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**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

14 CHRISTOPHER PSAILA,
15
16 Plaintiff,
17
18 v.
19 ERIKA GIRARDI aka ERIKA
20 JAYNE, AMERICAN EXPRESS
21 COMPANY, ROBERT SAVAGE,
22 KENNETH HENDERSON, STEVE
23 SCARINCE, PETER GRIMM,
24 LAIA RIBATALLADA, MICHAEL
25 MINDEN, UNITED STATES of
26 AMERICA, and DOES 1 TO 10,
27 Inclusive,
28
29 Defendants.

Case no.: 2:23-cv-07120-MWF (SKx)

Hon. Michael W. Fitzgerald

**PLAINTIFF’S OPPOSITION TO
DEFENDANT ROBERT SAVAGE’S
MOTION TO DISMISS PLAINTIFF’S
FIRST AMENDED COMPLAINT**

Hearing Date: September 23, 2024

Time: 10:00 a.m.

Ctrm: 5A

Complaint filed: 8/29/2023

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1 **I. INTRODUCTION**

2 The Court dismissed the complaint against Defendants Savage, Henderson and
3 Scarince on the Bivens claim but gave the opportunity to amend the complaint. (Court
4 Ruling on MTD, Dkt. 106, p. 13.)¹

5 This opposition brief argues how the circumstantial facts set forth in the First
6 Amended Complaint (“FAC”), request for judicial notice “RJN” and Exhibits 9-15
7 reference therein, support that Savage’s personal conduct *vis a vis* this investigation
8 was corrupt and not simply an act of authorization by someone who ”played no role”
9 as Savage claims. These circumstantial facts support that there was a *quid pro quo*
10 between Tom Girardi and Savage, in exchange for Tom Girardi agreeing to represent
11 Savage and his wife in the *Volkswagen* case and promise to get \$100,000 in the
12 *Volkswagen* litigation, that Savage agreed to commence the Secret Service
13 investigation into Plaintiff. Savage’s argument that the \$7,500 payment cannot be a
14 bribe misses the point and ignores important facts. First, the Girardi offer/promise to
15 Savage was his representation and promise to get \$100,000 not \$7,500 and second,
16 Girardi’s statement to the judge did not “expose” the nature of the payment, as Girardi

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20 ¹ The Court further ruled that the Bivens claim, *Bivens v. Six Unknown Named*
21 *Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971) (“Bivens”), was made
22 in a “new context”, and that there are “alternate remedies” that “precludes” a Bivens
23 claim against Savage. (Id. at 11, 12). The Court ruled that Savage is protected by
24 qualified immunity because there is no “respondeat superior” liability against Savage.
25 (Court Ruling on MTD, Dkt. 106, p. 12-13. Indeed, the ruling to dismiss the claim
26 against Savage was solely based on the grounds that as a legal matter, this case
27 presented a new Bivens context, and that Bivens should not be extended to Savage
because of rank as a “senior officer in charge” of the Los Angeles Secret Service
office, and that providing a Bivens remedy would provide a “greater risk of intruding
on the investigatory . . . function of the executive branch.” *Id.*

1 failed to tell the judge that Savage had initiated a federal criminal investigation of his
2 wife’s claim that Plaintiff had stolen \$800,000 from her. ²

3 Plaintiff’s FAC added the additional supervisory Bivens claim against
4 Defendants Savage and Scarince as without their integral participation and failures to
5 train and supervise agent Henderson on the case, there would not have been a violation
6 of Plaintiff’s constitutional rights. Savage mischaracterizes Plaintiff’s claim against
7 Savage as being premised on a respondeat superior theory. It is not. The facts support
8 he was personally involved with the corrupt purpose of benefitting himself: using his
9 position as the head of the LA office to accept the investigation and assign it for
10 investigation to subordinate agents; directing his subordinates to investigate Plaintiff;
11 and, omitting telling his office or the prosecutor of his transactional relationship with
12 Tom Girardi.

13 Contrary to Savage’s argument, his conflict of interest in initiating and
14 overseeing the investigation was *Brady* material. Had the extent of that conflict been
15 made known to his office or the prosecutor, it is likely the case would never have been
16 accepted. As such, he violated his duty as a supervisor to ensure that Plaintiff would
17 not be prosecuted based on concealed and fabricated evidence.

18 In addition, this brief addresses that Savage is not entitled to qualified immunity
19 as the case law supports that the malicious prosecution of Plaintiff in 2016-2017
20 violated clearly established rights.

21
22
23 ² Counsel for defendant also threatens Rule 11 sanctions claiming the Complaint
24 is frivolous. (Savage Motion to Dismiss, (“MTD”), First Amended Complaint,
25 (“FAC”), p. 2. The parties disagree on the facts and the conclusions to draw from the
26 facts, that is why the case should not be dismissed, and Plaintiff should be allowed to
27 move forward to discovery. Our disagreement does not make the FAC frivolous. If the
28 Bivens action is dismissed against Savage, there will be no mechanism to hold him
accountable for his actions since he is no longer with the Secret Service.

1 Finally, with respect to the Bivens remedy, Plaintiff's position is Biven's
2 appropriately gives him a remedy both because these circumstances do not present a
3 new context, rather involve ordinary law enforcement investigation that deprived the
4 Plaintiff of his civil rights analogous to the violation in *Bivens*, and because no special
5 factors exist that warrant not extending the *Bivens* remedy here.

