

Request for Sanctions Against Enforcement Senior Trial Prosecutor and
Request for Judicial Notice of District Court Orders in “Mark Feathers v. Roger Boudreau”
re: Mark Feathers 3-15755

Time, and time again, Enforcement knowingly presents false, misleading, and harmful information to this court that Respondent’s civil claims against an Enforcement CPA were dismissed because they did not have merit. Respondent respectfully asks this court take judicial notice of Exhibit 1 and 2, which are PACER filings related to “Feathers v. Boudreau”, litigated in 2016 in District Court. Exhibit 1 (Case 5:16-cv-00529-RMW Document 21), shows Boudreau raising the issue of *res judicata*. The court stated the following on page 5:

“Although the court finds sufficient identity of claims and privity between the parties, the court is not persuaded that the dismissal of plaintiff’s prior claims against the United States constitutes a final judgment on the merits.”

District court here clearly disproves Enforcement’s prior false pleadings to this court of a merit-based dismissal of Respondent’s civil suit against its Enforcement CPA. Further, as shown in Exhibit 2 (Case 5:16-cv-00529-RMW Document 39), the Court states:

“Even giving plaintiff the benefit of the periods for which he claims the statute of limitations was tolled—that is, the pendency of his sanctions motions in the SEC enforcement action, his SEC administrative tort claim, and his federal lawsuit against the United States—his claim is not timely. Because plaintiff’s claim is barred by the statute of limitations, the court does not reach defendant’s other arguments for dismissal.”

Respondent’s civil action against Boudreau was dismissed for failure to meet timely filing requirement.

On the basis of Enforcement repeatedly misrepresenting the causes of Respondent’s civil action dismissal, and its false merit arguments, both due to Enforcement’s desire to skew these proceedings, to win at all costs, and to mislead this tribunal, Respondent asks for a termination of these proceedings.

In the alternative, and in accordance with the Commission’s Rules of Practice, Respondent asks for this court to sanction Enforcement’s senior trial prosecutor, and to disallow his further participation in these proceedings.

Respectfully,


Mark Feathers, *pro se*

Respondent 8-18-20

United States District Court
Northern District of California

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

MARK FEATHERS,
Plaintiff,
v.
ROGER D. BOUDREAU,
Defendant.

Case No. 16-cv-00529-RMW

**ORDER GRANTING DEFENDANT’S
MOTION TO DISMISS**

Re: Dkt. Nos. 8, 13

Plaintiff Mark Feathers, proceeding pro se, brings a claim for judicial deception against defendant Roger D. Boudreau, an accountant for the Securities and Exchange Commission. Dkt. No. 1. Defendant moves to dismiss for lack of subject matter jurisdiction and failure to state a claim. Dkt. Nos. 8, 13. Plaintiff opposes the motion. Dkt. No. 11. The court heard oral argument on April 29, 2016. For the reasons set forth below, the court grants defendant’s motion to dismiss.

I. BACKGROUND

On June 21, 2012, the SEC filed an enforcement action against plaintiff and certain entities controlled by plaintiff. *See SEC v. Small Bus. Capital Corp.*, Case No. 12-cv-03237-EJD, Dkt. No. 1. On the same day, the SEC moved ex parte for a temporary restraining order seeking, among other relief, to freeze plaintiff’s assets and appoint a receiver. *Id.*, Dkt. No. 5. The temporary restraining order was granted, and plaintiff later consented to entry of a preliminary injunction. *Id.*,

1 Dkt. Nos. 16, 29, 34. In support of its ex parte motion, the SEC submitted a declaration from
2 Roger D. Boudreau, a senior accountant in the SEC's enforcement division and the defendant in
3 this case. *Id.*, Dkt. No. 8.

