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ATTORNEYS FOR PLAINTIFFS

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

JOSE BAUTISTA-PEREZ, OSCAR GUARDADO-GONZALEZ, DENIS CABALLERO-ESPINOZA, JOSE ALVARADO-MENJIVAR, OSCAR RENE RAMOS, MARIA SALAZAR, JOSE BENJAMIN QUINTEROS, AND MARIA JOSEFA CRUZ, Individually and on behalf of all others similarly situated,

Plaintiffs,

vs.

ERIC H. HOLDER, JR., Attorney General of the United States, and JANET NAPOLITANO, Secretary of Homeland Security,

Defendants.

Case No.: C 07-4192 TEH

PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

Date: March 2, 2009
Time: 10:00 a.m.
Dept: Courtroom 12
Judge: Hon. Thelton E. Henderson

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I. INTRODUCTION

Defendants' motion to dismiss is yet another in a series of efforts to take this case away from this Court (or at the very least delay the hearing of Plaintiffs' class certification motion), a pattern Defendants have repeated ever since the Court found that "Plaintiffs have made a strong showing of probability of success on the merits." Order Den. Mot. for Prelim. Inj. (Dkt. 40) 1:21-23. This Court recognized and rejected Defendants' earlier attempts as "forum shopping and [a] waste of judicial resources." Order Den. Defs' Mot. to Dismiss (Dkt. 68) 10:19-21. Defendants' new motion is more of the same.

Defendants now assert that Plaintiffs must amend their complaint to specifically plead the Little Tucker Act and name the United States, in order for the Court to maintain jurisdiction over Plaintiffs' monetary relief claims. These arguments are contrary to well-settled law. They also ignore the factual allegations of Plaintiffs' First Amended Complaint, which states a class claim against the Government for reimbursement of illegally exacted funds. Defendants' arguments also belie their own recognition that Plaintiffs' monetary relief claims are against the United States and that this Court has jurisdiction over those claims based on the Little Tucker Act.

Defendants are also mistaken in asserting that Plaintiffs' injunctive and declaratory relief claims, over which this Court has already found jurisdiction pursuant to either the Little Tucker Act or the Administrative Procedures Act, are moot or unnecessary. Defendants have not met their burden of showing that there is no likelihood that they will impose excess biometric services fees on Plaintiffs and the putative class in the future.

Defendants are similarly incorrect in attempting once more to lodge an objection to venue. Defendants long ago waived their venue objections, and in any event, venue is proper in this Court. Accordingly, the instant Motion to Dismiss should be denied. However, if the Court grants Defendants' Motion, Plaintiffs request that this Court afford Plaintiffs leave to amend their complaint.[1] Amendment will not affect the propriety of venue in this Court.

[1] Defendants' description of Plaintiffs' "refusal" to amend their complaint is misleading. When Defense counsel asked if Plaintiffs intended to amend their complaint, Plaintiffs' counsel replied in the negative – as discussed in Section III.A and B, *infra*, such an amendment is not necessary. However, Plaintiffs did not refuse categorically to amend their complaint, and will do so if this Court so orders.

II. PROCEDURAL HISTORY

Plaintiffs filed their initial Complaint on August 16, 2007, and their First Amended Complaint on August 21, 2007. Plaintiffs, nationals of Honduras, Nicaragua, and El Salvador, allege that they and other similarly situated individuals are routinely charged in excess of the $50.00 limit set by 8 U.S.C. § 1254a(c)(1)(B) as a condition of registering for Temporary Protected Status ("TPS"). First Am. Comp. ("FAC") (Dkt. 5) 1:23-25, 3:15-4:7. Plaintiffs' FAC states that they "seek[] to enjoin defendants from charging a fee for TPS registration, including a fee imposed for the collection of biometric information, that exceeds the $50.00 permitted under 8 U.S.C. § 1254a(c)(1)(B), and to enjoin defendants to refund to plaintiffs and other class members fees they previously remitted to register for TPS that exceeded the amount permitted under 8 U.S.C. § 1254a(c)(1)(B)." *Id.* at 2:2-4. The FAC prays for an order requiring defendants to refund "all fees paid by plaintiffs and other class members to register for TPS and to collect biometric information that have exceeded the $50.00 permitted under 8 U.S.C. § 1254a(c)(1)(B)" and "all service fees paid by plaintiffs and other class members for the collection of biometric information when the collection of biometric information was not required." *Id.* at 10:1-8. Plaintiffs therefore pleaded a class claim for reimbursement of funds improperly collected by the United States Government – a claim that falls within the Tucker Act's waiver of sovereign immunity.

After filing their First Amended Complaint, Plaintiffs filed a Motion for Preliminary Injunction. Dkt. 10. In their first responsive pleading in this action, filed on September 24, 2007, Defendants opposed Plaintiffs' Motion for Preliminary Injunction on the merits, arguing that Plaintiffs' case was not sound. Opp. to Pls' Mot. for Prelim. Inj. (Dkt. 24) 10-12. Defendants did not object to venue in this Court. Defendants did not argue that under 28 U.S.C. § 1402(a), venue in this Court is proper only for plaintiffs and class members who reside in this judicial district. Defendants did not argue that venue is improper for plaintiffs and class members because they are aliens. Defendants did not argue that Plaintiffs could not proceed with this action until they demonstrate that United States citizens have the reciprocal right to sue the governments of El Salvador, Nicaragua, and Honduras in the courts of those countries. Accordingly, Defendants waived the right to make any of those objections here.