6 II. MOTION TO DISMISS STANDARD

7 To state a claim for relief, a pleading must contain "a short and plain statement
8 of the claim showing that the pleader is entitled to relief." F.R.C.P. 8(a)(2). To survive
9 a motion to dismiss, a complaint must "state a claim to relief that is plausible on its
10 face." *Ashcroft v. Iqbal*, 556 U.S. at 678 (quoting *Bell Atlantic Co. v. Twombly*, 550
11 U.S. 544, 570 (2007)). "A claim has facial plausibility when the plaintiff pleads factual
12 content that allows the court to draw the reasonable inference that the defendant is
13 liable for the misconduct alleged." *Id.*

14 A complaint may be dismissed for failure to state a claim only when (1) it fails
15 to state a cognizable legal theory or (2) fails to allege sufficient factual support for its
16 legal theories. *Caltex Plastics, Inc. v. Lockheed Martin Corporation*, 824 F.3d 1156,
17 1159 (9th Cir. 2016). Additionally, when reviewing a motion to dismiss, the court
18 accepts as true all factual allegations as true and construes the pleadings in the light
19 most favorable to the nonmoving party. *See id.* at 679; *Knievel v. ESPN*, 393 F.3d
20 1068, 1072 (9th Cir. 2005). Plaintiff agrees with the Court's statement in its order
21 granting the motion to dismiss that, "Determining whether a complaint states a
22 plausible claim for relief is 'context-specific task that requires the reviewing court to
23 draw on its judicial experience and common sense.'" *Ebner v. Fresh, Inc.*, 838 F.3d
24 958, 963 (9th Cir. 2016) (quoting *Iqbal*, 556 U.S. at 679).

25 Common sense application of the facts and reasonable inferences from those
26 facts support the conclusion that Plaintiff has stated a viable *Bivens* claim against
27 Savage.
28

1 **III. THE FACTS SUPPORT PLAINTIFF'S *BIVENS* CLAIM AGAINST**
 2 **SAVAGE**

3 **A. The Facts Alleged Against Savage**

4 Plaintiff incorporates by reference the Statement of Facts set forth in his
 5 Opposition to Defendant Savage's Motion to Dismiss the original complaint, (Dkt.
 6 81),³ for purposes of avoiding repetition, brevity and to ensure Plaintiff does not
 7 exceed the word count limitation in the local rules. Instead, Plaintiff will address the
 8 facts alleged against Savage that support the conclusion that there was a bribe, quid pro
 9 quo or illegal gratuity, and additional facts that establish Savage's personal
 10 involvement in the Secret Service investigation and prosecution of Plaintiff. It is not
 11 the number of acts, but the quality of those acts, which demonstrates Savage's singular
 12 responsibility for the malicious prosecution of Plaintiff.

- 13 ➤ FAC ¶ 43 alleges that Savage had a history of fake presidential advance
 14 trips where he would use his Secret Service credential to obtain free
 15 rooms, food, drinks and golf for him and other agents that resulted in his
 16 involuntary separation from the Secret Service. This was *Brady* evidence
 17 that Savage needed to disclose to Scarince and Henderson so it could be
 18

19 _____
 20 ³ Plaintiff also incorporates the law on *Bivens* and whether this case presents a
 21 new context, and whether if so, *Bivens* should be extended to this context since it
 22 involves ordinary law enforcement activities that are not novel, whether the special
 23 factors in this case support denying *Bivens* relief, and whether the other remedies such
 24 as the Federal Tort Claims Act provides a sufficient level of deterrence, which it does
 25 not. The *Bivens* issue has been presented thoroughly in the opposition to Scarince and
 26 Henderson's motion to dismiss the original complaint, Dkt. 78, pp. 13-21, opposition
 27 to Savage's motion to dismiss the original complaint, Dkt. 81, pp. 15-22, and
 28 opposition to Scarince and Henderson's motion to dismiss the FAC, Dkt. 115, pp. 16-
 22. There is no case on point rejecting a *Bivens* remedy based on the facts of this case,
 and the Court will have to make its decision on whether *Bivens* supports a remedy in
 this case.

1 disclosed to the defense since he initiated the investigation against
2 Plaintiff. It also affects Savage's credibility in opposing this motion.

- 3 ➤ FAC¶ 44 alleges that Tom Girardi and Savage knew each other for at least
4 10 years prior to 2016, two of Savage's wife's relatives interned at Girardi
5 Keese in the 90's, and that Savage and Tom Girardi socialized regularly
6 and was a regular attendee at Girardi's Super Bowl parties.
- 7 ➤ FAC¶ 45 alleges that Erika Girardi contacted Savage to assist with what
8 she claimed were fraudulent Marco Marco charges on her AMEX credit
9 card.
- 10 ➤ At the same time Tom Girardi agreed to represent Savage in the
11 Volkswagen litigation. FAC¶ 49. Exhibit 9 attached to McLane decl.⁴ is
12 the *Volkswagen* docket which first mentions an appearance by Tom
13 Girardi on November 22, 2016. (Ex. 9, Dkt. 77) Thus, the quid pro quo
14 was already in the works dating back to November 22, 2016. Girardi's
15 representation of Savage in the *Volkswagen* litigation is a thing of value
16 under the bribery statutes. On December 1, 2016, Girardi filed a document
17 with the court, Clarification of Joint Status Report, along with Robert
18 Savage's declaration alleging that the Capstone Law APC had misled him
19 about a previous settlement of the Volkswagen litigation, (McLane decl.,
20 Exhibit 10, Dkts. 78 and 78-1, Volkswagen litigation). On that same day,
21 Capstone Law APC filed a response, disputing Savage's affidavit, and
22 alleging it contained "false allegations." Exhibit 11, McLane decl.,
23 *Volkswagen* Dkts. 79 and 79-1. In Savage's declaration he stated it would

24
25 ⁴ Plaintiff seeks Judicial Notice of Exhibits 9-14 which represent events in the
26 *Volkswagen* litigation (*Valencia v. Volkswagen*, 4:15-cv-00887-HSG, Northern District
27 of California), in which Savage and his wife were Plaintiffs and represented by Tom
28 Girardi.

