County, Michigan. Dr. Pompy says that the high volume of treatments administered by his legitimate practice is explained by the fact that he was one of the few physicians medically qualified to offer chronic pain treatment in the medically underserved communities from which most of his patients hailed.

According to the complaints, Blue Cross and MANTIS engaged in a conspiratorial scheme to advance trumped-up charges against legitimate physicians who, in Blue Cross's view, were in the habit of writing "too many" prescriptions for expensive pain relief medications. To carry out the scheme, "BCBSM would provide data mining and undercover support, and [MANTIS] officers, acting under color of authority, would provide the muscle — 'shock and awe' raids of doctors' offices, the seizure of doctors' assets, and cherry-picking evidence to persuade prosecutors to indict, to scare doctors into

pleading guilty, or to convince juries to convict." 2d Am. Compl. ¶ 8, PageID.2301. In pursuit of the scheme, Moore opened an investigation of Dr. Pompy's clinic, and Blue Cross assigned its employee, James Howell, to assist. Among other things, Howell used a fake Michigan driver license and went to IPMA to obtain pain medications under false pretenses. Howell lied and said that he was a truck driver who suffered occupationally related chronic back pain, and he eventually was successful in persuading Dr. Pompy to prescribe medications to treat his pain.

Dr. Pompy alleges that Blue Cross and MANTIS formed an ad hoc criminal "enterprise" when Blue Cross delegated Howell to assist in the investigation of IPMA. In furtherance of the illegitimate investigation, Howell allegedly made numerous false statements about his medical condition and history

complaining about nonexistent pain and injuries, presented a fabricated referral from another physician, used a fake driver's license, and presented a fake member identification card indicating that he was a Blue Cross beneficiary. Howell visited IPMA for appointments eight times between January and May 2016, and each time he presented the fake credentials. He filled out extensive patient history forms on each occasion, and each time he lied in response to numerous questions. When he was directed to attend physical therapy, he scheduled bogus physical therapy appointments to maintain the ruse.

Dr. Pompy initially refused to prescribe prescription pain medication before having Howell undergo an MRI scan, but he relented after Howell told him that Blue Cross refused to cover the scan, and that he could not afford to pay the cost himself. Finally, in

May 2016, Dr. Pompy issued a prescription for a two-week "trial period" for Norco, Lyrica, and Zanaflex. Howell had the prescription filled and delivered the drugs to Moore, who was present at the pharmacy. When he returned for a follow-up appointment, Dr. Pompy was hesitant to renew the prescription because a urine screen showed results different from those that would be expected for someone taking the previously prescribed medications. However, he renewed the Norco prescription for one more week. Howell again filled the prescription and conveyed the drugs to Moore. After the second refill was obtained, Howell's participation in the undercover operation was suspended because the defendants knew that suspicion would be aroused if he was subjected to future urine tests that would expose the fact that he was not taking any of the medications prescribed.

The complaints allege that, in the course of their conspiracy, Blue Cross and Moore engaged in several predicate acts that constituted "racketeering activity" as that term is defined under 18 U.S.C. § 1961. First, it is alleged that on each of his eight patient visits at IPMA Howell presented a fake driver's license and Blue Cross member identification card, which constitutes the crime of using a means of identification without legal authority, contrary to 18 U.S.C. § 1028(a)(7), (c)(3)(A). "Racketeering activity" includes any crime chargeable under 18 U.S.C. § 1028, see 18 U.S.C. § 1961(1)(B). Second, it is alleged that by fabricating search warrant applications supported by materially false and misleading statements, the defendants engaged in "bank fraud" contrary to 18 U.S.C. § 1344(2), which is also is a RICO predicate activity enumerated in section 1961(1)(B). Allegedly the procurement of the

warrants was intended by false pretenses to purloin the plaintiffs' funds, which were in the custody and control of a financial institutions insured by the FDIC, namely Monroe Bank & Trust and Monroe County Community Credit Union. Third, it is alleged that the defendants also engaged in "wire fraud" contrary to 18 U.S.C. § 1343, by sending the fraudulent search warrants via email or facsimile to E*Trade and Merrill Lynch, which subsequently froze assets in the plaintiffs' accounts at those institutions.

The plaintiffs allege that defendant Moore knowingly directed and caused MANTIS task force officer Detective Robert Blair of the Monroe County Sheriff Department to include materially false and misleading statements in applications for warrants to seize the plaintiffs' funds and to search Dr. Pompy's clinic and home. The proposed third

amended complaint enumerates only two examples of such allegedly false and misleading statements.

First, it is alleged that Blair wrote in a September 27, 2016 affidavit that, during 2014, compared among all of the 2,304 medical providers in his specialty, Dr. Pompy "prescribed the most overall prescription medication," "prescribed the most controlled prescription medications," and "prescribed the most days supply of controlled prescription medications," and that in 2015 "96.13% of [Dr.] Pompy's 177 patients covered by BCBSM insurance were prescribed controlled substances," which was described by Blair as "a high prescribing rate for a medical doctor." Dr. Pompy says those statements were materially misleading because Blair's figures were based on comparisons with anesthesiologists, who typically provide services in a hospital setting and provide treatment for acute pain from surgical

procedures and other painful events of short duration, and he was not compared with peers specializing in pain management, who practice in clinical settings and often prescribe powerful narcotics for management of long-term, ongoing chronic pain conditions.

