. *Id.* The court also discounted the government's interest in preventing the offending *res*—the seized vehicles—from being used as instrumentalities in future acts of driving while intoxicated. *Id.* at 66. In doing so, the court reasoned that (1) the "offending *res*" is only an allegedly offending *res* inasmuch as the alleged misconduct has yet to be established in a criminal or civil proceeding; (2) while the initial seizure serves the constructive purpose of keeping an individual from driving in an inebriated condition, that purpose loses its basis in urgency once the individual has regained sobriety; and (3) impoundment leaves the alleged offender free to drive while intoxicated in any other vehicle when the opportunity presents itself,

while depriving some potentially innocent owners of the often indispensable benefits of daily access to their vehicles; and finally (4) the possibility, unique to the factual circumstances of the case, that New York only seized vehicles that might yield an attractive price at auction. *Id.* at 66–67.

Following a review of the existing precedent, this Court agrees with Judge White's conclusion that the Plaintiff has not demonstrated that *Krimstock* and its progeny dictate the outcome of this Court's own balancing of the *Mathews* factors under the factual circumstances presented in this case. With respect to the first *Mathews* factor, Judge White agreed with *Krimstock* and *Brown* in finding that the seizure of a vehicle "unquestionably" implicates an important private interest in being able to travel and go to work. (ECF No. 64 at 20.) However, this Court's review indicates that other courts have readily arrived at different conclusions with respect to the *Krimstock* court's balancing of the second and third *Mathews* factors.

For example, in *United States v. One 1971 BMW 4-Door Sedan*, the Ninth Circuit found that the applicable forfeiture procedures under the federal customs laws "far better protected" vehicle owners' rights against the risk of erroneous seizure while distinguishing a prior decision involving a California state law because, under the customs laws, the U.S. Attorney had a duty to investigate and make a determination, independent of the seizing agency, as to whether forfeiture was warranted, and, in an event, the judicial hearing to which the individuals were entitled served to assure

the propriety of the forfeiture. 652 F.2d 817, 820–21 (9th Cir. 1981). The court added, "[t]he pervasive statutory scheme of which these sections are a part evidences substantial concern on the part of Congress with respect to what process is due owners of vehicles seized under the narcotics laws. Great weight must be given to its judgment." *Id.* at 820 (citing *Mathews*, 424 U.S. at 349). Those procedures prescribed by Congress not only afforded the plaintiff the right to petition for remission of the forfeiture, but further assured him the right to judicial review of the forfeiture. *Id.* The Plaintiff here attempts to distinguish *One 1971 BMW* by arguing that the customs laws have since been amended to require additional administrative procedures for property valued at less than $500,000, which includes his vehicle. (ECF No. 65 at 6 n.2 (citing § 19 U.S.C. §§ 1607, 1610).) However, as well-documented throughout the briefing in this case, under the current customs laws applicable to the Plaintiff's property, he similarly had the option to petition for remission of the forfeiture, have his case submitted to the U.S. Attorney for an independent evaluation, and ultimately judicial review to determine whether the forfeiture was just.[4] *See One 1971 BMW, 652* F.2d at 820 (distinguishing *Lee v. Thornton*, 538 F.2d 27 (2nd Cir. 1976)); *cf.*

[4] The Court also notes that the Plaintiff's class claims argue that due process requires the creation of a prompt post-seizure hearing, not that the alleged administrative delays in referring his case to the United States Attorney in this instance or the disposition of his judicial proceedings violate due process, which would be governed by the speedy trial balancing test outlined in *Barker v. Wingo*, 407 U.S. 514 (1972).

Krimstock, 306 F.3d at 62 (finding factor weighed in favor of government, but also stating "[n]either the arresting officer's unreviewed probable cause determination nor a court's ruling in the distant future on the merits of the City's forfeiture claim can fully protect against an erroneous deprivation . . . ."); *Brown*, 115 F. Supp. 3d at 67 ("validity of traffic stops 'rests solely on the arresting officer's unreviewed probable cause determination"). Put another way, Judge White was correct in distinguishing the Plaintiff's cited cases because the federal scheme here afforded the Plaintiff multiple alternative remedial processes that were not present in the state schemes, which lowers the risk of erroneous deprivation in this instance.

The Second Circuit's findings in *Krimstock* with respect to the weight accorded to the third factor, the government's interests, also depart from other courts' analyses. For example, while *Krimstock* discounted the government's interest and effectiveness in preventing future acts of driving while intoxicated, the court in *One 1971 BMW* found that "[t]he interest in the appellant in the uninterrupted use of his vehicle is not so compelling as to outweigh the substantial interest of the government in controlling the narcotics trade without being hampered by costly and substantially redundant administrative burdens." 652 F.2d at 821. Likewise, the Supreme Court held in *City of Los Angeles v. David*, 538 U.S. 715, 718 (2003)—a case decided after *Krimstock* that reversed a circuit court's ruling that an additional post-seizure hearing was required—that the government's interest weighs "strongly" in the

city's favor in recognition of the sheer burden that requiring prompt post-seizure hearings would place on governments. *See also United States v. $8,850 in U.S. Currency*, 461 U.S. 555 (1983) (noting that U.S. Customs processes over 50,000 noncontraband forfeitures per year); *cf. Brown*, 115 F. Supp 3d at 67 (finding third factor weighs in vehicle owners' favor where "the government has not offered any evidence regarding the potential administrative burden of providing prompt hearings with respect to automobiles . . . ."). Just as the Supreme Court recognized in *David*, Judge White did not err in acknowledging the sheer administrative burden that would fall on the government if it was required to provide prompt post-seizure hearings following every seizure.

For the reasons stated above, Judge White also correctly found that a review of existing precedent does not bind this Court, without further examination of the circumstances presented in this case, to adopt the Second Circuit's analysis of the *Mathews* factors in *Krimstock* and its progeny to find that due process requires a prompt post-seizure hearing. This Court agrees with the Plaintiff to the extent that, whether the forfeiture procedures in question arise from either federal law, state law, municipalities, or district statutes, is not outcome determinative absent further inquiry into the particular circumstances of a particular case. However, Judge White correctly noted the distinction in the particular circumstances in cases arising under federal laws, including the availability of alternate remedial processes and the lack thereof in the cases that the

Plaintiff relies on, which should be considered and weighed accordingly in this Court's balancing of the *Mathews* factors.

The Plaintiff's argument that Judge White's cited cases are themselves distinguishable is also misplaced. *See* (ECF No. 65 at 6.) *One 1971 BMW* held that the appellant was *not* entitled to an additional hearing for probable cause within 72 hours of a seizure, not that one is required as the Plaintiff suggests. *See* 652 F.2d at 820 (distinguishing *Lee*, which involved vehicles seized at remote border points that were subject to summary forfeiture and were not subject to independent review by the U.S. Attorney and final judicial determination of forfeiture). Moreover, the Plaintiff's argument that cases involving seizure of property other than vehicles "are beside the point" is unpersuasive, particularly in light of the *Krimstock* court's heavy reliance on *James Daniel Good*, which itself involved analysis of due process requirements *prior* to the seizure of real property. This Court readily agrees that existing precedent reflects that the seizure of a vehicle implicates significant private interests, which a court must take into account in its analysis and which the *Krimstock* court placed great weight in, but the significance of an owner's interest in a vehicle is not in itself determinative and must be balanced in light of the remaining factors under *Mathews*.

Accordingly, the Plaintiff's objection that Judge White errs in disregarding the Plaintiff's cited cases is overruled.

b. Von Neumann Does Not Govern Whether Due Process Requires a Prompt Post-Seizure Hearing

The Plaintiff objects to Judge White's finding that *United States v. Von Neumann*, 474 U.S. 242 (1986) controls the question of whether due process requires a prompt post-seizure hearing. This Court agrees to the extent that *Von Neumann* addressed a separate question of whether an individual's interest in a car seized for a customs violation or in the money put up to secure a bond entitles him to a speedy answer to his administrative remission petition, not disposition of judicial forfeiture proceedings. The Supreme Court, while noting that "most forfeitures are disposed of through the administrative remission procedures," found that remission proceedings "supply both the Government and the claimant a way to resolve a dispute informally rather than in judicial forfeiture proceedings." *Id* at 250. However, "remission proceedings are not *necessary* to a forfeiture determination, and therefore are not constitutionally required." *Id.* Thus, "there is no constitutional basis for a claim that respondent's interest in the car, or in the money put up to secure the bond, entitles him to a speedy answer to his remission petition." *Id.* The Supreme Court also addressed *$8,850*, which in turn applied the speedy trial test outlined in *Barker v. Wingo*, 407 U.S. 514 (1972) in finding that an eighteen-month delay in filing a customs forfeiture action did not violate constitutional due process guarantees. On the other hand, the Supreme Court's underlying rationale may have some

value here where it reasoned that "[i]mplicit in this Court's discussion of timeliness in $8,850 was the view that the forfeiture proceeding, without more, provides the post-seizure hearing required by due process to protect [the claimant's] property interest in the car." *Von Neumann*, 474 U.S. at 249. Thus, "[a claimant's] right to a forfeiture proceeding meeting the *Barker* test satisfies any due process right with respect to the car." *Id.* at 251.

Here, the Plaintiff strenuously argues that his class claims do not challenge a delay in initiating forfeiture proceedings, which would require analysis of the *Barker* test as applied in *Von Neumann.* Instead, the Plaintiff argues that he has a right to a prompt post-seizure hearing, which mandates analysis of what procedures are required under the *Mathews* test. Stated another way, "[the Plaintiff's] claim does not concern the speed with which civil forfeiture proceedings themselves are instituted or conducted. Instead, plaintiffs seek a prompt post-seizure opportunity to challenge the legitimacy of the city's retention of the vehicles while those proceedings are conducted." *See Krimstock*, 306 F.3d at 68 (discussing same distinction). This Court agrees with the Plaintiff's objection, to the extent that his class claims challenge the procedures due and not an alleged delay in the final judicial process, the proper inquiry requires application of the *Mathews* factors.[5]

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[5] Again, the Supreme Court's rationale with respect to the private interest in a vehicle in *$8,850* and *Von Neumann* may still

To be sure, Judge White ultimately concluded that "[e]ven assuming *Von Neumann* does not provide a clear answer . . . a weighing of the *Mathews* factors firmly supports a finding that no hearing is required to satisfy due process." (ECF No. 64 at 20 (analyzing the applicability of each *Mathews* factor in turn).) Because Judge White correctly weighed the *Mathews* factors and found that due process does not require a prompt post-seizure hearing, if this Court agrees with that finding, the Plaintiff's objection is rendered moot.

c. The Plaintiff has not Demonstrated that a Prompt Post-Seizure Hearing is Required under the Mathews Factors

The Plaintiff also objects to Judge White's findings with respect to the *Mathews* factors. Regarding the first factor, Judge White found that "[u]nquestionably the seizure of a vehicle implicates an important private interest in being able to travel and to go to work." (ECF No. 64 at 20.) The Plaintiff objects that Judge White "gives short shrift to the vital importance of the interest." Upon review of the applicable law, this Court

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add some value in balancing the *Mathews* factors. More specifically, *Krimstock* gave great weight to an owner's private interest in a vehicle in its *Mathews* analysis while heavily analogizing vehicle seizures to the Supreme Court's analysis of an individual's right to pre-seizure notice of real property in *James Daniel Good. $8,850* and *Von Neumann* appear to at least contemplate on a broader level that an individual's private interest in a vehicle may not be as compelling as *Krimstock* suggests, at least in circumstances where the applicable forfeiture procedures provide for ultimate judicial determination.

agrees with Judge White's finding that the seizure of a vehicle implicates an important private interest, and that this factor weighs in favor of the Plaintiff. Accordingly, the Plaintiff's objection is overruled.

The Plaintiff next objects to Judge White's finding that the risk of erroneous deprivation is minimal. As stated in *Krimstock*, the risk of erroneous seizure and retention of a vehicle is reduced because a trained officer's assessment of illegality can typically be expected to be accurate. 306 F.3d at 62–63 (finding that this factor weighed *against* the requirement of a prompt post-seizure hearing). Here, CBP agents are well-trained in identifying customs violations and this Court notes that, in the light most favorable to the Plaintiff, there is no dispute related to the CBP agents' assessment here that the Plaintiff's vehicle contained the magazine and bullets when he was attempting to enter Mexico. *See David*, 538 U.S. at 718 (finding minimal risk of erroneous deprivation where straightforward nature of allegations makes errors unlikely). Moreover, this Court agrees that the risk of erroneous deprivation was further minimized "by the duty of the United States Attorney immediately after notification of the seizure to investigate the facts and laws and independently to determine whether initiation of forfeiture proceedings [is] warranted." *One 1971 BMW*, 652 F2d at 821. The Plaintiff responds that his Complaint alleges that CBP does not forward cases to the U.S. Attorney in a timely fashion. However, as Plaintiff has strenuously argued, his class claims involve the issue of whether an additional prompt-post seizure hearing

is required by due process, not that the delay in the carrying out the existing procedures violates due process. As discussed above, arguments regarding delay in the existing procedures would require analysis of the *Barker* factors as applied in *$8,850* and *Von Neumann.*[6] Here, Congress has provided several alternative remedial processes under the applicable portions of the customs scheme by which the Plaintiff may correct the erroneous deprivation of his vehicle, including the opportunity to file a petition for remission; the U.S. Attorney's independent review; the availability of a Rule 41(g) motion, or if no criminal action is pending, invoking this Court's general equity jurisdiction; and ultimate judicial determination of the forfeiture. *Id.* at 820; *see also Smith*, 524 F.3d at 837 (distinguishing *Von Neumann* by noting that the risk of erroneous deprivation is *lessened* in forfeiture proceedings under the customs laws because of the availability of relief under Rule 41). Just as in *One 1971 BMW*, the availability of such alternative remedial processes under the federal scheme here strongly suggests that Congress has already determined what process is due. This Court accordingly finds that the risk of erroneous deprivation is minimal. The Plaintiff's objection is overruled.

Finally, the Plaintiff objects to Judge White's findings with respect to the weight given to the third *Mathews* factor, the Government's interest. As other

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[6] Again, to the extent that the Plaintiff challenges the timeliness in receiving process, his right to a forfeiture proceeding meeting the *Barker* test satisfies any due process right with respect to the car. *See Von Neumann*, 474 U.S. at 251.

courts have held, this Court cannot ignore the fact that the seizure at issue occurred pursuant to laws designed to curb illegal activity—in this instance, the exportation of munitions of war. *See One 1971 BMW*, 652 F2d at 821. Seizure and forfeiture of vehicles for violations of laws foster the public interest. *Id.* (citing *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 679 (1974)). Moreover, the interest of the Plaintiff "in the uninterrupted use of his vehicle is not so compelling as to outweigh the substantial interest of the government in controlling [the illegal exportation of munitions] without being hampered by costly and substantially redundant administrative burdens." *Id.* Additionally, after *Krimstock* was decided, the Supreme Court recognized that "administrative resources . . . are not limitless." *David*, 538 U.S. at 718. (finding that added administrative burden of providing prompt post-seizure hearings "strongly" weighs in favor of the government). The Plaintiff argues that *Washington* and *Brown* discounted the administrative burdens that could be caused by prompt post-seizure hearing for the governments in Marion County, Indiana and the District of Columbia. However, the proposed hearings in those cases were far less redundant than the proposed hearings here because those jurisdictions did not have the alternative remedial processes under federal law as outlined above in order to correct erroneous deprivations.[7]

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[7] The Court also remains unconvinced by the Plaintiff's proposed standard that due process requires the Government to provide such hearings where it is theoretically possible or even

For all of these reasons, this Court finds that the Government's substantial interest in controlling the exportation and importation of illegal contraband at the border without being hampered by costly and substantially redundant administrative burdens weighs against requiring a prompt post-seizure hearing. Thus, the Plaintiff's objection is overruled.

Because this Court finds a weighing of the *Mathews* factors indicates that due process does not require a prompt post-seizure, pre-forfeiture hearing, the Plaintiff has failed to state a claim for which relief can be granted. Accordingly, his class claims should be dismissed.[8]

B. Motion to Certify Class Action

The Plaintiff additionally objects to Judge White's recommendation, after finding the Plaintiff's class claims be dismissed for failure to state a claim, that the Plaintiff's motion for class certification be denied because there are no remaining issues to base class certification on. For the reasons outlined above, this Court finds that the Plaintiff has failed to state a claim on behalf of the class members. No issues remain to

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plausible that the Federal Government, or any other, would be able to conduct such hearings.