4 Plaintiff challenged the accuracy of defendant's accounting and moved for sanctions
5 against defendant during the course of the SEC enforcement action. *See, e.g.*, Case No. 12-cv-
6 03237-EJD, Dkt. Nos. 96, 126. Plaintiff's motions for sanctions against defendant were denied.
7 *Id.*, Dkt. No. 272. The court subsequently granted summary judgment for the SEC and awarded
8 injunctive and monetary relief. *Id.*, Dkt. Nos. 591, 622. The SEC did not rely on Mr. Boudreau's
9 declaration in its motion for summary judgment or its motion for injunctive relief and monetary
10 remedies. *See id.* Dkt. Nos. 477, 602. Plaintiff's appeals of these orders are pending. *Id.*, Dkt. Nos.
11 593, 623.

12 Plaintiff then challenged the accuracy of defendant's accounting in a federal action against
13 the United States. *See Feathers v. United States*, Case No. 5:15-CV-2194-PSG, Dkt. No. 1.
14 Plaintiff's complaint against the United States sought relief under the Federal Tort Claims Act, the
15 Civil Rights Act, and the Privacy Act. *Id.* The court dismissed plaintiff's tort claims, finding that
16 the discretionary function exception of the FTCA deprived the court of subject matter jurisdiction.
17 *Id.*, Dkt. No. 30 at 6-7. The court dismissed plaintiff's § 1983 claim for lack of subject matter
18 jurisdiction based on sovereign immunity. *Id.* at 7-8. The court dismissed plaintiff's Privacy Act
19 claim relating to the release of information by the SEC for failure to state a claim. *Id.* at 8. Plaintiff
20 amended his complaint to allege new constitutional causes of action against the United States
21 based on "largely the same body of facts," but the court dismissed plaintiff's constitutional claims
22 for lack of subject matter jurisdiction, finding that plaintiff's constitutional claims could not
23 satisfy the requirements for waiver of sovereign immunity under the Administrative Procedures
24 Act, under the FTCA, or through a *Bivens* action. *Id.*, Dkt. No. 47 at 3, 5-6. The court denied
25 plaintiff leave to amend, noting that plaintiff had "not suggested that further leave to amend would
26 solve the difficulty of sovereign immunity." *Id.* at 6. The court specifically noted that "amending
27 his complaint to name the accountant would not allow Feathers to successfully present a *Bivens*

1 claim, because the court previously found that Feathers' injury was caused by the SEC's decision
2 to bring a civil enforcement action against him, not by the accountant's alleged error." *Id.*

3 In this case, plaintiff appears to present a *Bivens* claim for "judicial deception" naming the
4 SEC accountant.¹ The elements of a judicial deception claim are 1) an officer's "deliberate
5 falsehood or reckless disregard for the truth," and 2) the materiality of the dishonesty such that
6 "but for the dishonesty, the challenged action would not have occurred." *See Butler v. Elle*, 281
7 F.3d 1014, 1024 (9th Cir. 2002).²

8 Here, plaintiff alleges that defendant was grossly reckless when he departed from accepted
9 accounting practices, specifically by falsely labeling "his accounting charts, tables, and narratives
10 with the public accounting reference of 'distributions' in his testimony," even though the labeled
11 figures "were not actually distributions at all." *Id.* ¶¶ 2-3, 7-8, 11. According to plaintiff,
12 defendant's accounting made it appear that plaintiff's "investment funds were distributing more
13 than twice the amount of capital distributions as they actually distributed." *Id.* ¶ 14.