Second, it is alleged that Blair wrote in the same affidavit that Dr. Pompy submitted claims for five office visits including between 15 and 60 minutes of face-to-face time with Howell during his various appearances at the clinic, and on each occasion Howell stated that he saw Dr. Pompy face to face for far less time — on most occasions for less than one minute. Dr. Pompy says that the insinuation that he selected improperly inflated billing designations is misleading because it disregards (1) guidance from relevant sections of the Medicare billing manual, which state that "[t]he duration of the visit is an

ancillary factor and does not control [the CPT code] to be billed unless more than 50 percent of the face-to-face time (for noninpatient service) . . . is spent providing counseling or coordination of care," (2) none of Howell's visits involved more than 50% of the total face-to-face time spent providing counseling or coordination of care, and (3) when time is not a controlling factor, the Medicare manual states that various other factors govern the selection of billing code, including "patient history, physical examination, medical decision making, counseling, coordination of care, the nature of the patient's problems, and time estimates." Dr. Pompy says, moreover, that Blair's criticism of his billing code selection was off base because the use of billing codes based on face-to-face time typically applies to physicians in general practice, not pain management specialists like Dr. Pompy.

Defendant Moore obtained search warrants from a state court magistrate to search Dr. Pompy's home and seize his personal and business funds. The plaintiffs allege that as a result of the execution of the fraudulently obtained warrants, they suffered from the destruction of Dr. Pompy's medical practice and the seizure of more than $600,000 in personal and business funds. The plaintiffs say that Blue Cross and Moore conspired together to achieve the violation of Dr. Pompy's Fourth Amendment rights in order to enrich themselves and secure notoriety and acclaim for the high-profile prosecution of a physician.

In a separate count, the plaintiffs allege that, on September 26, 2016, after MANTIS team officers had completed the execution of a warrant at Dr. Pompy's home, they secured the premises and then left. However, sometime later on the same day, defendant

Bishop entered the home without authorization from an additional warrant, conducted a search, and seized personal property belonging to Dr. Pompy, which never was returned. The plaintiffs contend that this second warrantless search of the home was per se a violation of the Fourth Amendment.

D. Procedural History

On February 4, 2019, while the criminal prosecution was still underway, Dr. Pompy filed his pro se complaint in this case naming himself and his clinic as plaintiffs. The case was referred to the assigned magistrate judge to conduct pretrial proceedings. On April 4, 2019, after receiving the plaintiffs' response to an order to show cause, the Court dismissed the claims brought by plaintiff IPMA, because that entity was not represented by counsel.

The case proceeded through several rounds of initial pleading challenges. On August 5, 2020, the magistrate judge recommended that the Court dismiss with prejudice all of the claims pleaded against Monroe Bank & Trust (MBT) and its several employees who were named as defendants, and also dismiss with prejudice all but one of the claims against defendant Blue Cross Blue Shield of Michigan and its affiliates and employees who were sued. The magistrate also recommended dismissing without prejudice a breach of contract claim against Blue Cross for want of subject matter jurisdiction. The plaintiffs objected, and defendant Blue Cross objected to the dismissal of the contract claim without prejudice, contending that it should be dismissed with prejudice instead. On October 27, 2020, the Court issued an opinion adopting the recommendation in its entirety, overruling the

parties' objections, and dismissing all of the claims against MBT and Blue Cross with prejudice, with the exception of the contract claim that was dismissed without prejudice. The Court also adopted the magistrate judge's recommendation to stay the proceedings, since the criminal prosecution had been initiated.

On November 3, 2020, the Court adopted a second recommendation from the magistrate judge and dismissed with prejudice all of the claims against several other individuals named as defendants after the parties raised no objections. Dr. Pompy appealed that order of dismissal to the Sixth Circuit, but the appeal was dismissed for want of jurisdiction on January 21, 2021.

At the parties' request, discovery in the case was delayed while the criminal prosecution was pending. On April 15, 2022, the magistrate judge issued an

order granting the defendants' motion to extend the stay of proceedings, and also denying the plaintiff's motion for leave to file an amended complaint, on the ground that the proposed amended pleading was grossly profuse at more than 331 pages, failed to set forth a concise pleading of any discernible cause of action, and also sought to replead claims against defendants who previously had been dismissed from the case with prejudice.

After Dr. Pompy was acquitted, he retained counsel. The magistrate judge subsequently dissolved the stay and held a status conference with the parties and their counsel. Following that conference, the Court granted the plaintiff's request for leave to file an amended complaint. The second amended complaint was filed on June 9, 2023, and the defendants' motions followed. On July 28, 2023, the Court vacated the reference to the magistrate judge

and scheduled the defendants' motions for oral argument, which were heard on February 21, 2024.

The second amended complaint pleads counts against defendants Blue Cross and Moore for RICO conspiracy, 18 U.S.C. § 1962(d) (Count 1), and racketeering, 18 U.S.C. § 1962(c) (Count 2) as to plaintiff IPMA, which was added back to the case. It also pleads a claim of conspiracy to violate civil rights via 42 U.S.C. § 1983 against defendant Moore only (Count 3). In the proposed third amended complaint, Dr. Pompy also seeks to add himself as a plaintiff in the claims against Blue Cross and add Blue Cross as a defendant on Count 3. Count 4 pleads a claim that Moore violated his rights under the Fourth Amendment by causing search warrants to issue based on materially false and misleading information, resulting in the seizure of Dr. Pompy's funds from his and IPMA's bank accounts. Similarly,

Dr. Pompy seeks in the proposed third amended complaint to join Blue Cross as a defendant for Count 4. In Count 5, Dr. Pompy pleads a claim for breach of contract against Blue Cross only, alleging that Blue Cross's employment of an "undercover" investigator posing falsely as a patient violated contractual obligations in a provider agreement that required Blue Cross to give "reasonable notice" whenever it desired to exercise its privilege to conduct audits of Dr. Pompy's practice, and that Blue Cross failed to allow opportunities for its audit determinations about the legitimacy of prescriptions to be appealed through an internal grievance procedure provided for under the contract. In Count 6, the second amended complaint pleads that Moore and Blue Cross tortiously interfered with a legitimate business expectancy by causing other benefit plans besides Blue Cross to suspend Dr.