[8] The Plaintiff did not object to Judge White's findings with respect to the Plaintiff' class claim involving the requirement of posting a bond to institute forfeiture procedures. (ECF No. 64 at 22–23). Thus, having reviewed Judge White's findings on that issue for clear error and finding none, the Court adopts that section of Judge White's report in full.

base class certification on, and therefore, the Plaintiff's Motion to Certify Class should also be denied. Accordingly, the Plaintiff's objection is overruled.

C. *Bivens* Claims

The Plaintiff next objects to Judge White's findings that (1) this case arises in a "new context" because the Supreme Court has not recognized a *Bivens* remedy under these facts and (2) that special factors advise hesitation against allowing the Plaintiff's claims to proceed. (ECF No. 65 at 13–19.) The Plaintiff's *Bivens* claims allege that Defendant Espinoza violated his Fourth and Fifth Amendment rights by processing the Plaintiff's case for civil forfeiture without providing for any post-seizure judicial process or instituting forfeiture proceedings. (ECF No. 1 at 15, 21, 22.) The Plaintiff also alleges that the unknown defendants had authority to hold or release his truck and are therefore responsible for violating his Fourth and Fifth Amendment rights because they maintained custody of his vehicle for over 23 months without judicial process. (*Id.* at 15, 21, 22–23.) The Plaintiff argues that a reasonable official in the *Bivens* Defendants' shoes would have understood that holding property for such an unreasonable period of time without a post-seizure hearing and without commencing forfeiture proceedings violates due process and constitutes an unreasonably prolonged seizure in violation of the Fourth Amendment. (*Id.* at 15–16, 21.) The Plaintiff's objections are overruled.

The Supreme Court recently clarified the reach and limits of *Bivens* claims for damages for violations of the Constitution in *Ziglar v. Abbasi*. *See* 137 S. Ct. 1843, 1854–65 (2017). In 1871, Congress passed a statute later codified at Rev. Stat. § 1979, 42 U.S.C. § 1983, which entitles an injured person to money damages if a state official violates his or her constitutional rights. In the 100 years leading up to *Bivens*, Congress did not provide a specific damages remedy to plaintiffs who suffered violations of their constitutional rights at the hands of agents of the Federal Government. Then, in 1971, the Supreme Court held in *Bivens* that, even absent statutory authorization, it would enforce a damages remedy pursuant to general principles of federal jurisdiction in order to compensate persons injured by federal officers who violated the prohibition against unreasonable search and seizures. 403 U.S. at 392, 397. The Supreme Court has since approved an implied damages remedy under the Constitution in only two other contexts. *See Davis v. Passman*, 442 U.S. 228 (1979) (gender discrimination claim pursuant to Fifth Amendment's Due Process Clause); *Carlson v. Green*, 446 U.S. 14 (1980) (failure to provide adequate medical treatment claim pursuant to Eighth Amendment's Cruel and Unusual Punishment Clause).

In the years that followed *Bivens*, *Davis*, and *Carlson*, the arguments for recognizing implied causes of action for damages began to lose their force, and the Supreme Court adopted a "far more cautious course before finding implied causes of action." *Ziglar*, 137 S. Ct. at 1855. Now, when a party seeks to assert an implied

cause of action under the Constitution, separation-of-powers principles are central to the analysis. *Id.* at 1857. To be sure, the Supreme Court reiterated that *Bivens* remains well-settled law in its own context, but "expanding the *Bivens* remedy is now a 'disfavored' judicial activity[,]" and the Court has "'consistently refused to extend *Bivens* to any new context or new category of defendants.'" *Id.* at 1855, 1857 (quoting *Iqbal*, 556 U.S. at 675; *Correctional Services Corp. v. Malesko*, 534 U.S. 61, 68 (2001)). The guiding principle to be considered in a *Bivens* analysis is "'who should decide' whether to provide for a damages remedy, Congress or the courts?" *Ziglar*, 137 S. Ct. at 1857 (quoting *Bush*, 462 U.S. at 380). "The answer most often will be Congress. When an issue involves a host of considerations that must be weighed and appraised, it should be committed to those who write the laws rather than those who interpret them." *Id.* (internal quotations and citations omitted).

In analyzing whether a *Bivens* remedy for damages should be extended to a particular plaintiff's claim, courts must therefore determine (1) whether the claim arises in a new context from previous *Bivens* cases decided by the Supreme Court, and if so, (2) whether special factors exist that counsel hesitation in the absence of affirmative action by Congress. *Id.* at 1859.

1. The Plaintiff's Bivens Claims Arise in a New Context

Judge White found that both the Plaintiff's Fourth and Fifth Amendment *Bivens* claims differ in meaningful ways from previous *Bivens* cases decided by the Supreme Court and therefore arise in a new context. The Plaintiff objects to Judge White's findings and argues that his *Bivens* claims do not arise in a new context because the Supreme Court recently reaffirmed the continued vitality of *Bivens* in the Fourth Amendment context and has "explicitly endorsed" Fifth Amendment *Bivens* claims for unreasonable delay in civil forfeiture cases. (ECF No. 65 at 13–15.)

The proper test for determining whether a case presents a new *Bivens* context is the following: "If the case is different in a meaningful way from previous cases decided by the Supreme Court, then the context is new." *Ziglar*, 137 S. Ct. at 1859. Some of the meaningful differences may include "the rank of the officers involved; the constitutional right at issue; the generality or specificity of the official action; the extent of judicial guidance as to how an officer should respond to the problem or emergency to be confronted; the statutory or other legal mandate under which the officer was operating; the risk of disruptive intrusion by the Judiciary into the functioning of other branches; or the presence of potential special factors that previous *Bivens* cases did not consider." *Id.* at 1860.

a. Fourth Amendment Claim

Here, the Plaintiff's Fourth Amendment claim bears little resemblance to the three *Bivens* claims that the Supreme Court has approved in the past, particularly in light of the Court's recent analysis in *Ziglar*. In *Ziglar*, the plaintiffs were a subset of more than 700 aliens arrested and detained on immigration charges following the September 11, 2001 terrorist attacks. *Id* at 1852–53. Upon detention, the Federal Bureau of Investigation ("FBI") designated the aliens as either "not of interest" or "of interest" in its investigation of the terrorist attacks. *Id.* at 1852. If a detainee was designated not of interest, the alien was processed according to the normal immigration procedures. *Id.* However, if any doubt as to the proper designation existed in a particular case, the detainee was designated as "hold-until-cleared." *Id.* The plaintiffs were aliens who were subject to the hold-until-cleared policy that were detained without bail for periods ranging from three to eight months. *Id.* The hold-until-cleared detainees were housed in the Administrative Maximum Special Housing Unit of the Metropolitan Detention Center in Brooklyn, New York. *Id.* Pursuant to official Bureau of Prisons ("BOP") policy, the detainees were subjected to several harsh conditions of confinement, including being held in tiny cells for over 23 hours per day; having their lights kept on 24 hours per day; being granted little opportunity for exercise or recreation; being forbidden to keep anything in their cells, including basic hygiene products; being shackled and escorted by four guards when removed from their cells for any

reason; being denied access to most forms of communication with the outside world; and being strip searched often—any time they were moved, as well as at random in their cells. *Id.* at 1853. The hold-until-cleared detainees were also allegedly subjected to harsh conditions not imposed pursuant to official policy, including physical and verbal abuse from guards; being slammed into walls; having their arms, wrists, and fingers twisted; having bones broken; being referred to as terrorists; being threatened with violence; and being subjected to humiliating sexual comments and insults about their religion. *Id.* While acknowledging that in the ordinary course aliens who are present in the United States may be detained without legal authorization for some period of time, the "gravamen of [the plaintiffs' claims were] that the Government had no reason to suspect them of any connection to terrorism, and thus had no legitimate reason to hold them for so long in these harsh conditions." *Id.*

The Supreme Court found that—despite their detention for months without bail under the harsh conditions described above—the aliens' claims "bear little resemblance to the three *Bivens* claims the Court has approved in the past: a claim against FBI agents for handcuffing a man in his own home without a warrant; a claim against a Congressman for firing his female secretary; and a claim against prison officials for failure to treat an inmate's asthma." *Id.* at 1860 (citing *Bivens*, 403 U.S. at 388; *Davis*, 442 U.S. at 228; *Chappell v. Wallace*, 462 U.S. 296 (1983)).

Like Judge White, this Court agrees that the Plaintiff's Fourth Amendment claim—that the seizure of his property for over 23 months, without judicial process, violates the Fourth Amendment's prohibition on unreasonable seizures—is meaningfully different from the Supreme Court's three previous *Bivens* cases and therefore arises in a new context. While *Ziglar* reaffirmed "the continued force, or even the necessity, of *Bivens* in the search-and-seizure context in which it arose," the Supreme Court simultaneously emphasized its longstanding cautionary approach to expanding *Bivens* remedies today, such that even slight differences can indicate that a particular claim arises in a new context. *See Ziglar*, 137 S. Ct. at 1856. *Ziglar* also forecloses the Plaintiff's conclusory argument that his Fourth Amendment claim arises in the same context as *Bivens* simply because he alleged a violation of the Fourth Amendment's prohibition against unreasonable searches and seizures. The Supreme Court rejected such an expansive standard in finding that the appellate court erred in its analysis of (1) whether the right at issue was the same, and if so, (2) whether the mechanism of injury was the same. *See id.* at 1859–60 (*citing Malesko*, 534 U.S. at 64 (finding different context despite almost parallel circumstances, where the right at issue and mechanism of injury were the same)). Even using such analysis, the Plaintiff's claim here would still not pass muster, where he argues that the Fourth Amendment right at issue is the same, but has not demonstrated that the FBI's warrantless handcuffing of a man in his home in *Bivens* involves the same mechanism of injury as CBP's lawful seizure of

property under 19 U.S.C. § 1595a(d) and 22 U.S.C. § 401, that according to the Plaintiff is unlawful because of the delay in receiving judicial process.

The Supreme Court's consistent refusal to expand *Bivens* remedies over the past 30 years, discussed at length in *Ziglar*, similarly forecloses the Plaintiff's reliance on decades-old circuit decisions in objecting that Judge White erred in finding that the Supreme Court has not recognized a *Bivens* remedy in the asset forfeiture context. *See* (ECF No. 65 at 13 (citing *Seguin v. Eide*, 720 F.2d 1046, 1048 (9th Cir. 1984) (customs officials held vehicle for six months without a hearing); *States Marine Lines, Inc. v. Schultz*, 498 F.2d 1146, 1152 (4th Cir. 1974) (customs officials held cargo freight for seventeen months without a hearing)); *see also Ziglar*, 137 S. Ct. at 1857 (collecting cases)). The Supreme Court's instructions are clear: courts must determine whether "the case is different in a meaningful way from previous *Bivens* cases decided by this Court." *Ziglar*, 137 S. Ct. at 1859–60. Such an instruction precludes this Court from relying on cases decided by "federal courts," as Plaintiff requests, and particularly nonbinding federal court cases decided prior to the Supreme Court's clear shift to its cautionary approach to expanding *Bivens* remedies. This Court also agrees with Judge White that the remaining cases that the Plaintiff cites are meaningfully different because those cases involved the unlawful seizure of property, or the continued seizure of property once the initial justification for the seizure expired and, in any event, did not arise in the asset forfeiture context. In the light

most favorable to the Plaintiff, the initial justification of the seizure of his vehicle, magazine, and bullets was lawful and that justification did not expire. Such differences are meaningful enough to lead this Court to find that Plaintiff's Fourth Amendment claim arises in a new context from the Supreme Court's previously decided *Bivens* cases.

The Plaintiff additionally objects to Judge White's analysis that the true premise of his argument is that the delay in processing the forfeiture claim made the forfeiture, not the seizure, unconstitutional. *See* (ECF No. 64 at 30.) Judge White found that, while such an allegation may establish a potential Fifth Amendment violation, the Plaintiff may not simply reframe his Fifth Amendment allegation as a Fourth Amendment claim. (*Id.*) Judge White also added, on the other hand, that the distinctions present here are meaningful enough from prior Supreme Court and Fifth Circuit cases to find that Plaintiff's claims arise in a new context. (*Id.*) The Plaintiff argues that his Fourth Amendment claim cannot be dismissed simply because his Fifth Amendment rights were also allegedly violated and refers this Court to his Complaint, which alleges that the "seizure of Plaintiff's property for over twenty-three months, without judicial process, violates the Fourth Amendment's prohibition on unreasonable seizures." (ECF No. 65 at 14. (quoting ECF No. 1 ¶ 138).) This Court disagrees with Plaintiff's reading of Judge White's report to the extent that Plaintiff argues that Judge White found the Plaintiff's Fourth Amendment claim was solely precluded by the

existence of his potential Fifth Amendment claim. In any event, the Plaintiff's objection is moot because this Court agrees with Judge White's ultimate conclusion that *Bivens* allegations relating to the lawful seizure of the Plaintiff's property that allegedly became unlawful by delay in receiving judicial process differ enough from prior *Bivens* cases to support a finding that the Plaintiff's Fourth Amendment claim arises in a new context.

For the same reason, the Plaintiff's objection "to the extent that [the report suggests his] Fourth Amendment claim should fail on the merits" is overruled. The Plaintiff is correct that the issue presently before this Court is whether his Fourth Amendment *Bivens* claim may be heard, not the underlying merits of his Fourth Amendment claim. However, Judge White ultimately found, and this Court agrees, that the factual circumstances in this case meaningfully differ enough from the Supreme Court's prior approved *Bivens* cases to support a finding that the Plaintiff's Fourth Amendment Claim arises in a new context. The Plaintiff's objections to Judge White's finding that his Fourth Amendment Claim arises in a new context are therefore overruled.

b. Fifth Amendment Claim

The Plaintiff similarly objects to Judge White's finding that his Fifth Amendment *Bivens* claim arises in a new context. The Plaintiff argues that "federal courts have allowed this type of *Bivens* claim for

almost half a century, and the Supreme Court endorsed that longstanding practice in *Davis* . . . ." (ECF No. 65 at 15–16.) The Plaintiff adds that the Supreme Court included a footnote in *Davis* citing a 1974 Fourth Circuit case that allowed a Fifth Amendment *Bivens* claim to proceed following an approximately seventeen-month cargo freight seizure by customs officials. (*Id.* at 16 (citing 442 U.S. at 244 n.22 (in turn citing *State Marine Lines*, 498F.2d at 1146))). The Plaintiff objects that, even if a 1979 Supreme Court footnote citing a circuit opinion not before the Court is dicta, Judge White erred because this Court is bound by both the holding and reasoning of the Supreme Court, even if it is dicta. (ECF No. 65 at 16.)

Judge White found that the Plaintiff's Fifth Amendment claim arises in a new context because the Supreme Court has not recognized a *Bivens* cause of action under the Fifth Amendment in the asset forfeiture context. (ECF No. 64 at 27.) Judge White distinguishes the Supreme Court's explicit recognition of a *Bivens* Fifth Amendment cause of action in *Davis* because it "involved gender-based employment discrimination and is wholly dissimilar to the facts here." (*Id.*) Citing *Ziglar*, Judge White then rejected the Plaintiff's argument that cases need not be identical in order to find that this case arises in the same context as previous *Bivens* claims under the Fifth Amendment. (*Id.*) According to Judge White, [a]n equal protection claim challenging conditions of confinement has nothing in common with an asset forfeiture case, other than the fact that both claims arise under the Fifth

Amendment." (*Id.*) With respect to the *Davis* footnote citing *State Marine Lines*, Judge White reasoned that a 1979 Supreme Court footnote citing a circuit opinion is dicta and hardly grounds to find the same context here. (*Id.* at 28.) Judge White also noted that *State Marine Lines* itself "is extremely outdated, called into question by *Bivens* progeny, and likely overruled." (*Id.* n.18.)

