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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

CAROLYN MARTIN,

Plaintiff,

vs.
NAVAL CRIMINAL INVESTIGATIVE
SERVICE, (“NCIS”); MARK D.
CLOOKIE, NCIS Director; WADE
JACOBSON, NCIS Acting Special Agent
in Charge; MARINE CORPS WEST
FIELD OFFICE; SEAN SULLIVAN,
Staff Judge Advocate; MARINE CORPS
RECRUIT DEPOT SAN DIEGO;
GERALD MARTIN, “Jerry,” NCIS
Special Agent; RAY MABUS, Secretary
of the Navy; JOHN DOES 1-7,

Defendants.

CASE NO. 10CV1879WQH(MDD)
ORDER

HAYES, Judge:

The matters before the Court are (1) the Motion to Dismiss Counts 1 and 2 filed by Defendant Gerald “Jerry” Martin, NCIS Special Agent (“Agent Martin”) (ECF No. 31) and (2) the Motion to Dismiss Counts 1, 3, and 4 filed by the United States on behalf of Defendant Naval Criminal Investigative Service (“NCIS”); Defendant Mark D. Clookie, in his official capacity as NCIS Director (“Clookie”); Defendant Wade Jacobson, in his official capacity as NCIS Acting Special Agent in Charge (“Jacobson”); Defendant Marine Corps West Field Office; Defendant Sean Sullivan, in his official capacity as Staff Judge Advocate (“Sullivan”);

1 Defendant Marine Corps Recruit Depot San Diego; and Defendant Ray Mabus, in his official
2 capacity as Secretary of the Navy (“Mabus”) (ECF No. 32).

3 **I. Background**

4 On September 9, 2010, Plaintiff initiated this action by filing a Complaint for
5 Declaratory and Injunctive Relief and Damages against Defendants NCIS, Clookie, Jacobson,
6 Marine Corps West Field Office, Sullivan, Marine Corps Recruit Depot San Diego, Agent
7 Martin, and Mabus. (ECF No. 1).

8 On December 17, 2010, Agent Martin filed a Motion to Dismiss Count 1, retaliation in
9 violation of the First Amendment, and Count 2, violation of the Fourth Amendment. (ECF No.
10 31). On that same day, the United States filed a Motion to Dismiss Count 1, retaliation in
11 violation of the First Amendment, Count 3, violation of the Fifth Amendment for unreasonable
12 interference with employment, and Count 4, violation of the First Amendment for interference
13 with right of access to court on behalf of Defendants NCIS, Clookie, Jacobson, Marine Corps
14 West Field Office, Sullivan, Marine Corps Recruit Depot San Diego, and Mabus. (ECF No.
15 32).

16 **II. Allegations of the Complaint**

17 Plaintiff has worked as a federal contract investigator for the past ten years performing
18 mostly personnel security investigations and, for the past four years, performing military
19 criminal defense investigations. Plaintiff has held a ‘Top Secret’ security clearance “with
20 multiple federal agencies” since 1984. (ECF No. 1 at ¶ 17).

21 Plaintiff has conducted approximately 40 criminal defense investigations in the military
22 justice system since 2006. As a criminal defense investigator, Plaintiff enters into a contract
23 “directly with the defendant but works at the direction of defense counsel.” *Id.* at ¶ 20. As a
24 criminal defense investigator, Plaintiff performs investigations including “interviewing the
25 accused and the witnesses, conducting an investigation of the scene of the alleged crime,
26 engaging in other background investigation, communicating with defense counsel about
27 [Plaintiff’s] findings, and writing reports for defense counsel.” *Id.* at ¶ 21. Plaintiff “often
28 testifies to bring evidence before the court [and] sometimes assists the defense in post-trial

1 matters” *Id.*

2 Plaintiff’s military criminal defense investigations “have enabled her clients’ attorneys
3 to undermine prosecution testimony in courts-martial in a number of cases.” *Id.* at ¶ 22. In
4 *U.S. v. Blundell*, Plaintiff discovered an individual who had not been interviewed by NCIS and
5 “[h]er client was subsequently found not guilty” *Id.* at ¶ 22(c). In *U.S. v. Been*, “[Plaintiff]
6 testified that NCIS agents’ interrogation violated an NCIS policy and regulations.” *Id.* at ¶
7 23(a). In *U.S. v. Maziarz*, “[Plaintiff] testified on security regulations and mandates within the
8 Department of Defense, explaining the difference between a security breach, violation, and
9 compromise.” *Id.* at ¶ 23(c).

10 “NCIS retaliated against [Plaintiff] because she is a zealous, effective defense
11 investigator.” *Id.* at ¶ 2. “Since around June 2009, military law enforcement personnel,
12 including NCIS Special Agent Martin, an unknown agent ... and various Military Police ...
13 have harassed and intimidated [Plaintiff] on account of her defense investigations.” *Id.* at ¶
14 26.

15 On June 29, 2009, Plaintiff’s vehicle was pulled over by four Military Police Officers
16 as she left the parking lot of the Legal Services Support Section-Echo in Camp Pendelton for
17 failing to display a California vehicle registration sticker. One of the Military Police
18 “acknowledged that her vehicle displayed a valid sticker ... demanded [Plaintiff’s]
19 identification and credentials and eventually issued a warning citation.” *Id.* at ¶ 27.