Pompy and IPMA's provider relationships, based on the results of the allegedly bogus investigation. In Count 7, the second amended complaint pleads that, on September 26, 2016, defendant Bishop violated the Fourth Amendment when he entered Pompy's home without a search warrant and seized Dr. Pompy's personal property. In his proposed third amended complaint, Pompy tacks on an additional Count 8, which alleges that Bishop committed trespass contrary to Michigan state law when he entered Dr. Pompy's home to conduct the illegal search and seized Pompy's property therein.

II. Defendant Bishop's Motion to Dismiss

The plaintiffs base their constitutional claims against defendant Brian Bishop, a federal officer, on Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971), which established a remedy against federal agents for

violating the Fourth Amendment rights of individuals. Bishop argues that *Bivens* has been constricted severely and cannot be extended to cover the factual scenario in this case, and therefore the Court has no subject matter jurisdiction to entertain a claim against a federal officer. Wisely, Bishop also argues that the second amended complaint and proposed third amended complaint do not state viable claims against him.

A. Subject Matter Jurisdiction

The plaintiffs allege that defendant Bishop violated their Fourth Amendment rights when he entered Dr. Pompy's home on the second occasion to search it and seize property without having obtained a second search warrant. Bishop moves to dismiss that claim under Federal Rule of Civil Procedure 12(b)(1), arguing that the Court does not have subject matter jurisdiction to adjudicate it. Bishop reasons that

because the theoretical basis for the claim — Bivens — has been confined to its facts, and the pleaded facts in this case are different, there is no jurisdiction to review it.

Bishop's motion plainly presents an attack on the merits of the claims; it does not pose a sound argument that questions the Court's jurisdiction over claims against a federal officer accused of violating constitutional rights. The Sixth Circuit has warned that attacks on the merits should not be confounded with jurisdictional challenges, admonishing courts to be more exacting when addressing challenges that are phrased as an attack on jurisdiction. *Primax Recoveries, Inc. v. Gunter*, 433 F.3d 515, 518-19 (6th Cir. 2006) ("'Clarity would be facilitated . . . if courts and litigants used the label "jurisdictional" not for claim-processing rules, but only for prescriptions delineating the classes of cases (subject-matter

jurisdiction) and the persons (personal jurisdiction) falling within a court's adjudicatory authority.'") (quoting *Eberhart v. United States*, 546 U.S. 12, 16 (2005) (per curiam), and citing *Kontrick v. Ryan*, 540 U.S. 443, 453 (2004)).

In most instances, a plaintiff's failure to state a claim under Federal Rule of Civil Procedure 12(b)(6) does not deprive a federal court of subject-matter jurisdiction. See *Steel Co. v. Citizens for Better Env't*, 523 U.S. 83, 89 (1998). "Dismissal for lack of subject-matter jurisdiction . . . is proper only when the claim is so . . . 'completely devoid of merit as not to involve a federal controversy.'" *Ibid.* However, a plaintiff must plausibly allege all jurisdictional elements. See, e.g., *Dart Cherokee Basin Operating Co. v. Owens*, 574 U.S. 81, 89 (2014). In this case, the plaintiffs plead that defendant Bishop violated his Fourth Amendment rights by conducting a

warrantless search of his residence. Bivens itself established that federal courts have jurisdiction to entertain such claims against federal officers for alleged violations of the Fourth Amendment prohibition on unreasonable searches and seizures.

The Supreme Court has instructed that when "a plaintiff fails to plausibly allege an element that is both a merit element of a claim and a jurisdictional element, the district court may dismiss the claim under Rule 12(b)(1) or Rule 12(b)(6)"; however, the Court should resort to dismissal for want of subject matter jurisdiction only where it "lack[s] subject-matter jurisdiction for non-merits reasons." *Brownback v. King*, — U.S. —, 141 S. Ct. 740, 750 n.8 (2021). Here the defendant's challenge to the Fourth Amendment claim squarely engages the merits and turns on a fact-intensive analysis of whether the circumstances, as alleged, fit within the

umbra of the decisional law establishing the elements of the claim — i.e., whether the circumstances are congruent to those in which the Supreme Court previously has allowed *Bivens* claims for unreasonable searches to proceed.

In the Bivens context, the Sixth Circuit has rejected attempts by defendants to cloak merits challenges as attacks on the Court's jurisdiction. E.g., *Koprowski v. Baker*, 822 F.3d 248, 251 (6th Cir. 2016) ("As an initial matter, we must decide whether the defendants' challenge is jurisdictional. The district court dismissed Koprowski's Eighth Amendment claim for lack of subject-matter jurisdiction. We disagree. We have jurisdiction to adjudicate claims that arise under the Constitution, including Koprowski's Eighth Amendment claim. The relevant question here is whether judicial relief is available to Koprowski for his claim.") (citing 28 U.S.C. §

1331; *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61 (2001); *Davis v. Passman*, 442 U.S. 228 (1979)). The same reasoning applies here. Bishop's pleading challenge properly is viewed as one attacking the merits and not the Court's subject matter jurisdiction.

B. Merits of the Bivens Claim

United States Code Title 42, Section 1983 "enables a person to seek money damages for constitutional violations by State officials," but "no analogous federal statute authorizes similar suits against federal officials." *Enriquez-Perdomo v. Newman*, 54 F.4th 855, 867 (6th Cir. 2022) (citing *Ziglar v. Abbasi*, 582 U.S. 120 (2017)). In *Bivens*, the Supreme Court held that the Fourth Amendment implied a "private action for damages against federal officers alleged to have violated a citizen's constitutional rights." *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61,

66 (2001); see *Bivens*, 403 U.S. at 397. The implied right of action parallels similar claims against state officials under section 1983. To establish such a claim, a plaintiff must allege that he was "deprived of rights secured by the Constitution or laws of the United States" and that "the defendants who allegedly deprived [him] of those rights acted under color of federal law." *Marie v. Am. Red Cross*, 771 F.3d 344, 364 (6th Cir. 2014).