As discussed at length above with respect to the Plaintiff's *Bivens* claim under the Fourth Amendment, whether the Plaintiff's Fifth Amendment claim arises in a new context from previously approved *Bivens* cases requires analysis in light of the Supreme Court's instructions in *Ziglar*. If the case is different in a meaningful way from previous *Bivens* cases decided by the Supreme Court, then the context is new. *Ziglar*, 137 S. Ct. at 1859. "[E]ven a modest extension is still an extension." *Id.* at 1864. Here, this Court agrees with Judge White's conclusion that the Plaintiff's Fifth Amendment claim—that the *Bivens* Defendants' retention of the Plaintiff's property without a post-seizure hearing violates the Due Process Clause—bears little resemblance to a claim against a Congressman for firing his female secretary and therefore arises in a new context. *See id.* at 1860. Again, given the clear shift in the Supreme Court's approach to recognizing implied causes of action such that expanding the *Bivens* remedy is now a "disfavored" judicial activity, and consistent refusal over the past 30 years to extend *Bivens* to any new context or new category of defendants, the Plaintiff's reliance on nonbinding circuit

opinions decided shortly after *Bivens* does not persuade this Court to disregard the Supreme Court's instructions in *Ziglar*. Moreover, as discussed at length in the previous section, *Ziglar* rejects the Plaintiff's proposed expansive argument that an alleged violation of the same constitutional right requires a finding that a particular claim sufficiently arises in the same context as prior *Bivens* cases without further examination into the circumstances of a particular case. *See id.* at 1859–60. The Plaintiff's objection is therefore overruled.

Because this Court finds that the Plaintiff's *Bivens* claims under the Fourth and Fifth Amendment arise in a new *Bivens* context, a special factors analysis is required before allowing Plaintiff's claim for damages to proceed.

2. Special Factors Exist that Counsel Hesitation

The Plaintiff next objects that there are no special factors counseling hesitation and argues that Judge White erred in finding that the customs forfeiture laws amount to a comprehensive scheme that demonstrates Congress's reluctance to the extend the availability of monetary damages. (ECF No. 65 at 17.) The Plaintiff argues that the mere existence of a detailed statutory scheme does not preclude a *Bivens* remedy. Instead, "the statutory scheme must show that Congress made a considered decision about how best to remedy the type of violation suffered by the plaintiff." (*Id.*) The Plaintiff concludes that, because the customs forfeiture

laws are silent on what should happen if the Government unreasonably delays initiating a forfeiture action, Congress "appears not to have considered the question." (*Id.* at 17–18.) The Plaintiff also objects that Judge White's erred in considering other alternate remedies, including the possibility of filing a Rule 41(g) motion pursuant to the Federal Rules of Criminal Procedure. Finally, while agreeing that this Court has general equity jurisdiction that may be invoked in cases of delay, the Plaintiff argues that his need to invoke equity jurisdiction demonstrates the absence of a comprehensive statutory scheme. (*Id.* at 18–19.)

Judge White found that Congress has already implemented procedural protections that sufficiently function as review systems. (ECF No. 64 at 31.) Such systems, Judge White concluded, are analogous to the protection schemes that the Supreme Court previously found to preclude implied *Bivens* remedies in *Schweiker* and *Bush. See Schweiker v. Chilicky*, 487 U.S. 412, 423 (1988) (person seeking disability benefits can pursue various levels of recourse after an initial determination of eligibility, including review by a federal ALJ a hearing before the Appeals Council; and judicial review); *Bush v. Lucas*, 462 U.S. 367 (1983) (First Amendment suit against federal employer, where there existed comprehensive procedural and substantive provisions for civil service remedies). Judge White further reasoned that the absence of a statutory provision allowing for monetary damages against either the United States or an officer in his or her individual capacity indicates Congress's reluctance to extend the

availability of monetary damages against individual officers. (ECF No. 64 at 31–32 (citing *Schweiker*, 487 U.S. at 424).) Additionally, Judge White found that recognizing a cause of action would have significant consequences on the federal government and its employees, and that Congress is in a far better position than a court to evaluate the impact of a new species of litigation. Finally, Judge White found that there is nothing unconstitutional about the forfeiture scheme itself, and in any event, *Schweiker* made it clear that courts must look to the comprehensiveness of the statutory scheme involved, not the adequacy of specific remedies extended thereunder. (*Id.* at 33.)

A *Bivens* remedy will not be extended to new contexts where there are "special factors counselling hesitation in the absence of affirmative action by Congress." *Ziglar*, 137 S. Ct. at 1857–58 (internal citations and quotations omitted). The Supreme Court has not defined the phrase "special factors counseling hesitation[,]" however, "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.* Thus, a special factor counseling hesitation must cause a court to hesitate before answering that question in the affirmative. *Id.* "The decision to recognize a damages remedy requires an assessment of its impact on governmental operations system-wide. Those matters include the burdens on Government employees who are sued personally, as well as the projected costs and consequences to the Government itself

when the tort and monetary liability mechanisms of the legal system are used to bring about the proper formulation and implementation of public policies." *Id.* at 1858.

Importantly, courts defer to indications that congressional inaction has not been inadvertent. *Schweiker*, 487 U.S. at 423. Courts also have not created additional *Bivens* remedies "[w]hen the design of a Government program suggests that Congress has provided what it considers adequate remedial mechanisms for constitutional violations that may occur in the course of its administration." *Id.* "If the statute does not display an intent to create a private remedy, then a cause of action does not exist and courts may not create one, no matter how desirable that might be as a policy matter, or how compatible with the statute." *Ziglar*, 137 S. Ct.. at 1856. Likewise, the "absence of statutory relief for a constitutional violation . . . does not by any means necessarily imply that courts should award money damages against the officers responsible for the violation." *Schweiker*, 487 U.S. at 421–22. Even where existing remedies do not provide "complete relief" for a plaintiff, the Supreme Court has refused to create a *Bivens* action. *Id.* at 423 (internal citations omitted).

Here, having considered the special factors necessarily implicated by the Plaintiff's Fourth and Fifth Amendment claims, this Court finds that those factors demonstrate that Congress should decide whether a damages actions should be allowed, not the courts. At the outset, this Court agrees with Judge White's

finding that the forfeiture system in place cannot reasonably be distinguished from the review systems in *Bush* and *Schweiker*. Just as in *Bush* and *Schweiker*, Congress has failed to provide for "complete relief" to the extent that the Plaintiff has not been given a remedy in damages for allegedly unreasonable delays in receiving judicial process following the seizure of his property. Therefore, the creation of a *Bivens* remedy would obviously offer the prospect of relief for alleged injuries that must now go unredressed. However, even assuming arguendo Plaintiff's allegation that the seizure of his property for 23 months was in fact unreasonable, despite the five-year statute of limitations under 19 U.S.C. § 1621, Congress still has not failed to provide meaningful safeguards or remedies for the rights of persons situated as the Plaintiff was here.

After CBP officers seized the Plaintiff's vehicle, bullets, and magazine pursuant to 19 U.S.C. § 1595a(d) and 22 U.S.C. § 401, the Plaintiff had several alternatives under the existing scheme that served as sufficient safeguards available to him in order to remedy the alleged wrongful seizure of his property. Indeed, on October 1, 2015, CBP issued the Plaintiff a Non-CAFRA Notice of Seizure and Information to Claimants outlining those several alternatives available to him, including (1) filing an administrative petition for remission under 19 U.S.C. § 1618; (2) submitting an offer of compromise under 19 U.S.C. § 1617; (3) abandoning the property; or (4) requesting a referral to the United States Attorney's Office for the institution of

judicial forfeiture proceedings. *See* (ECF No. 50–2.)[9] Additionally, this Court notes the Plaintiff's actual filing of a Rule 41(g) motion in this case, regardless of its merits, prompted CBP to return his property. Moreover, the Plaintiff concedes that invoking this Court's general equity jurisdiction was an alternative available to him at any point during the alleged delay. (ECF No. 65 at 18–19.)

The existence of the administrative scheme here, combined with the Plaintiff's option to file a Rule 41(g) motion or invoke this Court's general equity jurisdiction, strongly suggests that there exists alternate remedial processes available to the Plaintiff for the type of violation that he allegedly suffered. The existence of such alternate remedial processes in this case is sufficient to deny the Plaintiff an additional *Bivens* remedy. *See Ziglar*, 137 S. Ct. at 1858. These alternate remedial

[9] The Plaintiff appears not to have opted to take advantage of at least one of the administrative remedies available to him that most similarly situated people utilize. *See Von Neumann*, 474 U.S. at 250 (observing that most forfeitures are resolved through petitions for remission). Therefore, while the Plaintiff's claims relate to unreasonable delay in receiving judicial process through the current scheme, the Court does note that he declined to exercise his option to directly and immediately petition CBP for administrative remission in addition to seeking referral to the U.S. Attorney for judicial action during the time his property was seized. Even in the event that the Plaintiff was dissatisfied with the decision on that hypothetical petition for remission, he then would have been granted an additional 60 days to request to have his case reviewed by the U.S. Attorney's office for judicial action. (ECF No. 50–2 at 2.) At any time, the Plaintiff also could have, and did, file a Rule 41(g) motion or invoke this Court's general equity jurisdiction.

processes available to the Plaintiff also strongly suggest that this is not a case of "damages or nothing" as the he argues, and the Court again notes that the Plaintiff's actual utilization of one available method in this case resulted in the return of his property. *See Ziglar*, 137 S. Ct. at 1862.

Additionally, *Schweiker* forecloses the Plaintiff's argument that the forfeiture laws do not amount to a comprehensive statutory scheme because they do not specifically address the question of what should happen if the Government unreasonably delays initiating a forfeiture action. *See Schweiker*, 487 U.S. at 427–28 ("Here, as in *Bush*, it is evident that if we were to fashion an adequate remedy for every wrong that can be proved in a case . . . [the complaining party] would obviously prevail. . . . In neither case, however, does the presence of alleged unconstitutional conduct that is not *separately* remedied under the statutory scheme imply that the statute has provided 'no remedy' for the constitutional wrong at issue.") (internal quotations and citations omitted). For the same reason, this Court is unpersuaded by the Plaintiff's argument, without citing authority, that the statutory scheme must affirmatively demonstrate that Congress made a considered decision about how best to remedy the specific type of violation suffered by the Plaintiff in order to preclude a *Bivens* remedy. In fact, it is equally reasonable here to conclude that "Congress' failure to provide a damages remedy might be more than mere oversight, and that congressional silence might be more than 'inadvertent.'" *Ziglar*, 137 S. Ct. at 1862 (citing

Schweiker, 487 U.S. at 423). Put another way, and just like in *Ziglar*, the silence of Congress here is relevant, and it is telling. *Id.* Congressional interest in the customs laws has been frequent and intense. Congressional interest specifically in asset forfeitures has been demonstrated by Congress's enactment of the Civil Asset Forfeiture Reform Act of 2000 (CAFRA). That legislation's exemption from the processing timeline contained therein of the forfeiture proceedings, under 19 U.S.C. § 1595a and 22 U.S.C. § 401, sufficiently causes this Court to hesitate before creating a *Bivens* remedy in these circumstances. *See* 18 U.S.C. § 983(i). Congress has, however, provided for a five-year statute of limitations under these circumstances, and this Court further hesitates to create a *Bivens* remedy where the Plaintiff's claim concludes that 23 months is unreasonable, despite the applicable statute of limitation. *See* 19 U.S.C. § 1621.

Additional special factors are present that make this Court hesitate to conclude that 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. For example, this Court agrees with Judge White's finding that recognizing a cause of action here would also have significant consequences on the federal government and its employees. (ECF No. 64 at 32.) The risk of personal damages liability is more likely to cause an employee to second guess difficult but necessary decisions concerning seizures under the customs laws. *See Ziglar*, 137 S. Ct. at 1862. Recognizing a new *Bivens* remedy here

would therefore weaken the strong governmental interest in halting criminal organizations' exportation of fruits of criminal enterprises into Mexico because border agents may hesitate before acting for fear of personal liability. *See De La Paz v. Coy*, 786 F. 3d 367, 379 (5th Cir. 2015) (declining to recognize a *Bivens* remedy in part because "[f]aced with a threat to his checkbook from suits based on evolving and uncertain law, the officer may too readily shirk his duty"). Moreover, creating a new remedy would impair the Executive Branch's power to control the borders and promote our relationship with Mexico by stemming the flow of arms into Mexico. *Id.* at 379 (finding Executive Branch has "'inherent power as sovereign to control and conduct relations with foreign nations.'") (internal citations omitted). Additionally, seizing money and property from criminals allows law enforcement to preserve evidence throughout its investigation and establish *in rem* jurisdiction during subsequent forfeiture proceedings.

The special factors outlined above are sufficient enough for this Court to find that whether a *Bivens* action for damages should be allowed is a decision for Congress to make. Congress is in a better position than the courts to decide whether the creation of a new substantive legal liability here would serve the public interest. *Schweiker*, 487 U.S. at 426–27; *Bush*, 462 U.S. at 390. Whether or not we believe that Congress's response in this case was the best response, Congress is the body charged with making the inevitable compromises required in the design of a massive and complex

asset forfeiture scheme under the customs laws. *Schweiker*, 487 U.S. at 429 (citation omitted). In summary, this Court finds that the Plaintiff's Fourth and Fifth Amendment *Bivens* claims arise in a new context from previously decided Supreme Court cases and special factors counsel against expanding *Bivens* here. The Plaintiff's objections with respect to his Fourth and Fifth Amendment *Bivens* claims are therefore overruled.

IV. CONCLUSION

Having reviewed the record and law in this case, this Court now **ORDERS** the following:

1. The Plaintiff's Motion for Class Certification (ECF No. 4) is **DENIED AS MOOT**.

2. The Motion to Dismiss by Defendants United States Customs and Border Protection, United States of America, and Kevin McAleenan (ECF No. 49) is **GRANTED**, the Rule 41(g) Motion is **DISMISSED AS MOOT**, and the class claims against them is **DISMISSED WITH PREJUDICE** to refiling by the above-named Plaintiff, but without prejudice as to any other potential plaintiffs.

3. Defendant Espinoza's Motion to Dismiss (ECF No. 50) is **GRANTED** and the claims against him are **DISMISSED WITH PREJUDICE**.

4. Finally, the claims against the unknown defendants are **DISMISSED WITHOUT PREJUDICE**. Assuming the Plaintiff could identify any of the unknown defendants at a later time,

amendment of the Complaint pursuant to Rule 15(a)(2) of the Federal Rules of Civil Procedure to name the specific agents would be futile, since a *Bivens* claim against them would have no merit. Courts, however, lack personal jurisdiction over unidentified fictitious defendants. *See Cunningham v. Advanta Corp.*, 2009 WL 10704752, at *3 (N.D. Tex. Feb. 6, 2009); *Taylor v. Fed. Home Loan Bank Bd.*, 661 F. Supp. 1341, 1350 (N.D. Tex. 1986). Therefore, the claims should be dismissed *without prejudice*, pursuant to Federal Rule of Civil Procedure 12(b)(2). *See Int'l Energy Ventures Mgmt., L.L.C. v. United Energy Grp., Ltd.*, 818 F.3d 193, 213 (5th Cir. 2016) (dismissal for lack of personal jurisdiction must be without prejudice).

It is so **ORDERED**.

SIGNED and ENTERED on this 28th day of September, 2018.

/s/ Alia Moses
ALIA MOSES
United States District Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
DEL RIO DIVISION

GERARDO SERRANO,	§	
Plaintiff,	§	
	§	
v.	§	**Civil Action No.**
U.S. CUSTOMS AND BORDER PROTECTION; UNITED STATES OF AMERICA, KEVIN McALEENAN, Acting Commissioner of U.S. Customs and Border Protection, Sued in His Official Capacity; JUAN ESPINOZA, Fines, Penalties, and Forfeiture Paralegal Specialist, Sued in His Individual Capacity; JOHN DOE I-X, Unknown U.S. Customs and Border Protection Agents, Sued in Their Individual Capacities,	§	**2:17-CV-48–AM–CW**
Defendants.	§	

REPORT AND RECOMMENDATION

(Filed Jul. 23, 2018)

To the Honorable Alia Moses, United States District Judge:

On September 6, 2017, Plaintiff Gerardo Serrano filed suit against the above-named defendants, alleging constitutional violations after his truck and its contents were seized at the United States-Mexico border. Plaintiff argues that Defendants denied him his constitutional rights: (1) by requiring him to post a bond to institute forfeiture proceedings; (2) by failing to provide him with a prompt post-seizure hearing to contest the validity of the seizure of his property; and (3) by waiting over twenty-three months without returning his property or instituting forfeiture proceedings. Plaintiff seeks declaratory and injunctive relief against the United States, U.S. Customs and Border Protection, and Kevin McAleenan; return of his property pursuant to Rule 41(g) of the Federal Rules of Criminal Procedure; and damages under *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971), from Defendant Juan Espinoza and other unknown defendants who are employees of the U.S. Customs and Border Protection.