14 According to plaintiff, defendant provided these false accountings "under oath," in his
15 declaration, and the SEC incorporated defendant's accountings throughout the complaint. *Id.* ¶¶ 2,
16 12. Plaintiff further alleges that defendant's "false material accountings caused a wrongful
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18 ¹ Plaintiff brings claims under the Fourth and Fifth Amendment. *See* Compl. ¶¶ 4, 10. In *Bivens v.*
19 *Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971), the
20 Supreme Court held that an alleged violation of the Fourth Amendment by a federal agent acting
21 under color of his authority gives rise to an implied cause of action for damages. The Court
22 extended the *Bivens* implied cause of action to Fifth Amendment claims. *Davis v. Passman*, 442
23 U.S. 228 (1979). Plaintiff also references the Fourteenth Amendment in the complaint. *See* Compl.
24 ¶ 30 (plaintiff's "claim is governed by the Fourth, Fifth, and Fourteenth Amendments"). The
25 Fourteenth Amendment, however, restricts only state action and "does not apply to the federal
26 government." *See Hamad v. Gates*, 732 F.3d 990, 1006 n.11 (9th Cir. 2013) ("Fourteenth
27 Amendment does not apply to the federal government . . .") (citing *Bolling v. Sharpe*, 347 U.S.
28 497, 499 (1954)).

² A judicial deception claim most commonly arises out of criminal law enforcement proceedings,
when a plaintiff argues that an officer "misled the magistrate judge when applying for the warrant,
and had the magistrate considered all of the facts that the magistrate would not have found
probable cause." *Chism v. Washington State*, 661 F.3d 380, 386 n.9 (9th Cir. 2011) (quoting *Smith*
v. Almada, 640 F.3d 931, 937 (9th Cir. 2011)). The claim has also been considered in the context
of protective custody warrants. *See, e.g., Mann v. Cnty. of San Diego*, No. 3:11-CV-0708-GPC-
BGS, 2013 WL 4046642, at *13 (S.D. Cal. Aug. 8, 2013) ("this Court finds that the Plaintiffs'
claimed right to be free from judicial deception in obtaining a protective custody warrant from a
juvenile court was clearly established").

1 seizure” of plaintiff’s assets when the court granted the temporary restraining order, thereby
 2 depriving plaintiff of “the ability to employ counsel and expert witnesses.” *Id.* ¶ 4. Plaintiff further
 3 alleges that the wrongful seizure resulted in plaintiff giving “uninformed consent” to the entry of
 4 the preliminary injunction. *Id.* ¶ 7. Plaintiff also claims harm to his reputation and loss of revenue,
 5 and seeks to represent the class “of all persons similarly situated and who suffered a loss from
 6 their investments” the entities controlled by plaintiff, “directly or indirectly.” *Id.* ¶¶ 32, 33, 26.³

7 **II. ANALYSIS**

8 Defendant moves to dismiss the complaint on four grounds: 1) the FTCA judgment bar, 2)
 9 res judicata, 3) absolute witness immunity, and 4) qualified immunity. Because the court finds that
 10 defendant is entitled to absolute witness immunity, the court does not reach the question of
 11 qualified immunity.

12 **A. Federal Tort Claims Act § 2676 Judgment Bar**

13 The FTCA provides limited waiver of sovereign immunity, permitting plaintiffs to seek
 14 damages for certain torts committed by federal employees. *See* 28 U.S.C. § 1346(b). The statute
 15 contains “Exceptions” to the waiver of sovereign immunity for certain categories of claims. *See* 28
 16 U.S.C. § 2680. The statute also contains a “judgment bar,” such that any judgment in an FTCA
 17 action “shall constitute a complete bar to any action by the claimant, by reason of the same subject
 18 matter, against the employee of the government whose act or omission gave rise to the claim.” 28
 19 U.S.C. § 2676. In *Feathers v. United States*, the court dismissed plaintiff’s tort claims against the
 20 United States as barred by the “discretionary function” exception of the FTCA. *See* Case No. 5:15-
 21 CV-2194-PSG, Dkt. No. 30 at 6-7 (“The only plausible reality is that Feathers’ injuries were
 22 caused by the SEC’s decision to bring a civil enforcement action against him, not Boudreau’s
 23 accounting error. That decision by the SEC satisfies both elements of the discretionary function
 24

25 ³ The court notes that a pro se plaintiff “may not serve as counsel for a class.” *Langan v. United*
 26 *Servs. Auto. Ass’n*, 69 F. Supp. 3d 965, 988 (N.D. Cal. 2014) (quoting *Newberg on Class Actions*
 27 § 3:79 (5th ed.)); *see also C.E. Pope Equity Trust v. United States*, 818 F.2d 696, 697 (9th Cir.
 1987) (a non-attorney “has no authority to appear as an attorney for others than himself”); Fed. R.
 Civ. P. 23(a)(4) (requiring that class representative be able to “fairly and adequately protect the
 interests of the class”).

