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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

CAROLYN MARTIN,

Plaintiff,

v.

NAVAL CRIMINAL INVESTIGATIVE SERVICE, et al.,

Defendants.

Case No. 10-cv-1879 WQH (NLS)

PLAINTIFF'S MEMORANDUM IN OPPOSITION TO MOTION TO DISMISS BY UNITED STATES

No Oral Argument Unless Requested by Court

Judge: Hon. William Q. Hayes
Date: July 16, 2012
Time: 11:00 a.m.
Room: 4

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INTRODUCTION

Carolyn Martin investigates facts and speaks out against official misconduct in military criminal justice proceedings. Because she has exercised her free speech rights as a zealous and effective investigator, NCIS Special Agent Gerald Martin and others have subjected her to a campaign of harassment and intimidation, carrying it from an unjustified detention on the roadside at Camp Pendleton to the doorstep of her home. As the Court found, "Plaintiff has sufficiently stated a claim of retaliation in violation [of] the First Amendment." Order (Doc. No. 42) at 11:25-26. The facts pleaded show that federal officers also committed several torts against Plaintiff, as stated in the First Supplemental Complaint (FSC) (Doc. No. 68). Because the facts and all reasonable inferences must be taken in the light most favorable to Plaintiff, the government cannot evade liability under the Federal Tort Claims Act by attempting to rewrite the complaint. The purported legitimacy of the government's actions is an issue for trial and cannot be decided on a motion to dismiss. At this stage, the complaint states more than sufficient facts showing that federal agents committed multiple torts against Plaintiff in the course of an unlawful campaign of retaliation. The Court is therefore requested to deny the motion to dismiss.

FACTS

Carolyn Martin (Plaintiff) is a former Marine who holds a Top Secret clearance and works as a contract investigator.[1] Compl. (Doc. No. 1) ¶¶ 17, 19. She conducts personnel security investigations (PSIs) and military criminal defense investigations. *Id.* ¶ 17. In criminal cases, which she has worked on since 2006, she typically contracts with the defendant for an initial retainer and an hourly rate for subsequent services. *Id.* ¶ 20. However, in many cases she works without full compensation, because she does not abandon her clients when their funds are exhausted and payment at government expense is not authorized, as regularly occurs. *Id.*

Plaintiff assists the defense by conducting an independent investigation. This includes interviewing the accused and witnesses, inspecting the scene of the alleged crime, engaging in

[1] The claims pleaded in the FSC incorporate by reference the facts pleaded in the original complaint, which is not superseded or replaced. Doc. No. 68, ¶¶ 8, 11, 15, 18, 21; *Habitat Educ. Center, Inc. v. Kimbell*, 250 F.R.D. 397, 401 (E.D. Wis. 2008).

other background investigation, communicating with defense counsel about her findings, and writing reports for defense counsel. *Id.* ¶ 21. She often testifies in court-martial proceedings and also assists the defense in post-trial matters and administrative separation hearings. *Id.*

On numerous occasions, Plaintiff has discovered and reported material facts that assisted the defense, often leading to acquittal or other favorable results for the defense. *Id.* ¶¶ 22-24. She has also criticized actions of the Naval Criminal Investigative Service (NCIS), which is responsible for investigating felonies punishable under the Uniform Code of Military Justice (UCMJ) in the Navy and Marine Corps. *Id.* ¶ 25. For example, she has "uncovered information leading to the recall of a key prosecution witness," *Id.* ¶ 22(a); "discovered that the alleged victim of assault had lied about his past military service and decorations," *Id.* ¶ 22(b); disclosed that NCIS failed to interview an adult male living with the alleged victim of child molestation, *Id.* ¶ 22(c); "testified that NCIS agents' interrogation violated an NCIS policy and regulation," *Id.* ¶ 23(a); "testified that other individuals had the opportunity and capability to create the fraudulent entries her client was accused of creating," *Id.* ¶ 23(b); "testified on security regulations and mandates within the Department of Defense," *Id.* ¶ 23(c); and "written investigative reports that assisted the defense" in post-trial proceedings that resulted in setting aside a conviction. *Id.* ¶ 24.

Beginning in June 2009, law enforcement personnel, including NCIS Special Agent Gerald Martin, have harassed and intimidated Plaintiff.[2] *Id.* ¶ 26. She has been subjected to multiple vehicle stops aboard Camp Pendleton, though she had previously entered the base hundreds of times and never been stopped. *Id.* ¶¶ 27-28. These incidents culminated in a humiliating two-hour roadside detention on July 23, 2009. *Id.* ¶¶ 29-39. Accompanied by an unmarked car, a military police officer (MP) pulled Plaintiff over as she left Legal Services Support Section-Echo after conducting defense investigation business. The MP gave conflicting information about why he pulled Plaintiff over, stating first that he clocked Plaintiff speeding but later saying someone else "had called to tell him that she was speeding." *Id.* ¶ 29. She was never issued a citation for the alleged speeding. *Id.*

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[2] To avoid confusion, Carolyn Martin is referred to as "Plaintiff" and Gerald Martin as "Agent Martin."

1 The MP immediately began interrogating Plaintiff about "her credentials," and when
2 Plaintiff responded that she had Defense Intelligence Agency (DIA) credentials, a male voice
3 from the unmarked car shouted "Get her credentials!" *Id.* ¶ 30. The MP then demanded Ms.
4 Martin's DIA credentials, which had nothing to do with her defense investigative business at
5 Camp Pendleton that day. *Id.* Instead, the credentials are used when conducting PSI's on behalf
6 of DIA. The MP took the credentials and told Plaintiff to get out of her car, after which an
7 unidentified "Special Agent" began repeatedly interrogating Plaintiff about "whether she used
8 NCIS credentials or posed as an NCIS officer." *Id.* ¶¶ 31-32. The Special Agent asked for
9 consent to search Plaintiff and her car, which she refused, after which he told her she was not free
10 to leave and could not call an attorney. *Id.* ¶ 32. The interrogation continued, during which the
11 Special Agent returned to his vehicle and spoke on his telephone while five armed MP's arrived
12 and surrounded Plaintiff. *Id.* ¶ 34. The Special Agent again told her she was not free to leave and
13 added that a search warrant for her person and vehicle was on its way. *Id.*
14 By this point, Plaintiff had been detained in humiliating circumstances for 90 minutes. *Id.*
15 ¶ 35. Finally, after an hour and 45 minutes of detention and relentless interrogation, Plaintiff
16 gave in and allowed a search of her car. *Id.* ¶ 36. The Special Agent and several MP's ransacked
17 her car, including privileged and confidential defense files, as well as her purse. *Id.* The search
18 turned up no evidence of false documents or false identification. *Id.* ¶ 37.
19 Agent Martin arrived and made a "false allegation" that he had received a call from an MP
20 reporting that Plaintiff had presented NCIS credentials at the Camp Pendleton gate. *Id.* Over
21 Plaintiff's protests, the Special Agent turned over the DIA credentials to Agent Martin, who
22 refused to allow Plaintiff to call ADC, Ltd., the company that sponsored Plaintiff for those
23 credentials. *Id.* ¶ 38. MP's then escorted Plaintiff off the base. *Id.* The entire detention lasted
24 approximately two hours. *Id.* ¶ 39. Approximately 15 minutes elapsed from the time the search
25 began until Plaintiff was released. *Id.* ¶¶ 36, 39.
26 This incident was not the end of the harassment. Several days later, Plaintiff saw the
27 unidentified Special Agent in the parking lot of a restaurant in Carlsbad. He stopped mid-stride
28 and followed Plaintiff as she drove away. *Id.* ¶ 42. Plaintiff then learned that Agent Martin told