Additionally, in their Opposition to Plaintiffs' Motion for Preliminary Injunction, Defendants made clear their understanding that Plaintiffs' First Amended Complaint raised class-wide monetary, injunctive, and declaratory relief claims against the United States government, as opposed to claims against Attorney General Gonzalez or Secretary Chertoff in their individual capacities.[2] Defendants acknowledged that if the Court granted Plaintiffs' request for declaratory relief invalidating the regulation permitting the Department of Homeland Security to charge biometric services fees, "it would . . . deprive *the government* of its ability to fund critical aspects of its mission." *Id.* at 9:21-23 (emphasis added). Defendants added that Plaintiffs' requested injunctive relief "would also deprive *the government* of funding necessary to maintain both mainframe computer systems and on-line information retrieval systems" that allow it to perform functions that "are vital to the TPS program and to national security." *Id.* at 9:23-28 (emphasis added). Defendants also claimed that Plaintiffs' request for relief would force "DHS" to face a financial loss and would "interfere[] with DHS' ability to collect the funds necessary" for its enhanced screening activities, and "have a direct, detrimental effect on the Government's ability to screen aliens and protect the public." *Id.* at 14:5-15. Defendants supported these assertions by citing the Declaration of Barbara Velarde, Chief of Service Center Operations for the United States Citizenship and Immigration Services (Dkt. 25) ("Velarde Decl."). Ms. Velarde testified that "if USCIS were ordered to refund TPS biometric fees collected since 1999 from putative Central American class members [as sought in Plaintiffs' complaint], . . . [l]oss of that large amount of funding would significantly affect USCIS' capability to conduct [its] operational functions." *Id.* Also, if the Court granted Plaintiffs' request for injunctive relief and the government was "ordered to cease collection of biometric fees" from TPS registrants from Honduras, Nicaragua, and El Salvador, "there would be an immediate and detrimental effect on USCIS's ability to conduct biometric-related operations." *Id.* at ¶ 21.

[2] Indeed, by the time that Defendants filed their Opposition brief, Alberto R. Gonzalez was no longer the Attorney General of the United States, and the brief was filed under the name of "Peter D. Keisler, Acting Attorney General," whom the Defendants "substituted for Alberto R. Gonzales as Respondent in this case" "in accordance with Fed. R. Civ. P. 25(d)." Dkt. 24 at 1. Rule 25 states that "[w]hen a public officer is a party to an action *in an official capacity* and during its pendency dies, resigns, or otherwise ceases to hold office, the action does not abate and the officer's successor is automatically substituted as a party." Fed. R. Civ. P. 25(d)(1) (emphasis added). Accordingly, Defendants have never been confused about the fact that Plaintiffs sued the named Defendants in their official capacities.

The Court held that while Plaintiffs had "made a strong showing of probability of success on the merits," they had not shown that they and the class would suffer irreparable injury absent a preliminary injunction. As such, the Court denied Plaintiffs' Motion. October 17, 2007 Order Den. Mot. for Prelim. Inj. (Dkt. 40) 10:3-5, 12:13-15.

On October 23, 2007, Plaintiffs filed their initial Motion for Class Certification, which Defendants opposed. Prior to the hearing of that motion, Defendants filed their first Motion to Dismiss on November 15, 2007. Dkt. 48. On December 20, 2007, the Court vacated the hearing on Plaintiffs' Motion for Class Certification, pending resolution of Defendants' Motion to Dismiss. Dkt. 59.

In their Motion to Dismiss, Defendants recognized that "the substance of Plaintiffs' refund claim is money damages *from the federal government* – in essence, an illegal exaction – and the Tucker Act covers such claims. . . . Should they succeed, Plaintiffs would be receiving monetary damages *from the public fisc of the United States* which is the touchstone of Tucker Act jurisdiction." Mem. In Supp. Of Mot. to Dismiss (Dkt. 49) 10:20-25 (internal quotation omitted, emphasis added). Furthermore, "if this Court possesses jurisdiction over this action, it could only be based on the Little Tucker Act's provision that the district courts have 'concurrent' jurisdiction with the Court of Federal Claims over claims of less than $10,000. Although this action seeks refunds totaling at least $100 million, each Plaintiff likely seeks unspecified damages that would fall below the Little Tucker Act's $10,000 threshold." *Id.* at 11:21-27. Thus, Defendants acknowledged the nature of Plaintiffs' monetary relief claims and the source of this Court's jurisdiction over those claims. Further revealing Defendants' understanding that the Little Tucker Act applies to Plaintiffs' claims, Defendants referred to the Little Tucker Act's venue provision and urged the Court to transfer the case to the Court of Federal Claims because Plaintiffs' putative class includes individuals who "reside outside the Northern District of California."[3] *Id.* at 12:11-12.

[3] Once again, Defendants failed to raise their objection as to the proper venue for aliens, and did not argue that this Court lacks jurisdiction over this case because Plaintiffs have not proven that citizens of the United States have a reciprocal right to sue the governments of El Salvador, Nicaragua, and Honduras in the courts of those countries.

On February 4, 2008, the Court denied Defendants' Motion to Dismiss, holding that its jurisdiction over Plaintiffs' claims for monetary relief stemmed from the Little Tucker Act, while its jurisdiction over Plaintiffs' claims for injunctive and declaratory relief stemmed from either the Little Tucker Act or Section 702 of the Administrative Procedures Act. Order Den. Defs' Mot. to Dismiss (Dkt. 68) 8. The Court also held that, by responding to Plaintiffs' Motion for Preliminary Injunction on the merits and neglecting to raise venue objections in that filing, Defendants had waived their right to object to venue. *Id.* at 8:19-10:25. The Court also admonished that "allowing Defendant to raise a venue objection only after this Court found a likelihood of success on the merits would permit the forum-shopping and waste of judicial resources Rule 12(h) is designed to avoid." *Id.*

The parties filed a Joint Case Management Statement on August 15, 2008, in which Defendants once again raised arguments that neither venue nor jurisdiction were proper in this judicial district, making points that the Court previously rejected, and previewing their new arguments that because Plaintiffs' First Amended Complaint does not specifically plead the Little Tucker Act or name the United States as a defendant, the Court has no jurisdiction over Plaintiffs' monetary relief claims, and amending the complaint to add the United States would generate another opportunity for Defendants to object to venue and force the case to be transferred to the Court of Federal Claims.[4] August 15, 2008 Joint Case Management Statement (Dkt. 85) 2:3-4:4, 6:17-26, 7:21-11:12. Additionally, Defendants proposed that the Court delay deciding class certification until after holding a series of test-cases to establish liability, and then (if liability were found) moving to the class certification process. The Court rejected Defendants' proposal, and ordered the parties to set a schedule for hearing Plaintiffs' motion for class certification. Order (Dkt. 87) 4-5.