But *Bivens* has fallen out of favor with the current Supreme Court, which has held that "expanding the *Bivens* remedy is now considered a 'disfavored' judicial activity." *Ziglar v. Abbasi*, 582 U.S. 120, 121 (2017). The Supreme Court had reasoned that implying a right of action to address Fourth Amendment violations by federal officers was intended to deter such conduct. *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 70 (2001). "But a money-

damages remedy is not available for all constitutional violations by federal officers." *Enriquez-Perdomo*, 54 F.4th at 867. The prevailing view is that "prescribing a cause of action is a job for Congress." *Ibid.* (quoting *Egbert v. Boule*, 596 U.S. 482, 487 (2022)). "Since Bivens, the Supreme Court has only twice extended the availability of the Bivens remedy: first, to a sex-discrimination claim brought against a member of Congress under the Fifth Amendment, and second, to a claim of deliberate indifference to a prisoner's medical needs brought against federal prison officials under the Eighth Amendment." *Id.* at 867-68 (citing *Davis v. Passman*, 442 U.S. 228 (1979); *Carlson v. Green*, 446 U.S. 14 (1980)).

Initially, Bishop contends that the Fourth Amendment claim against him must be dismissed because *Bivens* no longer is good law. He premises

that argument on a strained and unduly expansive overreading of dicta in *Egbert*. He essentially asserts that there no longer is any remedy at all even for the exact same sort of search for which a remedy was recognized in Bivens itself, due to the accretion of decades of intervening caselaw which, according to the defendant, have all but eliminated any pathway to relief that previously existed under Bivens and its progeny. That stretches the language of *Egbert* too far, particularly because the *Egbert* court explicitly acknowledged that it did not need to reexamine Bivens in order to decide Egbert.

Bishop points to a concluding passage in Egbert where the Court wrote that "if [they] were called to decide Bivens today, [they] would decline to discover any implied causes of action in the Constitution." *Egbert*, 596 U.S. at 501-02 (citing *Ziglar*, collecting cases). That statement

plainly was dictum, since the next sentence acknowledged that "to decide the case before us, we need not reconsider Bivens itself." *Id.* at 502. The Court also acknowledged that Bivens could be extended if a plaintiff "satisfies the 'analytic framework' prescribed by the last four decades of intervening case law." *Id.* at 501. As noted, the Court explicitly stated that it was not called upon to reexamine *Bivens* in order to decide the issue presented in Egbert. The question presented and decided by *Egbert* was whether a *Bivens* remedy should be judicially implied for constitutional violations involving cross-border interactions implicating "foreign policy" and "national security." The Court concluded that it should not. *Id.* at 494. Bishop's gross overreading of Egbert's dicta criticizing Bivens as a foundational holding is simply not supported by the concise reasoning of the opinion

that focused squarely on the narrow question presented. Nor is it necessary to resort to such an unwarranted overreach to resolve the distinct question presented by the case before this Court, as demonstrates below.

But before examining the complaints here to determine if they plead the elements of a Bivens claim, the Court must address the "antecedent" question whether "[a] cause of action [is] available[e] under Bivens." *Elhady v. Unidentified CBP Agents*, 18 F.4th 880, 884-85 (6th Cir. 2021). That requires application of "a two-step inquiry." *Enriquez-Perdomo*, 54 F.4th at 868 (citing *Egbert*, 596 U.S. at 491-92). "First, a court asks whether the case presents a new Bivens context — i.e., is it meaningfully different from the three cases in which the Court has implied a damages action. Second, if a claim arises in a new context, a Bivens remedy is

unavailable if there are special factors indicating that the Judiciary is at least arguably less equipped than Congress to 'weigh the costs and benefits of allowing a damages action to proceed.'" *Ibid.* (cleaned up). "'[T]hose steps often resolve to a single question: whether there is any reason to think that Congress might be better equipped to create a damages remedy.'" *Ibid.* (quoting *Egbert*, 596 U.S. at 492). "The Bivens inquiry does not invite federal courts to independently assess the costs and benefits of implying a cause of action. A court faces only one question: whether there is any rational reason (even one) to think that Congress is better suited to weigh the costs and benefits of allowing a damages action to proceed." *Egbert*, 596 U.S. at 496 (quotations omitted). "Additionally, 'a court may not fashion a Bivens remedy if Congress already has provided, or has authorized the Executive to provide, an

alternative remedial structure.'" *Enriquez-Perdomo*, 54 F.4th at 868 (quoting *Egbert*, 596 at 493).

Defendant Bishop contends that the plaintiffs cannot satisfy either step of the analysis. He argues, among other things, that the plaintiffs' claim arises in a "new context" because the circumstances of the search varied in significant ways from *Bivens* where (1) there was a valid search warrant that authorized the search of Dr. Pompy's home; (2) defendant Bishop did not handcuff Dr. Pompy, search his person, or arrest him or his family members (as occurred in *Bivens*), and the defendant could not have arrested Dr. Pompy anyway since DEA diversion officers have no arrest authority; and (3) Bishop is not a "fully commissioned law enforcement officer," unlike the defendants in Bivens who were sworn agents of the Federal Bureau of Narcotics (the predecessor agency to the DEA). Addressing the

second step, Bishop argues that extension of the *Bivens* remedy in this instance is barred because the plaintiff had several avenues for "alternative remedies" including (a) filing a pretrial motion to suppress evidence in his federal criminal case, (b) moving to compel a return of property under Federal Rule of Criminal Procedure 41(g), (c) filing an action for damages under 31 U.S.C. § 3724(a), which provides for damages up to $50,000 for an injury or loss of property caused by an employee of the Department of Justice, and (d) pursuing a grievance through the DOJ's internal grievance procedure.