1 third parties that "NCIS was investigating [her] for impersonating a federal officer." *Id.* ¶ 45.
2 Another NCIS agent followed Plaintiff at Camp Pendleton and questioned her about her
3 credentials and employers. *Id.* ¶ 46. After individuals in black vehicles took photographs of her
4 house, Plaintiff learned that "photos of her face and her car parked in front of a house were posted
5 on a 'be on the lookout' board at the NCIS Field Office at Marine Corps Air Station Miramar."
6 *Id.* ¶ 47. The government later filed an answer to the claims for injunctive relief, in which "the
7 United States admits NCIS agent(s) assisted with physical surveillance of Plaintiff during its
8 investigation, and that 'be-on-the-lookout' was displayed at the appropriate places for law
9 enforcement personnel at Marine Corps Air Station Miramar." Ans. (Doc. No. 47) ¶ 47.

10 On May 3, 2010, Agent Martin and the Special Agent rang Plaintiff's doorbell and banged
11 on her front door at 6:55 a.m. *Id.* ¶ 48. Agent Martin demanded that Plaintiff take a document
12 from him. When she declined, he threw the document at her, striking her in the face and
13 muttering, "You've been served." *Id.* ¶ 49. About thirty minutes later, Agent Martin and the
14 Special Agent returned, again ringing the doorbell and knocking on the door, but Plaintiff did not
15 answer because she was afraid for her safety. *Id.* ¶ 51. Plaintiff later noticed that either Agent
16 Martin or the Special Agent broke the glass window in her front door. *Id.*

17 The document was a "District Court Violation Notice" apparently filled out by Agent
18 Martin on DD Form 1805. The citation purported to charge Ms. Martin with impersonating a
19 federal officer on July 23, 2009 at Camp Pendleton, in alleged violation of 18 U.S.C. § 912, an
20 offense that cannot lawfully be charged by violation notice. *Id.* ¶ 50, Ex. A. The document
21 contained no violation number, location code, or court date. *Id.* ¶ 50. Ms. Martin has never
22 received a court date or other further notice regarding this purported charge, a fact that the
23 Answer admits. *Id.*; Ans. ¶ 50.

24 **LEGAL STANDARDS**

25 The Court must accept the facts pleaded by Plaintiff as true and draw all reasonable
26 inferences in Plaintiff's favor to determine whether they plausibly suggest that Plaintiff states a
27 claim. *Moss v. U.S. Secret Service*, 572 F.3d 962, 969-70 (9th Cir. 2009). The plausibility
28 standard is not a "probability requirement." *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009). The

Court reads the Complaint "as a whole, not parsed piece by piece to determine whether each allegation, in isolation, is plausible." *Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585, 594 (8th Cir. 2009). If the Court does not find the FSC states a claim, it must grant leave to seek amendment unless it is clear the pleading cannot possibly be cured by the allegation of additional facts. *Doe v. United States*, 58 F.3d 494, 497 (9th Cir. 1995).

The Federal Tort Claims Act (FTCA) waives the government's sovereign immunity against "civil actions on claims against the United States, for money damages … caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment." 28 U.S.C. § 1346(b)(1). The government is liable for torts committed by its employees "in the same manner and to the same extent as a private individual under like circumstances," except for prejudgment interest or punitive damages. 28 U.S.C. § 2674. The government does not dispute that Plaintiff complied with the FTCA requirement to exhaust administrative remedies and timely pursued her FTCA claims. FSC ¶¶ 6-7; 28 U.S.C. §§ 2675(a), 2401(b).

ARGUMENT

As a general matter, the government is foreclosed from contending on this motion that its agents were engaged in legitimate "routine law enforcement investigative activities." U.S. Mem. ISO Mot. to Dismiss (Doc. 78-1) at 9:8-9. First, the law of the case is otherwise. Under the law-of-the-case doctrine, a "court is generally precluded from reconsidering an issue that has already been decided by the same court."[3] *Thomas v. Bible*, 983 F.3d 152, 154 (9th Cir. 1993). "For the doctrine to apply, the issue in question must have been decided either expressly or by necessary implication in the previous disposition." *Id.* (quotations omitted). The Court previously denied the Defendants' motions to dismiss Plaintiff's retaliation claim. (Doc. No. 42 at 11:25-26, 12:25-27, 14:22-24). In finding that Plaintiff stated a claim for retaliation, the Court necessarily

[3] "The prior decision should be followed unless: (1) the decision is clearly erroneous and its enforcement would work a manifest injustice, (2) intervening controlling authority makes reconsideration appropriate, or (3) substantially different evidence was adduced at a subsequent trial." *Jeffries v. Wood*, 113 F.3d 1484, 1489 (9th Cir. 1997). None of these exceptions to the law-of-the-case doctrine apply here.

determined that retaliatory motive was "a but-for cause of [Defendants'] action." (Doc. No. 42 at 10:25 (quoting *Skoog v. County of Clackamas,* 469 F.3d 1221, 1232 (9th Cir. 2006)). The "necessary implication" of the Court's ruling is that the actions taken against Plaintiff, on which both the constitutional and tort claims are based, amounted to improper retaliation, not legitimate law enforcement. As a result, the law of the case forecloses the government's position. *See, e.g., Stetler v. Greenpoint Mortg. Funding, Inc*., No. 1:07cv0123 DLB, 2008 WL 652117, *3 (E.D. Cal. Mar. 7, 2008) (finding that the law-of-the-case doctrine required that summary judgment be granted where previous summary judgment order had already "determined" that a particular real estate practice was not unlawful). Second, even if law of the case does not apply, the government's assertion "violates the familiar axiom that on a motion to dismiss, inferences are to be drawn in favor of the non-moving party." *Braden*, 588 F.3d at 595. Therefore, the Court must construe the facts in Plaintiff's favor and cannot credit any contention that the government's agents were engaged in legitimate law enforcement.