Pursuant to the Court's instructions and the parties' stipulated briefing schedule, Plaintiffs filed their Motion for Class Certification and Bifurcation on December 8, 2008. Dkt. 98. Defendants filed their Opposition to Plaintiffs' Motion for Class Certification and Bifurcation on January 12, 2009. Dkt. 100. Defendants spent most of their Opposition arguing once again that this Court does not have jurisdiction over any of Plaintiffs' claims, and that venue is improper in this judicial district. *See*

[4] In this filing, Defendants also made their first-ever mention of their reciprocity argument.

generally id. Plaintiffs rebutted those arguments in their Reply in Support of Motion for Class Certification and Bifurcation, filed January 20, 2009. Dkt. 101.

Duplicating their earlier strategy of delaying hearing of a pending motion for class certification, Defendants filed this Motion to Dismiss on January 26, 2009, repeating arguments they made in earlier pleadings, and causing the Court to take the pending motion for class certification off calendar.

III. LEGAL ARGUMENT

A. Plaintiffs' First Amended Complaint Provides Sufficient Notice of the Basis for the Court's Little Tucker Act Jurisdiction Over Plaintiffs' Monetary Relief Claims

Defendants' assertion that Plaintiffs have failed to plead the requisite waiver of sovereign immunity for their money claims and therefore must amend their complaint to plead the Little Tucker Act is belied by liberal pleading standards and the allegations in Plaintiffs' First Amended Complaint. The Federal Rules of Civil Procedure specifically set a liberal notice pleading standard, which does not require Plaintiffs to plead the specific statutory basis of sovereign immunity.[5] The purpose of a complaint is "to give the defendant fair notice of the factual basis of the claim and of the basis for the court's jurisdiction." *Skaff v. Meridien N. Am. Beverly Hills, LLC*, 506 F.3d 832, 841 (9th Cir. 2007). Failure to plead the specific statute giving rise to jurisdiction "amount[s] to no more than inartful pleading, an error that 'does not in itself constitute an actual defect of federal jurisdiction.'" *Nationwide Mut. Ins. Co. v. Liberatore*, 408 F.3d 1158, 1162 (9th Cir. 2005). "[F]ormal amendment is not required when the reviewing court [as it did here] can readily recognize the existence of jurisdiction." *Id.* at 1162 n.2. *See also Assiniboine & Sioux Tribes of the Fort Peck Indian Reservation v. Bd. of Oil & Gas Conservation of the State of Mont.*, 792 F.2d 782, 793 (9th Cir. 1986) (even though jurisdiction under the APA was never specifically pled, defense of sovereign immunity was waived); *Quality Mech.*

[5] Defendants' claim that Plaintiffs did not plead the requisite waiver of sovereign immunity for their money claims in the Complaint is unsupported. None of the cases Defendants cite require that a complaint include a clear or "unequivocal" statement of the basis for waiver of sovereign immunity. Instead, *Kester v. Campbell*, 652 F.2d 13, 15 (9th Cir. 1981), stands for the proposition that 28 U.S.C. § 1331 does not waive sovereign immunity, while *Hou Hawaiians v. Cayetano*, 183 F.3d 945, 947 (9th Cir. 1979), stands for the proposition that 28 U.S.C. § 1361 does not waive sovereign immunity. Neither case addresses how a plaintiff should plead her complaint so as to state such a waiver, nor does either case state that a plaintiff must explicitly plead a waiver of sovereign immunity in her complaint.

Contractors v. Moreland Corp., 19 F. Supp. 2d 1169, 1172-73 (D. Nev. 1998) same; "[a] party can plead federal jurisdiction implicitly in a complaint."); *Randall v. United States*, 95 F.3d 339, 346 (4th Cir. 1996) (in a Tucker Act case, "[a]lthough a plaintiff must allege essential jurisdictional facts in a complaint, federal jurisdiction may be sustained on the basis of a statute not relied on or alleged in the pleadings."). Thus, "[t]he rule in this circuit is clear: 'If facts giving the court jurisdiction are set forth in the complaint, the provision conferring jurisdiction need not be specifically pleaded.'" *Aguirre v. Auto. Teamsters*, 633 F.2d 168, 174 (9th Cir. 1980) (quoting *Williams v. United States*, 405 F.2d 951, 954 (9th Cir. 1969)). Defendants' assertion that sovereign immunity depends upon the incantation of the words "Tucker Act" within the original pleading is simply incorrect.[6]

Plaintiffs' First Amended Complaint provides sufficient notice that the source of the waiver of sovereign immunity for Plaintiffs' monetary relief claims is the Tucker Act.[7] As set forth in Section II, above, the First Amended Complaint pleads that Defendants have illegally exacted biometric services fees from Plaintiffs and the class in excess of the fifty-dollar limit set forth in 8 U.S.C. § 1254a(c)(1)(B), and seeks an order requiring Defendants to refund those fees. FAC (Dkt. 5) 10:1-8. Plaintiffs have therefore pleaded a class claim for reimbursement of funds improperly collected by the United States Government – a claim that falls within the Tucker Act's waiver of sovereign immunity.