1 take \$39,000 to repair his car, so of course he had Girardi step in by
2 November 22, 2016, to get him more money, and Tom Girardi agreed to
3 do it.

4 ➤ Defendant Erika Girardi knew Savage and contacted him in early
5 December 2016, after Girardi had made an appearance in the *Volkswagen*
6 litigation. She spoke to Savage about her claims, and Savage set up a
7 meeting with her. At that meeting on December 7, 2016, authorized the
8 investigation into Plaintiff, and introduced her to Scarince and Henderson
9 who would be handling her case. (Girardi decl., Dkt. 25-1, ¶¶ 59, 64-65.)
10 Savage’s authorization of the investigation, and assigning Scarince and
11 Savage to investigate the case, was the official act he took in exchange for
12 Girardi to get him \$100,000.

13 ➤ As set forth in the FAC, on December 13, 2016, Tom Girardi appeared in
14 court on behalf of Defendants Robert and Michelle Savage in the
15 Volkswagen litigation. See McLane decl., Exhibit 13, transcript of a
16 telephonic court hearing on December 13, 2016, in the *Volkswagen*
17 litigation. The transcript specifically states that Girardi, and Robert and
18 Michelle Savage were present for the telephonic conference. Ex. 13 to
19 McLane decl., p. 3:1-25, and p. 4:1-2.

20 ➤ At the December 13, 2016 hearing, six days after Savage introduced Erika
21 Girardi to Scarince and Savage who would handle the Psaila criminal
22 investigation, the court and Girardi discussed Savage’s objection to the
23 settlement, and as alleged in the transcript, Ex. 13, Mr. Girardi states,
24 “Okay, your honor. I’ll do this. I’ll withdraw our objection. I will pay
25 these people what they have coming to them . . . So, I personally will pay
26 them \$100,000, which is what they are entitled to in this. . . .
27 Ex. 13, p. 10:10-17.
28

1 Well, I hope somebody's writing this down . . . Like we'll withdraw our
2 complaint. Well withdraw the fact that we got defrauded. We'll withdraw
3 all that. This case is over with as far as we're concerned, and I personally,
4 in light of the fact that the Court thought I intentionally disobeyed an
5 order, which isn't true, and in light of that fact, this is worth it to me, and I
6 will pay then \$100,000 they would be entitled to had they been properly
7 represented . . .” Ex. 13, p. 10:20-21; p. 10: 25, p. 11:1-7. Tom Girardi
8 was frustrated at the hearing, reading the signs he could not get Savage
9 the \$100,000 he promised to get him, so he personally promised to get
10 him the \$100,000 because he would be dismissing the *Volkswagen* lawsuit
11 by Robert and Michelle Savage. That promise was already agreed to by
12 Girardi and the reason why Girardi was intervened in the *Volkswagen*
13 case in the first place, to get the Savages more money. The \$100,000 did
14 not come out of thin air.

- 15 ➤ FAC¶ 51 alleges that on the very next day, December 14, 2016, two
16 significant events happen, Girardi and Savage agree to dismiss the
17 *Volkswagen* case with prejudice, and Scarince and Henderson arranged
18 with Erika Girardi to surreptitiously record a meeting with Plaintiff.
19 Savage agreed to dismiss the case with prejudice as Girardi had put on the
20 record he would pay Savage the \$100,000 he previously promised to get
21 him.
- 22 ➤ As set forth in Savage's motion, Girardi Keese issued a check on
23 December 23, 2016, to Lorenzo (Robert) and Michelle Savage for \$7,500.
24 As indicated in the declaration of David McLane, counsel for Savage, on
25 June 26, 2024, in an email supplied a \$7,500 check from the Girardi
26 Keese firm made payable to Lorenzo (Robert) and Michelle Savage, dated
27 December 21, 2016, and represented via email that was all the money Mr.
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Savage received from Tom Girardi. (McLane decl., ¶ 4) Plaintiff would amend paragraph 59 of the FAC to reflect the same without any information to the contrary at this time.

➤ FAC¶ 135 in the Supervisorial *Bivens* claim alleges that due to Savage’s personal relationship with the Girardis, he failed to supervise, along with Scarince, Henderson, which resulted in the malicious prosecution of Plaintiff. FAC¶ 136 alleges that Savage, in initiating and authorizing this investigation allowed for the malicious prosecution of Plaintiff by failing to ensure Henderson and Scarince carried out their duties, including failing to ensure the search warrant did not contain falsehoods, (FAC¶ 60), and that they had probable cause prior to presenting the case to the grand jury, instead Henderson and Scarince presented false facts to the grand jury. (FAC ¶¶ 90-92)

B. Girardi’s Representation and Promise of Money Was the Thing of Value that Induced Savage’s Official Act of Authorizing and Initiating the Investigation

Savage’s motion contends that Savage did nothing wrong by initiating and authorizing Scarince and Henderson to investigate and prosecute Plaintiff. A fair inference from the facts above is that Tom and Erika Girardi, had a transactional relationship with Savage, “if you scratch my back I’ll scratch yours.” The Girardis were in desperate need of cash, they were going bankrupt, and Tom Girardi was funding his and Erika Girardi’s lifestyles and Erika Girardi’s career by stealing money from clients. They needed money from somewhere, and Erika Girardi went to Tom Girardi and complained about issues with Plaintiff concerning his provision of costumes and services, which according to Erika Girardi’s declaration had begun by September 2016. (Erika Girardi decl., ¶ 30).