I. PLAINTIFF HAS STATED A CLAIM FOR FALSE IMPRISONMENT.

Plaintiff was subjected to the tort of false imprisonment when several Defendants detained her on the roadside of Camp Pendleton on July 23, 2009 for approximately two hours without justification. "The elements of false imprisonment are: (1) the nonconsensual, intentional confinement of a person, (2) without lawful privilege, and (3) for an appreciable period of time, however brief." *Easton v. Sutter Coast Hosp*., 80 Cal. App. 4th 485, 496 (2000). The facts pleaded easily meet every element of that tort.

A. Defendants intentionally confined Plaintiff by the roadside against her will for an appreciable period of time.

The United States does not dispute that Plaintiff satisfies the first and third elements of false imprisonment by pleading facts that show intentional confinement against her will for an appreciable period of time. According to the Complaint, an MP pulled her over, questioned her about her credentials, took her DIA credentials to the Special Agent, and demanded that she step out of her car. Compl. ¶¶ 29-31. The Special Agent repeatedly told her that she could not leave or call an attorney and that a search warrant was on its way. *Id.* ¶¶ 32-34. Five armed MPs

surrounded Plaintiff at one point. *Id.* ¶ 34. After Plaintiff had been detained for approximately 90 minutes, several federal officers searched her vehicle. *Id.* ¶ 36. Several MPs finally escorted her off the base after about two hours of roadside detention. *Id.* ¶¶ 38-39.

On those facts, Plaintiff clearly pleads intentional confinement without consent "by means of physical force, threat of force or of arrest, confinement by physical barriers, or by means of any other form of unreasonable duress," for "an appreciable length of time, however short."[4] *Fermino v. Fedco, Inc*., 7 Cal. 4th 701, 715 (1994) (citations omitted) (noting that length of confinement "can be as brief as 15 minutes").

B. Plaintiff's confinement, which was both unjustified at its inception and unreasonably prolonged, was not "privileged" under state law.

As a threshold matter, the government is mistaken that the Court should apply "federal law to determine whether an arrest by a federal officer was legally justified and hence privileged." U.S. Mem. at 20:1-2 (quoting *Rhoden v. United States*, 55 F.3d 428, 431 (9th Cir. 1995)). As the Ninth Circuit has held, Supreme Court precedent implicitly overruled *Rhoden* by holding that "the United States' liability under the FTCA is to be based on the state law liability of a *private party*." *Tekle v. United States*, 511 F.3d 839, 851 & 852 n.11 (9th Cir. 2006) (emphasis added) (citing *United States v. Olson*, 546 U.S. 43, 44-47 (2005) and noting "*Rhoden* was decided well before we had the guidance of *Olson*."). Therefore, this Court must apply state law "regarding the liability of a private person for false arrest."[5] *Tekle,* 511 F.3d at 854.

Under California law, a private person may arrest another individual under three circumstances: (1) "For a public offense committed or attempted in his presence," (2) "When the person arrested has committed a felony, although not in his presence," or (3) "When a felony has been in fact committed, and he has reasonable cause for believing the person arrested to have

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[4] "The only mental state required to be shown to prove false imprisonment is the intent to confine, or to create a similar intrusion," not "intent or motive to cause harm." *Fermino*, 7 Cal. 4th at 716.

[5] False arrest and false imprisonment are effectively synonymous. *Collins v. City & County of San Francisco,* 50 Cal. App. 3d 671, 673 (1975) (false arrest is "one way of committing a false imprisonment, and they are distinguishable only in terminology").

1 committed it." *Id.* (quoting Cal. Pen. Code § 837). On the facts pleaded, with all reasonable
2 inferences drawn in Plaintiff's favor, none of those circumstances exist and therefore the
3 detention was unjustified.

4 First, the facts show that Plaintiff did not commit a "public offense" in the presence of
5 anyone involved in her confinement. The complaint states that Plaintiff was not speeding when
6 she was pulled over. Compl. ¶ 29. Moreover, the MP who stopped her told her that "someone
7 called to tell him that she was speeding." *Id.* ¶ 29. That does not justify detention under
8 applicable state law. *Hamburg v. Wal-Mart Stores, Inc*., 116 Cal. App. 4th 497, 512 (2004)
9 (private citizen may arrest for misdemeanor "*only when the offense has actually been committed*
10 *or attempted in his presence,*" and "mere fact that the private person has reasonable cause to
11 believe a misdemeanor offense has been committed or attempted in his presence is not enough")
12 (emphasis in original). Accordingly, Plaintiff's detention could not have been justified based on
13 the allegation that she was speeding.

14 Second, the government cannot show that the facts pleaded, with reasonable inferences in
15 Plaintiff's favor, establish that "a felony has in fact been committed," as necessary to justify arrest
16 for an alleged felony under section 837. *People v. Piorkowski*, 41 Cal. App. 3d 324, 328 (1974).
17 The only purported felony suggested by the government is impersonation of an NCIS officer.
18 U.S. Mem. at 21:7-11. However, as Plaintiff expressly states, the claim that Plaintiff presented
19 NCIS credentials at the Camp Pendleton gate, or that Agent Martin received a call to that effect,
20 was a "false allegation." Compl. ¶ 37. Moreover, as Plaintiff has already explained and the
21 Court has implicitly accepted by denying the previous motion to dismiss, the "facts pleaded
22 justify a reasonable inference that Martin fabricated the alleged cause for detaining Plaintiff and
23 thus no reasonable suspicion or probable cause existed." Opp. to Mot. to Dism. (Doc. No. 33) at
24 10:1-2. It is implausible at best that Plaintiff presented NCIS credentials to the gate MP when she
25 had previously entered the base hundreds of times, Compl. ¶ 28, and needed only to present her
26 driver's license to enter the base. Ex. A to Def. G. Martin's Mot. to Dismiss (Doc. 31-2) at 6.
27 Likewise, if the agents genuinely had reasonable cause to believe that Plaintiff committed a
28 felony, they would have held her for detention by civilian law enforcement. *United States v.*

Banks, 539 F.2d 14, 16 n.2 (9th Cir. 1976) ("Since they are not subject to the UCMJ, civilians usually are turned over to civil authorities" when detained for offenses on base). Instead, they allowed her to leave the base, discrediting the government's position. Compl. ¶ 38. Accordingly, taking the facts pleaded as true and drawing all inferences in Plaintiff's favor, Plaintiff did not in fact commit a felony and her confinement by the roadside was not "privileged" under section 837.[6]

Even if the gate MP had reported that Plaintiff presented NCIS credentials, that mere allegation would be clearly insufficient to justify her confinement. Such a report would not necessarily constitute reasonable cause to believe that Plaintiff impersonated a federal officer, let alone that she "in fact" did so. *Cf. Motley v. Parks*, 432 F.3d 1072, 1081 (9th Cir. 2005) (officers "have an ongoing duty to make appropriate inquiries regarding the facts received or to further investigate if insufficient details are relayed"); *Arpin v. Santa Clara Valley Transp. Agency,* 261 F.3d 912, 925 (9th Cir. 2001) ("officers may not solely rely on the claim of a citizen witness that he was a victim of a crime, but must independently investigate the basis of the witness' knowledge or interview other witnesses."); *United States v. Kyllo*, 37 F.3d 526, 529 (9th Cir. 1994) ("the fact that [officer] relied on information received from another law enforcement officer does not *ipso facto* mean that [officer's] omissions were not reckless"); *Fuller v. M.G. Jewelry*, 950 F.2d 1437, 1444 (9th Cir. 1991) ("officers had a duty to conduct an investigation into the basis of the witness' report"). Moreover, the fact that Plaintiff was never properly charged with impersonating an NCIS officer despite a purported "investigation" lasting more than