20 On June 30, 2009, Plaintiff’s vehicle was pulled over as she entered Camp Pendelton,
21 although she had “entered Camp Pendelton hundreds of times previously and had never
22 previously been pulled over,” and a Military Police Officer asked for her identification. *Id.* at
23 ¶ 28. “After [Plaintiff] produced her driver’s license from inside her Defense Intelligence
24 Agency credential holder, she was allowed to leave.” *Id.*

25 On July 23, 2009, a Military Police vehicle and an unmarked car pulled Plaintiff’s
26 vehicle over as she was leaving the Legal Services Support Section-Echo in Camp Pendelton.
27 The Military Police officer “initially said that he had clocked [Plaintiff] speeding, although he
28 later said someone had called to tell him that she was speeding.” *Id.* at ¶ 29. “It quickly

1 became clear to [Plaintiff] that the allegation of speeding was a pretext for interrogating
2 [Plaintiff] about her credentials.” *Id.* at ¶ 30. A man in the unmarked car demanded Plaintiff’s
3 Defense Intelligence Agency credentials. Two more Military Police vehicles arrived and a
4 Military Police Officer asked Plaintiff whether she had posed as an NCIS officer or used NCIS
5 credentials. The Military Police Officer asked for Plaintiff’s permission to search her person
6 and vehicle and Plaintiff “denied consent to search and requested an attorney.” *Id.* at ¶ 32.
7 The Military Police Officer “responded that she was not under arrest, but he told [Plaintiff] that
8 she was not free to leave and that he would not allow her to call an attorney.” *Id.* The Military
9 Police Officer made a phone call and five armed Military Police Officers “surrounded
10 [Plaintiff] on all sides.” *Id.* at ¶ 34. The Military Police Officer told Plaintiff that “a search
11 warrant for her vehicle and person was on its way.” *Id.* After being detained for one hour and
12 forty-five minutes, Plaintiff told the Military Police Officer that they could search her car.

13 “NCIS Special Agent Martin arrived soon after the search with another marked
14 [Military Police] vehicle.” *Id.* at ¶ 37. “Agent Martin told [Plaintiff] that he had received a
15 call from a [Military Police Officer] reporting that [Plaintiff] had presented NCIS credentials
16 at the Camp Pendelton gate.” *Id.* Plaintiff “denied this false allegation.” *Id.*

17 The Military Police Officer told Plaintiff that he had called the Defense Intelligence
18 Agency and they directed him to confiscate her Defense Intelligence Agency credentials. The
19 Military Police Officer took Plaintiff’s Defense Intelligence Agency credentials, which
20 Plaintiff used to perform her contract investigation work, over Plaintiff’s protest. The Military
21 Police Officer “turned the credentials over to Agent Martin.” *Id.* at ¶ 38. Plaintiff was
22 escorted off the military base after being detained for a total of two hours.

23 On July 27, 2009, Computer Science Corporation, the sponsoring agent for Plaintiff’s
24 Customs and Border Patrol credentials, which Plaintiff used to perform her contract
25 investigation work, recalled Plaintiff’s credentials. Plaintiff “supports herself through her
26 contract investigation work and a major source of her income was suddenly cut off with the
27 recall of her [Customs and Border Patrol] credentials.” *Id.* at ¶ 41. Prior to the recall of her
28 Customs and Border Patrol credentials, contracts from the Customs and Border Patrol

1 constituted the “vast majority” of her personnel security investigation work. *Id.* “[Plaintiff]
2 now must rely for income on military criminal defense investigations[, but they] typically
3 provide less regular and constant work than do [personnel security investigations].” *Id.*

4 On August 4, 2009, the Military Police Officer who had previously detained Plaintiff
5 on July 23, followed Plaintiff’s vehicle out of a restaurant parking lot in Carlsbad, but Plaintiff
6 “made some unexpected turns” and the Military Police Officer “apparently lost sight of
7 [Plaintiff]” so he could not follow her home. *Id.* at ¶ 42.

8 On August 13, 2009, Plaintiff was in a courtroom in the Legal Services Support
9 Section-Echo in Camp Pendelton and a military prosecutor told her that “an investigator was
10 looking for her” and handed her a piece of paper with the initials of the Office of Personnel
11 Management and the name “Scot Rezendes” written on it. *Id.* at ¶ 43.

12 On August 17, 2009, the California Bureau of Security and Investigative Services sent
13 Plaintiff a cease and desist letter ordering her to stop operating as a private investigator without
14 a state license although it had determined in 2007 that Plaintiff was not subject to state
15 licensing requirements. As a result of a later unrelated subpoena of records from the California
16 Bureau of Security and Investigative Services, Plaintiff learned that “Special Agent Martin
17 [had] informed [the Bureau of Security and Investigative Services] that NCIS was investigating
18 [Plaintiff] for impersonating a federal officer.” *Id.* at ¶ 45.

19 On October 27, 2009, NCIS Agent Gonzales followed Plaintiff from the Legal Services
20 Support Section-Echo to the brig in Camp Pendelton and questioned Plaintiff about her
21 credentials and her employer.

22 “NCIS agents have engaged in surveillance of [Plaintiff] and her home.” *Id.* at ¶ 47.
23 Plaintiff was also informed that photos of her face and her car were posted on the “‘be on the
24 lookout’ board at the NCIS Field Office at the Marine Corps Air Station Miramar [in early
25 2010].” *Id.* Surveillance of Plaintiff is ongoing.