[6] Defendants' reliance on three cases involving sovereign immunity – *United States v. Sherwood*, 312 U.S. 584, 586 (1941); *Hodge v. Dalton*, 107 F.3d 705, 707 (9th Cir. 1997); and *Elias v. Connett*, 908 F.2d 521, 527 (9th Cir. 1990) – is misplaced. These cases concern the issue of whether sovereign immunity requires a clear, unequivocal waiver, which is simply not in dispute in the instant matter. The Little Tucker Act provides the clear, unequivocal waiver of sovereign immunity necessary for Plaintiffs' monetary relief claims to proceed. *See* 28 U.S.C. 1346(a) (civil claims against the United States worth less than $10,000 may proceed in federal court); *United States v. Mitchell*, 463 U.S. 206, 218 (1983) ("If a claim falls within th[e] [Tucker Act] category, the existence of a waiver of sovereign immunity is clear" and "the United States has presumptively consented to suit."). Likewise, in drafting § 702 of the Administrative Procedures Act, Congress waived the Government's sovereign immunity from Plaintiffs' injunctive and declaratory relief claims. Thus, where, as here, "a plaintiff asserts a damage claim against the United States that falls within a Tucker Act category, consent to suit is simply a non-issue." *Wesreco, Inc. v. U.S. Dep't of Interior*, 618 F. Supp. 562, 569 (D. Utah 1985); *Short v. United States*, 719 F.2d 1133, 1135 (Fed. Cir. 1983) (same), superseded by statute on other grounds as stated in *Karuk Tribe of Cal. v. Ammon*, 209 F.3d 1366 (Fed. Cir. 2000).

[7] Defendants' assertion that "[b]ecause Little Tucker Act jurisdiction is adequate and available, the Administrative Procedures Act provides no waiver of sovereign immunity," Mot. to Dismiss (Dkt. 102), 8:3-4, is flawed. Plaintiffs do not simply seek restitution (covered by the Little Tucker Act) but also injunctive and declaratory relief (covered by the APA). The Court has already held that it has jurisdiction under both the Little Tucker Act and the APA. Order Den. Mot. to Dismiss (Dkt. 68) 7-8.

Furthermore, the Court and Defendants have already acknowledged that jurisdiction over Plaintiffs' monetary relief claims exists under the Little Tucker Act. In this regard, Defendants stated in their Motion to Dismiss, filed in November 2007, that "the substance of Plaintiffs' refund claim is money damages from the federal government – in essence, an illegal exaction – and the Tucker Act covers such claims." Motion to Dismiss (Dkt. 102) 10:20-21. Defendants continued: "each Plaintiff likely seeks unspecified damages that would fall below the Little Tucker Act's $10,000 threshold." *Id.* at 11:26-27. Additionally, in denying Defendants' initial motion to dismiss, the Court held that "the Little Tucker Act provides a grant of jurisdiction to this Court and a waiver of sovereign immunity for the requests for refunds of the biometric services fees Plaintiffs paid." Order Den. Defs' Mot. to Dismiss (Dkt. 68) 8:11-13. Defendants knew when they subsequently answered Plaintiffs' First Amended Complaint on April 18, 2008 that the source of the Court's jurisdiction over Plaintiffs' monetary relief claims was the Little Tucker Act. Plaintiffs' complaint therefore provides sufficient factual basis for the Court's exercise of jurisdiction. There is no need now for Plaintiffs to amend their complaint to state what Defendants and the Court already know.[8]

B. The Court Has Jurisdiction Over this Entire Case, Despite the Failure to Expressly Name "the United States"

Defendants argue the Court has no jurisdiction over Plaintiffs' monetary relief claims under the Little Tucker Act because Plaintiffs have not expressly named the United States as a Defendant, and that a waiver of sovereign immunity pursuant to the Little Tucker Act exists only where a case includes the "United States" in its caption. Plaintiffs are not required to name the United States as a defendant where, as here, they have already named the United States Attorney General and the appropriate federal agency heads in their official capacities. Furthermore, Defendants' argument ignores the many occasions in which Defendants themselves have admitted that this suit is against the United States.

Defendants "appear[] to take refuge in the idea that the captioning of the lawsuit somehow outweighs the functional identity of the United States and its instrumentalities." *Auction Co. of Am. v.*

[8] Even if Plaintiffs were required to amend their complaint to add such a statement, Defendants cite no authority to support their claim that this would allow a new venue objection.

Fed. Deposit Ins. Co., 132 F.3d 746, 750 (D.C. Cir. 1997) ("[T]he FDIC as Receiver counts as the United States for the Tucker Act."). Contrary to Defendants' view, "sovereign immunity is determined not by the party named as the defendant, but by the issues presented and the effect of the judgment." *State of N.M. v. Regan*, 745 F.2d 1318, 1320 (10th Cir. 1984) (finding Tucker Act jurisdiction where plaintiff named Secretary of the Treasury, rather than the United States, as the defendant); *Wesreco*, 618 F. Supp. at 566 (same).[9]

Where plaintiffs name as defendants federal officials in their official capacities, the claims have been raised against "the United States." *Wright v. Gregg*, 685 F.2d 340, 341-42 (9th Cir. 1982) (suit against the Director of the Bureau of Land Management was a suit against the United States).[10] "It is not necessary that the United States be denominated as a party. An action against a federal . . . official will be treated as an action against the sovereign if 'the judgment sought would expend itself on the public treasury . . . , or if the effect of the judgment would be to restrain the Government from acting, or compel it to act.'" *Portsmouth Redev. & Hous. Auth. v. Pierce*, 706 F.2d 471, 473 (4th Cir. 1983) (Tucker Act jurisdiction appropriate where the "suit [was] against a federal official for acts performed within his official capacity, and, consequently, it amount[ed] to an action against the sovereign."); *Dugan v. Rank*, 372 U.S. 609, 612 (1963) (a "suit against . . . local officials of the Reclamation Bureau is in fact against the United States")[11]; *McClellan v. Kimball*, 623 F.2d 83, 85 (9th Cir. 1980) ("[i]n the

[9] Defendants' citation to *Hughes v. United States*, 701 F.2d 56 (7th Cir. 1982), is of no import. *Hughes* concerns the Federal Tort Claims Act and has been sharply criticized as overly harsh. *See Murray v. U.S. Postal Serv.*, 569 F. Supp. 794, 797 (N.D. N.Y. 1983) ("The [FTCA's] requirement that the United States be sued in its own name rather than in the name of the offending agency or officer is a trap for the unwary that has often been criticized for preventing too many deserving claimants from obtaining relief against the government."). Moreover, even under the jurisdictional rules of the FTCA, service on the United States Attorney or the Attorney General of the United States provides the requisite notice for bringing the United States in as a defendant. *Johnson v. U.S. Postal Serv.*, 861 F.2d 1475, 1481 (10th Cir. 1988). Here, the United States Attorney General was served and named in the complaint, so there does not appear to be any coherent argument of lack of notice to the United States as a defendant.