Now pending before the Court are: (1) Plaintiff's Motion to Certify Class (ECF No. 4); (2) Motion to Dismiss of Defendants United States of America, United States Customs and Border Protection, and Kevin McAleenan (ECF No. 49); and (3) Motion to Dismiss of Defendant Juan Espinoza (ECF No. 50). Because all pretrial matters were referred to the undersigned pursuant to 28 U.S.C. § 636, the undersigned hereby issues this report and recommendation, recommending that the motion to certify class be denied and the motions to dismiss be granted.

I. BACKGROUND

On September 21, 2015, Plaintiff Serrano, a resident of Kentucky, drove his 2014 Ford F-250 truck to the United States-Mexico border through Eagle Pass, Texas, with the intent of driving to Mexico. Compl. 4, 6, ECF No. 1 at 4, 6. After paying the toll to enter into Mexico, but while still in the United States, he began using his cell phone to film activity at the border, getting the attention of Customs and Border Protection ("CBP") agents on duty. *Id.* After a tense encounter, the agents handcuffed Plaintiff and searched his vehicle, finding a .380 caliber magazine with five bullets in it. *Id.* at 7-8. The agents detained Plaintiff for several hours, continuously pressuring him to reveal the passcode for his phone without success. *Id.* at 8-10. They then released him but seized his vehicle and its contents, including the magazine and the bullets. *Id.* at 10.

A few days later, Plaintiff received notice in the mail of the seizure, informing him that the truck, magazine, and bullets were seized and subject to civil forfeiture because there was probable cause to believe that Plaintiff had attempted to export munitions of war from the United States.[1] *Id.* at 11; *see also* Seizure

[1] The parties acknowledge that it is proper for the Court to consider the notice in a motion to dismiss without converting the motion to one for summary judgment because it was referred to in the complaint and is central to Plaintiff's claims. *Collins v. Morgan Stanley Dean Witter*, 224 F.3d 496, 498-99 (5th Cir. 2000) ("We note, approvingly, however, that various other circuits have specifically allowed that '[d]ocuments that a defendant attaches to a motion to dismiss are considered part of the pleadings if they

Notice, ECF No. 55-2 at 2.[2] He was informed that if he wished to challenge the seizure, he could request to have the matter referred to a U.S. attorney for the institution of judicial proceedings, if he posted a bond equal to ten percent of the value of the seized property. *Id.* He could also seek remission of the forfeiture, make an offer in compromise, or abandon the property. Seizure Notice, ECF No. 55-2 at 3-4.

Plaintiff timely demanded forfeiture proceedings and posted a ten percent bond in the amount of $3,804.99. Compl. 11, ECF No. 1 at 11. After some time, forfeiture proceedings still had not been instituted, so Plaintiff contacted Defendant Espinoza—a paralegal with CBP and the point person named in the notice—four times, asking about the status of his case. *Id.* Espinoza informed him that his paperwork was in order, but it would take time to proceed with the forfeiture action in court because the forfeiture attorneys were very busy. *Id*. at 11-12. He said that the case had not yet been referred to a U.S. attorney and would not be until an attorney had time to review it. *Id.* at 12.

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are referred to in the plaintiff's complaint and are central to her claim.'") (quoting *Venture Assocs. Corp. v. Zenith Data Sys. Corp*., 987 F.2d 429, 431 (7th Cir. 1993)).

[2] The notice cites to 19 U.S.C. § 1595a(d) (merchandise attempted to be exported from the United States contrary to law, and property used to facilitate the exporting, shall be seized and forfeited to the United States); 22 U.S.C. § 401 (providing for seizure and forfeiture of illegally exported war materials and vehicles used to attempt to export such articles); 22 U.S.C. § 2778 (control of arms exports and imports); and 22 C.F.R. § 127.1 (violations for illegal exports from the United States).

After twenty-three months of waiting, without (1) the return of his property, (2) a post-seizure hearing, or (3) the institution of a forfeiture action, Plaintiff filed the present cause of action against the United States, seeking return of his property pursuant to Rule 41(g) of the Criminal Rules of Federal Procedure, based on violations of the Fourth and Fifth Amendments. He argues that return of his property is proper since he was not provided with a post-seizure hearing, and because the United States waited too long to institute forfeiture proceedings. *Id.* at 20-21. He also argues that his bond money must be returned because the requirement to post a bond as a condition of obtaining a hearing violates due process. *Id.*

Plaintiff also brings two class action claims pursuant to Rule 23 of the Federal Rules of Civil Procedure, seeking class-wide injunctive and declaratory relief under the Fifth Amendment against Defendants United States of America, U.S. Customs and Border Protection, and Acting Commissioner McAleenan, in his official capacity (collectively "Class Defendants"). *Id.* at 23. According to Plaintiff, after seizing vehicles, Class Defendants fail to provide a constitutionally required prompt post-seizure hearing at which a property owner can challenge the legality of the seizure and the continued retention of the property pending the forfeiture proceeding, in contravention of *Krimstock v. Kelly*, 306 F.3d 40 (2d Cir. 2002). *Id.* Plaintiff also alleges that Class Defendants violate due process when they condition the right to a forfeiture hearing on the posting of a bond. *Id.* Simultaneously with his

complaint, Plaintiff filed a motion to certify the class. ECF No. 4.

Finally, Plaintiff seeks damages from Defendant Espinoza and other unknown and unserved agents acting in their individual capacities, pursuant to *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971), for violations of his Fourth and Fifth Amendment rights. Compl. 21-23, ECF No. 1 at 21-23. Plaintiff argues that Espinoza deprived him of his constitutional right to a post-seizure hearing, and other unknown agents violated his rights by maintaining custody of his property even though no hearing was provided. *Id.* According to Plaintiff, while his truck was seized, he had to rent a vehicle, pay insurance on the truck, and pay title fees, all while his vehicle sat unused, continuing to depreciate in value.

Shortly after the suit was filed, Plaintiff's truck was returned to him, but not the bond money, magazine, or bullets. ECF No. 49-1. Class Defendants then filed a motion to dismiss, in which they argue that the return of Plaintiff's truck moots any cause of action under Rule 41(g). ECF No. 49 at 4-5. Class Defendants also argue that due process does not require a post-seizure hearing. *Id.* at 6. In response to the motion for class certification, Class Defendants argue that class action certification is improper because the matter is now moot, since Plaintiff's truck has been returned. ECF No. 51.

Defendant Espinoza also filed a motion to dismiss based on two grounds. ECF No. 50. First, he argues

that the Supreme Court has never recognized a *Bivens* causes of action in the asset forfeiture context, and it would be improper to extend *Bivens* to the facts here. Second, he argues that he is entitled to qualified immunity because he did not violate any clearly established constitutional right.

Since then, Plaintiff's bond money, magazine, and bullets were returned. *See* Pl.'s Notice Regarding Return of Bond Money, ECF No. 62; Pl.'s Notice Regarding Return of Seized Prop., ECF No. 63. Plaintiff acknowledges that the Rule 41(g) motion is now moot. ECF No. 63 at 1. However, Plaintiff maintains that his class action claims and his *Bivens* action are not moot. *Id*. at. 2.

II. ANALYSIS

A. Rule 41(g) Motion for Return of Property

The first question is whether Plaintiff's Rule 41(g) motion for return of property should be dismissed. Under Rule 41(g) of the Federal Rules of Criminal Procedure,

> A person aggrieved by an unlawful search and seizure of property or by the deprivation of property may move for the property's return. The motion must be filed in the district where the property was seized. The court must receive evidence on any factual issue necessary to decide the motion. If it grants the motion, the court must return the property to the movant, but may impose reasonable conditions to

> protect access to the property and its use in later proceedings.

Fed. R. Crim. P. 41(g). As Plaintiff now concedes, the matter is moot because all of his property has been returned to him. ECF No. 63 at 1. Accordingly, the claim should be dismissed for lack of subject matter jurisdiction, pursuant to Rule 12(b)(1).[3]

B. Class Action Claims Under the Fifth Amendment

The next question is how to resolve Plaintiff's claims brought on behalf of himself and others similarly situated. Plaintiff's class action claims are premised upon two arguments. First, Plaintiff argues that Class Defendants' failure to provide a prompt post-seizure, pre-forfeiture hearing after every vehicle seizure violates the Fifth Amendment's Due Process Clause. Compl. 23, ECF No. 1 at 23. Second, Plaintiff asserts that requiring a bond in order to initiate forfeiture proceedings violates due process. *Id.*

Plaintiff seeks to proceed on behalf of a class of all U.S. citizens, likely hundreds a year, "whose vehicles are or will be seized by CBP for civil forfeiture and held without a post-seizure hearing." *Id*. at 17-18. Plaintiff

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[3] The undersigned notes that because no criminal proceeding is pending, Rule 41(g) motion is an improper mechanism for seeking the return of seized property. *See Bailey v. United States*, 508 F.3d 736, 738 (5th Cir. 2007). The Court, however, could have exercised its general equity jurisdiction under 28 U.S.C. § 1331. *Id.* Regardless, the matter is now moot.

seeks declaratory and injunctive relief, including (1) a declaration that Class Defendants' "policy or practice of failing to provide prompt post-seizure hearings to U.S. citizens whose vehicles have been seized for civil forfeiture" is unconstitutional under the Due Process Clause of the Fifth Amendment, and (2) an injunction prohibiting Class Defendants "from continuing to seize vehicles from U. S. citizens for civil forfeiture without providing a prompt post-seizure hearing." *Id.* at 25.

Class Defendants, in turn, have filed (1) a motion to dismiss these claims (ECF No. 49), and (2) a response in opposition to the motion to certify (ECF No. 51), arguing in both that the claims are moot since Plaintiff's property has been returned. Class Defendants also argue that due process does not require a post-seizure hearing.

1. Mootness

The Court must first determine whether Plaintiff's class action claims are moot now that all of his property (and bond money) has been returned to him. Article III jurisdiction is contingent upon the presence of a live case or controversy, or a legally cognizable interest in the outcome. *In re Scruggs*, 392 F.3d 124, 128 (5th Cir.2004). "If a case has been rendered moot, a federal court has no constitutional authority to resolve the issues that it presents." *Envtl. Conservation Org. v. City of Dallas*, 529 F.3d 519, 525 (5th Cir.2008). A case becomes moot when "'there are no longer adverse parties with sufficient legal interests to maintain the

litigation' or 'when the parties lack a legally cognizable interest in the outcome' of the litigation." *Id*. at 527 (quoting *In re Scruggs*, 392 F.3d at 128).

Plaintiff's personal stake in the class claims is now extinguished, since Plaintiff has received all the relief that he is entitled from Class Defendants. He has received all of his property and bond money, and is not entitled to compensatory damages. *See Lane v. Pena*, 518 U.S. 187, 192 (1996) ("A waiver of the Federal Government's sovereign immunity must be unequivocally expressed in statutory text, and will not be implied.") (internal citations omitted). The declaratory judgment issue is also moot. The question of mootness for declaratory judgments becomes "whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issue of a declaratory judgment." *Connell v. Shoemaker*, 555 F.2d 483, 486 (5th Cir. 1977). Plaintiff's claims do not meet this test of immediacy, where his property and bond money have already been returned to him.

This is also not a situation where the claim on the merits is "capable of repetition, yet evading review," creating a mootness exception. *See Gerstein v. Pugh*, 420 U.S. 103, 110 n.11 (1975).[4] Nothing suggests that

[4] "When the claim on the merits is 'capable of repetition, yet evading review' the named plaintiff may litigate the class certification issue despite loss of his personal stake in the outcome of the litigation" so long as "the claim may arise again with respect

Plaintiff "will likely again prove subject to the [Government's] seizure procedures" so that Plaintiff should be allowed to continue with his claims despite a current lack of a personal stake. *Alvarez v. Smith*, 558 U.S. 87, 93 (2009);[5] *U.S. Parole Comm'n v. Geraghty*, 445 U.S. 388, 398 (1980). The only continuing dispute "is an abstract dispute about the law, unlikely to affect [Plaintiff] any more than it affects other . . . citizens." *Alvarez*, 558 U.S. at 93. "And a dispute solely about the meaning of a law, abstracted from any concrete actual or threatened harm, falls outside the scope of the constitutional words 'Cases' and 'Controversies.'" *Id.*

However, one other possible exception to mootness might save Plaintiff's class action claims—the "inherently transitory" mootness exception, which applies only to Rule 23 class action claims. *United States v. Sanchez-Gomez*, 138 S. Ct. 1532, 1538 (2018) (noting that a certified class "acquires a legal status separate from the interest asserted by the named plaintiff") (internal quotations omitted). "The 'inherently transitory' rationale was developed to address circumstances in which the challenged conduct was effectively unreviewable, because no plaintiff possessed a personal stake in the suit long enough for litigation to run its course." *Genesis Healthcare Corp. v. Symczyk*, 569 U.S.

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to that plaintiff." *U.S. Parole Comm'n v. Geraghty*, 445 U.S. 388, 398 (1980).

[5] Even if the United States were to institute a forfeiture action at this point, he currently has possession of his truck, and would not lose possession of his truck until at least after a hearing.

66, 76 (2013). In such a situation, "certification could potentially 'relate back' to the filing of the complaint," before the named plaintiff's claim became moot, allowing the named plaintiff to proceed on behalf of the class. *Id.*

In *Zeidman v. McDermott & Co.*, 651 F.2d 1030, 1050,1051 (5th Cir. Unit A 1981), the Fifth Circuit extended the "inherently transitory" approach even further, holding that "a suit brought as a class action should not be dismissed for mootness upon tender to the named plaintiffs of their personal claims" (i.e. picking off a plaintiff's claim to effectively "prevent any plaintiff in the class from procuring a decision on class certification"), at least when "there is pending before the district court a timely filed and diligently pursued motion for class certification."[6]

This is not a classic inherently transitory situation under *Alvarez*. The present scenario, however, falls squarely under *Zeidman*. Plaintiff filed the motion to certify class simultaneously with his complaint and vigorously pursued it. Shortly after, Class Defendants

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[6] It is clear that had the Court ruled on the motion for certification in Plaintiff's favor prior to mootness of Plaintiff's claims, the class claims would not have been rendered moot. *See Sosna v. Iowa*, 419 U.S. 393, 402 (1975) (an Article III case or controversy "may exist . . . between a named defendant and a member of the class represented by the named plaintiff, even though the claim of the named plaintiff has become moot."). It is also fairly well settled that had Plaintiff filed the motion for class certification after his claims became moot, then the class claims would have been rendered moot. *See Fontenot v. McCraw*, 777 F.3d 741 (5th Cir. 2015).

returned Plaintiff's truck, then immediately moved for dismissal of Plaintiff's class action claims based on mootness. In other words, after a twenty-three month initial delay of doing nothing, Class Defendants suddenly decided to act promptly once Plaintiff filed suit. This "picking off" of Plaintiff's claims before the class action could be certified makes the claims inherently transitory under *Zeidman*.[7] [8]

2. Rule 12(b)(6) or Class Certification

Now that it has been determined that Plaintiff's class claims are not moot, the next question is whether the Court should first address Plaintiff's motion for class certification, or Class Defendants' Rule 12(b)(6) motion to dismiss for failure to state a claim. Rule 23 of the Federal Rules of Civil Procedure permits class

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[7] *Genesis Healthcare* appears to be at odds with *Zeidman*, with the Court noting that the "inherently transitory" doctrine "has invariably focused on the fleeting nature of the challenged conduct giving rise to the claim, not on the defendant's litigation strategy." 569 U.S. at 76-77. In *Fontenot*, in fact, the Fifth Circuit questioned the continued viability of *Zeidman*, at least for monetary damages cases, noting that the Supreme Court's rationale in *Genesis Healthcare* undermined "*Zeidman's* analogy between the 'inherently transitory' exception to mootness and the strategic 'picking off' of named plaintiffs' claims." 777 F.3d at 750. But until *Zeidman* has been explicitly overruled by either the Fifth Circuit en banc or the Supreme Court, *Zeidman* is binding precedent. *Soc'y of Separationists, Inc. v. Herman*, 939 F.2d 1207, 1211 (5th Cir. 1991).