1 Savage was dissatisfied with the *Volkswagen* settlement. He went to Girardi to
2 have him intervene in the litigation so Savage would get more money. So, Girardi
3 intervened in the *Volkswagen* litigation because he promised to get Savage \$100,000.
4 He commenced to act on Savage's behalf with respect to the *Volkswagen* litigation by
5 at least November 22, 2016. (McLane decl., Exhibit 9, Dkt. 77) This was prior to
6 December 2016 when Erika Girardi went to Savage for him to reciprocate and
7 commence the criminal investigation against Plaintiff. She knew Savage, and she went
8 directly to him. She did not file a report with an intake officer with the Secret Service.
9 She did not get AMEX to commence an investigation of Marco Marco; she did not go
10 to the Los Angeles Police Department and file a complaint, she went to the person with
11 the biggest stick she and Tom Girardi could find and with whom she had a personal
12 relationship, and most importantly, because of Girardi's representation of Savage in
13 the *Volkswagen* suit and promise to get him more money. In December 2016, Savage
14 authorized the investigation into Psaila, the official act done in response to the thing of
15 value, Tom Girardi's representation of Savage in the *Volkswagen* litigation and
16 promise to get him \$100,000.

17 On December 7, 2016, Savage meets with Erika Girardi and tells her that
18 Scarince and Savage were assigned to the case, without doing any background work by
19 contacting AMEX and asking about Erika Girardi's account. Instead of the normal
20 course in white collar or credit card cases where the Secret Service relies on the credit
21 card company's investigation or goes to the merchant and asks for a voluntary
22 interview, because many of these disputes can be cleared up with a meeting and
23 Girardi come up with the unusual step and heavy handed step to conduct an
24 undercover recorded conversation with Plaintiff on December 14, 2016, so they can
25 develop a case against him.

26 The surveillance occurred the day after Tom Girardi appeared in court on
27 December 13, 2016, and promised to personally pay the Savages \$100,000 during the
28

1 telephonic judicial appearance which the Savages attended. Then on the same day,
2 December 14, 2016, Girardi on behalf of the Savages moves to dismiss with prejudice
3 the civil case because Girardi promised to personally pay \$100,000 to Savage. If the
4 agreement was for \$7,500, why dismiss the lawsuit since Volkswagen was willing to
5 pay that amount prior to Savage retaining Girardi in the *Volkswagen* litigation. Tom
6 Girardi, who is going broke at this time, after Savage authorized the criminal
7 investigation which is what the Girardis wanted, either reneges on his promise and
8 only pays Savage \$7,500 or was going to pay him more as he had promised at a later
9 time. We don't know because we don't have discovery. Savage never discloses his
10 arrangement with Tom Girardi, the promise to pay \$100,000 to the government or
11 Scarince or Henderson, the prosecutor in the case, or defense counsel (he had a duty to
12 disclose it through Henderson and Scarince); he never obtained a conflict waiver or
13 took any actions to ensure the Secret Service could proceed with the case, because he
14 initiated the case in return for a thing of value, Girardi's representation in the
15 *Volkswagen* case to get him more money.

16 These acts, agreeing to receive a bribe from Girardi, and then hiding it from
17 everyone who had a right to know, and the institution and authorization of this
18 investigation, personally involved him in the case. His actions set in motion the
19 malicious prosecution of Plaintiff. Despite his entanglement with the Girardis, he did
20 not create a wall between him and the Girardis, or between him and Scarince and
21 Henderson, as they proceeded to investigate and prosecute Plaintiff. The case should
22 have never been commenced in the first place because any real investigation would
23 have revealed all of Plaintiff's AMEX charges were authorized and legitimate. It was
24 the quality of his few actions, and as the head of the office in Los Angeles, there was
25 no question that this case would be investigated and prosecuted on the thinnest of
26 proof. That was borne out by the dismissal in September 2021.

1 Just prior to the time the investigation was initiated and put into operation by
2 Savage on December 7, 2016, which Plaintiff alleges is no coincidence, Tom Girardi
3 by November 22, 2016, agreed to represent Savage in the *Volkswagen* litigation.
4 Savage initiated the criminal investigation into Plaintiff that eventually led to AMEX
5 reimbursing the Girardis \$787,117.88. As alleged in the FAC, the AMEX
6 reimbursement contributed to the indictment, the criminal investigation led AMEX to
7 reimburse the money to the Girardis without any audit or chargeback by AMEX of
8 Plaintiff, what the Girardis wanted all along. On December 13, 2016, Tom Girardi put
9 on the record what he previously promised to pay the Savages, \$100,000 in his
10 personal funds. Then the very next day, two key events happened. In reliance on that
11 promise, which is a bribe as discussed below, the Savages dismissed their lawsuit with
12 prejudice, and secondly, on that day the Secret Service and Defendants Scarince and
13 Henderson conducted the undercover recording with Plaintiff.

14 Savage contends that since the payment was eventually \$7,500, the amount that
15 he was supposed to receive from the *Volkswagen* defendants, there was no bribe. The
16 problem with the analysis is that it is plain wrong. Nowhere does he address why the
17 offer of \$100,000 is not a bribe. Nowhere does Savage explain why a personal
18 payment from Girardi is not normal: plaintiff's contingency attorneys are not in the
19 business of paying settlements out of their personal funds to their clients. The fact of
20 the representation of the Savages and intervening in the *Volkswagen* case and
21 promising to get the Savages \$100,000 is the thing of value and the bribe in this case
22 that influenced Savage to authorize the investigation of Plaintiff. The fact Girardi
23 promised to pay \$100,000 out of his personal funds at the time of dire financial
24 circumstances supports the reasonable inference the Girardis did this as part of a
25 transaction with Savage, "we will help you and you will help us."

26 And if ever the United States Attorney or responsible persons at the Secret
27 Service knew of this financial, personal and legal entanglement of Savage with
28

1 Girardi, this case would have been rejected out of hand and never been investigated by
2 the Secret Service or prosecuted by the United States Attorney.