The plaintiffs characterize Fourth Amendment claim differently in an effort to bring it within *Bivens's* scope. They say that that their second amended (and proposed third amended) complaint concedes that state police officers entered the home and conducted a search under a warrant

issued by a state magistrate. He says, however, that after those officers left the premises, defendant Bishop reentered the home without a warrant, conducted his own separate search, and then seized items. The plaintiffs say that these are the same facts found in Bivens where federal officers entered a home and searched and seized without a warrant, and there is, therefore no need to engage in any analysis of whether this case presents a "new context." The plaintiffs cite a litany of decisions where extension of the *Bivens* remedy was rejected, arguing that, unlike in all those cases, the distinctions in this case are trivial or illusory and do not set this case apart in any meaningful way from being on all fours with Bivens.

Bishop has the better argument: he has demonstrated both that the claim of an unlawful search alleged in this case implicates a "new context"

under Bivens, and that the applicable "special factors" counsel against extending the Bivens remedy to this new species of claim.

1. New Context

In its recent decision in *Cain v. Rinehart*, No. 22-1893, 2023 WL 6439438 (6th Cir. July 25, 2023), the Sixth Circuit reaffirmed the principle that "the existence of a warrant" authorizing entry to the home suffices to distinguish a case from Bivens and to place it within a "new context." *Cain*, 2023 WL 6439438, at *3. In that case, federal officers entered a home to execute an arrest warrant. They did not have a search warrant authorizing home entry. But the arrest warrant, the court said, put the claim in a new context. "Although the task force members did not have a search warrant for the Glastonbury address, the arrest warrant for Mathis, who they believed resided there, gave them limited authority

to enter the home. Indeed, courts in several recent cases have found that the existence of a warrant creates a new context for Bivens purposes." *Id.*, at *3 (collecting cases) (emphasis added). "[C]laims challenging warrantless searches are meaningfully different from claims concerning searches and seizures conducted pursuant to a warrant because they 'implicate[] distinct Fourth Amendment guarantee[s]' and are 'governed by different legal standards.'" *Ibid.* (quoting *Annappareddy v. Pascale*, 996 F.3d 120, 135 (4th Cir. 2021)).

The cause of action in this case occupies a grey zone between searches of a residence conducted pursuant to a search warrant issued by a judicial officer and searches conducted entirely without such authorization. It is undisputed here that a state magistrate issued a search warrant for the search of Dr. Pompy's home. Dr. Pompy does not dispute the

existence of that warrant, and he has not challenged the execution of it by other task force officers. Instead, he takes pains in his opposition to distinguish his cause of action, arguing that the only allegedly unlawful conduct by defendant Bishop occurred when Bishop "reentered" the home after the search team had completed its canvas of the premises. The second amended complaint alleges that the warrant team was present from 10:00 a.m. to 12:00 noon on September 26, 2016. Second Am. Compl. ¶ 229, ECF No. 146, PageID.2354. The team "searched and removed property from the home," and then "secured the home when leaving to prevent unauthorized entry." *Id.* ¶ 230. According to the complaint, "Later that same day, after the raid team finished the search, secured Dr. Pompy's home and left, Bishop entered Dr. Pompy's home without an additional search warrant." *Id.* ¶ 231. Other than

those sparse facts, no circumstances are alleged in the complaint pertaining to the scope of the search, whether the search was incomplete in any way when the warrant team departed, or how long after the "conclusion" of the search defendant Bishop's "reentry" occurred. None of those details were added to the proposed third amended complaint, either.

The question in such circumstances is whether the "reentry" of the home constituted a reasonable continuation of the original search, which is an inquiry governed by a decidedly distinct framework of analysis compared with the seizure that occurred in *Bivens*, where there was no warrant to enter the residence. "Most of the federal courts of appeals to have considered the question, including the Sixth Circuit, have held that a single search warrant may authorize *more than one entry* into the premises identified in the warrant, as long as the second entry

is a reasonable continuation of the original search." *United States v. Keszthelyi*, 308 F.3d 557, 568 (6th Cir. 2002) (collecting cases) (emphasis added). Subsequent decisions have shed some additional light on the hazy interregnum between the continuation of a valid warranted search and a subsequent unauthorized warrantless entry.

One such case was *United States v. Bowling*, 351 F.2d 236 (6th Cir. 1965), discussed by the court of appeals in *Keszthelyi*. In *Bowling*, the police entered the defendant's home with a warrant to search for stolen business machines. "During the search, the police identified a large number of machines they suspected to have been stolen in the defendant's basement. The police recorded the serial numbers of the machines, left the house without seizing the items, and checked the serial numbers overnight. Upon discovering that the serial numbers matched

those of the stolen goods, the police returned the next day and seized the machines." *Bowling*, 351 F.3d at 241. The court of appeals held that the search warrant authorized the second entry. *Ibid.* Bowling stands for the rule that a reentry on the following day may be authorized as a reasonable continuation of the search, if agents had a reason to pause and resume the search at that later time. "Bowling, however, does not permit the police unlimited access to the premises identified in a warrant throughout the life of the warrant," and "[c]ourts have long recognized the dangers of official abuse that inhere in such a rule." *Keszthelyi*, 308 F.3d at 568 (quoting *Bowling*, 351 F.3d at 241). At the least, *Bowling* establishes that a search "later the same day" reasonably could be viewed as a continuation of the original warranted search.