1 exception.”).

2 Defendant argued in his motion to dismiss that plaintiff’s judicial deception claim is barred
 3 by the earlier dismissal of plaintiff’s tort claims. After the hearing on defendant’s motion,
 4 however, the Supreme Court held the judgment bar does not apply to suits that are dismissed as
 5 falling within one of the statutory “Exceptions” of the FTCA. *See Simmons v. Himmelreich*, No.
 6 15-109, 2016 WL 3128838, at *5-7 (U.S. June 6, 2016) (concluding that plaintiff’s second suit
 7 against individual prison employees should be permitted to go forward where plaintiff’s first suit
 8 against the United States was dismissed based on FTCA’s discretionary function exception).
 9 Defendant conceded at the hearing that such a ruling would preclude dismissal of plaintiff’s claims
 10 on § 2676 grounds. The FTCA judgment bar, therefore, does not apply to plaintiff’s claims in this
 11 case.

12 **B. Res Judicata**

13 “Res judicata, or claim preclusion, prohibits lawsuits on ‘any claims that were raised *or*
 14 *could have been raised*’ in a prior action if there is: “(1) an identity of claims; (2) a final judgment
 15 on the merits; and (3) identity or privity between parties.” *Stewart v. U.S. Bancorp*, 297 F.3d 953,
 16 956 (9th Cir. 2002) (emphasis in original) (citing *Owens v. Kaiser Found. Health Plan, Inc.*, 244
 17 F.3d 708, 713 (9th Cir. 2001)). Defendant asserts that all three criteria are met in this case because
 18 plaintiff’s prior claims against the United States were dismissed without leave to amend. *See Case*
 19 *No. 5:15-CV-2194-PSG, Dkt. No. 47*. Plaintiff counters that res judicata does not apply because
 20 plaintiff has not previously alleged or litigated a judicial deception claim against Mr. Boudreau.
 21 Although the court finds sufficient identity of claims and privity between the parties, the court is
 22 not persuaded that the dismissal of plaintiff’s prior claims against the United States constitutes a
 23 final judgment on the merits.

24 First, the “central criterion in determining whether there is an identity of claims between
 25 the first and second adjudications is ‘whether the two suits arise out of the same transactional
 26 nucleus of facts.’” *Owens*, 244 F.3d at 714 (quoting *Frank v. United Airlines, Inc.*, 216 F.3d 845,
 27 851 (9th Cir. 2000)). Plaintiff’s judicial deception claim arises out of the same nucleus of facts as

1 his prior claims against the United States—specifically plaintiff’s allegations that the Boudreau
 2 declaration relied on by the SEC contained “false material accountings.” *Compare* Compl. ¶ 2
 3 (alleging that defendant “provided extensive false material accounting and financial information
 4 under oath”), *with* Case No. 5:15-CV-2194-PSG, Dkt. No. 1 ¶ 97 (alleging that defendant
 5 provided “objectively false financial illustrations about Plaintiffs distributions within SEC’s
 6 pleadings”), *and* Dkt. No. 30 ¶ 6 (alleging that SEC allowed “material false accounting narratives,
 7 charts, and tables about Plaintiff’s investment companies in its sealed pleadings”). Therefore,
 8 plaintiff’s current claims all “could have been asserted, whether they were or not, in a prior suit
 9 between the same parties . . . on the same cause of action.” *Owens*, 244 F.3d at 714 (9th Cir. 2001)
 10 (finding identity of claims where “both causes of action are predicated on racial discrimination and
 11 allege the same circumstances”) (quoting *Gregory v. Widnall*, 153 F.3d 1071, 1074 (9th Cir.
 12 1998)).

