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 10 Christopher Wray and Chad Warren

11 UNITED STATES DISTRICT COURT
 12 FOR THE CENTRAL DISTRICT OF CALIFORNIA
 13 WESTERN DIVISION

14 SIAKA MASSAQUOI,
 15 Plaintiff,
 16 v.
 17 FEDERAL BUREAU OF
 18 INVESTIGATION, CHAD WARREN,
 19 Defendants.

Case No. 2:21-cv-08569-SVW-PD

**DEFENDANTS' REPLY IN SUPPORT
 OF MOTION TO DISMISS;
 MEMORANDUM OF POINTS AND
 AUTHORITIES IN SUPPORT
 THEREOF**

Hearing Date: March 21, 2022
 Hearing Time: 1:30 p.m.
 Ctrm: 10A

Honorable Stephen V. Wilson
 United States District Judge

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Plaintiff sues FBI Director Christopher Wray and FBI Special Agent Chad Warren
4 in their individual capacities. Yet, other than conclusory allegations that cannot
5 withstand *Twombly*, Plaintiff does not present any argument or authority why he should
6 be permitted to proceed with this baseless litigation. Plaintiff ignores that the Court
7 rejected the same allegations presented in the Amended Complaint in *Massaquoi I*.
8 Plaintiff ignores that he was permitted to amend the complaint in *Massaquoi I*, but
9 instead of amending the complaint, he voluntarily dismissed it. He then filed a small
10 claims complaint in Los Angeles County Superior Court presumably to avoid the
11 findings in *Massaquoi I*. Plaintiff ignores that after Defendants removed the small claims
12 complaint, this Court gave him another opportunity to amend the complaint. Instead of
13 addressing the deficiencies identified by this Court in its December 1, 2021 Order, and in
14 the August 16, 2021 *Massaquoi I* Order, Plaintiff filed a nearly identical complaint that
15 had previously been found deficient in *Massaquoi I*. Plaintiff’s continued gamesmanship
16 with this Court’s valuable time should be rejected. The amended complaint should be
17 dismissed with prejudice and without leave to amend.

18 **II. ARGUMENT**

19 Plaintiff contends that he should survive the motion to dismiss and be permitted to
20 proceed with his *Bivens* claims against Director Wray and Special Agent Warren
21 because the amended complaint alleges that “Defendants Warren and Wray were acting
22 in their individual capacities to violate Plaintiff Massaquoi’s constitutional rights.” Dkt.
23 22 (“Opp’n.”) at 5:1-13. Such conclusory allegations, however, cannot withstand the fair
24 notice requirement under Fed. R. Civ. P. 8. *See Massaquoi I*, Dkt. 4 at 3 (citing *Bell*
25 *Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 & n.3 (2007)).

26 As an initial matter, Plaintiff does not address the Court’s prior finding that
27 Director Wray cannot be sued for vicarious liability because there is no supervisor
28 liability in a *Bivens* claim. *Id.* at 7; *Ashcroft v. Iqbal*, 556 U.S. 662, 676 (2009)

1 (“Government officials may not be held liable for the unconstitutional conduct of their
2 subordinates under a theory of respondeat superior.”); *Pellegrino v. United States*, 73
3 F.3d 934, 936 (9th Cir. 1996) (*Bivens* liability is premised on proof of direct personal
4 responsibility). Other than comparing Director Wray’s public comments regarding the
5 prosecution of the Capitol Hill rioters as analogous to the “Secret Police” and the
6 “Gestapo,” Plaintiff does not allege that Director Wray was involved in the June 10,
7 2021, search of his residence. *See* Dkt. 20 (Am. Compl. ¶¶ 24-26, 30-86). Plaintiff
8 therefore cannot state a claim against Director Wray, and Director Wray must be
9 dismissed with prejudice.

10 Similarly, Plaintiff relies on the same conclusory allegation that Special Agent
11 Warren violated his constitutional rights. Opp’n. at 5:6-8; Am. Compl. ¶ 10. Plaintiff,
12 however, does not allege what unconstitutional actions Special Agent Warren allegedly
13 took that could state a claim. Instead, Plaintiff is challenging the issuance of the warrant
14 itself. *See* Opp’n. at 1:19-20 (speculating that “it is highly likely that the ‘warrant’ used
15 by Defendants was either fraudulent or obtained through fraud”). *Bivens* claims,
16 however, are barred in such circumstances. Plaintiff notably does not address the
17 Supreme Court case, *Messerschmidt v. Millender*, 565 U.S. 535, 547 (2012), that a
18 search conducted pursuant to a warrant shields the officer conducting the search from a
19 *Bivens* claim. *Messerschmidt* in fact found that “even assuming that the warrant should
20 not have been issued,” the agent executing the warrant is entitled to qualified immunity.
21 *Id.* at 546. Plaintiff cannot state a *Bivens* claim under the Fourth Amendment against
22 Special Agent Warren.¹

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25 ¹ In addition, it appears that Plaintiff’s *Bivens* claim against Special Agent Warren
26 is based on his role as the “apparent leader” of the search team. *See* Am. Compl. ¶ 33.
27 Again, a *Bivens* claim cannot lie against an individual on the grounds of respondeat
28 superior. Plaintiff, moreover, does not allege that anyone violated his constitutional
rights during the search. *See id.* ¶¶ 33-47. Instead, he is challenging the warrant
underlying the search which, as explained above, cannot form the basis for a *Bivens*
claim under *Messerschmidt*.