[8] For other forfeiture cases allowing a class action claim to proceed, despite resolution of the named plaintiff's claim, *see Krimstock v. Kelly*, 306 F.3d 40 (2d Cir. 2002); *Washington v. Marion Cty. Prosecutor*, 264 F. Supp. 3d 957 (S.D. Ind. 2017).

certification only if the party seeking certification demonstrates that:

> (1) the class is so numerous that joinder of all members is impracticable;
>
> (2) there are questions of law or fact common to the class;
>
> (3) the claims or defenses of the representative parties are typical of the claims or defense of the class; and
>
> (4) the representative parties will fairly and adequately protect the interests of the class.

Fed. R. Civ. P. 23(a). Furthermore, certification is appropriate only if certain additional criteria laid out in Rule 23(b) are met.

A motion for class certification should be ruled on at an early practicable time, usually before the resolution of any dispositive motion. *Schwarzschild v. Tse*, 69 F.3d 293, 295 (9th Cir. 1995); *see also Hyman v. First Union Corp*., 982 F. Supp. 8, 11 (D.D.C.1997). "Courts apply this general rule because 'a plaintiff who files a proposed class action cannot legally bind members of the proposed class before the class is certified.'" *Hartley v. Suburban Radiologic Consultants, Ltd.*, 295 F.R.D. 357, 367–69 (D. Minn. 2013) (quoting *Standard Fire Ins. Co. v. Knowles*, 568 U.S. 588, 593 (2013)); *see also Smith v. Bayer Corp*., 564 U.S. 299 (2011) ("Neither a proposed class action nor a rejected class action may bind nonparties. What does have this effect is a class action approved under Rule 23.").

However, advisory committee notes for Rule 23 indicate that "[o]ther considerations may affect the timing of the certification decision. The party opposing the class may prefer to win dismissal or summary judgment as to the individual plaintiffs without certification and without binding the class that might have been certified." Fed. R. Civ. P. 23(c)(1)(A) advisory committee's note to 2003 amendment. Thus, a court does not abuse its discretion in ruling on a dispositive motion before ruling on a motion for class certification. *See Toben v. Bridgestone Retail Operations, LLC*, 751 F.3d 888, 896 (8th Cir. 2014); *Wright v. Schock*, 742 F.2d 541, 543-44 (9th Cir.1984); *Hartley*, 295 F.R.D. at 367–69; *Hyman*, 982 F. Supp. at 10–11. This is especially true where a defendant essentially waives the protections of Rule 23 by seeking a ruling on the merits of the class action claims prior to certification. *Curtin v. United Airlines, Inc*., 275 F.3d 88, 92-93 (D.C. Cir.2001) (reversing the usual order of disposition where rendering an easy decision on an individual claim avoid[s] an unnecessary and harder decision on the propriety of certification).

The undersigned recommends ruling on the motion to dismiss first. Even though it might have been to their advantage to bind a class of plaintiffs, Class Defendants essentially waived that right by filing the present motion to dismiss. Also, because ruling on the merits is a relatively simple inquiry, while the certification process is not, and because the merits of Plaintiff's claims inevitably come into play in the certification analysis as well, *see Wal-Mart Stores, Inc.*

v. Dukes, 564 U. S. 338, 350-51 (2011), it would be wise to begin with the Rule 12(b)(6) motion.

3. Rule 12(b)(6)

The next issue then is whether Plaintiff's class claims should be dismissed under Rule 12(b)(6). Rule 12(b)(6) authorizes the dismissal of a complaint that "[fails] to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). A Rule 12(b)(6) motion to dismiss, however, "is viewed with disfavor and is rarely granted." *Kaiser Alum. & Chem. Sales, Inc. v. Avondale Shipyards, Inc.*, 677 F.2d 1045, 1050 (5th Cir. 1982) (internal quotations omitted). Accordingly, the complaint must be liberally construed in the plaintiff's favor, all reasonable inferences must be drawn in favor of the plaintiff's claims, and the factual allegations of the complaint must be taken as true. *Campbell v. Wells Fargo Bank, N.A.*, 781 F.2d 440, 442 (5th Cir. 1986).

In determining whether a complaint fails to state a claim, the Court must look to Rule 8 of the Federal Rules of Civil Procedure, which requires pleadings to include a "short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). To comply with Rule 8, a plaintiff must include enough facts to give a defendant fair notice of the claims against it. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)

(quoting *Twombly*, 550 U.S. at 570). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* To meet this standard, "[f]actual allegations must be enough to raise a right to relief above the speculative level . . . ." *Twombly*, 550 U.S. at 555.

a. Applicable Laws

As background, Plaintiff's seized truck and property were subject to the customs forfeiture procedures found at 19 U.S.C. §§ 1602–1619. *See* 19 U.S.C. § 1600 ("The procedures set forth in sections 1602 through 1619 of this title shall apply to seizures of any property effected by customs officers under any law enforced or administered by the Customs Service unless such law specifies different procedures."); *see also* 18 U.S.C. § 983(i) (exempting offenses under Title 19 from CAFRA and its provisions). If the value of property is less than $500,000, the government can seek to use administrative forfeiture procedures after providing proper notice. *See* § 1607(a) (describing notice requirements). If no party files a claim within twenty days, the property is summarily forfeited to the Government. § 1609. However, if a person files a claim and gives a bond to the United States in the "penal sum" of ten percent of the value of the claimed property, the customs officer "shall transmit such claim and bond, with a duplicate list and description of the articles seized, to the United States attorney for the district in which seizure was made, who shall proceed to a condemnation of the

merchandise or other property in the manner prescribed by law." § 1608. A party may also offer to pay the value of the seized vehicle for its return (§ 1614), make an offer in compromise (§ 1617), or seek remission or mitigation of forfeiture (§ 1618).

When action by the United States attorney is required, the customs officer must "report promptly" to the United States attorney and include "a statement of all the facts and circumstances of the case within his knowledge, with the names of the witnesses and a citation to the statute or statutes believed to have been violated, and on which reliance may be had for forfeiture or conviction." § 1603(b). The Attorney General must then inquire immediately into the facts of the case, and if it appears probable that a forfeiture has occurred, must institute judicial proceedings "without delay," unless such proceedings can not probably be sustained" or "the ends of justice do not require" it. § 1604. A designated customs agent shall maintain custody of the property "to await disposition according to law." § 1605.

b. Failure to Provide a Post-seizure Pre-forfeiture Hearing

Plaintiff first alleges that the failure of Class Defendants to provide a prompt post-seizure hearing to contest the initial seizure violates due process. In procedural due process claims, "the deprivation by [governmental] action of a constitutionally protected interest in 'life, liberty, or property' is not in itself

unconstitutional; what is unconstitutional is the deprivation of such an interest *without due process of law*." *Zinermon v. Burch*, 494 U.S. 113, 125 (1990). Due process "requires, at a minimum, that absent a countervailing state interest of overriding significance, persons forced to settle their claims of right and duty through the judicial process must be given" notice and a "meaningful opportunity to be heard." *Boddie v. Connecticut*, 401 U.S. 371, 377-78 (1971). The proper inquiry to determine whether due process has been satisfied requires a court to ask two questions: (1) what process the government has provided, and (2) whether it was constitutionally adequate. *Zinermon*, 494 U.S. at 126.

As noted above, the customs laws do not provide for any sort of prompt post-seizure, pre-forfeiture hearing. Nor does CBP provide for a hearing. Instead, a claimant demanding forfeiture must await referral of his case by a customs agent to a U.S. attorney for possible institution of forfeiture proceedings. The agent must "report promptly," and if forfeiture is warranted, the U.S. attorney must proceed without "unreasonable delay." *United States v. $8,850 in U.S. Currency*, 461 U.S. 555, 565 (1983). Class Defendants, citing to *United States v. Von Neumann*, 474 U.S. 242 (1986), argue that this is all that due process requires. Plaintiff, citing to *Krimstock v. Kelly*, 306 F.3d 40 (2d Cir. 2002), and other

similar cases, argues that an additional hearing is required.[9]

A good starting point in the analysis is *Mathews v. Eldridge*, 424 U.S. 319 (1976), which set forth three factors to determine whether an individual has received the "process" that the Constitution finds "due": "First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." 424 U.S. at 335. By weighing these concerns, courts can determine whether a government has met the "fundamental requirement of due process," which is "the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *Id*. at 333 (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)).

In *United States v. $8,850 in U.S. Currency*, 461 U.S. 555 (1983), the Supreme Court looked to whether an eighteen-month delay in instituting a forfeiture action of money seized pursuant to 31 U.S.C. § 1101 violated due process. Similar to here, the Court looked to customs laws, which do not provide a specific time

[9] It is well settled that no pre-seizure hearing was required. *See Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 680 (1974) (seizure under similar customs statutes "presents an 'extraordinary' situation in which postponement of notice and hearing until after seizure did not deny due process").

frame for forfeiture, only a requirement of reasonableness. The Court then applied the balancing test of *Barker v. Wingo*, 407 U.S. 514 (1972)—which also applies to speedy trials—to determine if the eighteen-month delay violated the claimant's due process right to a meaningful forfeiture hearing at a meaningful time. Barker instructs a court to weigh four factors: "length of delay, the reason for the delay, the [claimant's] assertion of his right, and prejudice to the [claimant]." *$8,850*, 461 U.S. at 564. The Court did not explicitly discuss whether any additional pre-forfeiture hearing is required to satisfy due process and did not discuss the *Mathews* factors.

In *Von Neumann*, 474 U.S. 242, the Court addressed whether the Constitution requires a prompt disposition of remission proceedings. The claimant experienced a 36-day delay after he filed a petition for remission when his car was seized for a customs violation under 19 U.S.C. § 1497. The Court, again without addressing the *Mathews* factors, held that "remission proceedings are not *necessary* to a forfeiture determination, and therefore are not constitutionally required. Thus there is no constitutional basis for a claim that respondent's interest in the car, or in the money put up to secure the bond, entitles him to a speedy answer to his remission petition." 474 U.S. at 250. Importantly, the Court addressed *$8,850*, stating, "Implicit in this Court's discussion of timeliness in *$8,850* was the view that the forfeiture proceeding, without more, provides the postseizure hearing required by due process to protect Von Neumann's property interest in the car." *Id.* at

249. The Court also reiterated that "we have already noted that [a claimant's] right to a forfeiture proceeding meeting the *Barker* test satisfies any due process right with respect to the car. *Id*. at 251.

Despite the clear indication of *Von Neumann* that no additional hearing is required to satisfy due process, Plaintiff argues that *Krimstock* holds otherwise. In *Krimstock*, 306 F.3d 40, the Second Circuit addressed a New York forfeiture statute that applied to DWI arrests. The court held that a post-seizure, pre-forfeiture hearing was required in order to allow a claimant to challenge the validity of the seizure. In reaching a determination that a prompt hearing was necessary to satisfy due process, the court addressed the *Mathews* factors. For the first factor, the court noted that the deprivation of a person's vehicle "involves substantial due process interests," thus weighing in favor of the claimant. 306 F.3d at 61. As for the second factor, the court found that it weighed in favor of the city, since "the risk of erroneous seizure and retention of a vehicle is reduced in the case of a DWI owner-arrestee, because a trained police officer's assessment of the owner-driver's state of intoxication can typically be expected to be accurate." *Id.* at 62-63. However, the court noted that the city's victory on this point was narrow, "in light of the comparably greater risk of error that is posed to innocent owners, the City's direct pecuniary interest in the outcome of forfeiture proceedings, and the lack of adequate recompense for losses occasioned by erroneous seizure of vehicles." *Id.* at 64. For the third factor, the court discounted the city's

reasoning that it has an interest in (1) protecting the property from "being sold or destroyed before a court can render judgment in future forfeiture proceedings," (2) maintaining custody in order to preserve in rem jurisdiction, and (3) preventing the seized vehicle from being used as an instrumentality in future DWI acts. *Id*. at 64-67.

After balancing the factors, the court found that the Fourteenth Amendment guarantee that deprivations of property be accomplished only with due process of law demands "that plaintiffs be afforded a prompt post-seizure, prejudgment hearing before a neutral judicial or administrative officer." *Id.* at 67. Such a hearing would allow a claimant "an early opportunity to test the probable validity of further deprivation, including probable cause for the initial seizure, and to ask whether other measures, short of continued impoundment, would satisfy the legitimate interests of the City in protecting the vehicles from sale or destruction *pendente lite*." *Id.* at 68.

The court also briefly discussed the application of *$8,850* and *Von Neumann*. Concerning *$8,850*, the court held that the balancing test of *Barker v. Wingo* did not displace the balancing test of *Mathews v. Eldrige*, finding that the Constitution "distinguishes between the need for prompt review of the propriety of continued government custody, on the one hand, and delays in rendering final judgment, on the other." *Id*. According to the Second Circuit, "[t]he application of the speedy trial test presumes prior resolution of any issues involving probable cause to commence

proceedings and the government's custody of the property or persons *pendente lite*, leaving only the issue of delay in the proceedings." *Id*. As for the applicability of *Von Neumann*, the court distinguished the case because (1) the Supreme Court "was addressing the different issue of what process was due in proceedings for remission or mitigation under U.S. customs laws when a claimant could challenge the seizure of his or her property in judicial forfeiture proceedings;" (2) under federal law, a claimant could file a motion under Federal Rule of Criminal Procedure 41 for return of seized property if he believed the initial seizure was improper; and (3) the claimant's vehicle was released to him after he posted a bond. *Id.* at 52 n.12.

With these cases in mind, there is some support to the idea that a prompt post-seizure hearing is required when state, municipal, or district statutes allow for seizures for violations of law, especially where seized property is not subject to replevin. *See*, *e.g.*, *Krimstock*, 306 F.3d 40; *Smith v. City of Chicago*, 524 F.3d 834 (7th Cir. 2008) (following the reasoning of *Krimstock* in addressing a Chicago forfeiture statute; however, the decision was vacated and remanded for dismissal by the Supreme Court because of mootness); *Brown v. District of Columbia*, 115 F. Supp. 3d 56 (D.D.C. 2015) (requiring a prompt hearing for automobile seizures but not cash seizures under D.C. law); *Simms v. District of Columbia*, 872 F. Supp. 2d 90 (D.D.C. 2012) (requiring hearing after automobile seizure under D.C. law). Plaintiff, however, has not pointed to any case in

support of an argument that a hearing is required after a seizure under federal law.[10]

The only cases the undersigned can find that could theoretically support Plaintiff's contention are *Lee v. Thornton*, 53 8 F. 2d 27 (2d Cir. 1976), and *Pollgreen v. Morris*, 496 F. Supp. 1042, 1051- 54 (S.D. Fla. 1980), two cases that predate *$8,850* and *Von Neumann*. In *Lee*, the court balanced the *Mathews* factors and held:

> [W]hen vehicles are seized for forfeiture or as security, action on petitions for mitigation or remission should be required within 24 hours, with notice of the charge, and with opportunity to file a written response and to make an oral appearance and that, if requested, some kind of hearing on probable cause for the detention before an officer other than the one making the charge should be provided within 72 hours if the petition is not granted in full.

538 F.2d at 33. Without such procedures, the court held that the seizures were unlawful and the property must be returned. *Id. Pollgreen*, in turn, addressed different seizure and forfeiture laws, ones that did not impose any time period for the resolution of an owner's claims. 496 F. Supp. at 1053.

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[10] Plaintiff cites to *United States v. $23,407.69 in U.S. Currency*, 715 F.2d 162 (5th Cir. 1983). But that case simply weighed the *Barker* factors laid out in $8,850 in finding that a "the government must explain and justify substantial delays in seeking forfeiture of seized property." *Id*. at 166. It did not hold that a post-seizure, pre-forfeiture hearing must be held.