26 On May 3, 2010, at 6:55 a.m., Special Agent Martin and the Military Police Officer who
27 had detained Plaintiff on July 23 appeared at Plaintiff’s home. After Plaintiff opened the door,
28 Agent Martin held a document and said “Carolyn, you need to take this.” *Id.* at ¶ 49. Plaintiff

1 refused and “Agent Martin threw the document at her, striking her in the face ... [and] muttered
2 ‘You’ve been served.’” *Id.* The document was a District Court Violation Notice completed
3 by Agent Martin charging Plaintiff with impersonating a federal officer on July 23, 2009 at
4 Camp Pendelton. The violation notice was defective and Plaintiff “has never received a court
5 date or other further notice regarding this purported charge.” *Id.* at ¶ 50.

6 “Approximately thirty minutes after this confrontation, Agent Martin and [the Military
7 Police Officer] returned” *Id.* at ¶ 51. Plaintiff did not answer the door and she
8 “subsequently noticed that the glass window in her front door had been broken by the
9 pounding of either or both Agent Martin and [the Military Police Officer].” *Id.*

10 Lt. Col. Sean Sullivan “recently informed the chief military defense counsel at [the
11 Marine Corps Recruit Depot] San Diego that [Plaintiff] was banned from Building 12 at [the
12 Marine Corps Recruit Depot] San Diego which includes the military criminal defense office,
13 the legal assistance office, and the courtroom at [the Marine Corps Recruit Depot] San
14 Diego.” *Id.* at ¶ 53. The ban “substantially impairs [Plaintiff’s] ability to meet and confer with
15 defense counsel, prevents her from attending any courtroom proceedings or testifying on
16 behalf of her clients, and otherwise impedes her ability to adequately investigate her client’s
17 cases.” *Id.*

18 Plaintiff Carolyn Martin asserts the following claims: (1) violation of the First
19 Amendment, retaliation for protected speech against Defendants NCIS, Clookie, Jacobson, and
20 Mabus for declaratory and injunctive relief and against Agent Martin and Doe 1 for damages
21 pursuant to *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S.
22 388 (1971) as well as declaratory and injunctive relief; (2) violation of the Fourth Amendment,
23 unreasonable search and seizure against Agent Martin and Does 1 through 7 for money
24 damages pursuant to *Bivens*; (3) violation of the Fifth Amendment, unreasonable interference
25 with employment against Defendants NCIS, Clookie, Jacobson, Mabus, Agent Martin and Doe
26 1 for declaratory and injunctive relief; (4) violation of the First Amendment, interference with
27 right of access to court against Defendant Sullivan for declaratory and injunctive relief.

28

1 **III. Standard of Review**

2 Federal Rule of Civil Procedure 12(b)(6) permits dismissal for “failure to state a
3 claim upon which relief can be granted.” Fed. R. Civ. P. 12(b)(6). Federal Rule of Civil
4 Procedure 8(a) provides: “A pleading that states a claim for relief must contain . . . a short and
5 plain statement of the claim showing that the pleader is entitled to relief.” Fed. R. Civ. P.
6 8(a)(2). Dismissal under Rule 12(b)(6) is appropriate where the complaint lacks a cognizable
7 legal theory or sufficient facts to support a cognizable legal theory. *See Balistreri v. Pacifica*
8 *Police Dep’t*, 901 F.2d 696, 699 (9th Cir. 1990).

9 To sufficiently state a claim for relief and survive a Rule 12(b)(6) motion, a complaint
10 “does not need detailed factual allegations” but the “[f]actual allegations must be enough to
11 raise a right to relief above the speculative level.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544,
12 555 (2007). “[A] plaintiff’s obligation to provide the ‘grounds’ of his ‘entitle[ment] to relief’
13 requires more than labels and conclusions, and a formulaic recitation of the elements of a cause
14 of action will not do.” *Id.* (quoting Fed. R. Civ. P. 8(a)(2)). When considering a motion to
15 dismiss, a court must accept as true all “well-pleaded factual allegations.” *Ashcroft v. Iqbal*,
16 __ U.S. __, 129 S. Ct. 1937, 1950 (2009). However, a court is not “required to accept as true
17 allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable
18 inferences.” *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001). “In sum,
19 for a complaint to survive a motion to dismiss, the non-conclusory factual content, and
20 reasonable inferences from that content, must be plausibly suggestive of a claim entitling the
21 plaintiff to relief.” *Moss v. U.S. Secret Serv.*, 572 F.3d 962, 969 (9th Cir. 2009) (quotations
22 omitted).

23 **IV. Discussion**

24 **A. Count Two: Violation of the Fourth Amendment - Unreasonable Search** 25 **and Seizure**

26 Defendant Martin seeks dismissal of Plaintiff’s Fourth Amendment claim against
27 him pursuant to *Bivens*. Agent Martin contends that Plaintiff has failed to state a claim for
28 violation of the Fourth Amendment on the grounds that Plaintiff relies on the legal theory of
respondeat superior.

1 Plaintiff contends that Defendant Martin “personally or through others” violated the
2 Fourth Amendment by detaining her for an excessively long time in an unreasonable manner.
3 (ECF No. 36 at 21). Plaintiff contends that her consent to the search was obtained by fraud
4 and “the Complaint justifies a reasonable inference that [Agent Martin] instigated, encouraged,
5 or solicited [the detention].” *Id.* at 24.