13 Second, an “employer-employee relationship generally satisfies the privity requirement for
 14 matters within the scope of employment.” *Drawsand v. F.F. Properties, L.L.P.*, 866 F. Supp. 2d
 15 1110, 1127 (N.D. Cal. 2011) (citing *Spector v. El Rancho, Inc.*, 263 F.2d 143, 145 (9th Cir. 1959)
 16 (“Where . . . the relations between two parties are analogous to that of principal and agent, the rule
 17 is that a judgment in favor of either . . . rendered upon a ground equally applicable to both, is to be
 18 accepted as conclusive against the plaintiff’s right of action against the other.”)). In this case, there
 19 is no dispute that plaintiff’s allegations arise out of defendant’s acts as an SEC employee. *See*
 20 Compl. ¶¶ 1-2 (identifying defendant as “CPA of the United States Securities and Exchange
 21 Commission” who knew or should have known that false material accountings “were replete
 22 throughout an SEC complaint” against plaintiff).

23 Third, however, a dismissal for lack of jurisdiction does not generally operate as an
 24 adjudication on the merits. *See* Fed. R. Civ. P. 41(b) (“Unless the dismissal order states otherwise,
 25 a dismissal . . . —*except one for lack of jurisdiction*, improper venue, or failure to join a party
 26 under Rule 19—operates as an adjudication on the merits.”) (emphasis added); *see also* 10A
 27 Charles Alan Wright, Arthur R. Miller, & Mary Kay Kane, *Federal Practice and Procedure* §

1 2713 (3d ed. 2016) (“motion to dismiss for lack of subject-matter or personal jurisdiction . . . only
 2 contemplates a dismissal of the proceeding, not a judgment on the merits for either party”).
 3 Plaintiff’s original tort and civil rights claims arising out of the Boudreau declaration were
 4 dismissed for lack of subject matter jurisdiction in *Feathers v. United States*. See Case No. 5:15-
 5 CV-2194-PSG, Dkt. No. 30 at 6-8. The constitutional claims asserted by plaintiff in the amended
 6 complaint were similarly dismissed for lack of subject matter jurisdiction. See *id.*, Dkt. No. 47 at
 7 5-6.

8 Defendant cites *Stewart v. U.S. Bancorp*, 297 F.3d 953 (9th Cir. 2002) to argue that a
 9 dismissal with prejudice constitutes a final judgment on the merits, but defendant’s reliance on
 10 *Stewart* is misplaced. The Ninth Circuit considered whether the district court’s dismissal on
 11 federal preemption grounds was in fact a dismissal for lack of jurisdiction, rather than for failure
 12 to state a claim, and therefore not a final judgment on the merits. *Id.* at 957-58. The Ninth Circuit
 13 concluded that plaintiffs’ first suit was dismissed “*not for lack of jurisdiction*, but rather for the
 14 substantive reason that Plaintiffs’ claims were preempted by federal law.” *Id.* at 959 (emphasis
 15 added). Rather than supporting defendant’s position, this holding implicitly supports the
 16 conclusion that a dismissal for lack of jurisdiction is not a final judgment on the merits. In this
 17 case, there is no suggestion that plaintiff’s previous claims arising out of the Boudreau declaration
 18 were dismissed for any reason other than lack of jurisdiction. Therefore, the court concludes that
 19 there was no prior final judgment on the merits and that res judicata does not bar plaintiff’s claims
 20 in this case.