3 Defendant Savage argues he cannot be held liable because he only authorized
4 and initiated the investigation. It is not the number of acts committed by Savage that is
5 legally significant, it is the quality of the acts he committed by using his position as
6 head of the Los Angeles Secret Service to authorize the Psaila investigation. Tom
7 Girardi gave him a thing of value – his representation and intervention in the
8 *Volkswagen* case and promised to get him \$100,000, and in return, Savage committed
9 an official act, authorizing a criminal investigation into Plaintiff. And all the actions
10 that are alleged that were committed by Scarince and Henderson flow from Savage’s
11 actions at the beginning of the case.

12 The fact he initiated this case is the most important legally significant action in
13 this case. It is this personal involvement of Savage in accepting and directing the
14 investigation to occur that takes it out of an upper manager with no involvement and
15 no stake in the investigation that makes this case *Bivens* worthy for supervisory
16 liability for his personal involvement.

17 It is a question for the jury – and there is evidence that Tom Girardi represented
18 Savage and promised to get him \$100,000, and in exchange Savage authorized the
19 investigation. Was it a bribe or was it just a mere coincidence. It is as simple as that;
20 and those are powerful facts. Tom Girardi was going broke, how was he going to pay
21 for it. By getting Savage to initiate the investigation of Plaintiff that resulted in Tom
22 Girardi being reimbursed \$787, 117.88. A reimbursement that should have never been
23 made since all the costumes and services were provided by Plaintiff to Erika Girardi.
24 AMEX was going to get its money back too through the criminal prosecution as
25 mandatory restitution.

26 The criminal statutes of receiving a bribe by a public official and receiving an
27 illegal gratuity support Plaintiff’s reasonable assessment of the facts. Under Ninth
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1 Jury Criminal Instruction 10.3. Receiving a Bribe Public Official, 18 U.S.C §
2 201(b)(2), the elements are that the defendant is a public official (Savage as an
3 executive branch employee is a public official 18 U.S.C § 201(a)(1)), the defendant
4 **agreed to receive or accept something of value**, in return for being influenced in the
5 performance of an official act, and the defendant acted corruptly, which includes,
6 “intending to be influenced [in the performance of an official act][to commit or allow a
7 fraud on the United Staes][to do or to omit to do an act in violation of the defendant’s
8 official duty. A public official acts “corruptly” when he or she accepts or receives, or
9 agrees to accept or receive, a thing of value in return for being influence with the intent
10 that, in exchange for the thing of value, some act would be influenced.” The official
11 does not have to receive a thing of value, but just agrees to accept it.

12 Under 18 U.S.C § 201(c)(1)(A), receiving an illegal gratuity, as set forth in
13 Ninth Circuit Criminal Instruction 10.7, the elements are that the defendant was a
14 public official, and received or agreed to receive something of value, personally for or
15 because of an official act to be performed by the defendant. As set forth in Model
16 Ninth Circuit Criminal Instruction 10.6, the distinction between bribery and illegal
17 gratuity is the intent element, bribery requires the intent to be influenced in an official
18 act, while illegal gratuity only require that the gratuity be accepted because of an
19 official act.

20 The **thing of value** was Tom Girardi’s representation and promise to get him
21 \$100,000 from *Volkswagen*. Either alone is a thing of value. It was of great value to
22 Savage to have the top personal injury attorney in California to represent him in the
23 *Volkswagen* litigation. Savage’s **official act** in response was authorizing the
24 investigation. He acted corruptly because he disclosed to no one his arrangement with
25 Girardi. The proof is contained in the *Volkswagen* docket and the December 13, 2016,
26 transcript. Girardi realized he was getting nowhere with the Court in trying to
27 withdraw from the settlement, so he told the Court he would personally pay \$100,000
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1 he already had promised to get Savage in the litigation. Thus, the elements of both
2 offenses are met in this case. For bribery, he acted corruptly because he agreed to
3 accept a thing of value, Girardi's representation and promise to get him \$100,000, and
4 when Erika Girardi approached him, he was influenced in his decision to investigate
5 Plaintiff. For receiving an illegal gratuity by a public official, Savage was influenced
6 by Girardi representing him for free in his civil case, and Girardi offering to pay him
7 \$100,000.

8 Savage disputes the conclusions to be drawn from the personal, financial and
9 legal relationship between Tom and Erika Girardi and Savage; Savage sees this as the
10 ordinary payments of legal fees. But that is why we have trials: to discern who is right,
11 and the facts support Plaintiff's conclusions. See also *Danhoe v. Arpaio* 986 F. Supp
12 2d 1091 (D.C. Az. 2013) (in holding a criminal defendant may maintain a § 1983
13 claim not only against prosecutors, but police officers and investigators who
14 wrongfully caused plaintiff's prosecution, if the evidence is "conflicting, so that on one
15 conclusion as to the facts drawn therefrom probable cause exists, while from another it
16 does not, it is then for the jury to determine the true state of facts.)"

17 The acts and omissions of Savage are the essential acts as to why this case was
18 pursued in the first place. His authorization was the one essential act that set in motion
19 the chain of events that resulted in the malicious prosecution by all three Secret
20 Service defendants of Girardi. Under an aiding and abetting theory, he did not need to
21 participate in all actions that Scarince or Savage conducted, or know every single act,
22 but he set in motion a chain of events for which he was responsible for because he was
23 personally involved in the one essential decision that tainted the criminal investigation.
24 Without his actions, Plaintiff never would have been prosecuted because as set forth in
25 the Anti-SLAPP briefing, and the previous oppositions to the motions to dismiss, there
26 was no probable cause to prosecute Plaintiff.