[10] Defendants cite *Sherwood*, 312 U.S. at 588 (1941), for the concept that relief sought against others than the United States must be ignored as beyond the jurisdiction of the court. This case is inapposite because, unlike in *Sherwood*, Plaintiffs here are not bringing a case against "private parties." *Id.* This case is, as Defendants concede, a case against the government of the United States, and jurisdiction would therefore be appropriate. Defendants' reference to *Brown v. United States*, 105 F.3d 621 (Fed. Cir. 1997), is also inapt because *Brown* held that the Tucker Act does not grant jurisdiction over suits against individual Government officials in their *individual* capacities. *Brown*, 105 F.3d at 624. Plaintiffs are not suing government officials in their individual capacities, so the holding in *Brown* is inapposite.

[11] In *Dugan*, the United States was dismissed as a party because "the provision of the McCarran

absence of such allegations [that the official acted outside his authority] the action is against the United States."); *Chabal v. Reagan*, 822 F.2d 349, 355-56 (3d Cir. 1987) ("For purposes of the Tucker Act, we treat [plaintiff's] claims against individual federal defendants in their official capacities as alleging claims against the United States."). Defendants have consistently acknowledged since the beginning of this case that the Attorney General and Secretary of the Department of Homeland Security have been named in their official capacities (*see* Section II, *supra*). Additionally, Plaintiffs' complaint in no way alleges that the named Defendants acted outside their official capacities. Accordingly, this case is against "the United States."[12]

Moreover, the touchstone of immunity is the effect of judgment on the United States. As the Supreme Court has explained, "[i]n deciding whether an action is in reality one against the Government, the identity of the named parties defendant is not controlling; the dispositive inquiry is 'who will pay the judgment?'" *Stafford v. Briggs*, 444 U.S. 527, 542 n. 10 (1980). *See also Marcus Garvey Square, Inc. v. Winston Burnett Constr. Co. of Cal., Inc.*, 595 F.2d 1126, 1132 (9th Cir. 1979) ("[i]mmunity is not determined by the names of the titular parties, but by the practical test of whether a judgment must be satisfied from the United States Treasury"); *State of N.M.*, 745 F.2d at 1319-20 ("If the relief sought against a federal officer in fact operates against the sovereign, then the action must be deemed as one against the sovereign."); *Hill v. United States*, 571 F.2d 1098, 1101 n.5 (9th Cir. 1978) ("To the extent

(continued …)
amendment, . . . 43 U.S.C. § 666, relied upon by respondents and providing that the United States may be joined in suits 'for the adjudication of rights to the use of water of a river system or other source,' is not applicable here." 372 U.S. at 618. In *Dugan*, the United States *was* a named defendant. Contrary to Defendants' assertion, the claim against the United States was *not* dismissed for failure to name the United States. Rather, the case was dismissed because the substantive rights at issue were not covered by the McCarran amendment. Thus, this case does not support Defendants' position; rather, it buttresses the well-accepted concept that a case against a federal official, acting in his or her official capacity, is in fact a case against the United States. Defendants have cited no case law contradicting this basic principle.

[12] Although Defendants cite *Saints v. Winter*, No. 05CV0806 JAH, 2007 WL 2481514, *4 (S.D. Cal. Aug. 29, 2007), for the proposition that a Title VII "suit against 'Secretary of the Navy' is not viable because '[s]uits under the Tucker Act are permitted only against the United States, not its agencies,'" Plaintiffs claim, Defendants concede, and this Court has already determined that Plaintiffs' money claim is "against the United States." Order Den. Mot. to Dismiss (Dkt. 68) 5. The clear weight of authority is that money claims against federal officials in their official authority are claims against the United States.

[a plaintiff] seeks money damages, the suit must be construed as one against the United States, since [the monetary damages] would come from the federal treasury").[13]

Defendants are well aware that Plaintiffs seek restitution from the public fisc of the United States, and they have stated this repeatedly. *See* Defendants' Memorandum in Support of Defendants' Motion to Dismiss (Dkt. No. 49) 10:20-25 ("[T]he substance of Plaintiffs' refund claim is money damages from the federal government"; "Should they succeed, Plaintiffs would be receiving monetary damages from the public fisc of the United States."). Indeed, Defendants' arguments about sovereign immunity only arise because the United States is a party to this case. Particularly where, as here, Defendants argue that Plaintiffs are actually suing the United States, they cannot claim lack of jurisdiction because of failure to name the United States as a defendant. *Wright*, 685 F.2d at 342. "To hold otherwise would permit defendant to take logically inconsistent positions." *Id.* ("[O]n the one hand, defendant argues [plaintiff] is actually suing the United States and thus must overcome sovereign immunity by alleging jurisdiction under a federal statute that specifically waives such immunity. On the other hand, defendant contends that because [plaintiff] failed to name the United States as defendant, [plaintiff] cannot invoke [28 U.S.C. §] 2409a which specifically waives sovereign immunity."). Plaintiffs thus need not amend their complaint to expressly name the United States.[14]

[13] Defendants mistakenly believe that Plaintiffs' reliance on *Hill* is misplaced. *Hill* stands for the established tenet that suits that seek to draw from the federal treasury are construed as suits against the United States. Defendants do not offer any case law to the contrary. The "sovereign immunity bar" to which Defendants refer concerns the lack of a substantive right created by Congress that plaintiffs in *Hill* wished to enforce. It was that lack of a statutory right that defeated sovereign immunity. There is no such concern in this case. Additionally, Defendants attempt to distinguish *Van Drasek v. Lehman*, 762 F.2d 1065, 1069 (D.C. Cir. 1985) (finding, in a Tucker Act case, that "[e]ven if the United States is not a named defendant, [] if the judgment sought would expend itself on the public treasury, the suit will be construed as one against the United States requiring a waiver of sovereign immunity." (internal quotation marks omitted)). Defendants miss the mark. Plaintiffs are not disputing that waiver of sovereign immunity is required for suits against Federal officials. The point here is that the United States does not have to be a named defendant where the suit is against federal officials, acting within their official capacities, and where relief would draw from the public treasury. In *Van Drasek*, even though plaintiff did not expressly name the United States as a defendant, the court determined that the suit was against the United States and jurisdiction under the Tucker Act lay with the Federal Circuit.