21 **C. Absolute Witness Immunity**

22 “Witnesses, including police witnesses, are accorded absolute immunity from liability for
 23 their testimony in judicial proceedings.” *Paine v. City of Lompoc*, 265 F.3d 975, 980 (9th Cir.
 24 2001). The “purpose of such immunity is to encourage witnesses to come forward and speak freely
 25 in court by relieving the potential defendant of any fear that he will later have the burden of
 26 litigating the propriety of his conduct as a witness.” *Id.* (citing *Briscoe v. LaHue*, 460 U.S. 325,
 27 335-36 (1983)). Witness immunity applies to testimony offered in sworn statements and in pretrial

1 proceedings. *Burns v. Cty. of King*, 883 F.2d 819, 823 (9th Cir. 1989) (citing *Briscoe*, 460 U.S.
 2 325 and *Holt v. Castaneda*, 832 F.2d 123 (9th Cir. 1987)); see also *Gray v. Poole*, 275 F.3d 1113,
 3 1118 (D.C. Cir. 2002) (“It does not matter whether Poole’s sworn statement was given in oral or
 4 written form; what matters is that her statement was the equivalent of sworn testimony in a
 5 judicial proceeding.”). Witness immunity extends even to perjured testimony, but it “does not
 6 shield non-testimonial conduct” that is not “inextricably tied” to the testimony. *Paine*, 265 F.3d at
 7 982-83. In this case, all of plaintiff’s allegations are inextricably tied to defendant’s testimony.
 8 See, e.g., Compl. ¶ 1 (“This is a complaint for judicial deception . . . due to the false testimony” of
 9 defendant.). Therefore, defendant has absolute witness immunity from suit on these claims.

10 Plaintiff’s citation to *Malley v. Briggs*, 475 U.S. 335 (1986) is unavailing. In *Malley*, the
 11 Supreme Court held that law enforcement officials were not entitled to absolute immunity when
 12 they act as “complaining witnesses” and initiate criminal prosecutions by submitting a legally
 13 invalid arrest warrant. In *Rehberg v. Paulk*, however, the Supreme Court explained that at
 14 common law, “testifying was not a necessary characteristic of a ‘complaining witness’” because
 15 “the term ‘complaining witness’ was used to refer to a party who procured an arrest and initiated a
 16 criminal prosecution.” 132 S. Ct. 1497, 1507 (2012) (holding that district attorney’s chief
 17 investigator was entitled to absolute witness immunity not only for trial testimony, but also for
 18 grand jury testimony). In distinguishing *Malley*, the Court noted that “it is apparent that a law
 19 enforcement officer who testifies before a grand jury is not at all comparable to a ‘complaining
 20 witness’” because “a law enforcement officer does not perform the function of applying for an
 21 arrest warrant; nor does such an officer make the critical decision to initiate a prosecution.” *Id.* In
 22 this case, plaintiff alleges that defendant offered testimony in the course of an SEC enforcement
 23 action, but plaintiff does not allege that defendant performed any function similar to applying for a
 24 warrant or that defendant initiated the enforcement action.⁴ Therefore, the court finds no basis in
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26 ⁴ This is consistent with the court’s finding in *Feathers v. United States* that the “only plausible
 27 reality is that Feathers’ injuries were caused by the SEC’s decision to bring a civil enforcement
 28 action against him, not Boudreau’s accounting error.” Case No. 5:15-CV-2194-PSG, Dkt. No. 30
 at 6-7.

1 *Malley* for abrogating defendant's witness immunity.

2 Plaintiff also argues that defendant is not "simply a 'witness,'" but rather a "licensed
3 certified public accountant" employed by the SEC. Dkt. No. 11 at 3. There is, however, no
4 exception to witness immunity for expert witnesses. *See, e.g., Cannon v. Polk Cty. Dist. Atty.*, 501
5 F. App'x 611, 613 (9th Cir. 2012) (affirming witness immunity dismissal of claims based on
6 government experts' preparation and testimony); *Franklin v. Terr*, 201 F.3d 1098, 1100 (9th Cir.
7 2000) (applying witness immunity to bar claims against prosecution's expert witness on childhood
8 trauma and its effect on memory).