1 Pursuant to California and federal law, Savage meets the elements for malicious
2 prosecution. In California, Plaintiff must establish (1) the prosecution was commenced
3 by or at the direction of the defendant and was pursued to a legal termination in his,
4 plaintiff's, favor; (2) was brought without probable cause; and (3) was initiated with
5 malice. *Zucchet v. Galardi*, 229 Cal.App.4th 1466, 1481 (2014). To prove malice the
6 Plaintiff must prove ill will or some improper motive. *Daniels v. Robbins*, 182 Cal.
7 App. 4th 204, 224 (2010). In *Mazetti v. Bellino*, 57 F.Supp.3d 1262 (2014), citing
8 *Awabdy v. City of Adelanto*, 368 F.3d 1062, 1066 (9th Cir. 2004), to maintain a § 1983
9 malicious prosecution the plaintiff must show that the defendants prosecuted with
10 malice and without probable cause, and did it for the purpose of denying her a specific
11 constitutional right.

12 The Court has already determined in the Anti-SLAPP opinion that the elements
13 for a malicious prosecution have been met against the Girardi defendants, and it has
14 been met here since the investigation and prosecution terminated in Plaintiff's favor,
15 was brought or continue to be brought when there was no probable cause and was done
16 with malice because it was done for the personal benefit of the Girardis and Savage.

17 **IV. SAVAGE VIOLATED CLEARLY ESTABLISHED LAW AND**
18 **PLAINTIFF IS NOT HOLDING SAVAGE LIABLE UNDER A**
19 **RESPONDEAT SUPERIOR THEORY**

20 **A. Savage Violated Clearly Established Law**

21 Here, the Complaint identifies constitutional rights violated, using fabricated
22 evidence to maliciously prosecute Plaintiff during the entire investigation, the
23 presentation to obtain the search warrant, (*Franks v. Delaware*, 438 U.S. 154 (1978)
24 (recognizing that the Fourth Amendment may be violated if a search warrant
25 affidavit's probable cause is based on a false statement made knowingly or with
26 reckless disregard for the truth); violated Plaintiff's Fifth Amendment clearly
27 established due process rights in 2016-17 by continuing to prosecute him in reckless
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1 disregard of his innocence; *See* 9th Cir. Model Civil Jury Instruc., 9.33 (Deliberate
2 Fabrication of Evidence). *Devereaux v. Abbey*, 263 F.3d 1070, 1075 (9th Cir. 2001)
3 *see also Napue v. People of State of Il.*, 360 U.S. 264 (1959); *Pyle v. State of Kansas*,
4 317 U.S. 213 (1942); malicious prosecution of Plaintiff in 2016-17 violated clearly
5 established rights; *see, e.g., Awabdy v. City of Adelanto*, 368 F.3d 1062 (2004); and a
6 Brady violation, *Brady v. Maryland*, 373 U.S. 83 (1963). *See also* Opp. to Scarince
7 and Henderson motion to dismiss. (Dkt. 115, pp. 3-5)

8 **B. Plaintiff Is Not Holding Plaintiff Responsible Under a Respondeat**
9 **Theory of Liability**

10 Plaintiff agrees with both Savage and the Court that Plaintiff cannot sue a
11 government official under a respondeat superior theory of liability but must allege that
12 through the official's own individual actions has violated the constitution. *See*
13 Court's ruling on motions to dismiss the original complaint, Dkt. 106, pp. 12-13,
14 citing *Ashcroft v. Iqbal*, 556 U.S. 662, 676 (2009). The Court went onto say that
15 under a respondeat superior theory, Savage cannot be found to violate clearly
16 established law. Court's Order on Motion to Dismiss Original Complaint, p. 13.

17 However, Plaintiff desires to make clear that Savage is being sued for his own
18 personal conduct in initiating and prosecuting Plaintiff, and his supervisory conduct in
19 authorizing the investigation of Plaintiff, that never would have happened without the
20 personal, financial and legal entanglements between Savage and Girardi, his conduct
21 in receiving a bribe or gratuity, for clearly the quid pro quo between Girardi and him,
22 and failure in not disclosing this relationship and his actions that would have ended
23 the investigation into Plaintiff.

24 **V. THIS COURT SHOULD ALLOW THE *BIVENS* CASE TO PROCEED**

25 Plaintiff has argued in his opposition to Defendants Scarince and Savage
26 motion to dismiss the original complaint, Dkt. 78, pp. 13-21, the opposition to
27 Defendant Savage's motion to dismiss the original complaint, Dkt. 81, pp. 15-22, and
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1 the opposition to Defendants Scarince and Savage motion to dismiss the FAC, Dkt.
2 115, pp, 16-22, and incorporates those arguments by reference. Plaintiff will not
3 address whether the case arises in a context already covered by *Bivens* and
4 incorporates by reference those arguments.

5 But whether to allow *Bivens* in this case, no “special factors” counsel against
6 allowing the *Bivens* remedy. This is a unique case, and the facts alleged against
7 Savage are so compelling that they justify applying *Bivens* in this context.

8 On the one hand, the crimes that were investigated are ordinary, and thus do not
9 take it out of the *Bivens* context. This type of prosecution, as the Court said at the
10 hearing on the Motion to Dismiss, “But the Secret Service investigates credit card
11 fraud all the time. You know, it’s not like it’s the NASA Inspector General, or
12 something.” McLane decl., Exhibit 15, April 8, 2024, Hearing on Motion to Dismiss
13 transcript, p. 12:5-7.

14 The prosecution is an ordinary prosecution and allowing a *Bivens* remedy
15 against Savage and Scarince, who are no longer with the Secret Service, does not
16 intrude in any way on the executive branch. It is hard to fathom additionally why if
17 Plaintiff proceeds on an FTCA claim and takes discovery and depositions from the
18 three individual Secret Service agents, and discovery on its claims from the
19 government, that dismissing the *Bivens* claims provides these defendants any relief or
20 is any less burdensome. What it does do is deprive Plaintiff of a jury and punitive
21 damages, so the relief in dismissing *Bivens* is more a financial consideration rather
22 than a burden on the government that has to defend the FTCA action anyway.