[14] *Finley v. United States*, 490 U.S. 545 (1989), also does not support Defendants' argument regarding the need to add the United States as a party. There, the plaintiff initially sued San Diego Gas & Electric Company under tort theories. Upon learning that the Federal Aviation Administration was a necessary party, the plaintiff added the agency as a party and included a cause of action under the Federal Tort Claims Act, and district court exerted "pendent-party" jurisdiction over the FAA. Here, by contrast, Plaintiffs' claims have only ever been against the United States, and indeed could only have been viewed as being against the United States.

C. Plaintiffs Have A Proper Claim for Injunctive and Declaratory Relief That Vests Jurisdiction in this Court

In addition to their claims for monetary relief, Plaintiffs assert, on behalf of themselves and the putative class, claims for injunctive and declaratory relief. The Court has already found that it has jurisdiction over those claims under either the Little Tucker Act or the Administrative Procedures Act. Order Denying Defendants' Motion to Dismiss (Dkt. 68) 8:11-17 ("[t]his Court also has the power to grant whatever equitable relief might be necessary, whether it is considered "associated with and subordinated to" the Tucker Act monetary claim [citation omitted], or separate equitable relief which the Court can grant under § 702 of the APA."). In an effort to wrest this case away from this Court, Defendants claim that because all named Plaintiffs have submitted biometric services payments for TPS registration for their current extension periods, their injunctive relief claims are moot or unnecessary. Defendants' argument misapprehends the standards for mootness and the facts of this case.

1. Plaintiffs' Injunctive and Declaratory Relief Claims Are Not Moot

Defendants have not met their burden of showing that Plaintiffs' claims are moot. "The test for mootness . . . is a stringent one." *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 n.10 (1982). In order to establish mootness, Defendants, as "the part[ies] asserting mootness," bear the "heavy burden of persua[ding] the court that the challenged conduct cannot reasonably be expected to start up again. . . ." *Adarand Constructors, Inc. v. Slater*, 528 U.S. 216, 222 (2000); *see also Knuckles v. Weinberger*, 511 F.2d 1221, 1222 (9th Cir. 1975) (same). Defendants must show that "'it is *absolutely* clear the allegedly wrongful behavior could not reasonably be expected to recur.'" *Lozano v. AT&T Wireless Servs., Inc.*, 504 F.3d 718, 733 (9th Cir. 2007) (quoting *Friends of the Earth v. Laidlaw*, 528 U.S. 167, 190 (2000)) (emphasis added). "[V]oluntary cessation of allegedly illegal conduct does not moot a case; if it did, the courts would be compelled to 'leave the defendant . . . free to return to his old ways.'" *City of Mesquite*, 455 U.S. at 289 n.10 (defendant's repeal of objectionable language from an ordinance did not render the case moot because the defendant was not precluded "from reenacting precisely the same decision.") (quoting *United States v. W.T. Grant Co.*, 345 U.S. 629, 632 (1953)).

Defendants' assertion that Plaintiffs' prospective relief claims have been mooted is disingenuous. First, there has been no voluntary cessation in this case. Defendants' regulations under 8

C.F.R. § 244.6, which unlawfully impose biometric services fees for TPS registration in contravention of the fifty-dollar statutory cap, have not been withdrawn. To this day, the Government continues to maintain, to all those inquiring about TPS, that "[a]n $80 per person fee for biometrics may be required" for TPS applicants and registrants.[15] Defendants remain silent as to the continuation of their regulations, yet they vigorously defend the legality of those same regulations. "The continued and uncontested existence of the policy that gave rise to the legal challenges forecloses the mootness argument." *United States v. Howard*, 480 F.3d 1005, 1010 (9th Cir. 2007) (quotation omitted). Moreover, because Defendants continue to insist that their conduct is legal, the questioned conduct is likely to recur and therefore not moot. *See Armster v. U.S. Dist. Court for Cent. Dist. of Cal.*, 806 F.2d 1347, 1359 (9th Cir. 1986) ("It has long been recognized that the likelihood of recurrence of challenged activity is more substantial when the cessation is not based upon a recognition of the initial illegality of that conduct."). Similarly, where, as here, "the harm alleged is directly traceable to a written policy . . . , there is an implicit likelihood of its repetition in the immediate future." *Armstrong v. Davis*, 275 F.3d 849, 861 (9th Cir. 2001). Defendants, therefore, ask the Court to speculate that their unlawful activities will cease even though the excess biometric services fee provisions remain on the books; Defendants insist that their practices are legal; and Defendants have given no indication that they will repeal their regulations or end their practice of charging excess biometric services fees. Defendants have not proven mootness.

Second, regardless of whether the most recent TPS registration period has closed, the TPS designations for Honduras, Nicaragua, and El Salvador have repeatedly been extended, most recently in 2008 (Grimes Decl. Exs. 2, 3, and 4), and Defendants have consistently imposed excess biometric service fees as a condition of TPS registration. Defendants have not offered a scintilla of evidence that the DHS intends to allow the TPS designations for El Salvador, Nicaragua, or Honduras to expire in 2010. Accordingly, they have not made it "*absolutely* clear [that] the[ir] allegedly wrongful behavior could not reasonably be expected to recur." *Lozano*, 504 F.3d at 733. Plaintiffs' challenge to

[15] *See* Decl. of Scott G. Grimes in Supp. of Opp. to Mot. to Dismiss ("Grimes Decl.," filed herewith) Ex. 1 (U.S. Citizenship and Immigration Services information page re Application for Temporary Protected Status).