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[6] The burden-shifting framework of false imprisonment further illustrates exactly why it would be inappropriate to dismiss this claim at this stage of the litigation. "In a civil action for false arrest, once a plaintiff establishes an arrest without a warrant, followed by imprisonment and damages, the burden shifts to the defendant to show a justification for the arrest." *Levin v. United Airlines*, 158 Cal. App. 4th 1002, 1018 (2008). The United States will have its opportunity to seek to meet its burden of justifying Plaintiff's confinement on July 23, 2009 at summary judgment and/or trial. But on this motion to dismiss, particularly on a record bereft of evidence sufficient to show that Plaintiff actually committed a felony, the United States cannot meet its burden. This burden-shifting rule is necessary because "justification is a matter which ordinarily lies peculiarly within the knowledge of the defendant," meaning that "[t]he plaintiff would encounter almost insurmountable practical problems in attempting to prove the negative proposition of the nonexistence of any justification." *Cervantez v. J.C. Penney Co.*, 24 Cal.3d 579, 592 (1979).

a year and occupying the resources of multiple federal officers significantly undermines any claim that plaintiff actually committed that crime.[7] In sum, the facts pleaded justify a reasonable inference that Plaintiff did not in fact impersonate an NCIS officer, and therefore her detention was without lawful privilege because it was unjustified at its inception.

Even assuming the detention was justified at its inception, the agents unjustifiably detained Plaintiff for "approximately two hours," Compl. ¶ 39, far beyond the time reasonably related to any initial justification. Even if a detention is initially justified, an "action for false imprisonment may be maintained if the defendant unlawfully detains the [plaintiff] for an unreasonable period of time." *Lincoln v. Grazer*, 163 Cal.App.2d 758, 761 (1958). Regardless of any initial justification, the agents unreasonably prolonged Plaintiff's detention by holding her for two hours while haranguing her about her "credentials," demanding consent to search, and declaring "a search warrant for her vehicle and person was on its way." Compl. ¶ 34.

As the government contends, only probable cause, not consent, is needed "to justify a warrantless search of the vehicle." U.S. Mem. at 20:12. If the agents genuinely had probable cause to search Plaintiff's vehicle, they could have done so immediately, without detaining her in prolonged and humiliating circumstances. Indeed, the search itself took no more than 15 minutes, after which Plaintiff was allowed to leave. Compl. ¶¶ 36, 38-39 (search began after plaintiff was detained one hour and 45 minutes, and entire detention lasted about two hours). Therefore, even if Plaintiff's detention was initially justified, it should have lasted at most only fifteen minutes and was therefore unreasonably prolonged beyond that time. *Cf. United States v. Sharpe,* 470 U.S. 675, 686 (1985) ("In assessing whether a detention is too long in duration to be justified as

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[7] The government has admitted that the violation notice "served" by Agent Martin had no legal force. U.S. Mem. at 17. The lack of any charge is striking in light of the length and nature of the "investigation." In October 2010, fifteen months after the alleged incident, the government asserted that the "investigation" of Plaintiff was ongoing. Defs.' Opp. to Pl.'s Mot. for a Prelim. Ijunction (Doc. No. 16) at 10:2-3. Even when the "investigation" had been ongoing for only a few months, a military judge expressed skepticism that it needed to be prolonged given the nature of the charge. Ex. B to Def. G. Martin's Mot. to Dismiss (Doc. No. 31-2) at 36 ("I mean, the allegation is that she drove through the front gate and she told PFC Binatz that she was an NCIS investigator. What could possibly by [sic] out there … She either did or she didn't.").

1 an investigative stop, we consider it appropriate to examine whether the police diligently pursued
2 a means of investigation that was likely to confirm or dispel their suspicions quickly"); *United*
3 *States v. Charrington*, 285 F. Supp. 2d 1063, 1072 (S.D. Ohio 2003) (MP's "prolonged
4 detention" of civilian at base "was unreasonably long" because "it was absolutely unnecessary to
5 detain him as long as he did").

6 In any event, because this is a motion to dismiss, the Court need not decide whether
7 Plaintiff in fact committed a felony or whether probable cause in fact existed. That is an issue for
8 summary judgment or trial, after discovery. The issue now is whether Plaintiff states a claim.
9 For the reasons stated above, the facts pleaded, taken as true, plausibly suggest that Plaintiff was
10 unlawfully subjected to false imprisonment, because the detention was unjustified at its inception
11 or unreasonably prolonged beyond any legitimate time.

12 **II. PLAINTIFF HAS STATED A CLAIM FOR BATTERY.**

13 Agent Martin clearly committed the tort of battery against Plaintiff when he struck her
14 with the "Violation Notice" after she refused to accept it from him. "The elements of civil battery
15 are: (1) defendant intentionally performed an act that resulted in a harmful or offensive contact
16 with the plaintiff's person; (2) plaintiff did not consent to the contact; and (3) the harmful or
17 offensive contact caused injury, damage, loss or harm to plaintiff." *Brown v. Ransweiler*, 171
18 Cal. App. 4th 516, 526-27 (2009). "A harmful contact, intentionally done is the essence of a
19 battery." *Ashcraft v. King*, 228 Cal. App. 3d 604, 611 (1991) (citations omitted). The facts
20 pleaded establish all elements of battery.

21 **A. Agent Martin intentionally propelled the violation notice towards Plaintiff,**
22 **striking her in a manner that harmed and offended her.**