1 Instead of addressing the authority cited in the moving brief or in the *Massaquoi I*
2 and *Massaquoi II* Orders, Plaintiff relies on a single case: *Trulock v. Freeh*, 275 F.3d 391
3 (4th Cir. 2001) where the Fourth Circuit found that the plaintiff had stated a First
4 Amendment violation.² See Opp’n. at 5:14-28; 7:1-3. *Trulock* does not support Plaintiff.
5 First, *Trulock* is an out-of-circuit decision decided more than 20 years ago, well before
6 *Ziglar v. Abbasi*, —U.S.—, 137 S. Ct. 1843, 1856-57 (2017). As this Court has
7 previously found, *Abbasi* severely restricted the availability of *Bivens* remedies outside
8 certain situations within the Fourth, Fifth and Eighth Amendment context. *Massaquoi I*,
9 Dkt. 4 at 5, 6. The Court concluded that Plaintiff’s First Amendment claim failed to meet
10 the requirements under Fed. R. Civ. P. 8 because the complaint “fail[ed] to provide each
11 Defendant with fair notice of how their individual actions resulted in the deprivation of
12 Plaintiff’s First Amendment right.” Id. at 6. The Court is correct. Plaintiff has not stated
13 how his First Amendment rights were violated when he avers that he freely exercised his
14 First Amendment rights. Opp’n. at 5:9-11 (“The bottom line is this—Plaintiff *Massaquoi*
15 was around the Capitol on January 6, 2021, and simply peacefully assembled and
16 protested. At the Capitol, Plaintiff *Massaquoi* peered into an open door, walked a few
17 steps in the U.S. Capitol, and took photographs and video with his smart phone.”).
18 Plaintiff therefore admits that he exercised his First Amendment rights and Special
19 Agent Warren did not prevent him from doing so.

20 The facts of *Trulock*, moreover, are inapposite. *Trulock* involved the former
21 Director of the Office of Intelligence of the U.S. Department of Energy (“DOE”) and the
22 DOE’s Director of the Office of Counterintelligence. *Trulock*, 275 F.3d at 397. After
23 serving in these positions, Trulock wrote an account of his findings that Chinese spies
24 had systematically penetrated U.S. weapons laboratories, most significantly the Los
25 Alamos Nuclear Laboratory, but that the White House, the FBI, and the CIA ignored his
26

27 ² Larry Klayman argued on behalf of the appellants in *Trulock*. 275 F.3d at 397. It
28 therefore appears that Mr. Klayman is practicing in this case despite having failed to file
a *pro hac vice* application or obtain approval from the Court.

1 repeated warnings. *Id.* Trulock lived with Linda Conrad who had reported to Trulock
2 during his tenure. *Id.* On the morning of July 14, 2000, Conrad alleges that when she
3 arrived at work, she was told that the FBI wanted to question her about Trulock. *Id.* at
4 398. Conrad alleges that she was questioned for about three hours, and towards the end
5 of the interview, she signed a form that was not explained to her, and which she did not
6 read. *Id.* She alleges that she learned afterwards that she had consented to the search of
7 the townhouse she shared with Trulock. *Id.* The FBI conceded that it did not have a
8 warrant, and relied on Conrad's consent. *Id.* at 401. In contrast, here, the search was
9 conducted pursuant to a warrant, protecting Special Agent Warren from a *Bivens* claim
10 under *Messerschmidt* regardless of whether the claim is under the First or Fourth
11 Amendment.

12 Further, the Fourth Circuit found that Trulock had stated a First Amendment claim
13 because Trulock had alleged that the search was in retaliation for publishing an article
14 critical of the government. *Trulock*, 275 F.3d at 404. Here, the opposite is true. Plaintiff
15 admits that he exercised his First Amendment rights to assemble on January 6, 2021.
16 *Opp'n.* at 5:9-11. Any search of his home was pursuant to a warrant, presumably based
17 on Plaintiff's admitted entry into the Capitol. Based on Plaintiff's admissions that he
18 entered the Capitol to take photographs and videos disprove that the "warrant was 'based
19 on an affidavit so lacking in indicia of probable cause as to render official belief in its
20 existence entirely unreasonable.'" *Messerschmidt*, 565 U.S. at 547 (citation omitted).
21 Finally, as this Court has already noted, it is questionable whether Plaintiff's First
22 Amendment claim could survive *Abbasi*, especially where his First Amendment claim is
23 so attenuated from the actions of Special Agent Warren.

24 In sum, Plaintiff cannot make a *Bivens* claim against either Director Wray or
25 Special Agent Warren. Plaintiff was afforded the opportunity to amend the nearly
26 identical "Amended Complaint" in *Massaquoi I*. He did not. He was given the
27 opportunity to amend in *Massaquoi II*, and filed the deficient complaint in *Massaquoi I*.
28 Plaintiff's gamesmanship must end. Defendants respectfully request that the Court grant

1 this motion and dismiss the Amended Complaint with prejudice and without leave to
2 amend.

3 **III. CONCLUSION**

4 For the foregoing reasons, and those set forth in the moving brief, Defendants
5 respectfully request that the Court grant this motion.

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7 Dated: March 4, 2022

Respectfully submitted,

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