6 In *Bivens*, the Supreme Court held that violation of the Fourth Amendment “by a
7 federal agent acting under color of his authority gives rise to a cause of action for damages
8 consequent upon his unconstitutional conduct.” *Bivens*, 403 U.S. at 389. *Bivens* suits may
9 only be maintained against federal officials in their personal capacity and not in their official
10 capacities. *Ibrahim v. Dep’t of Homeland Sec.*, 538 F.3d 1250, 1257 (9th Cir. 2008). In
11 *Bivens* actions, “Government officials may not be held liable for the unconstitutional conduct
12 of their subordinates under a theory of respondeat superior.” *Ashcroft v. Iqbal*, 129 S.Ct. at
13 1948-51. “Because vicarious liability is inapplicable to *Bivens* ... suits, a plaintiff must plead
14 that each Government-official defendant, through the official’s own individual actions, has
15 violated the Constitution.” *Id.* at 1948.

16 “The Fourth Amendment does not proscribe all state-initiated searches and seizures; it
17 merely proscribes those which are unreasonable.” *Morgan v. United States*, 323 F.3d 776,
18 780-81 (9th Cir. 2003) (quotation omitted). A civilian may impliedly consent to a search by
19 entering a closed military base. *Id.* at 782. However, a search may violate the Fourth
20 Amendment “either because the detention itself is unreasonable or because it is carried out in
21 an unreasonable manner.” *Meredith v. Erath*, 342 F.3d 1057, 1061 (9th Cir. 2003) (citations
22 omitted); *see also Graham v. Connor*, 490 U.S. 386, 376 (1989) (explaining the court should
23 consider the totality of circumstances to determine whether a search was conducted in a
24 reasonable manner); *Franklin v. Foxworth*, 31 F.3d 873, 875-76 (9th Cir. 1994) (explaining
25 that the court should apply an objective test to determine whether a search was conducted in
26 a reasonable manner). “A detention conducted in connection with a search may be
27 unreasonable if it is unnecessarily painful, degrading, or prolonged.” *Meredith*, 342 F.3d at
28 1062 (quotation omitted). “In assessing whether a detention is too long in duration to be

1 justified as an investigative stop, [the court should] ... examine whether the police diligently
2 pursued a means of investigation that was likely to confirm or dispel their suspicions quickly,
3 during which time it was necessary to detain the defendant.” *United States v. Sharpe*, 470 U.S.
4 675, 686 (1985) (citations omitted). “[T]he court should not indulge in unrealistic
5 second-guessing.” *Id.*

6 In this case, Plaintiff alleges that “Agent Martin and Does 1-7 stopped and detained
7 Plaintiff for an unreasonably long period of time and searched her car and person in an
8 unreasonable manner.” (ECF No. 1 at 14). Plaintiff alleges that on July 23, 2009, seven
9 Military Police Officers and Agents detained Plaintiff in Camp Pendelton for one hour and
10 forty-five minutes at which time they searched her car. Plaintiff alleges that “NCIS Special
11 Agent Martin arrived soon after the search ...” *Id.* at ¶ 37. “Agent Martin told [Plaintiff] that
12 he had received a call from a [Military Police Officer] reporting that [Plaintiff] had presented
13 NCIS credentials at the Camp Pendelton gate.” *Id.* Plaintiff alleges that a Military Police
14 Officer told Plaintiff that he had called the Defense Intelligence Agency and they directed him
15 to confiscate her Defense Intelligence Agency credentials. The Military Police Officer “turned
16 the credentials over to Agent Martin.” *Id.* at ¶ 38. Plaintiff was escorted off base after being
17 detained for a total of two hours.

18 Viewing the allegations in the Complaint as true, Agent Martin arrived at the location
19 of Plaintiff’s detention after over one hour and forty-five minutes had passed and the search
20 of Plaintiff’s vehicle had been completed. Agent Martin briefly spoke to Plaintiff and received
21 the credentials which had been confiscated by a Military Police Officer. Plaintiff was released
22 less than fifteen minutes after Agent Martin arrived. The Complaint fails to allege facts to
23 support an inference that Agent Martin instigated, encouraged, or solicited the detention and
24 search. The Court finds the Complaint fails to allege sufficient facts to support a claim for
25 violation of the Fourth Amendment due to unreasonable search and seizure against Agent
26 Martin. In addition, the Court finds that the Complaint fails to allege that Agent Martin,
27 “through the [his] own individual actions,” has violated Plaintiff’s rights under the Fourth
28 Amendment. *Ashcroft v. Iqbal*, ___ U.S. ___, 129 S.Ct. at 1948. Accordingly, the Complaint

1 fails to allege sufficient facts to support a claim for damages pursuant to *Bivens* against Agent
2 Martin. The Motion to Dismiss count two for violation of the Fourth Amendment due to
3 unreasonable search and seizure and the request for damages pursuant to *Bivens* filed by
4 Defendant Agent Martin is GRANTED.

5 **B. Count 1: Violation of the First Amendment - Retaliation for Protected**
6 **Speech**

7 **1. Defendants NCIS, Mabus, Clookie, and Jacobson**

8 Defendants NCIS, Mabus, Clookie, and Jacobson seek dismissal of Plaintiff's claim of
9 violation of the First Amendment on the grounds that Plaintiff did not engage in protected
10 speech, that Plaintiff should be treated as a public employee and her speech was not related to
11 a matter of public concern, that Plaintiff's claim is based on her inability to earn money, and
12 Plaintiff's claim is implausible on its face.

