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 9 **UNITED STATES DISTRICT COURT**
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

10 COUNTY OF SANTA CRUZ, et al.,)
 11 Plaintiffs,)
 12 v.)
 13 ALBERTO GONZALES, Attorney General)
 14 of the United States; KAREN P. TANDY,)
 15 Administrator of the Drug Enforcement)
 16 Administration; JOHN P. WALTERS,)
 Director of the Office of National Drug)
 17 DRUG ENFORCEMENT)
 ADMINISTRATION AGENTS,)
 18 Defendants.)
 19

Nos. C 03-1802 JF **CONSOLIDATED**
 MC 02-7012 JF

REPLY IN SUPPORT OF
DEFENDANTS’ MOTION TO DISMISS
PLAINTIFFS’ FIFTH CAUSE OF ACTION

Date: June 23, 2006
 Time: 9:00 a.m.
 Courtroom 3, 5th Floor
 The Hon. Jeremy Fogel

20 In their Opposition to Defendants’ Motion to Dismiss Plaintiffs’ Fifth Cause of Action,
 21 plaintiffs do not oppose dismissal of the 30 Unknown Drug Enforcement Administration Agents
 22 (“30 Unknown Agents”). Nor do plaintiffs oppose dismissal of their claim for monetary damages
 23 under Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971). Plaintiffs contend, however,
 24 that their Fifth Cause of Action was pled against all defendants and therefore “survives against all
 25 official-capacity Defendants.” Pl. Opp. at 3. Specifically, plaintiffs contend that they are “entitled
 26 to the protections of the Fourth Amendment, and a cause of action exists even if the 30 Unknown
 27 DEA Agents are dismissed as Defendants and money damages under [Bivens] are unavailable as a
 28 remedy.” Id. As we now show, that contention lacks merit.

1 In their First Amended Complaint, plaintiffs captioned their Fifth Cause of Action as seeking
2 “Damages for Violations of the Fourth, Fifth, Ninth, and Tenth Amendments of the United States,”
3 and specifically pled that they were “entitled under [Bivens] to damages to compensate for the
4 Defendants’ violation of their constitutional rights.” First Amended Complaint ¶ 116, at 28.
5 Nowhere did plaintiffs seek anything other than damages under Bivens in pleading the Fifth Cause
6 of Action. To the contrary, plaintiffs specifically alleged that “[t]he actions of Defendants, as alleged
7 herein, violate Plaintiffs’ rights secured under the Fourth, Fifth, Ninth and Tenth Amendment, and
8 Plaintiffs request the relief set forth in the Prayer for Relief.” Id. ¶ 117, at 28 (emphasis added).
9 Consistent with this formulation, the only relief sought by plaintiffs in their Prayer for Relief for
10 alleged violations of the Fourth Amendment was compensatory and punitive damages. Id. Prayer
11 for Relief ¶¶ 11, 12, at 30.

12 To cinch matters, in their allegations regarding Jurisdiction and Venue, plaintiffs cited the
13 Fourth Amendment only as forming the basis of their claims for damages. Id. ¶ 12, at 4 (“The
14 claims for damages in this action arise under the Fourth, Fifth, Ninth and Tenth Amendments to the
15 United States Constitution.”). Plaintiffs did not cite to the Fourth Amendment as forming the basis
16 of their claims for declaratory or injunctive relief. Id. ¶¶ 13, 14, at 4.

17 Under these circumstances, plaintiffs’ Fifth Cause of Action must be dismissed. The only
18 relief that plaintiffs sought in their First Amended Complaint for alleged violations of the Fourth
19 Amendment -- either in their Fifth Cause of Action or elsewhere -- is monetary damages, and it is
20 beyond peradventure that damages cannot be sought against officers of the United States sued in
21 their official capacities. See Balser v. Dept. of Justice, Office of the U.S. Trustee, 327 F.3d 903, 909
22 (9th Cir. 2003) (holding that, “to the extent the Balsers are asserting a Bivens action, their claim does
23 not abridge sovereign immunity because a Bivens suit is against a federal employee ‘in his individual
24 rather than official capacity.’ The existence of a Bivens claim therefore does not state a viable cause
25 of action against the United States trustee in his official capacity.”) (quoting Holloman v. Watt, 708
26 F.2d 1399, 1401 (9th Cir. 1983)); Daly-Murphy v. Winston, 837 F.2d 348, 355 (9th Cir. 1987) (“[A]
27 Bivens action can be maintained against a defendant in his or her individual capacity only, and not
28 in his or her official capacity.”). Consequently, plaintiffs’ contention that their Fifth Cause of Action

1 somehow survives the dismissal of the 30 Unknown Agents and the dismissal of their claims for
2 damages under Bivens is entirely insubstantial.

3 **CONCLUSION**

4 For the foregoing reasons, and for the reasons set forth in our opening memorandum,
5 plaintiffs' Fifth Cause of Action should be dismissed.

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7 Respectfully submitted,

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