"[A] search conducted pursuant to a lawful warrant may last as long, and be as thorough, as reasonably necessary to fully execute the warrant. Thus, law enforcement agents generally may continue to search the premises described in the warrant until they are satisfied that all available evidence has been located. Once the execution of a warrant is complete, however, the authority conferred by the warrant terminates." *Keszthelyi*, 308 F.3d at 571. The complaint here does not allege any specific facts bearing on the duration or conduct of the search, and the facts alleged do not negate the possibility that a two-hour entry was not sufficient for the defendant and other agents to be satisfied that their job in executing the warrant fully was concluded. In Keszthelyi, the Sixth Circuit found that reentry of a home on the day following a warrant execution was not a reasonable continuation because testimony

affirmatively showed that the searching officers had no reason to believe that the search had not been fully completed when it was concluded after the initial entry; one officer admitted that the team could have stayed longer, that the search was "thorough," and that a drug detecting dog had been called in to aid human searchers; and the search resulted in the seizure of a wide range of items including documents, electronics equipment, some of which may have been only tangentially related to the criminal charges. *Keszthelyi*, 308 F.3d at 571. No such distinctive facts are alleged here to establish that reentry of the home "later the same day" constituted a separate, warrantless search, rather than a reasonable continuation of the original search. To decide the present motion, The Court need not determine the legality of the second home entry based on the pleaded allegations. It is enough for this

inquiry to observe that, as the cases above illustrate, the circumstances evoke a decidedly distinct frame of analysis from the nakedly warrantless search that was alleged in *Bivens*. Again, the Sixth Circuit held in *Cain* that "the existence of a warrant creates a new context for *Bivens* purposes." *Cain*, 2023 WL 6439438, at *3. The existence of the warrant here calls for a different analysis invoking distinct rules of decision under the Fourth Amendment compared with the situation in *Bivens*. That sets this case apart and requires the Court to proceed to the second step of the threshold inquiry.

2. Special Factors

Is there even a single "rational reason" to think that Congress is better equipped to conduct a cost-benefit analysis and decide that a damage remedy is warranted in the context of this case? *See Egbert*, 596 U.S. at 496. When considering this question, the

Court must be mindful that it "may not fashion a *Bivens* remedy if Congress already has provided, or has authorized the Executive to provide, an alternative remedial structure." *Id.* at 493.

Here, the undisputed fact that the executive branch has set up pathways for "alternative remedies" for the alleged constitutional violation establishes that extension of the Bivens remedy is not warranted. In Cain, the Sixth Circuit acknowledged that the authority of executive branch Inspectors General and the existence of the Attorney General's authority to settle personal injury claims under 31 U.S.C. § 3724 precluded the extension of the Bivens remedy to embrace a new cause of action for use of excessive force by employees of the United States Marshals Service. 2023 WL 6439438, at *4 ("Inspectors General are authorized to investigate and report abuses by federal law enforcement officers, including

employees and officials of the U.S. Marshal Service, which may serve to deter misconduct. See 5a U.S.C. § 3. Although such alternative remedies do not allow an outside individual to participate or seek judicial review of the agency determination, *Egbert* held that similar provisions applicable to the U.S. Border Patrol precluded a Bivens remedy. *Egbert*, 142 S. Ct. at 1806. Further, the Attorney General is authorized under 31 U.S.C. § 3724 to settle certain claims for personal injury, death, or property damage caused by a law enforcement officer employed by the Department of Justice acting within the scope of employment, and at least one circuit court of appeals has found that this alternative remedy precluded expansion of Bivens to a new context.") (citing *Davis v. Dotson*, No. 20-13123, 2021 WL 5353099, at *2 (11th Cir. Nov. 17, 2021). Bishop asserts — and the plaintiff does not dispute — that similar pathways

for alternative remedies are applicable to Bishop's conduct in this case. The directive of Egbert here is plain: "So long as Congress or the Executive has created a remedial process that it finds sufficient to secure an adequate level of deterrence, the courts cannot second-guess that calibration by superimposing a Bivens remedy"; "[t]hat is true even if a court independently concludes that the Government's procedures are 'not as effective as an individual damages remedy.'" *Egbert*, 596 U.S. at 498 (quoting *Bush*, 462 U.S. at 372). Just as in Egbert and Cain, extension of the *Bivens* remedy is not justified here.

C. Proposed Trespass Claim

In his proposed third amended complaint, the plaintiffs seek to tack onto their pleadings a state law claim of trespass against defendant Bishop as an alternative theory of recovery for the same allegedly

warrantless search on which their Bivens claim is based. Several obstacles hinder that endeavor. For one, common law tort suits against federal officers categorically are barred unless properly brought against the United States under the Federal Tort Claims Act. The Supreme Court explained that in response to its "recognition] of the continuing viability of state-law tort suits against federal officials [in] Westfall v. Erwin, 484 U.S. 292 (1988), ... Congress passed the so-called Westfall Act, formally the Federal Employees Liability Reform and Tort Compensation Act of 1988, 28 U.S.C. § 2679. That Act makes the Federal Tort Claims Act (FTCA) 'the exclusive remedy for most claims against Government employees arising out of their official conduct.'" *Hernandez v. Mesa*, — U.S. —, 140 S. Ct. 735, 748 (2020) (quoting *Hui v. Castaneda*, 559 U.S. 799, 806 (2010)). "In the Westfall Act, Congress

provided for absolute immunity from common law tort suits for federal employees acting within the scope of their employment." *Laible v. Lanter*, 91 F.4th 438, 448 (6th Cir. 2024) (citing 28 U.S.C. § 2679(b)(1)). It is undisputed that Bishop was acting within the scope of his employment as a federal officer, and no claim under the FTCA has been pleaded, nor has the United States been named as a defendant in this suit.