13 Plaintiff contends that the facts alleged in the Complaint sufficiently state a claim of
14 retaliation in violation of the First Amendment because there is "[n]o other plausible
15 explanation" for the "campaign of harassment against Plaintiff." (ECF No. 36 at 17 n.4).
16 Plaintiff contends that she enjoys "the same free speech rights as a reporter" for her activities
17 which include "investigat[ing] facts and speak[ing] out against official misconduct." *Id.* at 9,
18 13. Plaintiff seeks declaratory and injunctive relief against Defendants NCIS, Clookie,
19 Jacobson, and Mabus.

20 "To demonstrate retaliation in violation of the First Amendment, [a plaintiff] must
21 ultimately prove first that [the defendant] took action that 'would chill or silence a person of
22 ordinary firmness from future First Amendment activities.'" *Skoog v. County of Clackamas*,
23 469 F.3d 1221, 1232 (9th Cir. 2006) (quoting *Mendocino Envtl. Ctr. v. Mendocino Cty.*, 192
24 F.3d 1283, 1300 (9th Cir.1999)). Second, a plaintiff must "prove that [the defendant's] desire
25 to cause the chilling effect was a but-for cause of the defendant's action." *Skoog*, 469 F.3d
26 at1232 (citing *Mendocino Envtl. Ctr. v. Mendocino Cty.*, 192 F.3d at1300 (explaining that
27 "[i]ntent to inhibit speech" is an element a First Amendment retaliation claim); *see also*
28 *Hartman v. Moore*, 547 U.S. 250, 260 (2006) (explaining that causation is shown when "the
adverse action would not have been taken").

1 “[A]s a general matter, the First Amendment means that government has no power to
2 restrict expression because of its message, its ideas, its subject matter, or its content.” *United*
3 *States v. Stevens*, ___ U.S. ___, 130 S.Ct. 1577, 1584 (2010) (quoting *Ashcroft v. Am. Civil*
4 *Liberties Union*, 535 U.S. 564, 573 (2002) (noting that First Amendment principles are not
5 “absolute”); *see also Anderson v. City of Hermosa Beach*, 621 F.3d 1051, 1058 (9th Cir. 2010)
6 (“[P]ure speech is entitled to First Amendment protection unless it falls within one of the
7 categories of speech ... fully outside the protection of the First Amendment[.]” (quotation and
8 citation omitted)). “The essential thrust of the First Amendment is to prohibit improper
9 restraints on the voluntary public expression of ideas” *Dietrich v. John Ascuaga's Nugget*,
10 548 F.3d 892, 897 (9th Cir. 2008). Generally, “truthful testimony is protected by the First
11 Amendment” *Worrell v. Henry*, 219 F.3d 1197, 1204 (10th Cir. 2000); *Lytle v. City of*
12 *Haysville, Kan.*, 138 F.3d 857, 864 n.2 (10th Cir. 1998); *see also Alpha Energy Savers, Inc. v.*
13 *Hansen*, 381 F.3d 917, 924 (9th Cir. 2004) (“By agreeing to be listed as a witness, [the
14 individual] conveyed the ‘particularized message’ that he intended to testify ... along the lines
15 set forth in his affidavit and in the summary witness statement.”).

16 In this case, Plaintiff alleges that she has “conducted military criminal defense
17 investigations[.]” for four years. (ECF No. 1 at ¶¶ 1, 20). “As a criminal defense investigator,
18 Plaintiff engages in speech ... including, but not limited to: ...testifying in pre-trial proceedings
19 or court-martial” *Id.* at ¶ 55. Plaintiff cites nine specific cases in which her “investigations
20 have enabled her clients’ attorneys to undermine prosecution testimony in courts-martial....”
21 *Id.* at ¶ 22. Plaintiff alleges that “NCIS retaliated against [Plaintiff] because she is a zealous,
22 effective defense investigator.” *Id.* at ¶ 2. “NCIS has intentionally retaliated against, and
23 continues to retaliate against, Plaintiff on account of at least some of her First Amendment-
24 protected speech and activities with the impermissible motive of curbing that speech and those
25 activities.” *Id.* at ¶ 56. The Court finds that Plaintiff has sufficiently stated a claim of
26 retaliation in violation the First Amendment.

27 “[T]he State has interests as an employer in regulating the speech of its employees that
28 differ significantly from those it possesses in connection with regulation of the speech of the

1 citizenry in general.” *Clairmont v. Sound Mental Health*, 632 F.3d 1091, 1100 (9th Cir. 2011)
2 (citing *Pickering v. Board of Ed. of Tp. High School Dist. 205*, 391 U.S. 563, 568 (1968)).
3 Where a government employee asserts a First Amendment retaliation claim, the employee must
4 establish “(1) [the employee] engaged in expressive conduct that addressed a matter of public
5 concern; (2) the government officials took an adverse action against [the employee]; and (3)
6 its expressive conduct was a substantial or motivating factor for the adverse action.” *Id.* “[I]n
7 evaluating whether a plaintiff should be considered a public employee, [the court should]
8 consider whether the relationship between the parties is analogous to that between an employer
9 and employee and whether the rationale for balancing the government's interests in efficient
10 performance of public services against public employees’ speech rights applies.” *Clairmont*,
11 632 F.3d at 1100 (citations omitted); *see also Alpha Energy Savers, Inc.*, 381 F.3d at 923
12 (“When a business vendor operates under a contract with a public agency, we analyze its First
13 Amendment retaliation claim ... using the same basic approach that we would use if the claim
14 had been raised by an employee of the agency.”).