9 **III. CONCLUSION**

10 Defendant's motion to dismiss for failure to state a claim is granted. "Leave to amend
11 should be granted unless the pleading 'could not possibly be cured by the allegation of other
12 facts,' and should be granted more liberally to pro se plaintiffs." *Ramirez v. Galaza*, 334 F.3d 850,
13 861 (9th Cir. 2003) (quoting *Lopez v. Smith*, 203 F.3d 1122, 1131 (9th Cir. 2000) (en banc)). As
14 plaintiff has not suggested any basis for his claim against defendant other than defendant's
15 testimony, the court is skeptical that plaintiff will be able to cure the defects in the complaint by
16 amendment, but the court cannot say it is impossible. Therefore, plaintiff is granted 30 days leave
17 to amend. The court notes that in addition to the absolute immunity available to witnesses, the
18 "doctrine of qualified immunity protects government officials from liability for civil damages
19 insofar as their conduct does not violate clearly established statutory or constitutional rights of
20 which a reasonable person would have known." *Messerschmidt v. Millender*, 132 S. Ct. 1235,
21 1244 (2012) (citations omitted). The case management conference set for June 24, 2016 is hereby
22 reset for August 5, 2016 at 10:30 a.m.

23 **IT IS SO ORDERED.**

24 Dated: June 21, 2016

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26 Ronald M. Whyte
27 United States District Judge

United States District Court
Northern District of California

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

MARK FEATHERS,
Plaintiff,
v.
ROGER D. BOUDREAU,
Defendant.

Case No. 16-cv-00529-RMW

**ORDER GRANTING DEFENDANT’S
MOTION TO DISMISS AND DENYING
PLAINTIFF’S MOTION TO FOR
LEAVE TO AMEND**

Re: Dkt. Nos. 25, 35

Plaintiff Mark Feathers, proceeding pro se, asserts a *Bivens* claim for judicial deception against defendant Roger D. Boudreau. Defendant moves to dismiss. Dkt. No. 25. Plaintiff opposes the motion and seeks leave to file a second amended complaint. Dkt. Nos. 31, 35. The court heard oral argument on September 30, 2016. The court denies plaintiff’s motion for leave to amend and grants defendant’s motion to dismiss with prejudice.

I. BACKGROUND

The SEC filed an enforcement action against plaintiff and certain entities controlled by plaintiff on June 21, 2012. *See SEC v. Small Bus. Capital Corp.*, Case No. 12-cv-03237-EJD, Dkt. No. 1. The SEC simultaneously moved ex parte for a temporary restraining order to freeze plaintiff’s assets and for other related relief. *Id.*, Dkt. No. 5. In support of its ex parte motion, the

1 SEC submitted a declaration from defendant Roger D. Boudreau, a senior accountant in the SEC’s
 2 enforcement division. *Id.*, Dkt. No. 8. The district court granted the TRO and appointed a
 3 temporary receiver on June 26, 2012. *Id.*, Dkt. No. 16. Plaintiff later stipulated to entry of a
 4 preliminary injunction and appointment of a permanent receiver. *Id.*, Dkt. Nos. 29, 34. The district
 5 court subsequently granted summary judgment for the SEC and awarded injunctive and monetary
 6 relief. *Id.*, Dkt. Nos. 591, 622. The SEC did not rely on Mr. Boudreau’s declaration in moving for
 7 summary judgment or for a permanent injunction and monetary remedies. *See id.* Dkt. Nos. 477,
 8 602. Plaintiff’s appeal to the Ninth Circuit, *id.*, Dkt. No. 623, is still pending.

9 In the SEC enforcement action, plaintiff challenged the accuracy of defendant’s accounting
 10 and moved for sanctions against defendant in November 2012. *See, e.g., id.*, Dkt. Nos. 96, 126.
 11 Plaintiff’s motions to dismiss and for sanctions were denied on February 22, 2013. *Id.*, Dkt. No.
 12 272. Plaintiff alleges that he then challenged defendant’s “wrongful financial illustrations” in an
 13 “administrative action with SEC” filed in April 2014, which the SEC denied six months later.
 14 FAC ¶ 52; *see* Dkt. No. 31 at 12 & Ex. 5. Plaintiff next challenged the accuracy of defendant’s
 15 accounting in a federal action against the United States on May 15, 2015. *See Feathers v. United*
 16 *States*, Case No. 5:15-CV-2194-PSG, Dkt. No. 1. The district court dismissed plaintiff’s claims
 17 against the United States as barred by sovereign immunity on December 1, 2015. *Id.*, Dkt. No. 47.