23 However, the manner in which this case was authorized and investigated, and
24 the issues presented are so extraordinary this case does not open the doors to a
25 stampede of civil rights plaintiffs. The Court can see for itself that this case is unique
26 and stands on its own. It also does not intrude on the executive branch because this
27 case is *sui generis*, it is one of a kind, and there are not many cases with the unique
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1 facts here, so allowing *Bivens* remedy is not going to cause a rush of lawsuits against
2 federal agents.

3 Moreover, both the Court in its order on the Motion to Dismiss, and Savage cite
4 the fact that Savage was the head of the Los Angeles Secret Service at the time who
5 supervised hundreds of agents. The Court indicated that Defendant Savage whose duty
6 was to supervise the third largest Secret Service office was under a different “legal
7 mandate.” Court Order on MTD original complaint, Dkt. 106, p. 11.

8 If, in fact, all that Savage did was supervise from afar with many intermediaries
9 in between in this case and was only being sued as the head of the office and without
10 any proof of involvement, Plaintiff would agree that special factors would dictate not
11 allowing a *Bivens* remedy. However, such is not the case here, because rather than
12 Plaintiff intruding on Savage, Savage interjected himself into the investigation of
13 Plaintiff. Here, the allegations prove that Erika Girardi did not file a complaint with an
14 intake officer, she went directly to Savage who then authorized the investigation,
15 which Plaintiff has alleged was for an improper purpose as a result of receiving a bribe
16 or gratuity, and was done as a result of the legal, business and financial relationship
17 between Savage and the Girardis that was not disclosed in the case to the prosecutor or
18 the defendants. He was not acting as a supervisor dispassionately analyzing whether to
19 authorize an investigation, he was authorizing the investigation for the benefit of his
20 friends and himself. His actions and omissions were the moving force in this case, and
21 he was personally involved. He was not a high up administrator who did nothing on
22 the case; he was the reason the case was pursued.

23 Even if this Court concludes that Plaintiff’s *Bivens* claims arise in a new context,
24 there are no special factors “indicating that the Judiciary is at least arguably less
25 equipped than Congress to ‘weigh the costs and benefits of allowing a damages action to
26 proceed. *Egbert v. Boule*, 596 U.S. 482, 492 (2022) (internal citation omitted) (quoting
27 *Ziglar v. Abassi*, 582 U.S. 120, 136-39(2017))” cited in Court’s MTD order, p. 6, Dkt.
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1 106. The judiciary is well-suited to consider Plaintiff’s functional equivalent of
2 ordinary law enforcement § 1983 claims.

3 There are no special factors not allowing Plaintiff to hold the Secret Service
4 defendants personally responsible for their conduct: it does not concern the border,
5 where the Court has not extended *Bivens*. See *Egbert*, 596 U.S. 482, 494 (2022);
6 *Hernandez v. Mesa*, 140 S. Ct. 735, 744 (2020). In both cases, the Court hesitated to
7 extend a *Bivens* cause of action to those federal defendants because it ran the “risk of
8 undermining border security,” and that “[m]atters intimately related to foreign policy
9 and national security are rarely proper subjects for judicial intervention.” *Egbert*, 596
10 U.S. at 494); and it does not involve terrorism, *Ziglar v. Abassi*, *Id.*, (high level
11 executive branch officials alleged to violate rights of suspected terrorists). The border,
12 and national security counsel against extending *Bivens* where in those areas the
13 judiciary is not as equipped to weigh the pros and cons of remedies for constitutional
14 violations.

15 Even in the immigration context, where a government immigration attorney
16 fabricated evidence in a deportation proceeding, the Court held that the plaintiff could
17 proceed under *Bivens*. *Lanuza v. Love*, 899 F.3d 1019 (9th Cir. 2018). The conduct in
18 that case was so outrageous, as it is here, the Court allowed a *Bivens* claim.

19 Further, this case does not involve a new category of defendants. *Bivens*
20 recognized a cause of action against federal *agents* of the Federal Bureau of Narcotics
21 who entered the plaintiff’s apartment and arrested him for alleged narcotics violations.
22 *Bivens*, 403 U.S. at 389. Similarly, the plaintiff in *Carlson v. Green*⁵ brought a *Bivens*
23 action against federal prison officials. 446 U.S. 14, 17 (1980). Despite belonging to
24 different agencies, the Court recognized a *Bivens* cause of action against the individual
25 federal agents in both cases.

26 _____
27 ⁵ *Carlson* recognized a *Bivens* cause of action for the petitioner’s Eighth Amendment
28 violations. 446 U.S. 14, 19 (1980).

1 Savage’s attempt to point to “alternative” remedial schemes counseling against
2 recognition of a new *Bivens* context misunderstands the ultimate consideration of this
3 factor. “*Bivens* is concerned solely with deterring the unconstitutional acts of
4 individual officers.” *Egbert*, 596 U.S. at 498 (emphasis added, internal quotations
5 omitted). “So long as Congress or the Executive has created a remedial process that it
6 finds sufficient to secure an adequate level of deterrence the courts cannot second-
7 guess that calibration by superimposing a *Bivens* remedy.” *Id.* (emphasis added). Thus,
8 the sole concern is not the mere existence of an alternative remedial scheme but rather
9 an alternative remedial scheme that provides an “adequate level of deterrence” against
10 individual officers.