Other courts who have addressed the adequacy of federal law have found that no such hearing is required. For example, in *United States v. One 1971 BMW 4-Door Sedan*, 652 F. 2d 817, 821 (9th Cir. 1981), the court looked to the *Mathews* factors and held no hearing was required, noting, "The interest of the appellant in the uninterrupted use of his vehicle is not so compelling as to outweigh the substantial interest of the government in controlling the narcotics trade without being hampered by costly and substantially redundant administrative burdens." The court distinguished *Lee* based on the fact that "the claimants were afforded neither the independent evaluation by the United States Attorney that prosecution was warranted, nor judicial review to determine whether the forfeiture was just." *Id.* at 820. *See also United States v. Aldridge*, 81 F.3d 170, at *2 (9th Cir. 1996) (unpublished opinion) ("Aldridge's due process right to contest the government's authority to forfeit the weapons was satisfied by the availability of the administrative claim and remission procedures."); *In re Seizure of Any and All Funds on Deposit in Wells Fargo Bank, NA*, 25 F. Supp. 3d 270, 279-80 (E.D.N.Y. 2014); *United States v. All Funds on Deposit in Dime Sav. Bank*, 255 F. Supp. 2d 56, 72 (E.D.N.Y 2003) (finding *Krimstock* inapplicable); *Krimstock v. Safir*, No. 99 Civ. 12041-MBM, 2000 WL 1702035, at *5 (S.D.N.Y. Nov. 13, 2000) (rev'd on other grounds) (holding that in light of *$8800* and *Von Neumann*, *Lee* had been implicitly overruled).

After reviewing existing precedent, the undersigned finds that no prompt post-seizure hearing is

required. Even assuming *Von Neumann* does not provide a clear answer—which the undersigned finds that it does—a weighing of the *Mathews* factors firmly supports a finding that no hearing is required to satisfy due process. Unquestionably the seizure of a vehicle implicates an important private interest in being able to travel and to go to work. *See Krimstock*, 306 F.3d at 61; *Brown*, 115 F. Supp. 3d at 66. The government, however, also has a strong interest in preventing the exportation of munitions of war and preserving items capable of escaping the grasps of forfeiture, such as a truck, which can easily be disposed of or sold.[11]

The risk of erroneous deprivation is also minimal. At the border, a person has diminished privacy rights and is subject to "[r]outine searches of the persons and effects" without "any requirement of reasonable suspicion, probable cause, or warrant." *United States v. Montoya de Hernandez*, 473 U.S. 531, 538 (1985). Thus, there are minimal Fourth Amendment or probable cause concerns. And certainly CBP agents are well trained in identifying customs violations, so their assessment "can typically be expected to be accurate." *Krimstock*, 306 F.3d at 62-63.

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[11] *See Calero-Toledo*, 416 U.S. 663, 676-80 (1974) (Seizure permits the government "to assert in rem jurisdiction over the property in order to conduct forfeiture proceedings, thereby fostering the public interest in preventing continued illicit use of the property and in enforcing criminal sanctions. Second, preseizure notice and hearing might frustrate the interests served by the statutes since the property seized . . . will often be of a sort that could be removed to another jurisdiction, destroyed, or concealed, if advance warning of confiscation were given.")

"The risk of an erroneous seizure [is further] minimized by the duty of the United States Attorney immediately after notification of the seizure to investigate the facts and laws and independently to determine whether initiation of forfeiture proceedings [is] warranted." *One 1971 BMW*, 652 F.2d at 821.[12] And even though the risk of an erroneous seizure is already minimal, a claimant still has various options available to seek the return of property, including filing a motion pursuant to Rule 41(g) (or, if no criminal proceeding is pending, seeking equitable relief) to immediately challenge the legality of a seizure.

Finally, the United States government simply does not have the capability of providing a prompt post-seizure hearing in every case. As Plaintiff notes, personal property is routinely seized at the border, amounting to thousands of cases a year. To require an immediate post-seizure hearing in every case, even if just for vehicle seizures, would strain resources beyond capacity. *Cf. City of Los Angeles v. David*, 538 U.S. 715, 716-17 (2003) (considering, for example, the volume of cases, preparation time, resources, organizing hearings, the number of courtrooms and presiding officials available, arranging the appearance of those involved, and covering responsibilities while employees make appearances); *see also One 1971 BMW*, 652 F.2d at 821

[12] *Compare Brown*, 115 F. Supp. 3d at 66-67 (quoting *Simms*, 872 F. Supp. 2d at 101-02) (finding that "there is at least some risk of erroneous deprivation when a seizure is based on a traffic stop, which most of the seizures here were. That is so because the validity of traffic stops 'rests solely on the arresting officer's unreviewed probable cause determination.'").

(calling such potential hearings "costly and substantially redundant administrative burdens").

In all, the *Mathews* factors do not weigh in favor of requiring a prompt post-seizure, pre-forfeiture hearing to satisfy due process. Because Plaintiff has failed to state a claim for which relief can be granted, this claim should be dismissed.

c. Bond Requirement

There is likewise no merit to Plaintiff's contention that requiring the posting of a bond to institute forfeiture procedures violates due process. Plaintiff has not cited to any cases that support this view, and in fact, courts have long approved of the constitutionality of requiring bonds, even in the forfeiture context.[13] At most, case law establishes that due process prohibits

[13] *See*, *e.g.*, *Schlib v. Kuebel*, 404 U.S. 357 (1971) (holding that Illinois's retention of a percentage of the amount of bail, returned to those not convicted and designed to curtail abuses by bail bondsmen, was an acceptable administrative cost and not violative of due process.); *Cohen v. Beneficial Indus. Loan Corp*., 337 U.S. 541 (1949) (upholding bond for stockholder cases); *Arango v. Dep't of the Treasury*, 115 F. 3d 922, 929 (11th Cir. 1997) (holding that the bond requirement in the federal asset forfeiture statute was designed to promote "more efficient and less costly administrative forfeitures"); *Gladden v. Roach*, 864 F.2d 1196, 1200 (5th Cir. 1989) (determining that the payment of a bond as a precondition for release following arrest for a nonjailable offense does not constitute a due process violation); *Brown*, 115 F. Supp. 3d at 72 ("The statute's bond requirement easily survives rational-basis review because it serves the legitimate purposes of weeding out frivolous claims and promoting summary administrative proceedings.").

the government from denying access to some courts based on the inability to pay a court fee. *See Boddie v. Connecticut*, 401 U.S. 371 (1971); *Arango v. U.S. Dep't of the Treasury*, 115 F. 3d 922, 929 (11th Cir. 1997); *Wren v. Eide*, 542 F.2d 757, 763 (9th Cir. 1976) (holding that "the fifth amendment prohibits the federal government from denying the opportunity for a hearing to persons whose property has been seized and is potentially subject to forfeiture solely because of their inability to post a bond"). Here, though, customs regulations provide claimants an opportunity to proceed without prepayment of costs, which is all that is necessary to satisfy due process. *See* 19 C.F.R. § 162.47(e); *Brown*, 115 F. Supp. 3d at 71 (noting that indigence "is not a suspect constitutional classification," and so long as indigent claimants can obtain a waiver or reduction, the bond requirement does not burden their fundamental right to challenge the seizure of their property") (internal citations omitted). Because requiring a bond under these circumstances is not unconstitutional, Plaintiff has failed to state a claim for which relief can be granted, and this claim should likewise be dismissed.

C. Motion for Class Certification

The next question is how to resolve Plaintiff's Motion for Class Certification. ECF No. 4. As previously discussed, Plaintiff has failed to state a claim on behalf of the class members. Accordingly, there is nothing to base class certification upon, and the motion should be dismissed as moot.

D. *Bivens* Claim

The final issue is whether Plaintiff's *Bivens* claim should be dismissed. Plaintiff brings two claims under *Bivens*—a Fourth Amendment claim and a Fifth Amendment claim. First, he argues that Defendant Espinoza violated his Fourth and Fifth Amendment rights by processing Plaintiff's case for civil forfeiture without providing for any kind of post-seizure judicial process or instituting forfeiture proceedings. Compl. 15, 21, 22, ECF No. 1 at 15, 21, 22. As for the unknown defendants, he argues that they are the ones with authority to hold or release the truck and are therefore responsible for violating his Fourth and Fifth Amendment rights, as they maintained custody of Plaintiff's truck for over twenty-three months without judicial process. *Id*. at 15, 21, 22-23. He further alleges that a reasonable official in the *Bivens* Defendants' shoes would have understood that holding property for such an unreasonable period of time without a post-seizure hearing and without commencing forfeiture proceedings violates due process and constitutes an unreasonably prolonged seizure in violation of the Fourth Amendment. *Id.* at 15-16, 21.

1. *Bivens* Framework

A *Bivens* cause of action is a judicially created cause of action arising under the Constitution for money damages against federal officials sued in their individual capacities who have violated the plaintiff's constitutional rights while acting in the course and

scope of employment. *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 66 (2001). Qualified immunity, however, shields government officials from monetary damages unless the official violated a statutory or constitutional right that was clearly established at the time of the challenged conduct. *Ashcroft v. al-Kidd*, 563 U.S. 731, 735 (2011). If a defendant "properly invokes the defense of qualified immunity, the plaintiff bears the burden of proving that the defendant is not entitled to the doctrine's protection." *Howell v. Town of Ball*, 827 F.3d 515, 525 (5th Cir. 2016).

To be clearly established, a right must be sufficiently clear "that a reasonable official would understand that what he is doing violates that right." *Anderson v. Creighton*, 483 U.S. 636, 640 (1987). "Because the focus is on whether the officer had fair notice that [his] conduct was unlawful, reasonableness is judged against the backdrop of the law at the time of the conduct." *Brosseau v. Haugen*, 543 U.S. 194, 198 (2004). Case law need not be exactly on point, but "existing precedent must have placed the statutory or constitutional question beyond debate." *al-Kidd*, 563 U. S. at 741. This means being able "to point to controlling authority—or a 'robust consensus of cases of persuasive authority'—that defines the contours of the right in question with a high degree of particularity." *Morgan v. Swanson*, 659 F.3d 359, 371-72 (5th Cir. 2011) (quoting *al-Kidd*, 563 U. S. at 742). "Where no controlling authority specifically prohibits a defendant's conduct, and when the federal circuit courts are split on

the issue, the law cannot be said to be clearly established." *Id*. at 372.

It is also a defense to a cause of action under *Bivens* that (1) the alleged constitutional violations extend beyond the types that have been recognized under *Bivens* and its progeny, and (2) there are "'special factors counseling hesitation" of implying a private damages action "in the absence of affirmative action by Congress.'" *Carlson v. Green*, 446 U.S. 14, 18 (1980) (quoting *Bivens*, 403 U.S. at 396). Generally, a court should resolve the *Bivens* application issue first before addressing the constitutional question. *Hernandez v. Mesa*, 137 S. Ct. 2003, 2006 (2017). However, "disposing of a *Bivens* claim by resolving the constitutional question, while assuming the existence of a *Bivens* remedy—is appropriate in many cases," unless the question at issue "is sensitive and may have consequences that are far reaching." *Id.*[14]

[14] For example, *Hernandez* raised a sensitive issue with potential far reaching consequences. 137 S. Ct. 2003. The question was whether the family of a decedent who was killed on Mexican soil could bring a *Bivens* cause of action against a Border Patrol agent who fired shots from the United States. Without deciding the *Bivens* question, the Court of Appeals found that the agent did not violate a clearly established constitutional right. The Supreme Court remanded the case for a determination of the *Bivens* question first.

2. Is Plaintiff's Fifth Amendment Claim Cognizable Under *Bivens*?

Following the standard procedure, the first question the Court should address is whether Plaintiff's claims are cognizable under *Bivens*. A *Bivens* cause of action is disfavored. *Iqbal*, 556 U.S. at 675. Indeed, the Supreme Court has only recognized a *Bivens* cause of action under the Constitution in three contexts: (1) Fourth Amendment unreasonable searches and seizures; (2) a Fifth Amendment Due Process Clause violation for gender discrimination, *see Davis v. Passman*, 442 U.S. 228 (1979); and (3) an Eighth Amendment Cruel and Unusual Punishment claim for failure to provide adequate medical care, *see Carlson v. Green*, 446 U.S. 14 (1980). Since *Bivens*, *Passman*, and *Carlson*, the Supreme Court has "adopted a far more cautious course before finding implied causes of action." *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1855 (2017).[15]

In determining if *Bivens* applies, the first question the Court must address is whether Plaintiff's *Bivens* claims arise in a new context. If the case is different in a meaningful way from previous *Bivens* cases *decided by the Supreme Court*, then the context is new. *Id.* at

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[15] For examples of cases where the Court has refused to recognize an implied cause of action, *see*, *e.g.*, *Wilkie v. Robbins*, 551 U.S. 537 (2007) (no Fifth Amendment claim for landowners seeking damages from government officials who unconstitutionally interfere with their exercise of property rights); *Malesko*, 534 U.S. 61 (2001) (no Eighth Amendment-based suit against a private corporation that managed a federal prison); *Bush v. Lucas*, 462 U.S. 367 (1983) (no First Amendment claim for retaliatory demotion because of the comprehensive civil service remedies available).

1859. "Instead of an amendment-by-amendment ratification of *Bivens* actions, courts must examine each new context—that is, each new 'potentially recurring scenario that has similar legal and factual components.'" *De La Paz v. Coy*, 786 F. 3d 367, 372 (5th Cir. 2015) (quoting *Arar v. Ashcroft*, 585 F.3d 559, 572 (2d Cir. 2009)). The Supreme Court has provided an instructive non-exhaustive list of examples where differences are meaningful enough to make a given context a new one, including: "the rank of the officers involved; the constitutional right at issue; the generality or specificity of the official action; the extent of judicial guidance as to how an officer should respond to the problem or emergency to be confronted; the statutory or other legal mandate under which the officer was operating; the risk of disruptive intrusion by the Judiciary into the functioning of other branches; or the presence of potential special factors that previous *Bivens* cases did not consider." *Ziglar*, 137 S. Ct. at 1860.

If a *Bivens* claim arises in a new context, a *Bivens* remedy "will not be available if there are 'special factors counseling hesitation in the absence of affirmative action by Congress.'" *Id*. at 1857 (quoting *Carlson*, 446 U.S. at 18). For example, "*Bivens* remedies may be foreclosed by congressional action where an 'alternative, existing process for protecting the interest amounts to a convincing reason for the Judicial Branch to refrain from providing a new and freestanding remedy in damages.'" *Butts v. Martin*, 877 F.3d 571, 587-88 (5th Cir. 2017) (quoting *Wilkie v. Robbins*, 551 U.S. 537, 550 (2007)).

a. Plaintiff's Claims Arise in a New Context

1. Fifth Amendment Claim

The undersigned finds that Plaintiff's Fifth Amendment claim arises in a new context. The Supreme Court has not recognized a *Bivens* cause of action in the asset forfeiture context under the Fifth Amendment. In fact, the only explicit recognition of a Fifth Amendment claim was in *Passman*, 442 U.S. 228, which involved gender-based employment discrimination and is wholly dissimilar to the facts here.

Plaintiff, however, argues that cases need not be identical to prior *Bivens* cases and cites to *Iqbal*, 556 U.S. 662, where the Court impliedly recognized a Fifth Amendment *Bivens* claim. *Iqbal* involved allegations that the defendants subjected a detainee to harsh conditions of confinement, solely on account of his religion, race, and/or national origin and for no legitimate penological interest, in violation of the Equal Protection component of the Fifth Amendment Due Process Clause. *Ziglar*, however, indicates that similarities to a prior *Bivens* case must indeed be significant, strongly indicating that not only must a previously recognized *Bivens* case have actually arisen in the asset forfeiture context, *but also* have other additional aspects in common. An equal protection claim challenging conditions of confinement has nothing in common with an asset forfeiture case, other than the fact that both claims arise under the Fifth Amendment.[16]

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[16] Even assuming Fifth Circuit cases apply to the analysis, they likewise provide Plaintiff with no help. The Fifth Circuit has

Plaintiff also cites to footnote 22 in *Passman*, which, in turn, cites favorably to *States Marine Lines, Inc. v. Shultz*, 498 F. 2d 1146 (4th Cir. 1974), a *Bivens* case legally and factually similar to the one here.[17] However, a 1979 Supreme Court footnote citing a circuit opinion not before the Court is dicta and hardly grounds to conclude that the Supreme Court has recognized a *Bivens* claim in the same context as here.[18]

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routinely recognized the existence of a *Bivens* cause of action under similar circumstances to those here, with one significant difference—the seized property was missing or destroyed and thus unreturnable. *See United States v. Bacon*, 546 F. App'x 496, 499 (5th Cir. 2013) ("Bacon has no remedy available under Rule 41(g) because the government has already destroyed all of his property."); *Jaramillo-Gonzalez v. United States*, 397 F. App'x 978 (5th Cir. 2010); *Bailey v. United States*, 508 F.3d 736 (5th Cir. 2007); *Pena v. United States*, 157 F.3d 984 (5th Cir. 1998). In other words, there was no other form of relief for the claimant except for a *Bivens* remedy.