Defendants' unlawful overcharging of TPS registrants for biometrics fees, and Plaintiffs' request for prospective relief arising therefrom, are not immune from judicial scrutiny.[16]

Third, Plaintiffs' request for prospective relief is not moot because Defendants' practices are capable of repetition yet evading review. *Roe v. Wade*, 410 U.S. 113, 125 (1973) (practices that are capable of repetition yet evading review are not moot); *Howard*, 480 F.3d at 1009-10 (same). It must be "absolutely clear" "that the allegedly wrongful behavior could not reasonably be expected to recur" in order for Defendants to show the inapplicability of the "capable of repetition yet evading review" doctrine. *Doe v. Gallinot*, 657 F.2d 1017, 1021 n.6 (9th Cir. 1981). As discussed above, Defendants have failed to show that there is no reason to expect that the Government will continue to enforce its biometric fee provisions. Moreover, the TPS registration periods are so short that they evade review. "[W]here the underlying action is almost certain to run its course before either this court or the Supreme Court can give the case full consideration, the controversy evades review." *Miller for & on Behalf of NLRB v. Cal. Prac. Med. Ctr.*, 19 F.3d 449, 454 (9th Cir. 1994). "[A] regulation in effect for less than a year satisfie[s] the durational component because a year is not enough time for judicial review." *Biodiversity Legal Found. v. Badgley*, 309 F.3d 1155, 1166 (9th Cir. 2002). Here, the TPS registration periods typically last only sixty to ninety days. *See* Grimes Decl. Ex. 5 (USCIS Temporary Protected Status). A registration period of only sixty to ninety days is so short that it will certainly evade judicial review. Defendants have thus fallen far short of meeting their heavy burden of proving mootness.

2. Plaintiffs' Claims for Injunctive and Declaratory Relief Remain Necessary

Without citation to any legal standard, Defendants make the novel assertion that Plaintiffs' claims for non-monetary equitable relief are superfluous, relying heavily on three inapposite decisions in which the defendants had no ongoing relationship with the plaintiffs that could result in the plaintiffs suffering future injury. Defendants' reliance on those decisions is misplaced.

[16] Defendants' assertion that "[a]ll eight named plaintiffs have completed payment and application by the December 30, 2008 deadline" is similarly unavailing. Mot. to Dismiss (Dkt. 102) 10:13-14. The named plaintiffs will likely re-register for any future extension, as they have consistently done in the past, thereby continuing to be affected by Defendants' unlawful biometric service fee policies. They therefore have an active and ongoing interest in prospective declaratory and injunctive relief.

In *Briggs v. United States*, 564 F. Supp. 2d 1087 (N.D. Cal. 2008), the plaintiff claimed that the government engaged in improper debt collection on his credit card account that had not been active for more than ten years. *Id.* at 1088-89. The court dismissed plaintiff's individual claim for prospective relief as superfluous to a reimbursement of illegal offsets the government had taken from plaintiff's pay. Critical to this conclusion was the fact that plaintiff had stopped using his credit card, and there was no threat that future debts would be referred to collection. *Id.* at 1092-93. The court also stressed that its opinion "only looks to the validity of [the named plaintiff's] individual claims," and its comments that res judicata would bar the government from further exactions against the representative plaintiff were explicitly limited to the plaintiff's individual claims and not to those of the putative class. *Id.* at 1092. In a subsequent Order, the *Briggs* court highlighted precisely this distinction. *Briggs v. United States*, No. C-07-05760 WHA 2009 WL 113387, *4 (N.D. Cal. Jan. 16, 2009) ("*Briggs II*") ("The order, however, expressly limited its ruling to plaintiff's individual claim and declined to decide whether APA jurisdiction would exist over a properly certified class.").

Similarly, *Tucson Airport Authority v. General Dynamics Corp.*, 136 F.3d 641 (9th Cir. 1998), would only support Defendants' arguments if Plaintiffs' raised no claims for injunctive and declaratory relief. Presented with an alleged waiver of sovereign immunity pursuant to the Administrative Procedures Act, the *Tucson Airport Authority* court found that "the APA waives sovereign immunity for General Dynamics's claims only if three conditions are met: (1) its claims are not for money damages, (2) an adequate remedy for its claims is not available elsewhere and (3) its claims do not seek relief expressly or impliedly forbidden by another statute." *Id.* at 645. The plaintiffs in that case sought only injunctive relief, and no monetary damages. *Id.* Here, Plaintiffs seek injunctive *and* declaratory relief – an order to stop the Government from charging more than fifty dollars for TPS registration and invalidation of the regulation that endorses this illegal practice – that "cannot be satisfied by the mere payment of money damages." *Id.*

Consolidated Edison Co. of New York, Inc. v. United States Department of Energy, 247 F.3d 1378 (Fed. Cir. 2001), is likewise inapposite. Consolidated Edison filed its action solely to recover reimbursements for monetary assessments the Government had imposed on plaintiffs for use of the Government's nuclear enrichment services in the past. *Id.* at 1381. Instead of seeking refunds,

however, the plaintiff in that case deliberately styled its action as one for declaratory and injunctive relief in order to avoid jurisdiction of the Court of Federal Claims, where similar actions were going poorly. *Id.* Moreover, *Consolidated Edison* was not a class action, and the discussion of res judicata pertained only to the parties listed as plaintiffs.[17] Here, by contrast, Plaintiffs have affirmatively sought injunctive and declaratory relief in addition to reimbursement of fees paid. Moreover, without injunctive and declaratory relief, Plaintiffs again will be forced to pay excess fees the next time TPS designations are extended. Their equitable relief claims are therefore necessary.