15 Plaintiff alleges that she enters into a contract “directly with the defendant but works
16 at the direction of defense counsel.” *Id.* at ¶ 20. “[D]efense counsel normally requests that the
17 court-martial convening authority or military judge authorize government payment for
18 [Plaintiff’s] investigative work [which is] den[ied] in the vast majority of cases.” *Id.* Viewing
19 the allegations of the Complaint as true, Plaintiff has alleged facts to support the conclusion
20 that she is not a public employee where she is a criminal defense investigator. At this stage
21 in the proceeding, the Court cannot determine whether the “relationship between the parties
22 is analogous to that between an employer and employee and whether the rationale for
23 balancing the government’s interests in efficient performance of public services against public
24 employees’ speech rights applies.” *Clairmont*, 632 F.3d at 1100 .

25 The Motion to Dismiss count one for violation of the First Amendment due to
26 retaliation for protected speech filed by the United States on behalf of Defendants NCIS,
27 Mabus, Clookie, and Jacobson is DENIED.

28

2. *Bivens* Remedy Against Martin

Agent Martin contends that Plaintiff has failed to state a claim for violation of the First Amendment. Defendant contends that a *Bivens* remedy should not be created on the grounds that the Administrative Procedure Act and the Uniform Code of Military Justice provide adequate remedial process for any constitutional violations, and that supervision of military officers and protection of military bases is a special factor that precludes a *Bivens* remedy.

Plaintiff seeks damages against Agent Martin. Plaintiff contends that a *Bivens* remedy is available for her claim. Plaintiff contends that the Administrative Procedure Act does not apply because there is no final agency action. Plaintiff contends that the Uniform Code of Military Justice does not apply to Plaintiff as a civilian, and there are no special factors precluding a *Bivens* remedy.

The Ninth Circuit has expanded *Bivens* to include a claim for violation of the First Amendment due to retaliation against an individual's political speech. *Gibson v. United States*, 781 F.2d 1334, 1342 (9th Cir. 1986) (stating that the Supreme Court had not extended *Bivens* remedies to First Amendment claims, but finding that an individual who alleged that F.B.I. agents acted with the impermissible motive of curbing plaintiff's political activities by investigating her, tapping her phone, passing defamatory information to her employer, and attempting to entrap her in a drug transaction sufficiently stated a claim seeking *Bivens* relief); *Mendocino Env't Ctr v. Mendocino Cnty*, 14 F.3d 457, 464 (9th Cir. 1994) ("[the Ninth Circuit] held in *Gibson* that a *Bivens* plaintiff could maintain a First Amendment claim against a federal official.").

More recently in *Ashcroft v. Iqbal*, the Supreme Court "assume[d] without deciding" that the plaintiff's claim that he was detained under conditions which violated his rights under the First Amendment's Free Exercise Clause was actionable under *Bivens*. *Ashcroft v. Iqbal*, 129 S.Ct. at 1948, 1954 (finding that the complaint failed to "plead sufficient facts" to state a claim). However, the Supreme Court explained that "implied causes of action are disfavored" and noted that it had previously "declined to extend *Bivens* to a claim sounding in the First Amendment." *Id.* at 1948 (citing *Bush v. Lucas*, 462 U.S. 367, 368 (1983)). In

1 *Bush*, the Court found that a federal employee could not assert a claim that a supervisor
2 violated his First Amendment right and seek damages under *Bivens*, “[b]ecause such claims
3 arise out of an employment relationship that is governed by comprehensive procedural and
4 substantive provisions giving meaningful remedies against the United States....” *Bush*, 462
5 U.S. at 368.

6 The Ninth Circuit has also recently stated that “the [Supreme] Court has ‘rejected
7 invitations to extend *Bivens* ‘in every new factual and legal context presented after [*Carlson*
8 *v. Green*, 446 U.S. 14, 24 (1980)]’” *Pollard v. Geo Group, Inc.*, 607 F.3d 583, 593 (9th Cir.
9 2010) (quoting *Carlson*, 446 U.S. at 70 (finding that a federal inmate could bring a *Bivens*
10 claim against federal prison officials under the Eighth Amendment)). The Ninth Circuit
11 concluded, “Although *Bivens* remains intact, it is apparent that the ... ‘heady days in which [the
12 Supreme] Court assumed common-law powers to create causes of action’ is no more. *Id.*
13 (quoting *Correctional Services Corp. v. Malesko*, 534 U.S. 61, 75 (2001) (Scalia, J.,
14 concurring)).

15 In *Gibson*, the Ninth Circuit found that a *Bivens* remedy was available where an
16 individual alleged that federal officials acted with the impermissible motive of curbing
17 plaintiff’s political speech. In this case, Plaintiff alleges that a federal official acted with the
18 impermissible motive of curbing Plaintiff’s truthful testimony which is also protected speech.
19 The Ninth Circuit has found that *Bivens* remains intact and *Gibson* has not been overturned.
20 The Court finds that Plaintiff’s claim for damages due to violation of the First Amendment is
21 permitted under existing authority and does not require extension of *Bivens* to a “new factual
22 and legal context.” *See Pollard*, 607 F.3d at 593. The Court finds that Plaintiff has stated a
23 claim for damages against Agent Martin pursuant to *Bivens* for her claim of violation of the
24 First Amendment due to retaliation for protected speech. Accordingly, the Motion to Dismiss
25 count one for violation of the First Amendment due to retaliation for protected speech and the
26 request for damages pursuant to *Bivens* filed by Defendant Martin is DENIED.