This "damages or nothing" approach was the basis of *Bivens* and *Davis* and is sometimes employed by the Fifth Circuit where a *Bivens* remedy will be available if it is the only recourse. Plaintiff here though had other options, and indeed recovered his property. Notably, too, the Fifth Circuit has never actually upheld personal liability in an actual *Bivens* case or controversy in this context and has never clarified who a proper defendant might be; instead, the court merely recognized the existence of a cause of action and allowed a plaintiff to amend his complaint to add a *Bivens* cause of action. It will be interesting to know if the Fifth Circuit will continue to do so in light of *Ziglar*.

[17] Plaintiff also cites to *Seguin v. Eide*, 645 F.2d 804 (9th Cir. 1981), another similar *Bivens* case not cited by the Supreme Court.

[18] Moreover, *Shultz* is extremely outdated, called into question by *Bivens* progeny, and likely overruled.

Thus, Plaintiff's Fifth Amendment claim arises in a new context.

2. Fourth Amendment

The undersigned likewise finds that Plaintiff's Fourth Amendment claim arises in a new context. The Fourth Amendment prohibits "unreasonable searches and seizures." U.S. Const. amend. IV. This protection extends to "seizures conducted for purposes of civil forfeiture." *United States v. James Daniel Good Real Prop*., 510 U.S. 43, 49 (1993). "A 'seizure' of property occurs when there is some meaningful interference with an individual's possessory interests in that property." *United States v. Jacobsen*, 466 U.S. 109, 113 (1984).

Bivens of course involved a Fourth Amendment violation, and the Supreme Court has continuously recognized Fourth Amendment *Bivens* actions in various contexts. Plaintiff, citing to a string of Fourth Amendment *Bivens* cases, argues that they present a classic Fourth Amendment pattern similar to the facts here. *See Ashcroft v. al-Kidd*, 563 U.S. 731 (2011) (pretextual detention under the federal material witness statute); *Groh v. Ramirez*, 540 U.S. 551 (2004) (search pursuant to a deficient warrant); *Anderson v. Creighton*, 483 U.S. 635 (1987) (warrantless search of a home to find a robbery suspect); *United States v. Place*, 462 U.S. 696, 710 (1983) (holding that the 90- minute detention of luggage "went beyond the narrow authority possessed by police to detain briefly luggage reasonably suspected to contain narcotics."); *see also United States*

v. Portillo-Aguirre, 311 F.3d 647, 653 (5th Cir. 2002) (quotations omitted) (holding that the detention of a bus at an immigration checkpoint for an additional three to five minutes to investigate whether the defendant was carrying illegal drugs violated the Fourth Amendment because the seizure extended past the "time reasonably necessary to determine the citizenship status of the persons stopped.").

These cases, however, are meaningfully distinct from the present case. Again, "[i]nstead of an amendment-by-amendment ratification of *Bivens* actions, courts must examine each new context – that is, each new 'potentially recurring scenario that has similar legal and factual components.'" *De La Paz*, 786 F. 3d at 372 (quoting *Arar*, 585 F.3d at 572). And again, none of the Fourth Amendment cases arise in the asset forfeiture context.

Moreover, all of the cited cases involve an unlawful seizure of property, or the continued seizure of property once the initial justification for the seizure expired, thus implicating the Fourth Amendment. In contrast, Plaintiff only conclusorily suggests that the underlying seizure of his property was unlawful.[19] And looking at the facts in the light most favorable to Plaintiff, the initial justification for the seizure of Plaintiff's

[19] He in fact never alleges that seizure was unlawful. Rather, he contends that if he were provided a hearing, he would have argued that "CBP lacked a lawful basis to seize his vehicle, that the vehicle is not subject to forfeiture, and that forfeiture of the vehicle would violate the Constitution." Compl. 13, ECF No. 1 at 13.

vehicle, magazine, and bullets was indeed valid, and the justification never expired.

The true premise of Plaintiff's argument is that the delay in processing the forfeiture claim made the *forfeiture*, not the seizure, unconstitutional. Such allegations establish a potential Fifth Amendment Due Process Clause violation, not a Fourth Amendment violation. *See James Daniel Good*, 510 U.S. at 48–49 ("Here the Government seized property not to preserve evidence of wrongdoing, but to assert ownership and control over the property itself. Our cases establish that government action of this consequence must comply with the Due Process Clauses of the Fifth and Fourteenth Amendments."); *see also Brown*, 115 F. Supp. 3d at 63.[20] Plaintiff's simple reframing of his Fifth Amendment claim as a Fourth Amendment claim is to no avail. And because the distinctions here are meaningful enough from prior Supreme Court cases (and Fifth Circuit cases), Plaintiff's *Bivens* claims arise in a new context.[21]

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[20] The most analogous Fourth Amendment case Plaintiff has identified is *Brewster v. Beck*, 859 F.3d 1194 (9th Cir. 2017), which involved a seizure pursuant to a community caretaking exception to the Fourth Amendment, allowing for a 30-day impoundment of vehicles that "jeopardize public safety and the efficient movement of vehicular traffic." *Id*. at 1196 (quotations omitted). According to the Ninth Circuit, once an innocent owner came forth to claim the seized vehicle, continued possession of her vehicle for the full thirty days violated the Fourth Amendment. However, because *Brewster* was issued by another circuit and not the Supreme Court, it is not relevant to the present *Bivens* analysis.

[21] To clarify, *James Daniel Good* was not a *Bivens* case.

b. Special Factors Counsel Against Expanding *Bivens*

Because Plaintiff's claims arise in a new context, the next question is whether special factors counsel against expanding *Bivens*. With this second inquiry, a court must make "an assessment of its impact on governmental operations systemwide," including "the burdens on Government employees who are sued personally, as well as the projected costs and consequences to the Government itself when the tort and monetary liability mechanisms of the legal system are used to bring about the proper formulation and implementation of public policies." *Ziglar*, 137 S. Ct. at 1858. "If the statute does not display an intent to create a private remedy, then a cause of action does not exist and courts may not create one, no matter how desirable that might be as a policy matter, or how compatible with the statute." *Id*. at 1856 (internal quotations omitted).

The undersigned finds that special factors counsel against expanding *Bivens* here. Of great importance is whether Congress has already implemented procedural protections. *Schweiker v. Chilicky*, 487 U.S. 412, 423 (1988). "When the design of a Government program suggests that Congress has provided what it considers adequate remedial mechanisms for constitutional violations that may occur in the course of its administration, [the Supreme Court has] not created additional *Bivens* remedies." *Id.* For example, in *Schweiker*, the Court refused to recognize a *Bivens* cause of action against administrators of the continuing disability review program for due process

violations where disabled social security claimants were wrongfully denied benefits. A person seeking disability benefits can pursue various levels of recourse after an initial determination of eligibility, including review by a federal ALJ, a hearing before the Appeals Council, and judicial review. *Id*. at 424. And in *Bush v. Lucas*, 462 U.S. 367 (1983), the Court refused to recognize an implied cause of action for a First Amendment claim against a supervisor because there were comprehensive procedural and substantive provisions for civil service remedies.

The undersigned sees little overall distinction between the forfeiture system in place here and the review systems in place in *Bush* and *Schweiker*. Congress has invoked a comprehensive forfeiture scheme where an aggrieved party must receive notice and an opportunity to respond, and can seek remission, mitigation, invoke forfeiture proceedings, or file a Rule 41 motion for the return of property. Moreover, no statutory provision allows for monetary damages against either the United States or an officer in his or her individual capacity, thus indicating Congress's reluctance to extend the availability of monetary damages against individual officers. *See Schweiker* 487 U.S. at 424 (noting how the applicable laws make "no provision for remedies in money damages against officials responsible for unconstitutional conduct that leads to the wrongful denial of benefits").

Recognizing a cause of action would also have significant consequences on the federal government and its employees, with potential claims arising from every

seizure against CBP agents of all types (including paralegals, attorneys, and agents maintaining custody over the seized property, just to name a few).[22] "'Congress is in a far better position than a court to evaluate the impact of a new species of litigation'" that would arise and "can tailor any remedy to the problem perceived, thus lessening the risk of raising a tide of suits threatening legitimate initiative on the part of the Government's employees." *Wilkie*, 551 U.S. at 562 (quoting *Bush*, 462 U.S. at 389).

Plaintiff, however, complains that the available seizure and forfeiture remedies are in fact not remedies at all and do not work quickly enough. He also attempts to distinguish his claim, stating, "Whereas the plaintiffs in *Lucas* and *Chilicky* alleged that the government had violated the relevant statute, Gerardo alleges that the government *followed* the relevant statutes but that the statutes themselves violate the Constitution . . . An administrative scheme that itself violates the Constitution cannot possibly provide an 'alternative' remedy for that violation." Pl.'s Resp.

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[22] Notably, in *Rankin v. United States*, 556 F. App'x 305 (5th Cir. 2014), under a similar statutory scheme under the Civil Asset Forfeiture Reform Act of 2000 ("CAFRA"), 18 U.S.C. § 983, the Fifth Circuit refused to recognize a *Bivens* cause of action for forfeiture violations, noting, "Because CAFRA provides a comprehensive scheme for protecting property interests, no *Bivens* claim is available." *Id.* at 311. In reaching its conclusion, the Fifth Circuit simply cited *Bush* and *Schweiker*. *Id.* No doubt CAFRA has a more comprehensive system in place than customs laws, but *Rankin* reflects the strong significance placed on the existence of a comprehensive statutory scheme, even where unrecompensed damages are inevitable.

10-11, ECF No. 56 at 16-17. But this argument pertains to Plaintiff's claim regarding the failure to provide him with a post-seizure hearing, not his claim about delays in the forfeiture process. As previously discussed, there is nothing unconstitutional about the forfeiture scheme itself, on its face or as applied by CBP.

Although it is unfortunate when a statutory scheme fails, resulting in not insignificant damages (rental car, depreciation, insurance, etc...), the proper inquiry here is whether Congress intended for individual liability, not whether the statutory scheme is actually successful. *See*, *e.g.*, *Schweiker*, 487 U.S. at 428-29 (incomplete relief for damages and hardships suffered because of delays of no consequence); *Spagnola v. Mathis*, 859 F. 2d 233, 227 (D.C. Cir. 1988) (noting that "the *Chilicky* Court made clear that it is the comprehensiveness of the statutory scheme involved, not the 'adequacy' of specific remedies extended thereunder, that counsels judicial abstention"); *Gaspard v. United States*, 713 F.2d 1097, 1105 (5th Cir. 1983) ("It is the *existence* of the [statutory scheme], and not payment in fact, that lessens the justification for a *Bivens* remedy.").

Plaintiff's argument would also foreclose *Bivens* relief in general. In arguing that Defendants were simply following an unconstitutional scheme, he is merely reframing his class action claims as *Bivens* ones, without suggesting that Espinoza's or any other unnamed defendant individual's acts were otherwise unconstitutional. Congress "and not the individual

defendants are responsible for creating the remedial scheme," and a plaintiff "cannot avoid dismissal by recasting [his] constitutional claims against the agency as a *Bivens* action." *Knaust v. Digesualdo*, 589 F. App'x 698, 701 (5th Cir. 2014).

III. CONCLUSION

In sum, all of Plaintiff's property has been returned to him; the customs/forfeiture statutes are not unconstitutional on their face or as applied by CBP when Defendants do not provide a prompt post-seizure hearing; the customs/forfeiture statutes are not unconstitutional for requiring a bond; Plaintiff's motion for class action certification is moot; and Plaintiff has failed to state a cognizable *Bivens* cause of action. Although insufficient facts are before the Court, it certainly appears plausible that Plaintiff's due process rights were violated when it took over two years to return his property. *Compare United States v. $23,407.69 in U.S. Currency*, 715 F.2d 162 (5th Cir. 1983) (13 month delay unreasonable, thus precluding forfeiture). *But see $8,850*, 461 U.S. 555 (eighteen-month delay not unreasonable under the circumstances). Notwithstanding, Plaintiff's only redress was getting his property and bond money back.

Because Plaintiff now has all the relief to which he is entitled, the undersigned recommends that:

1. Plaintiff's motion for class certification (ECF No. 4) be **DENIED AS MOOT**.

2. The motion to dismiss by Defendants United States Customs and Border Protection, United States of America, and Kevin McAleenan (ECF No. 49) be **GRANTED**, the Rule 41(g) motion **DISMISSED AS MOOT**, and the class claims against them **DISMISSED WITH PREJUDICE** to refiling by Plaintiff, but without prejudice as to any other potential plaintiffs.

3. Defendant Espinoza's motions to dismiss (ECF No. 50) be **GRANTED** and the claims against him **DISMISSED WITH PREJUDICE**.

Finally, the undersigned recommends that the claims against the unknown defendants be **DISMISSED WITHOUT PREJUDICE.** Assuming Plaintiff could identify any of the unknown defendants at a later time, amendment of the complaint pursuant to Rule 15(a)(2) of the Federal Rules of Civil Procedure to name the specific agents would be futile, since a *Bivens* claim against them would have no merit.[23] Courts, however, lack personal jurisdiction over unidentified fictitious defendants. *See Cunningham v. Advanta Corp*., 2009 WL 10704752, at *3 (N.D. Tex. Feb. 6, 2009); *Taylor v. Fed. Home Loan Bank Bd.*, 661 F. Supp. 1341, 1350 (N.D. Tex. 1986). Therefore, the claims should be dismissed *without prejudice*, pursuant to

[23] Leave to amend should be allowed unless there is "undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc." *Foman v. Davis*, 371 U.S. 178, 182 (1962).

Federal Rule of Civil Procedure 12(b)(2). *See Int'l Energy Ventures Mgmt., L.L.C. v. United Energy Grp., Ltd.*, 818 F.3d 193, 213 (5th Cir. 2016) (dismissal for lack of personal jurisdiction must be without prejudice).

IV. NOTICE

The United States District Clerk shall serve a copy of this report and recommendation on all parties either by (1) electronic transmittal to all parties represented by an attorney registered as a filing user with the Clerk of Court pursuant to the Court's Procedural Rules for Electronic Filing in Civil and Criminal Cases; or (2) certified mail, return receipt requested, to any party not represented by an attorney registered as a filing user. Pursuant to 28 U.S.C. § 636(b)(1), any party who wishes to object to this report and recommendation may do so within fourteen days after being served with a copy. Failure to file written objections to the findings and recommendations contained in this report shall bar an aggrieved party from receiving a *de novo* review by the District Court of the findings and recommendations contained herein, *see* 28 U.S.C. § 636(b)(1)(c), and shall bar an aggrieved party from appealing "the unobjected-to proposed factual findings and legal conclusions accepted by the District Court"

except on grounds of plain error. *Douglass v. United Servs. Auto. Ass'n*, 79 F.3d 1415, 1429 (5th Cir. 1996).

SIGNED and **ENTERED** on July 23, 2018.