11 Here, all the reporting mechanisms provide inadequate levels of deterrence. The
12 Court in its MTD order, Dkt. 106, p.8, cites to *Pettibone v. Russell*, 59 F.4th 449, 455
13 (9th Cir. 2023), for the proposition that “reporting misconduct to the Inspector General
14 precludes a *Bivens* action in cases such as this one.” *Pettibone* is distinguishable and
15 was concerned with the judiciary intruding into a high-level regional official carrying
16 out an executive order. *Id.*, 59 F.4th 449, 455. In *Pettibone*, the court concluded that
17 the plaintiff’s claims arose in a new *Bivens* context because, among other things,
18 providing for a *Bivens* remedy would be a disruptive intrusion by the Judiciary into the
19 Executive branch because the defendant was carrying out an executive order. *Id.*, 59
20 F.4th 449, 455 (9th Cir. 2023). Here, no such intrusion would occur if this Court
21 permitted a *Bivens* remedy. The Secret Service investigates financial crimes via a
22 statutory mandate, similarly to other investigatory agencies. *Compare* 18 U.S.C. §
23 3056 (Powers, authorities, and duties of the United States Secret Service); *with* 28
24 U.S.C. § 540c(b) (describing the duties and authority of FBI agents). Thus, there is no
25 difference in legal mandate between the Secret Service and other federal investigatory
26 agencies operating under a statutory mandate.

1 Second, this case is distinguishable because unlike *Pettibone*, Plaintiff here has
2 demonstrated the reporting mechanisms provide inadequate deterrence. For example,
3 while the OIG website provides a forum for reporting alleged misconduct, the statistics
4 published on the OIG’s website regarding the results of reported conduct cast doubt on
5 whether the hotline provides a meaningful level of deterrence. In Fiscal Year 2022, the
6 OIG received 42,943 hotline complaints. Office of Inspector General, *About Us*,
7 www.oig.dhs.gov/about (last visited Feb. 13, 2024). Of those complaints, only 257
8 recommendations were issued, 95 investigations were referred to prosecution, and only
9 28 personnel actions were taken. *Id.* In other words, less than 1% of the complaints
10 received resulted in action by the OIG. Thus, it would be unreasonable to conclude that
11 action taken by the OIG’s office provides an “adequate level of deterrence” of
12 constitutional violations.

13 Similarly, while the Department of Homeland Security’s Office for Civil Rights
14 and Civil Liberties (“Office” or “the Office”) allows aggrieved individuals to make a
15 complaint, the Office’s annual statistics raise doubt in the effectiveness of deterring
16 constitutional violations. Of the 747 complaints closed in fiscal year 2022, only 5% of
17 these complaints were closed with a recommendation to a DHS office. Department of
18 Homeland Security, Fiscal Year 2022 Annual Report to Congress (last visited Feb. 13,
19 2024) [https://www.dhs.gov/sites/default/files/2023-12/23_1117_crcl_fy22-annual-](https://www.dhs.gov/sites/default/files/2023-12/23_1117_crcl_fy22-annual-report-508.pdf)
20 [report-508.pdf](https://www.dhs.gov/sites/default/files/2023-12/23_1117_crcl_fy22-annual-report-508.pdf). Additionally, the complaints result in “recommendations” implying
21 that even if an investigation concludes a civil rights violation may have occurred, the
22 relevant department is not bound to abide by the Office’s conclusions. *See id.* at 38.
23 Thus, making a complaint to the Office does not create an adequate level of deterrence
24 against future constitutional violations. Finally, while the Secret Service has an
25 independent avenue for reporting employee misconduct, it is even less clear whether
26 this provides an effective means of deterring future constitutional violations since
27 information regarding these reports is unavailable. Moreover, Savage and Scarince are
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1 no longer Secret Service employees, so no internal investigation could be mounted.
2 Thus, none of the three identified “alternative” reporting measures provide an
3 “adequate level of deterrence” of future constitutional violations.

4 Defendant’s two alternative statutory remedies are equally insufficient to
5 address Plaintiff’s constitutional violations because they are aimed at preventing
6 adverse action by the Government and its agencies, rather than individual misconduct.
7 First, the Supreme Court has held that the FTCA is “not a sufficient protector of [a]
8 citizens’ constitutional rights” and could not be viewed as an exclusive alternative
9 remedy to *Bivens* “without a clear constitutional mandate.” *Carlson*, 446 U.S. at 23.
10 The Court recognized that a *Bivens* claim against an individual officer is a more
11 effective deterrent than the FTCA remedy against the United States and would ensure
12 more uniform rules would govern a plaintiff’s constitutional claims. *Id.* at 21-23.
13 Second, the lack of punitive damages in FTCA suits rendered it a “much less effective”
14 remedy than *Bivens*. *Id.* at 22. Finally, the Court noted that a plaintiff’s inability to opt
15 for a jury trial in an FTCA action, which is available in a *Bivens* suit, rendered *Bivens* a
16 more effective remedy. *Id.* Thus, the FTCA claim is not an adequate alternative
17 remedy to Plaintiff’s *Bivens* claim.

18 Likewise, Defendant’s assertion that the Administrative Procedure Act (“APA”)
19 provides an effective avenue for Plaintiff to redress his constitutional claims is
20 inapposite since the APA is not concerned with individual action. The APA grants
21 judicial review for a person suffering a legal wrong because of “agency action.” 5
22 U.S.C. § 702. “[T]he ‘agency action’ in question must be ‘final agency action.’”
23 *Lujan v. Nat. Wildlife Federation*, 497 U.S. 871, 883 (1990) (quoting 5 U.S.C. § 704).
24 Because Plaintiff’s claims are against individual officers within the Secret Service,
25 which by definition cannot be viewed as final agency action, the APA is wholly
26 inapplicable and cannot address Plaintiff’s constitutional violations.

1 Accordingly, Defendant has failed to identify any special factors counseling
2 against recognition of a new *Bivens* context.

3 **VI. CONCLUSION**

4 For the reasons stated above, Defendant’s Motion to Dismiss should be denied.

5 Dated: August 5, 2024

McLANE, BEDNARSKI & LITT, LLP

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L.R. 11-6.2 – CERTIFICATE OF COMPLIANCE*

The undersigned, counsel of record for Plaintiff, certifies that this brief contains
6,859 words, which complies with the word limit of L.R. 11-6.1.