23 As a threshold matter, the intent element of Plaintiff's battery claim requires only that
24 Agent Martin intended to perform the act of throwing the "Violation Notice" at her, not that he
25 specifically intended to harm or offend her. For both civil and criminal purposes, a "person need
26 not have an intent to injure to commit a battery. He only needs to intend to commit the act."
27 *People v. Mansfield*, 200 Cal. App. 3d 82, 88 (1988); *see also Lopez v. Surchia*, 112 Cal. App. 2d
28 314, 318 (1952) ("If the cause of action is an alleged battery committed in the performance of an

unlawful or wrongful act, the intent of the wrongdoer to injure is immaterial."). The government is therefore mistaken that Plaintiff's battery claim requires that "a defendant must intend to harm or offend the victim." U.S. Mem. at 13:5 (quoting *Austin B. v. Escondido Union Sch. Dist.*, 149 Cal.App.4th 860, 872 (2007)). In *Austin B.*, the battery claim arose in "the unique situation of a teacher-pupil setting, where it is undisputed that some touching was necessary to control and guide" the students. 149 Cal. App. 4th at 873. As the court noted, "teaching autistic children by touching and guiding them is not unlawful, and students, by attending school, consent to some touching necessary to control them and protect both their safety and the safety of others." *Id.* In that unique context, "both an intent to harm and the reasonableness of the touching were at issue," because teachers are specifically authorized to use reasonable force to maintain physical control of students when necessary. *Id.* at 873-74. The "language of an opinion must be construed with reference to the facts presented by the case, and the positive authority of a decision is coextensive only with such facts." *Brown v. Kelly Broadcasting Co.*, 48 Cal.3d 711, 734-35 (1989). The government "cannot find shelter under a rule announced in a decision that is inapplicable to a different factual situation." *Harris v. Capital Growth Investors XIV*, 52 Cal.3d 1142, 1157 (1991). Accordingly, the language of *Austin B.* applies only to its unique facts and does not extend to this case.

On the facts pleaded, Agent Martin clearly intended to commit the act of throwing the Violation Notice, which resulted in the document striking her in the face. Compl. ¶ 49. For purposes of tort liability, "California law recognizes that every person is presumed to intend the natural and probable consequences of his acts." *Gomez v. Acquistapace*, 50 Cal. App. 4th 740, 746 (1996). While the government is free to argue at trial that Agent Martin "did not mean for the notice to fly into Plaintiff's face," U.S. Mem. at 13:25, on this motion the Court must infer in Plaintiff's favor that he intended to throw the document at Plaintiff, resulting in a harmful or offensive contact sufficient to establish battery when it struck her in the face. *Barouh v. Haberman*, 26 Cal. App. 4th 40, 46 n.5 (1994) ("'the least touching of another in anger' or the laying of hands in a rude or insolent manner may amount to a battery"); *Mansfield*, 200 Cal. App. 3d at 88 ("It has long been established, both in tort and criminal law, that 'the least touching' may

1 constitute battery"); *Inter-Insurance Exchange v. Lopez*, 238 Cal. App. 2d 441, 445 (1965)
2 (recognizing that battery can arise from "contact brought about by an object or substance thrown
3 or launched or set in motion by a defendant").

4 Even assuming Plaintiff must show specific intent to harm or offend, the facts pleaded
5 justify a reasonable inference that Agent Martin intended to harm or offend Plaintiff by throwing
6 the document at her face. As pleaded in the complaint, he rang her doorbell and banged on her
7 door in the early morning hours, after which he threw the document at her with sufficient force
8 and direction to strike her in the face and walked away muttering, "You've been served" without
9 apologizing or otherwise accounting for his behavior. Compl. ¶ 49. A reasonable inference in
10 Plaintiff's favor is therefore that Agent Martin specifically intended to harm or offend Plaintiff by
11 propelling the document at her with sufficient force to strike her in the face. Intent to harm or
12 offend can also be inferred from the admitted fact that the "notice has no force and effect of law,"
13 U.S. Mem. at 17:22, and was therefore fraudulent. Taken as a whole, the facts pleaded in the
14 complaint are not consistent with legitimate behavior and justify a reasonable inference that
15 Agent Martin intended to harm or offend Plaintiff.

16 **B. Plaintiff did not consent to being struck by the violation notice.**

17 The United States does not contend that Plaintiff consented to being struck by the
18 violation notice. Indeed, she did not accept the violation notice from Agent Martin before he
19 threw it at her. Compl. ¶ 51. Accordingly, Plaintiff satisfies the second element of battery.

20 **C. Being struck with the violation notice caused Plaintiff emotional harm.**

21 The United States does not contend that Plaintiff was not harmed by being struck with the
22 violation notice. In any event, the facts pleaded demonstrate sufficient injury, damage, loss or
23 harm. As stated in the Complaint, the actions of Agent Martin and Doe 1 "terrified" Plaintiff.
24 Compl. ¶ 51. It is a reasonable inference from this allegation that being struck in the face by the
25 violation notice contributed to Plaintiff's trauma. This type of emotional harm is sufficient to
26 complete the tort of battery. *See People v. Hernandez*, 200 Cal. App. 4th 1000, 1006 (2011) (to
27 cause battery, an act "need not be violent or severe, and it need not cause bodily harm or pain");
28 *Friedman Prof'l Mgmt. Co., Inc. v. Norcal Mut. Ins. Co.,* 120 Cal. App. 4th 17, 29 (2004) (the

1 harm from the battery [and other] torts was a harm to [plaintiff]'s *dignitary* and *privacy* interests
2 in being touched by a person that she never consented to touch her") (emphasis in original);
3 *People v. Collins*, 10 Cal. App. 4th 690, 694 n.2 (1992) (battery includes "any [unlawful]
4 application of physical force against the person of another, even though it causes no pain or
5 bodily harm or leaves no mark and even though only the feelings of such person are injured by
6 the act"). Accordingly, Plaintiff satisfies the third element of battery.

7 **III. PLAINTIFF STATES A CLAIM FOR ABUSE OF PROCESS**.

8 The essence of "'abuse of process' lies in the misuse of the power of the court; it is an act
9 done in the name of the court and under its authority for the purpose of perpetrating an injustice."
10 *Meadows v. Bakersfield Sav. & Loan Ass'n*, 250 Cal. App. 2d 749, 753 (1967). "If process, either
11 civil or criminal, is wilfully made use of for a purpose not justified by the law, this is abuse for
12 which an action will lie." *Spellens v. Spellens*, 49 Cal. 2d 210, 231 (1957). That is exactly what
13 happened here. Agent Martin misused the power of this Court by serving Plaintiff with a
14 fraudulent violation notice that "has no force or effect of law," U.S. Mem. at 17:22, for the
15 purpose of intimidating and harassing her. Plaintiff therefore states a claim for abuse of process.

16 The Violation Notice constituted process of this Court. "Process" is the "means of
17 compelling a defendant to appear in court" or the "means whereby a court compels compliance
18 with its demands." *Meadows*, 250 Cal. App. 2d at 753. Under federal rules, a violation notice is
19 used to initiate prosecution for petty offenses. Fed. R. Crim. P. 58(b)(1). A violation notice is
20 "process" because it is the functional equivalent of an indictment or information for petty
21 offenses and compels appearance in court for adjudication. *United States v. Moore,* 586 F.2d
22 1029, 1031 (4th Cir. 1978); *United States v. Johnson,* 131 F. Supp. 2d 721, 723 (D. Md. 2001).