/s/ Collis White
COLLIS WHITE
UNITED STATES
MAGISTRATE JUDGE

[SEAL] **U.S. Customs & Border Protection**
P.O. Box 3130
Laredo, Texas 78044-3130

NOTICE OF SEIZURE AND
INFORMATION TO CLAIMANTS
NON-CAFRA FORM

CERTIFIED – RETURN RECEIPT REQUESTED:
70131710000177142442

October 1, 2015

Gerardo Cesar Cerna
[Address Redacted]
Tyner, Kentucky 40486

Re: Case Number 2015230300013601

Dear Sir/Madam:

This is to notify you that U.S. Customs and Border Protection (OFO) seized the property described below at Eagle Pass, TX on 9/21/2015:

Quantity	UOM	DESCRIPTION	Appraised Value
1	BG	.380 Caliber Ammunition (EA 5)	$2.00
1	BG	SIG Sauer .380 Magazine Auto (EA 1)	$39.99
1	EA	2014 Ford – F-250 – VIN: 1FT7W2BT8EEB 05962	$38,000.00

The property was seized and is subject to forfeiture under the provisions of 19USC1595a(d), 22USC401, 22USC2778 & 22CFRPart127.1, because any arms or munitions of war or other articles known or where probable cause exist to believe that the arms or munitions of war or any vessel, vehicle or aircraft or other articles, are intended to be or are being or have been exported or removed from the US in violation of law are subject to be seizure.

The facts available to CBP indicate that you might have an interest in the seized property. The purpose of this letter is to advise you of the options available to you concerning this seizure. An important document – an "Election of Proceedings" form is enclosed with this letter. You must choose one of the options outlined below, indicate your choice on the "Election of Proceedings" form, and return it and any other necessary documents to CBP within the allotted time frame. Should you choose to abandon the property, you must still complete the "Election of Proceedings" form and return it to CBP.

Your options are as follows:

1. **Petition:** You may file a petition with this office within 30 days from the date of this letter in accordance with Title 19, United States Code (U.S.C.), Section 1618 (19 U.S.C. §1618) and Title 19, Code of Federal Regulations (C.F.R.), Sections 171.1 and 171.2 (19 C.F.R. §§ 171.1, 171.2), seeking remission of the forfeiture. The petition does not need to be in any specific form, but it must describe the property involved, identify the date and

place of the seizure, include all the facts and circumstances which you believe warrant relief from forfeiture, and must include proof of your interest in or claim to the property. Examples of proof of interest include, but are not limited to a car title, loan agreement, or documentation of the source of funds. If you choose this option, you must check **Box 1** on the "Election of Proceedings" form.

By completing Box 1 on the "Election of Proceedings" form, you are requesting administrative processing of your case by CBP. You are requesting that CBP refrain from beginning forfeiture proceedings while your petition is pending or that CBP halt administrative forfeiture proceedings, if they have already commenced. However, if CBP has already referred the matter to the U.S. Attorney's Office for the institution of judicial forfeiture proceedings, your petition will be forwarded to the U.S. Attorney for consideration.

If you are dissatisfied with the petition decision (initial petition or supplemental petition), you will have an additional 60 days from the date of the initial petition decision, or 60 days from the date of the supplemental petition decision, or such other time as specified by the Fines, Penalties and Forfeitures Officer to file a claim to the property, along with the required cost bond, requesting referral of the matter to the U.S. Attorney's Office for judicial action. If you do not act within these time frames, CBP may forfeit the property to the United States as authorized by law.

At any point prior to the forfeiture of the property, you may request a referral to the U.S. Attorney by

filing a claim and cost bond. *Please see section 4 of this letter for information on how to file a claim and cost bond.* If you take such action after filing a petition for relief, your pending petition will be withdrawn from consideration.

2. **Offer in Compromise:** At any time prior to forfeiture, you may file an offer in compromise in accordance with Title 19, U.S.C., Section 1617 (19 U.S.C. § 1617) and Title 19, C.F.R., Sections 161.5 and 171.31 (19 C.F.R. §§ 161.5, 171.31). The offer must specifically state that you are making it under the provisions of 19 U.S.C. § 1617. If you are offering money in settlement of the case, you must include payment (bank draft, cashier's check or certified check, drawn on a U.S. financial institution, and made payable to CBP) in the amount of your offer. CBP may only consider the amount of your offer and will return the full offer if it is rejected. *This option may serve to delay the case.* If you choose this option, you must check **Box 2** on the "Election of Proceedings" form.

   If you chose to submit an offer in compromise and are dissatisfied with the offer decision, you will have an additional 30 days from the date of the offer decision to file a claim and bond requesting a referral for judicial action. If you do not act within the additional 30 days, the property may be forfeited to the United States.

   You may also request a referral for judicial action at any point prior to the issuance of the offer in compromise decision. *(Please see section 4 of this letter for information on how to file a claim and*

cost bond.) If you take such action, your petition or offer will he considered to have been withdrawn.

If, upon receipt of your offer, the matter has already been referred to the U.S. Attorney for the institution of judicial forfeiture proceedings, your over will be forwarded to the United States Attorney for consideration as an offer of settlement in the judicial case, as appropriate.

3. **Abandon:** You may abandon the property or state that you have no claim or interest in it. If you choose this option, you should check **Box 3** on the "Election of Proceedings" form. The Government may proceed with forfeiture proceedings or address claims from other parties concerning the property, without further involving you.

4. **Court Action**: You may request to have this matter referred to the U.S. Attorney for institution of judicial forfeiture proceedings by notifying the office identified in this letter, in writing, that you do not intend to file a petition or offer in compromise with CBP or post the value of the merchandise to obtain its release on payment (see below). If you choose this option, you should check **Box 4** on the "Election of Proceedings" form.

   If you chose this option, you must submit to CBP (at the address provided at the end of this letter) a claim and cost bond in the penal sum of $5,000 or 10 percent of the value of the claimed property, whichever is less, but in no case shall the amount of the bond be less than $250.00.

   If you file the claim and bond, the case will be referred promptly to the appropriate U.S. Attorney

for the institution of judicial proceedings in Federal court to forfeit the seized property in accordance with 19 U.S.C. § 1608 and 19 C.F.R. § 162.47. You may then file a petition for relief with the Department of Justice pursuant to Title 28, Code of Federal Register, Part 9 (28 C.F.R. Pt. 9). Failure to submit a bond with the claim will render the request for judicial proceedings incomplete, and therefore, defective. This means that the case will NOT be referred to the appropriate U.S. Attorney.

If you wish the Government to seek judicial forfeiture proceedings but cannot afford to post the bond, you should contact the Fines, Penalties & Forfeitures Officer or Asset Forfeiture Officer of CBP (where applicable) so that CBP can make a determination of your financial ability to pay the bond. If a determination of inability to pay is made, the cost of the bond may be waived in its entirety. The case will be referred promptly and you may then file a petition for relief with the Department of Justice pursuant to 28 C.F.R. Pt. 9.

Take No Action: If you choose to do nothing, CBP may seek to forfeit the property. In order to obtain forfeiture, CBP must publish a notice of seizure and intent to forfeit for 30 consecutive days, and after that time the Government acquires full title to the seized property. The first notice will be posted on or about 30 days from the date of this letter.

For property appraised in excess of $5,000, CBP will post notice of seizure and intent to forfeit on the Internet at www.forfeiture.gov for 30 consecutive days.

> For property appraised at $5000 or less, CBP will post notice of seizure and intent to forfeit in a conspicuous place accessible to the public at the customhouse or Border Patrol sector office (where appropriate) nearest the place of seizure as well as on the internet at www.forfeiture.gov for 30 consecutive days.

Release on Payment: If the seized merchandise is not, by law, prohibited from entry into the commerce of the United States, you may, within 30 days of this letter, submit an offer to pay the full appraised domestic value of the seized property accompanied by the full payment (bank draft, cashier's check or certified check, drawn on a U.S. financial institution, and made payable to CBP) or an irrevocable letter of credit in accordance with 19 U.S.C. § 1614 and 19 C.F.R. § 162.44.

If CBP accepts your offer to substitute release of the seized property on payment, the property will be immediately released, and the payment or letter of credit will be substituted for the seized property. You may still submit a petition, offer in compromise, or file a claim and cost bond requesting that the matter be referred to the U.S. Attorney's Office, and you must check the appropriate box on the "Election of Proceedings" form. The decision letter on your offer will provide you with the time frames for those options. If, upon receipt of your offer, the matter has already been referred to the U.S. Attorney's Office for the institution of judicial forfeiture proceedings, your offer will be forwarded to the U.S. Attorney for consideration.

Holder of a Lien or Security Interest: If you are a holder of a lien or security interest and you do not file a request for court action (option 4 above), you may avail yourself of any of the other options listed. No relief will be granted to you until after forfeiture, unless your petition, offer or request is accompanied by an agreement to hold the United States, its officers and employees harmless, and a release from the registered owner and/or person from whom the property was seized.

All accompanying documents, including supporting documents, must be in the English language or accompanied by an English language translation and submitted in duplicate.

No matter which box you check on the enclosed "Election of Proceedings" form, you should sign, date and return the form, along with any petition, offer in compromise, or request for judicial forfeiture proceedings if those documents are necessary to support the option you choose. *If you did not receive this form, please call the telephone number below.*

In addition to the seizure and forfeiture liability, you may be liable for a civil penalty in this matter. If you are liable for a civil penalty, details on the civil penalty are in the attached letter; or, if not attached, are being prepared and will be mailed shortly.

All correspondence should be addressed to U.S. Customs and Border Protection, P.O. Box 3130. Should further information be required, contact Juan Espinoza at Fines, Penalties and Forfeitures Office, Lincoln Juarez

Bridge – Building II at [Phone Number Redacted]. Inquiries should reference the case number.

Sincerely,

/s/ [Illegible]
Liza Lopez
Fines, Penalties and Forfeitures Officer

Enclosures: Election of Proceedings – Non-CAFRA Form

A FALSE STATEMENT OR CLAIM MAY SUBJECT A PERSON TO PROSECUTION UNDER TITLE 18, U.S.C., SECTION 1001 AND/OR 1621, AND MAY BE PUNISHABLE BY A FINE AND IMPRISONMENT

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

Constitution of the United States

Amendment V.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

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19 U.S.C. § 1603

Seizure; warrants and reports

(a) Any property which is subject to forfeiture to the United States for violation of the customs laws and which is not subject to search and seizure in accordance with the provisions of section 1595 of this title, may be seized by the appropriate officer or person upon process issued in the same manner as provided for a search warrant under the Federal Rules of Criminal Procedure. This authority is in addition to any seizure authority otherwise provided by law.

(b) Whenever a seizure of merchandise for violation of the customs laws is made, or a violation of the customs laws is discovered, and legal proceedings by the United States attorney in connection with such seizure or discovery are required, it shall be the duty of the appropriate customs officer to report promptly such seizure or violation to the United States attorney for the district in which such violation has occurred, or in which such seizure was made, and to include in such report a statement of all the facts and circumstances of the case within his knowledge, with the names of the witnesses and a citation to the statute or statutes believed to have been violated, and on which reliance may be had for forfeiture or conviction.

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19 U.S.C. § 1604

Seizure; prosecution

It shall be the duty of the Attorney General of the United States immediately to inquire into the facts of cases reported to him by customs officers and the laws applicable thereto, and if it appears probable that any fine, penalty, or forfeiture has been incurred by reason of such violation, for the recovery of which the institution of proceedings in the United States district court or the Court of International Trade is necessary, forthwith to cause the proper proceedings to be commenced and prosecuted, without delay, for the recovery of such fine, penalty, or forfeiture in such case provided, unless,

upon inquiry and examination, the Attorney General decides that such proceedings can not probably be sustained or that the ends of public justice do not require that they should be instituted or prosecuted, in which case he shall report the facts to the Secretary of the Treasury for his direction in the premises.

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19 U.S.C. § 1607

Seizure; value $500,000 or less, prohibited articles, transporting conveyances

(a) Notice of seizure

If –

(1) the value of such seized vessel, vehicle, aircraft, merchandise, or baggage does not exceed $500,000;

(2) such seized merchandise is merchandise the importation of which is prohibited;

(3) such seized vessel, vehicle, or aircraft was used to import, export, transport, or store any controlled substance or listed chemical; or

(4) such seized merchandise is any monetary instrument within the meaning of section 5312(a)(3) of Title 31;

the appropriate customs officer shall cause a notice of the seizure of such articles and the intention to forfeit and sell or otherwise dispose of the same according to law to be published for at least three successive weeks in such manner as the Secretary of the Treasury may

direct. Written notice of seizure together with information on the applicable procedures shall be sent to each party who appears to have an interest in the seized article.

(b) "Controlled substance" and "listed chemical" defined

As used in this section, the terms "controlled substance" and "listed chemical" have the meaning given such terms in section 802 of Title 21.

(c) Report to Congress

The Commissioner of U.S. Customs and Border Protection shall submit to the Congress, by no later than February 1 of each fiscal year, a report on the total dollar value of uncontested seizures of monetary instruments having a value of over $100,000 which, or the proceeds of which, have not been deposited into the Customs Forfeiture Fund under section 1613b of this title within 120 days of seizure, as of the end of the previous fiscal year.

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19 U.S.C. § 1608

Seizure; claims; judicial condemnation

Any person claiming such vessel, vehicle, aircraft, merchandise, or baggage may at any time within twenty days from the date of the first publication of the notice of seizure file with the appropriate customs officer a claim stating his interest therein. Upon the filing of

such claim, and the giving of a bond to the United States in the penal sum of $5,000 or 10 percent of the value of the claimed property, whichever is lower, but not less than $250, with sureties to be approved by such customs officer, conditioned that in case of condemnation of the articles so claimed the obligor shall pay all the costs and expenses of the proceedings to obtain such condemnation, such customs officer shall transmit such claim and bond, with a duplicate list and description of the articles seized, to the United States attorney for the district in which seizure was made, who shall proceed to a condemnation of the merchandise or other property in the manner prescribed by law.

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19 U.S.C. § 1609

Seizure; summary forfeiture and sale

(A) In general

If no such claim is filed or bond given within the twenty days hereinbefore specified, the appropriate customs officer shall declare the vessel, vehicle, aircraft, merchandise, or baggage forfeited, and shall sell the same at public auction in the same manner as merchandise abandoned to the United States is sold or otherwise dispose of the same according to law, and shall deposit the proceeds of sale, after deducting the expenses described in section 1613 of this title, into the Customs Forfeiture Fund.

(b) Effect

A declaration of forfeiture under this section shall have the same force and effect as a final decree and order of forfeiture in a judicial forfeiture proceeding in a district court of the United States. Title shall be deemed to vest in the United States free and clear of any liens or encumbrances (except for first preferred ship mortgages pursuant to subsection O of section 30 of the Ship Mortgage Act, 1920 (46 U.S.C. App. 961) or any corresponding revision, consolidation, and enactment of such subsection in Title 46) from the date of the act for which the forfeiture was incurred. Officials of the various States, insular possessions, territories, and commonwealths of the United States shall, upon application of the appropriate customs officer accompanied by a certified copy of the declaration of forfeiture, remove any recorded liens or encumbrances which apply to such property and issue or reissue the necessary certificates of title, registration certificates, or similar documents to the United States or to any transferee of the United States.

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19 U.S.C. § 1610

Seizure; judicial forfeiture proceedings

If any vessel, vehicle, aircraft, merchandise, or baggage is not subject to section 1607 of this title, the appropriate customs officer shall transmit a report of the case, with the names of available witnesses, to the United States attorney for the district in which the seizure

was made for the institution of the proper proceedings for the condemnation of such property.

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19 U.S.C. § 1618

Remission or mitigation of penalties

Whenever any person interested in any vessel, vehicle, aircraft, merchandise, or baggage seized under the provisions of this chapter, or who has incurred, or is alleged to have incurred, any fine or penalty thereunder, files with the Secretary of the Treasury if under the customs laws, and with the Commandant of the Coast Guard or the Commissioner of U.S. Customs and Border Protection, as the case may be, if under the navigation laws, before the sale of such vessel, vehicle, aircraft, merchandise, or baggage a petition for the remission or mitigation of such fine, penalty, or forfeiture, the Secretary of the Treasury, the Commandant of the Coast Guard, or the Commissioner of U.S. Customs and Border Protection, if he finds that such fine, penalty, or forfeiture was incurred without willful negligence or without any intention on the part of the petitioner to defraud the revenue or to violate the law, or finds the existence of such mitigating circumstances as to justify the remission or mitigation of such fine, penalty, or forfeiture, may remit or mitigate the same upon such terms and conditions as he deems reasonable and just, or order discontinuance of any prosecution relating thereto. In order to enable him to ascertain the facts, the Secretary of the Treasury may issue a commission to any customs officer to take testimony upon

such petition: Provided, That nothing in this section shall be construed to deprive any person of an award of compensation made before the filing of such petition.