27 3. Qualified Immunity

28 “Even in circumstances in which a *Bivens* remedy is generally available, an action under

1 *Bivens* will be defeated if the defendant is immune from suit.” *Hui v. Castaneda*, ___ U.S. ___,
2 130 S.Ct. 1845, 1852 (2010) (citing *Bivens*, 403 U.S. at 397-98). Qualified immunity shields
3 “officials performing discretionary functions ... insofar as their conduct does not violate clearly
4 established statutory or constitutional rights.” *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).
5 Qualified immunity analysis is the same for § 1983 claims against state officials and *Bivens*
6 claims against federal officials. *Johnson v. Fankell*, 520 U.S. 911, 914-15. Under *Saucier v.*
7 *Katz*, 533 U.S. 194 (2001), the test for whether qualified immunity applies is “whether the law
8 clearly established that the officer’s conduct was unlawful in the circumstances of the case.”
9 *Saucier*, 533 U.S. at 201 (*overruled in part on other grounds by Pearson v. Callahan*, 129
10 S.Ct. 808, 818-19 (2009)). “For a constitutional right to be clearly established, its contours
11 must be sufficiently clear that a reasonable official would understand that what he is doing
12 violates that right.” *Hope v. Pelzer*, 536 U.S. 730, 739 (2002). The test is not whether “the
13 very action in question has previously been held unlawful” rather it is whether “in the light of
14 the preexisting law the unlawfulness [was] apparent.” *Id.*

15 In light of the similarities between this case and *Gibson*, the Court concludes that
16 Agent Martin is not entitled to qualified immunity at this stage of the proceedings . In addition,
17 a claim of qualified immunity is more appropriately resolved at summary judgment as opposed
18 to at the motion to dismiss stage of proceedings. *See Morley v. Walker*, 175 F.3d 756, 760-61
19 (9th Cir. 1999).

20 **C. Count Three: Violation of Fifth Amendment - Unreasonable Interference**
21 **with Employment**

22 Defendants NCIS, Clookie, Jacobson, and Mabus seek dismissal of Plaintiffs Fifth
23 Amendment substantive due process claim regarding interference with Plaintiff’s employment
24 on the grounds that Plaintiff’s allegation of a decrease in income is not subject to due process
25 protection.

26 Plaintiff contends that she has stated a claim of interference with her employment in
27 violation of the Fifth Amendment on the grounds that the “ongoing retaliation” and “purported
28 ‘investigation’ imminently threaten[s] her ability to work as a federal contract investigator or
a military criminal defense investigator ...” (ECF No. 36 at 30).

1 The court looks to the “nature of the interest at stake” to determine whether due process
2 requirements apply. *Bd. of Regents v. Roth*, 408 U.S. 564, 570-71 (1972). “A threshold
3 requirement to a substantive or procedural due process claim is the plaintiff’s showing of a
4 liberty or property interest protected by the Constitution.” *Wedges/Ledges of Cal. v. City of*
5 *Phoenix*, 24 F.3d 56, 62 (9th Cir. 1994) (citing *Bd. of Regents*, 408 U.S. at 569) “[T]he liberty
6 component of the ... Due Process Clause includes some generalized due process right to choose
7 one’s field of private employment, but a right which is nevertheless subject to reasonable
8 government regulation.” *Conn v. Gabbert*, 526 U.S. 286, 291-92 (1999) (noting that a brief
9 interruption in one’s occupation is not actionable) (citations omitted).

10 “The Supreme Court has not specified the boundaries of the right to pursue a profession,
11 but has identified it generally.” *Engquist v. Oregon Dept. of Agriculture*, 478 F.3d 985, 997
12 (9th Cir. 2007) (citing *Conn v. Gabbert*, 526 U.S. 286, 291-92 (1999)). “[C]ases recognizing
13 the right [to pursue a profession] ‘all deal with a complete prohibition of the right to engage
14 in a calling, and not [a] sort of brief interruption.’” *Id.* “[A] plaintiff can make out a
15 substantive due process claim if she is unable to pursue an occupation and this inability is
16 caused by government actions that were arbitrary and lacking a rational basis.” *Engquist*, 478
17 F.3d at 997.

18 In this case, Plaintiff alleges that she works as a “contract investigator.” (ECF No. 1
19 at ¶ 1). As a federal contract investigator “the bulk of [her work] involved personnel security
20 investigations for federal agencies.” *Id.* at ¶ 17. For the past four years, Plaintiff has “also
21 conducted military criminal defense investigations.” *Id.* Plaintiff alleges that on July 27, 2009,
22 Computer Science Corporation, the sponsoring agent for Plaintiff’s Customs and Border Patrol
23 credentials, recalled Plaintiff’s credentials. Prior to the recall of her Customs and Border
24 Patrol credentials, contracts from the Customs and Border Patrol constituted the “vast
25 majority” of her personnel security investigation work. *Id.* at ¶ 41. “[Plaintiff] now must rely
26 for income on military criminal defense investigations[, but they] typically provide less regular
27 and constant work than do [personnel security investigations].” *Id.* Although Plaintiff no
28 longer performs personnel security investigations pursuant to her Customs and Border Patrol

1 credentials, she has not alleged that she is unable to perform other personnel security
2 investigations. Plaintiff affirmatively alleges that she continues her work in military criminal
3 defense investigation. The Court finds that Plaintiff has failed to allege facts sufficient to show
4 that she is unable to pursue an occupation and the inability was caused by government actions.
5 Accordingly, the Motion to Dismiss count three for violation of Fifth Amendment due to
6 unreasonable interference with employment filed by the United States on behalf of Defendants
7 NCIS, Clookie, Jacobson, and Mabus is GRANTED.