23 A violation notice remains "process" regardless of whether it is issued by or obtained
24 from the Court. Unlike an indictment, information, or complaint, "a violation notice is completed
25 by a law enforcement officer alone, without the oversight of a magistrate." *United States v. Boyd*,
26 214 F.3d 1052, 1057 (9th Cir. 2000); *see also* Fed. R. Crim. P. 3 (complaint "made under oath to
27 before a magistrate judge"); Fed. R. Crim. P. 7(c) (indictment or information "must be signed by
28 an attorney for the government"). It requires no "review of the charges by a person or agency

independent of the citing law enforcement officer." *United States v. Dubiel*, 367 F. Supp. 2d 822, 826 (D. Md. 2005). On the facts pleaded, Agent Martin abused the power of the Court entrusted to him as a law enforcement officer by serving Plaintiff with a fraudulent Violation Notice for the purpose of harassing and intimidating her, and thus made "improper use of the machinery of the legal system for an ulterior motive." U.S. Mem. at 16:23-24.

Plaintiff therefore states a claim for abuse of process because Agent Martin used "the court's process for a purpose other than that for which the process was designed." *Rusheen v. Cohen*, 37 Cal. 4th 1048, 1056 (2006). A violation notice is designed to bring individuals properly charged with petty offenses before this Court for adjudication. Instead, Agent Martin misused a violation notice to intimidate and harass Plaintiff, as part of a campaign of retaliation. Therefore, he acted with "an ulterior motive in using the process" and "committed a willful act in the use of the process not proper in the regular conduct of the proceedings." *Id.* Nothing more is needed to state a claim for abuse of process.[8]

The government makes the remarkable contention that the act of serving a fraudulent violation notice is itself a defense to a cause of action arising from that act, because the violation notice "has no force and effect of law." U.S. Mem. at 17:22. To state this argument effectively refutes it. Moreover, nothing cited by the government supports its position that the commencement of litigation is an essential element of abuse of process. Though the California Supreme Court has explained that the term "process" is not "limited to the strict sense of the term" and instead "has been interpreted broadly to encompass the entire range of 'procedures' incident to litigation," *Barquis v. Merchants Collection Ass'n*, 7 Cal. 3d 94, 104 n.4 (1972), the Court did not hold that the filing of litigation is essential to the tort of abuse of process. Instead, it simply noted that "process" can extend beyond the strict definition of compulsion to appear in court. It would be remarkable if language intended to protect plaintiffs by expanding the definition of "process" somehow became a shield for the wrongful conduct of serving a

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[8] To the extent malice is necessary, it "may be inferred from the wilful abuse of the process." *Charles J. Vacanti, M.D., Inc. v. State Comp. Ins. Fund*, 24 Cal. 4th 800, 824 (2001).

fraudulent violation notice. This case represents abuse of process in the classic sense of the term, because Agent Martin willfully misused the process of this Court to harass and intimidate Plaintiff with a groundless charge.

Two additional points undermine the government's position. First, the unlawful pursuit of litigation constitutes the separate tort of malicious prosecution. *Oren Royal Oaks Venture v. Greenberg, Bernhard, Weiss & Karma, Inc.,* 42 Cal. 3d 1157, 1169 (1986). Second, communicative acts taken during otherwise proper litigation are protected by the litigation privilege.[9] *Rusheen*, 37 Cal.4th at 1058. Therefore, to hold that the existence of litigation is an element of abuse of process would render the claim either (a) redundant to malicious prosecution or (b) effectively void as barred by the litigation privilege. Neither result is proper. Instead, abuse of process exists whenever a defendant willfully abuses the machinery of the legal system, for example, by serving what amounts to a fraudulent summons, as Agent Martin did in this case, regardless of whether a lawsuit was actually filed. If an abuse of process claim arises from the fraudulent failure to serve an underlying action, *Booker v. Rountree*, 155 Cal. App. 4th 1366, 1373 (2007), it certainly exists when Agent Martin fraudulently misused legal process to harass and intimidate Plaintiff. To hold otherwise would effectively immunize the fraudulent use of legal process to retaliate against Plaintiff.

Finally, the government is mistaken that there was no "willful misuse of the process" or "act or threat not authorized by the process." U.S. Mem. at 18:8-11. On the facts pleaded, Agent Martin willfully misused a Violation Notice, which cannot be used to charge a felony, to wrongfully threaten Plaintiff with a groundless felony charge in order to harass and intimidate her and prevent her from effectively continuing her work as a defense investigator. That is certainly

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[9] Because the fraudulent violation notice was admittedly "not 'incident to litigation,'" U.S. Mem. at 18:2-3, Plaintiff's abuse of process claim is not barred by the litigation privilege, which the government has properly not raised because it applies only to communications with "some relation to judicial proceedings." *Rusheen*, 37 Cal. 4th at 1057. "A prelitigation communication is privileged only when it relates to litigation that is contemplated in good faith and under serious consideration." *Action Apartment Ass'n v. City of Santa Monica*, 41 Cal. 4th 1232, 1251 (2007). Taken as true, the complaint establishes that prosecution of Plaintiff was never contemplated in good faith or under serious consideration, and therefore the litigation privilege does not apply.

1 "a form of extortion," U.S. Mem. at 18:12, if any is needed, sufficient to establish abuse of
2 process. For all these reasons, Plaintiff states a claim for abuse of process.

3 **IV. PLAINTIFF HAS STATED A CLAIM FOR INTENTIONAL**
4 **INFLICTION OF EMOTIONAL DISTRESS.**

5 To state a claim for intentional infliction of emotional distress (IIED), a plaintiff must
6 plead facts showing (1) extreme and outrageous conduct by the defendant with the intention of
7 causing, or reckless disregard of the probability of causing, emotional distress; (2) the plaintiff's
8 suffering severe or extreme emotional distress; and (3) actual and proximate causation of the
9 emotional distress by the defendant's outrageous conduct. *Hughes v. Pair*, 46 Cal. 4th 1035, 1050
10 (2009) (quoting *Potter v. Firestone Tire & Rubber Co*., 6 Cal. 4th 965, 1001 (1993)). Defendants'
11 campaign of harassment and intimidation against Plaintiff and its effects on her easily make out a
12 claim for IIED.

13 **A. Defendants' prolonged campaign of harassment and intimidation constitutes**
14 **extreme and outrageous conduct that at the very least recklessly disregarded the probability of causing Plaintiff emotional distress.**

15 The defendants' conduct was outrageous because it consisted of a persistent course of
16 harassment and constituted an abuse of authority. Their campaign of harassment and intimidation
17 against Plaintiff easily constitutes outrageous conduct on its own. Outrageous conduct is that
18 which "exceed[s] all bounds usually tolerated by decent society" and is "of a nature which is
19 especially calculated to cause, and does cause, mental distress of a very serious kind."
20 *Christensen v. Superior Court*, 54 Cal. 3d 868, 905 (1991) (emphasis in original). The year-long
21 campaign of harassment against Plaintiff constitutes outrageous conduct. Defendants have
22 abused their authority as law enforcement officers to pursue unlawful retaliation against Plaintiff,
23 including multiple, unwarranted vehicle stops, Compl. ¶¶ 27-29, following her to a restaurant and
24 attempting to follow her home, *id.* ¶ 42, informing disinterested third parties that they were
25 investigating her, *id.* ¶ 45, surveilling her countless times at her house, *id.* ¶¶ 47, 52, falsely
26 suggesting they were at her house to serve her with process, and breaking a window at her home,
27 *id.* ¶¶ 49, 51. This was all done while the Defendants purported to investigate a nonsensical
28

allegation that she presented false credentials to gain entry to Camp Pendleton, where a simple driver's license is all that is necessary. *Id.* ¶¶ 28, 37.