The plaintiffs contend that this obstacle can be avoided under a theory articulated in a concurring opinion in *Buchanan v. Barr*, 71 F.4th 1003 (D.C. Cir. 2023), in which Judge Walker of the D.C. Circuit questioned whether the Westfall Act might permit some common law suits in certain circumstances. *Id.* at 1017-18. Judge Walker acknowledged that the Westfall Act declared that an action under the Federal Tort Claims Act is the

exclusive remedy for redress of personal injury claims based on "the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment." *Id.* at 1016 (citing 28 U.S.C. § 2679(b)(1)). But he says that the Act does not "preclude" an action against a federal employee "which is brought for a violation of the Constitution of the United States." *Ibid.* (citing 28 U.S.C. § 2679(b)(2)(A)).

How could a state tort action fit that exception? After all, the first section of the Act pretty clearly covers all actions against government employees for injury or property loss — which would include all state law tort claims — and deems the remedy under that statute "exclusive." An action for trespass, as the plaintiffs contemplate here, plainly is a state tort claim. See *Moher v. United States*, 875 F. Supp. 2d

739, 755, 2012 WL 2089849 (W.D. Mich. 2012) (citing *Amoco Pipeline Co. v. Herman Drainage Systems, Inc.*, 212 F. Supp. 2d 710, 720 (W.D. Mich. 2002); *Giddings v. Rogalewski*, 192 Mich. 319, 158 N.W. 951, 953 (1916)). And, as mentioned earlier, Congress passed the Westfall Act to immunize federal officers from civil suits after the Supreme Court held that tort claims against federal officials could be brought under state law. *Hernandez* 140 S. Ct. at 748; *Laible*, 91 F.4th at 448 (citing 28 U.S.C. § 2679(b)(1)).

But Judge Walker suggests that the exception in subsection 2679(b)(2)(A) "may allow state tort suits 'brought for' constitutional violations to proceed." *Buchanan*, 71 F.4th at 1016. He reasons that, "[o]n a broad reading of the exception, a suit might count as 'brought for a violation of the Constitution' if its purpose is to remedy a

constitutional violation. For instance, a state trespass suit could proceed if its goal was to remedy an unconstitutional search." *Ibid.* Parsing the language, Judge Walker finds a difference between suits "brought for" a violation of the Constitution and suits "arising under" the Constitution. *Id.* at 1017.

As far as the Court can determine, that reasoning has not caught on elsewhere. That may be because, as Judge Walker suggested, a state tort action does not "arise under" the Constitution or federal law. Unless the parties are diverse, the plaintiffs could not bring that claim in federal court, since federal law would not create the cause of action, see *American Well Works Co. v. Layne & Bowler Co.*, 241 U.S. 257, 260 (1916), and the plaintiff's right to relief would not necessarily depend on resolution of a substantial question of federal law, see *Franchise Tax Bd. v. Constr. Laborers Vacation Tr.*, 463 U.S. 1,

27-28 (1983); *Thornton v. Sw. Detroit Hosp.*, 895 F.2d 1131, 1133 (6th Cir. 1990). Bishop likely would raise the defense of justification by arguing that he had a valid search warrant to enter the house, but complaints that anticipate federal defense are not sufficient to establish "arising under" jurisdiction. *Taylor v. Anderson*, 234 U.S. 74 (1914). Any such claim would find no home in a federal courthouse. That fate likely would befall any state tort claim that was "brought for" a Constitutional violation where the Constitution does not provide relief or create the cause of action itself.

Judge Walker candidly acknowledged this difficulty. He allowed that his reading of the statutory exception may be "too broad." *Buchanan*, 71 F.4th at 1016. But he maintained that even "[o]n a narrower reading, a suit might count as 'brought for a violation of the Constitution' if a constitutional violation is

part of the plaintiff's cause of action." *Ibid.* He hastened to add, though that such a "reading would preclude most state tort suits — a constitutional violation is not part of a trespass action, for example . . . " *Ibid.* And that is what we have here.

As for the trespass claim itself as stated in the proposed third amended complaint, under Michigan law, "[t]here must be an intent by the defendant to trespass," and "[t]he trespasser must intend to enter or intrude on the plaintiff's land or real property without authorization to do so." *Moher*, 875 F. Supp. 2d at 755 (citing *Amoco Pipeline*, 212 F. Supp. 2d at 720; *Terlecki v. Stewart*, 278 Mich. App. 644, 754 N.W.2d 899 (Mich. Ct. App. 2008)). The facts alleged here suggest that, at most, Bishop may have erred in construing the temporal scope of the authorization granted by the search warrant; no facts at all have been alleged suggesting that Bishop knew that the

reentry of the home *was not authorized* by the warrant in the first instance, and it is undisputed (and expressly alleged) that his entry was premised in the first instance on the authority of that warrant. Moreover, for reasons discussed below, the search warrant that authorized the entry was issued based on a sufficient showing of probable cause, so there is no basis for any inference that Bishop should have known that the entry was premised on an invalid warrant.

The proposed trespass claim against Bishop would be futile. The pleaded claims against him are fatally flawed. Bishop's motion to dismiss will be granted, and the motion to amend to add the trespass claim will be denied.

III. Defendant Moore's Motion to Dismiss

Defendant Marc Moore argues that the plaintiffs' claims for violations of RICO and the Fourth Amendment, civil conspiracy, and tortious interference with a business expectancy must be dismissed because the pleaded facts do not support any of those causes of action. Moore also contends that the reintroduction of Interventional Pain Management Associates as a plaintiff is problematic because the statute of limitations bars the claims pleaded on behalf of that entity. The plaintiffs contend that the new claims by IPMA relate back to the original filing date (when IPMA was still a part of the case), see Fed. R. Civ. P. 15(c)(1)(B), and on that basis the second amended complaint was filed timely.

The Court assumes without deciding that the plaintiffs are correct on this point. However, there are problems with the merits of all the plaintiffs'

pleaded claims, considering both the second amended complaint and the proposed third amended complaint.