18 Plaintiff now asserts a *Bivens* claim for judicial deception against defendant, alleging that
 19 defendant, in his “declaration, charts, table, and narratives,” added together items labeled “capital
 20 distributions out of” and “capital investments into,” and then “falsely re-labeled” the items as
 21 “distributions.” Dkt. No. 22, FAC ¶ 2. Plaintiff also alleges that defendant “attached the words
 22 ‘Ponzi’ and, or, ‘scheme’ in his charts, tables, and narratives, and, or, wrongly gave cause to SEC
 23 prosecutors to do same,” which “severely magnified the economic harm of SEC’s wrongful
 24 injunction.” *Id.* ¶ 9. Plaintiff claims that the seizure of his assets is “directly traceable” to
 25 defendant’s “false material accounting,” and that the “government’s taking of property and
 26 property rights” based on defendant’s accounting “was without due process.” *Id.* ¶¶ 50, 72.

II. ANALYSIS

Defendant moves to dismiss on the basis, among others, that the statute of limitations has run. The parties do not dispute that the statute of limitations is two years. *See Van Strum v. Lawn*, 940 F.2d 406, 410 (9th Cir. 1991) (holding that forum state’s “personal injury statute of limitations properly applies to *Bivens* claims”); Cal. Civ. Proc. § 335.1 (two-year statute of limitations). Plaintiff, however, argues that his claim is preserved by the doctrine of equitable tolling, which “[b]roadly speaking,” applies “when an injured person has several legal remedies and, reasonably and in good faith, pursues one.” *McDonald v. Antelope Valley Cmty. Coll. Dist.*, 45 Cal. 4th 88, 100 (2008) (internal quotation marks omitted). Where applicable, “the effect of equitable tolling is that the limitations period *stops running* during the tolling event, and begins to run again only when the tolling event has concluded.” *Lantzy v. Centex Homes*, 31 Cal.4th 363, 370-71 (2003).

Plaintiff seeks damages arising from defendant’s allegedly “false, material, grossly misleading and highly prejudicial sealed declarations” submitted in connection with the SEC’s TRO request. FAC ¶ 1. That TRO was granted on June 26, 2012, and a preliminary injunction with the same terms was entered on July 3, 2012. Plaintiff is not claiming harm from the ultimate outcome of the enforcement proceedings, but rather from the application for and issuance of the TRO. Plaintiff did not file this action on February 1, 2016. *See* Dkt. No. 1. Even giving plaintiff the benefit of the periods for which he claims the statute of limitations was tolled—that is, the pendency of his sanctions motions in the SEC enforcement action, his SEC administrative tort claim, and his federal lawsuit against the United States—his claim is not timely. Because plaintiff’s claim is barred by the statute of limitations, the court does not reach defendant’s other arguments for dismissal.

Plaintiff seeks to leave to amend the complaint in order to add, among other things, allegations in support of equitable tolling. Plaintiff did not file a proposed amended complaint, but identified certain documents that would serve as the basis for amendment. Having reviewed the documents, the court finds that they do not support plaintiff’s contention that his claim is

1 preserved by equitable tolling.

2 **III. CONCLUSION**

3 Plaintiff's claim is dismissed with prejudice as untimely. Plaintiff's motion for leave to
4 amend is denied as futile.

5 **IT IS SO ORDERED.**

6 Dated: October 26, 2016



Ronald M. Whyte
United States District Judge

United States District Court
Northern District of California

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