8 **D. Count Four: Violation of the First Amendment - Interference with Right**
9 **of Access to Court**

10 Defendant Sullivan seek dismissal of Plaintiff's First Amendment claim of interference
11 with her right of access to the court on the grounds that it is moot due to the government's
12 assurance that she will be provided the same access to the courtroom as any other member of
13 the public.

14 Plaintiff contends that her claim for access to court is not moot on the grounds that the
15 government could return to its wrongdoing, the government never conceded that it violated
16 Plaintiff's rights, and the government ceased its violation to avoid an adjudication on the
17 merits.

18 Article III of the United States Constitution restricts federal judicial power to the
19 adjudication of "Cases" or "Controversies." U.S. Const. art. III, § 2. The Declaratory
20 Judgment Act provides: "In a case of actual controversy within its jurisdiction ... any court of
21 the United States, upon the filing of an appropriate pleading, may declare the rights and other
22 legal relations of any interested party seeking such declaration, whether or not further relief
23 is or could be sought." 28 U.S.C. § 2201. "The Declaratory Judgment Act's requirement of
24 'a case of actual controversy' simply affirms this [Article III] Constitutional requirement,
25 having long been interpreted as referring to any case and controversy that is justiciable under
26 Article III." *Prasco, LLC v. Medicis Pharm. Corp.*, 537 F.3d 1329, 1335 (Fed. Cir. 2008)
27 (citations omitted).

28 In deciding if the case or controversy requirement is satisfied, a court must determine
"whether the facts alleged, under all the circumstances, show that there is a substantial

1 controversy, between parties having adverse legal interests, of sufficient immediacy and reality
2 to warrant the issuance of a declaratory judgment.” *MedImmune, Inc. v. Genentech, Inc.*, 549
3 U.S. 118, 127 (2007) (quotation omitted). “[A] case or controversy must be based on a real
4 and immediate injury or threat of future injury that is *caused by the defendants*—an objective
5 standard that cannot be met by a purely subjective or speculative fear of future harm.” *Prasco*,
6 537 F.3d at 1339 (emphasis in original).

7 “Generally, a case should not be considered moot if the defendant voluntarily ceases
8 the allegedly improper behavior in response to a suit, but is free to return to it at any time.”
9 *Outdoor Media Group, Inc. v. City of Beaumont*, 506 F.3d 895, 900-01 (9th Cir. 2007); *Native*
10 *Vill. of Noatak v. Blatchford*, 38 F.3d 1505, 1510 (9th Cir.1994)). However, where there is a
11 challenge to a statute and that statute is repealed, the case will be considered moot unless “it
12 is virtually certain that the repealed law will be reenacted” *Boulder Sign Co., LLC. v. City of*
13 *Boulder City, Nevada*, 382 F. Supp. 2d 1190, 1196 (D. Nev. 2005) (*Native Vill. of Noatak*, 38
14 F.3d at 1510)).

15 Here, Plaintiff alleges that Sullivan “recently informed the chief military defense
16 counsel at [the Marine Corps Recruit Depot] San Diego that [Plaintiff] was banned from
17 Building 12 at [the Marine Corps Recruit Depot] San Diego which includes the military
18 criminal defense office, the legal assistance office, and the courtroom at [the Marine Corps
19 Recruit Depot] San Diego .” (ECF No. 1 at ¶ 53). Plaintiff alleges that the ban “substantially
20 impairs [Plaintiff’s] ability to meet and confer with defense counsel, prevents her from
21 attending any courtroom proceedings or testifying on behalf of her clients, and otherwise
22 impedes her ability to adequately investigate her client’s cases.” *Id.* Although Defendants
23 state: “The United States will stipulate that Plaintiff is allowed the same right of access to a
24 military courtroom to the same extent as any other member of the public[.]” this assertion is
25 akin to a voluntary cessation of allegedly improper behavior. The Court concludes that
26 Plaintiff’s claim for violation of her First Amendment Right of interference with her right of
27 access to court is not moot due to Defendant’s voluntary cessation of the allegedly improper
28 behavior. The Motion to Dismiss count four for violation of the First Amendment due to

1 interference with right of access to court filed by the United States on behalf of Defendant
2 Sullivan is DENIED.

3 **V. Conclusion**

4 IT IS HEREBY ORDERED that Motion to Dismiss (ECF No. 31) filed by Agent
5 Martin is GRANTED IN PART and DENIED IN PART. Plaintiff's Fourth Amendment claim
6 and request for damages pursuant to *Bivens* against Agent Martin is DISMISSED. The Motion
7 to Dismiss (ECF No. 32) filed by the United States on behalf of Defendants NCIS, Clookie,
8 Jacobson, Marine Corps West Field Office, Sullivan, Marine Corps Recruit Depot San Diego,
9 and Mabus is GRANTED IN PART and DENIED IN PART. Plaintiff's claim for violation
10 of Fifth Amendment due to unreasonable interference with employment is DISMISSED.

11 DATED: August 3, 2011

12 
13 **WILLIAM Q. HAYES**
14 United States District Judge

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