Courts have found similar conduct to be outrageous. The plaintiff in Fletcher v. W. Nat'l Life Ins. Co. was sent false and threatening letters by his insurance company and further threatened with legal action, while they denied him his benefits and attempted to coerce him into a settlement, over the course of over six months. 10 Cal. App. 3d 376, 392, 397-98 (1970). The court cited this "concerted course of conduct" in bad faith, noting that even the defendants admitted that their behavior was outrageous. *Id.* at 392. As in *Fletcher*, Defendants' actions in this case, taking place regularly over the period of a year, demonstrate a "concerted course of conduct" that is outrageous and more than plausibly states a claim for relief. *See* 10 Cal. App. 3d at 392, 398. Similarly, in *Newby v. Alto Riviera Apartments*, the plaintiff was subjected to insults, threats and shouting from her landlord, which the court called "a course of harassing, humiliating, and intimidating conduct" and was an aggravating circumstance that elevated the conduct from "mere insulting language" to outrageous conduct. 60 Cal. App. 3d 288, 298 (1976) (disapproved of on other grounds by *Marina Point, Ltd. v. Wolfson*, 30 Cal. 3d 721 (1982)). Defendants' actions are even more extreme than in *Newby*, because in this case, Plaintiff was subjected to much more than "mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities." *See Hughes*, 46 Cal. 4th at 1051. Defendants' conduct clearly went far beyond such insignificant actions when they conducted a campaign of harassment, humiliation and intimidation over an extended time. *See Newby*, 60 Cal. App. 3d at 298.

The defendants' actions were further outrageous because they constituted an abuse of authority. *See Hailey v. California Physicians' Serv.*, 158 Cal. App. 4th 452, 474 (2007) (conduct is outrageous where there is "abuse by the actor of a position, or a relation with the other, which gives him actual or apparent authority over the other, or power to affect his interests") (citations omitted). Defendants hold positions of authority as law enforcement officers for the United States Navy, which grant them great power to affect the interests of others. *See* Compl.¶¶ 9, 13, 15. Defendants have abused that authority by using the tools and practices of their profession to pursue their personal vendetta against Plaintiff. *Id.* ¶ 56. In *Crain v. Krehbiel*, the plaintiff, an

1 informant in a major marijuana seizure case, was subjected to threats, intimidation and
2 misconduct by DEA agents when he initially refused to sign a written statement for fear his
3 identity would be exposed. 443 F. Supp. 202, 206 (N.D. Cal. 1977). The court found that the
4 agents' "abuse of their official authority" was a compounding factor in establishing the element
5 of outrageous conduct. *Id.* at 213. The court expressly found that "law enforcement officers
6 require broad discretion" in some of their activities, yet still found the alleged conduct to be
7 outrageous and refused to dismiss the claim. *Id.* Similarly, Defendants abused their law
8 enforcement authority in order to intimidate and harass Plaintiff. Compl. ¶ 56. At the very least,
9 this abuse of authority compounds the outrageousness of their actions. *See Crain*, 443 F. Supp. at
10 213.

11 **B. The defendants' conduct has caused Plaintiff severe emotional distress.**

12 The facts show that Plaintiff has suffered severe emotional distress as a direct result of
13 Defendants' conduct. "[A]ny highly unpleasant mental reaction such as fright, grief, shame,
14 humiliation, embarrassment, anger, chagrin, disappointment or worry," constitutes severe
15 emotional distress. *Fletcher*, 10 Cal. App. 3d at 397; *see also Hailey*, 158 Cal. App. 4th at 477
16 (holding that "[h]eadaches, insomnia, anxiety, [and] irritability" may constitute severe emotional
17 distress) (citations omitted).

18 In this case, Plaintiff has alleged severe emotional distress in a manner recognized by
19 California law. Plaintiff was subjected to ongoing, outrageous conduct by Defendants, causing
20 this severe emotional distress. Plaintiff was humiliated when Defendants informed uninvolved
21 parties that she was being investigated and held her on the side of the road for two hours of
22 repetitive questioning. Compl. ¶ 39. She has been intimidated by their aggressive conduct,
23 including breaking a window at her home and returning to bang on her door again after they had
24 already purportedly executed the fraudulent "service" that brought them there. *Id.* ¶ 51. Plaintiff
25 is constantly fearful after being followed around town and having her privacy invaded by the
26 defendants' surveillance of her at her home. *Id.* ¶¶ 47, 52. Under these circumstances, severe
27 emotional distress is not only entirely reasonable, but also substantially certain to occur.
28

1 The long duration of Plaintiff's suffering as a result of Defendants' campaign shows that
2 her suffering was severe. *See Fletcher*, 10 Cal. App. 3d at 397. In *Fletcher*, the plaintiff had
3 been under investigation by his disability insurer on false charges. *Id.* at 397-98. After over six
4 months of harassment and implied threats of legal action against him, the plaintiff filed suit and
5 obtained a favorable verdict on his testimony of fright, worry, and upset. *Id.* Plaintiff was
6 subjected to an even more prolonged course of outrageous conduct in this case. Defendants
7 harassed her for over a year, causing humiliation, fright and intimidation. Similarly, in *Sanchez-*
8 *Corea v. Bank of Am.*, the California Supreme Court held a bank's prolonged harassment and
9 unethical practices that resulted in "problems of alcoholism, severe headaches, insomnia, tension
10 and anxiety" were "substantial evidence to support the jury's" finding of intentional infliction of
11 emotional distress. 38 Cal. 3d 892, 908-09 (1985). Consistent with these cases, Plaintiff easily
12 states a claim for severe emotional distress.
13 *Hughes* and *Wong*, U.S. Mem. at 11:14-16, 12:5-7, are of no help to the United States
14 because, in contrast to the facts of this case, those cases concerned isolated incidents that could
15 not reasonably be expected to produce severe suffering. Where the defendant in *Hughes* made
16 several offensive comments to the plaintiff on one day, the court held that the plaintiff's
17 "discomfort, worry, anxiety, upset stomach, concern, and agitation as the result of" this limited
18 and brief conduct were not sufficient to constitute severe distress. 46 Cal. 4th at 1051. Similarly,
19 in *Wong*, the plaintiff was not able to state a claim for IIED based on a single insulting post on
20 Yelp, which she alleged "was very emotionally upsetting to me, and has caused me to lose sleep,
21 have stomach upset and generalized anxiety." *Wong v. Jing*, 189 Cal. App. 4th 1354, 1376
22 (2010). In both cases, the outrageous conduct was an isolated incident; therefore it was not of
23 "such substantial quality or enduring quality that no reasonable [person] in civilized society
24 should be expected to endure it." *See Hughes*, 46 Cal. 4th at 1051 (citations omitted). Unlike
25 *Hughes* and *Wong*, Plaintiff did not suffer just one isolated incident of harassment. Defendants'
26 ongoing and pervasive conduct over the course of a year could reasonably be expected to result in
27 severe humiliation, intimidation, fright and helplessness. This kind of severe emotional distress is
28 neither trivial nor transient. *See id.*