A. RICO

The plaintiffs allege that the defendants engaged in an unlawful civil conspiracy actionable under the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §§ 1961 et seq. "Enacted in 1970, the [RICO] Act prohibits one from engaging in 'a pattern of racketeering activity' in connection with 'any enterprise' whose activities affect interstate commerce." *Grow Michigan, LLC v. LT Lender, LLC*, 50 F.4th 587, 593 (6th Cir. 2022) (citing 18 U.S.C. § 1962(a)). "Breaking down those statutory components into consumable pieces, the statute defines a 'pattern of racketeering activity' as 'at least two acts of racketeering activity' that occur within ten years of one another." *Ibid.* (quoting 18 U.S.C. §

1961(5)). "'Racketeering activity' means any of a set of specified state and federal crimes set forth in § 1961(1)." *Ibid.*

Although the RICO act is primarily a criminal statute, its prohibitions may be enforced civilly. "For parties seeking civil remedies, RICO creates a private cause of action: 'Any person injured in his business or property by reason of a violation of section 1962' may sue for treble damages and attorney's fees." *Ibid.* (quoting 18 U.S.C. § 1964(c)). "Drawing from this textual backdrop, then, to state a civil RICO claim, a plaintiff must allege (1) two or more predicate racketeering offenses, (2) the existence of an enterprise affecting interstate commerce, (3) a connection between the racketeering offenses and the enterprise, and (4) injury by reason of the above." *Ibid.*

Because "proximate causation is an element of a RICO plaintiff's cause of action," the plaintiffs also must demonstrate "a proximate connection between its injury and the defendant's conduct for purposes of pleading and proving a viable RICO claim." *Grow Michigan*, 50 F.4th at 593 (citing *Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451, 457 (2006); *Lerner v. Fleet Bank, N.A.*, 318 F.3d 113, 129 (2d Cir. 2003), abrogated on other grounds by *Lexmark Int'l v. Static Control Components, Inc.*, 572 U.S. 118, 127 (2014)). "Section 1964(c)'s causation standard — that the plaintiff suffer injury 'by reason of' the defendant's racketeering — is demanding. To satisfy this statutory requirement, a plaintiff, we have recently reaffirmed, must show 'that the defendant's violation was both a factual and proximate cause of his injury.'" *Id.* at 594 (quoting *Gen. Motors, LLC v. FCA US, LLC*, 44 F.4th 548, 559 (6th Cir. 2022)).

"And proximate cause, as an aspect of RICO's 'by reason of' standard, has been understood to require a RICO plaintiff to show that the defendant's racketeering offense 'led directly to the plaintiff's injuries.'" *Ibid.* (quoting *Anza*, 547 U.S. at 461). "In that way, RICO's directness requirement elevates a plaintiff's burden by requiring more than a showing of mere foreseeability, the crux of common law causation principles." *Ibid.* (citing *Perry v. Am. Tobacco Co., Inc.*, 324 F.3d 845, 850 (6th Cir. 2003) ("Though foreseeability is an element of the proximate cause analysis, it is distinct from the requirement of a direct injury.")); *Destano v. Warner-Lambert Co.*, 326 F.3d 339, 348 (2d Cir. 2003) ("In fact, the proximate cause requirements of RICO [a]re more stringent than those of most states.")). "The concept is flexible but 'the causal link between the injury and the conduct may be too weak to constitute

proximate cause [if] it is insubstantial, unforeseeable, speculative, or illogical, or because of intervening causes.'" *Collier v. LoGiudice*, 818 F. App'x 506, 511 (6th Cir. 2020) (quoting *Trollinger v. Tyson Foods, Inc.*, 370 F.3d 602, 614 (6th Cir. 2004)).

"Mail and wire fraud qualify as predicate acts under 18 U.S.C. § 1961." *Collier*, 818 F. App'x at 511 n.1 (citing 18 U.S.C. 1961(1), enumerating 18 U.S.C. § 1341 (mail fraud) and 18 U.S.C. § 1343 (wire fraud) as racketeering activity). Violations of the Federal Identity Theft Act, 18 U.S.C. § 1028, also are enumerated as RICO predicate offenses.

1. Existence of an "Enterprise"

RICO prohibits "racketeering activity" in connection with an "enterprise" whose activities affect interstate commerce. "[T]he term 'enterprise' denotes any legal entity, such as a corporation, or 'any union or group

of individuals associated in fact although not a legal entity.'" *Grow Michigan*, 50 F.4th at 593 (quoting 18 U.S.C. § 1961(4)). In this case, the plaintiffs contend that defendant Blue Cross Blue Shield, through the person of its employee James Howell, and the MANTIS task force, under the direction of defendant Detective Lieutenant Marc Moore, formed an "association-in-fact" enterprise with the purpose of appropriating the assets of legitimate physicians through bogus prosecutions resulting in asset forfeitures and restitution.

"From the terms of RICO, it is apparent that an association-in-fact enterprise must have at least three structural features: a purpose, relationships among those associated with the enterprise, and longevity sufficient to permit these associates to pursue the enterprise's purpose. As we succinctly put it in United States v. Turkette, 452 U.S. 576 (1981),

an association-in-fact enterprise is 'a group of persons associated together for a common purpose of engaging in a course of conduct.'" *Boyle v. United States*, 556 U.S. 938, 946 (2009) (quoting 452 U.S. at 583). "An association-in-fact enterprise can be proven by showing 1) that the associated persons formed an ongoing organization, formal or informal; 2) that they functioned as a continuing unit; and 3) that the organization was separate from the pattern of racketeering activity in which it engaged." *VanDenBroeck v. CommonPoint Mortg. Co.*, 210 F.3d 696, 699 (6th Cir. 2000), abrogated on *other grounds by Bridge v. Phoenix Bond & Indem. Co.*, 553 U.S. 639 (2008).

The difficulty for the plaintiffs is that they have not alleged any specific facts demonstrating that the association between the named defendants had any