1 *Fernandez v. United States*, 2012 WL 202775 (S.D. Cal.), similarly provides no support to
2 the government. In that case, the Court found that federal officers were engaged in "legitimate
3 investigative conduct" which was "within the bounds of that tolerated in a civilized community
4 because it satisfies constitutional scrutiny." *Id*. at *3. By contrast, the Court has already
5 determined that Plaintiff stated a claim that the "investigation" against her is retaliatory and thus
6 unconstitutional.

7 Taking the stated facts and all reasonable inferences in Plaintiff's favor, Plaintiff has
8 stated a plausible claim for relief for intentional infliction of emotional distress.

9 **V. PLAINTIFF STATES A CLAIM FOR MALICIOUS TRESPASS.**

10 Plaintiff has stated a cause of action for malicious trespass. "The essence of the cause of
11 action for trespass is an 'unauthorized entry' onto the land of another." *Miller v. NBC*, 187 Cal.
12 App. 3d 1463, 1480 (1986). The facts show that Agent Martin and Doe 1 entered Plaintiff's land
13 on May 3, 2010 at around 7 a.m. in order to "serve" her with the apparently fraudulent violation
14 notice. There is nothing in the facts to indicate that Plaintiff consented to their entry onto the
15 doorstep of her home for the purpose of terrorizing her with a falsified criminal charge. *Cf.*
16 *Madruga v. County of Riverside*, 431 F. Supp. 2d 1049, 1055 (C.D. Cal. 2005) (describing
17 curtilege of home as an area "against which intrusion from governmental agents, much like the
18 burglars of old, is sought to curb"); *Carey v. Brown*, 447 U.S. 455, 478-479 (1980) (Rehnquist, J.,
19 dissenting) ("Whether ... alone or accompanied by others ... there are few of us that would feel
20 comfortable knowing that a stranger lurks outside our home."). Accordingly, Plaintiff has stated
21 a claim for trespass.

22 The United States' argument regarding implied consent is unavailing because Agent
23 Martin and Doe 1 entered Plaintiff's property not with legitimate "business or courtesy or
24 information" nor with "honest intent," U.S. Mem. at 14:22-27, but rather to "serve" her with a
25 clearly improper violation notice in the course of their larger campaign of harassment and
26 intimidation against her.[10] "California does recognize a trespass claim where the defendant
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28 [10] These misdeeds make the trespass "malicious." "Every trespass upon real property imports an injury, for which the law gives nominal damages," *Davidson v. Devine*, 70 Cal. 519, 520 (1886),

exceeds the scope of the consent." *Baugh v. CBS*, 828 F. Supp. 745, 756 (N.D. Cal. 1993). Agent Martin and Doe 1 exceeded the scope of any implied consent to knock on her door to engage in illegitimate dealings with Plaintiff through their impermissible actions. *See Civic Western Corp. v. Zila Industries, Inc.*, 66 Cal. App. 3d 1, 17 (1977) ("A conditional or restricted consent to enter land creates a privilege to do so only in so far as the condition or restriction is complied with.") (quotation omitted); *Mangini v. Aerojet–General Corp*., 230 Cal. App. 3d 1125, 1141 (1991) ("A trespass may occur if the party, entering land pursuant to a limited consent, i.e., limited as to purpose or place, proceeds to exceed those limits by divergent conduct on the land of another.") (citations omitted). The United States cannot rely on any implied consent here given that such consent could not plausibly have included an invitation to those who would seek to harass and intimidate with a fraudulent criminal charge.

For similar reasons, the United States may not prevail on this claim by arguing that Agent Martin and Doe 1 had the "privilege" to enter Plaintiff's property to "execute" the process of the violation notice. U.S. Mem. at 16:8-9. As discussed above, *supra* section III, taking the facts in the light most favorable to Plaintiff and drawing all reasonable inferences from those facts in her favor, the violation notice was not "valid or fair on its face," as the United States argues, *id.* at 16:6. Rather, it was fraudulent and was "executed" for purposes of furthering Defendants' retaliatory campaign against Plaintiff. There can be no privilege for law enforcement officers to engage in illegitimate activities like these.

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but exemplary damages may be awarded where – as here – the trespass is accompanied by oppression, fraud, or malice. Cal. Civ. Code § 3294(a); *Haun v. Hyman*, 223 Cal. App. 2d 615, 620-621 (1963).

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CONCLUSION

For the foregoing reasons, the Court should deny the motion to dismiss the claims in Plaintiff's Supplemental Complaint, or in the alternative, grant leave to seek amendment of the Supplemental Complaint.

Dated: July 2, 2012 Respectfully submitted,

s/Sean Riordan
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Attorney for Plaintiff

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

CAROLYN MARTIN, Plaintiff, v. NAVAL CRIMINAL INVESTIGATIVE SERVICE ("NCIS") et al., Defendants.	**Case No. 10-CV-1879 WQH (NLS)** **PROOF OF SERVICE**

The undersigned hereby certifies that he is an employee for the ACLU Foundation of San Diego & Imperial Counties, P.O. Box 87131, San Diego, California 92138-7131; is a person of such age and discretion to be competent to serve papers; and that on **July 2, 2012**, he served copies of the following document(s):

1. **PLAINTIFF'S MEMORANDUM IN OPPOSITION TO MOTION TO DISMISS BY UNITED STATES**

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__X__ by transmitting via e-filing the document(s) listed above to the Case Management/ Electronic Case filing system, through which all counsel of record are deemed served.

_____ by transmitting via facsimile the document(s) listed above to the fax number(s) specified on this date before 5:00p.m.

_____ by placing the document(s) listed above in a sealed envelope with certified postage thereon fully prepaid, in the United States mail at San Diego, California addressed as set forth below.

_____ by placing the document(s) listed above in a sealed envelope with postage thereon fully Prepaid, and deposited with UPS Overnight at San Diego, California to the addressee(s) specified hereto.

______ by personally delivering the document(s) listed above to the person(s) at the address(es) set forth below.

I declare under penalty of perjury, under the laws of the State of California, that the foregoing is true and correct. Executed on **July 2, 2012**, at San Diego, California.

s/ Sean Riordan
Sean Riordan