D. Venue Is Proper in This Judicial District for the Entire Class Case

In their current Motion to Dismiss, Defendants renew their objection that venue is improper for out-of-district class members, and newly assert that venue is improper anywhere because Plaintiffs and the members of the proposed class are aliens. Defendants further claim that, once Plaintiffs amend their complaint to name the United States as a defendant (which, according to Defendants, Plaintiffs must do), they will have another opportunity to object to venue.[18] These objections cannot succeed. First, Defendants have long ago waived their venue objections when they responded substantively to Plaintiffs' Motion for Preliminary Injunction (instead of filing an Answer or a Motion to Dismiss). Second, on the merits, this is simply false; venue is proper in this judicial district for the entire class. Finally, Plaintiffs are aliens residing in the United States and may bring suit in the district where they reside.

[17] The *Consolidated Edison* court's speculative and unsupported assertion that a judgment on Consolidated Edison's claims would serve as res judicata for purposes of other utility companies simply does not apply to the instant matter. The plaintiffs in the *Consolidated Edison* case were a group of twenty-two nuclear utilities – large corporations with the ability to prosecute any further infractions if the United States continued to unlawfully exact fees. Here, Plaintiffs and the unnamed members of the putative class have no such litigation advantage. Further, because the sum of money at issue for each individual class member here is modest, most class members would be unlikely to find lawyers to take their individual cases should Defendants continue their unlawful fee assessments. Defendants thus have even less of an incentive to cease the challenged actions here than in *Consolidated Edison*.

[18] In making this argument, Defendants cite to *Immigration Assistance Project of Los Angeles County. Federation of Labor (AFL-CIO) v. I.N.S.*, 306 F.3d 842 (9th Cir. 2002). This case is inapposite. The court in that case assumed without analysis that venue could be re-challenged when new plaintiffs were added for purposes of satisfying new jurisdictional requirements. *Id*. at 848. In the instant matter, by contrast, Defendants urge that Plaintiffs must add a new named defendant. Moreover, the amendments urged by Defendants in this case are fundamentally different in nature. Defendants here seek a cosmetic, unrequired change – naming the United States as a defendant. In *Immigration Assistance Project*, the changes were required by Congressional revisions to the Immigration Reform and Control Act.

1. Defendants Long Ago Waived Their Objection That Venue Is Not Proper Here for Class Members Who Reside Outside This Judicial District

"A fundamental tenet of the Federal Rules of Civil Procedure is that certain defenses under Fed. R. Civ. P. 12 must be raised at the first available opportunity or, if they are not, they are forever waived." *Am. Ass'n of Naturopathic Physicians v. Hayhurst*, 227 F.3d 1104, 1106 (9th Cir. 2000). A motion to dismiss for lack of venue "must be made before pleading if a responsive pleading is allowed." Fed. R. Civ. P. 12(b). Failure to raise a venue objection under Rule 12(b)(3) in either a motion to dismiss pursuant to Rule 12(b), or in a responsive pleading, is fatal, and will serve to waive the moving party's venue objection entirely. Fed. R. Civ. P. 12(g)(2), 12(h)(1)(A), 12(h)(1)(B)(ii). Thus, a defendant must raise improper venue either by filing a motion pursuant to Rule 12(b)(3) or by raising it as an affirmative defense in its answer if no Rule 12 motion has been filed. Otherwise, venue objections have been waived.

Waiver is precisely what happened here. Defendants' "first significant defensive move" (5C Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1391 (3d ed. 2004)) was to respond to the substance of Plaintiffs' claims in its Opposition to Plaintiffs' Motion for Preliminary Injunction.[19] In that Opposition, Defendants made no reference to the propriety of venue. When Defendants later decided to file a motion to dismiss and object to venue for out-of-district plaintiffs, the Court held that Defendants "waived any objection to venue in this Court." Order Den. Mot. to Dismiss (Dkt. 68) 10:24-25. As this Court found at that time, "allowing Defendants to raise a venue objection only after this Court found a likelihood of success on the merits would permit the forum-shopping and

[19] Defendants' reliance on *American Home Assurance Co. v. TGL Container Lines, Ltd.*, 347 F. Supp. 2d 749 (N.D. Cal. 2004), is not well taken. *American Home Assurance Co*. does not provide helpful guidance where, as here, the defendant opposed a substantive motion filed by the plaintiff before filing either an answer or a 12(b) motion. The same is true of *Rates Technology v. Nortel Networks Corp.*, 399 F.3d 1302 (Fed. Cir. 2005), which is also procedurally distinguishable from the instant matter, as it did not involve a substantive opposition from the defendant before filing an answer or a 12(b) motion. Moreover, in quoting selectively from *Manchester Knitted Fashions, Inc. v. Amalgamated Cotton Garment Allied Industries Fund*, 967 F.2d 688 (1st Cir. 1992), Defendants ignore the court's statement that "nothing in the record would have prevented the Fund from raising this motion or defense in conjunction with or before the motion for a hearing on the TRO or before entering into a stipulation whereby it submitted itself to the jurisdiction of the district court." *Id.* at 692. This is precisely what happened in the instant matter: Defendants submitted themselves to the jurisdiction of this Court by opposing Plaintiffs' Motion for Preliminary Injunction on the merits before filing either their Answer or a 12(b) motion.

waste of judicial resources Rule 12(h) is designed to avoid." *Id.* at 10:19-21. Defendants' renewing the same venue objection a year later is an even more flagrant and untimely attempt at forum-shopping.[20]

2. This Judicial District Is the Proper Venue for Plaintiffs' Monetary Relief Claims Under the Little Tucker Act

Defendants assert that they can raise a new objection to venue if the United States is added as a named Defendant. As argued above, the United States has been the party defendant in this action from the outset, and has waived its venue objections. *See* Section III.B, *supra*. Yet, regardless of whether the United States has already waived its venue objections, venue is proper in this Court for all Plaintiffs and putative class members.

The Little Tucker Act's venue provision states that as to monetary relief claims, "any civil action in a district court against the United States under [the Little Tucker Act] . . . may be prosecuted only . . . in the judicial district where the plaintiff resides." 28 U.S.C. § 1402(a)(1). Defendants read this language to mean that only plaintiffs and class members who reside in this judicial district can have their money claims heard in this civil action before this Court. Defendants' argument hinges on their interpretation of the term "*the* plaintiff" to mean "*all* plaintiffs and class members" rather than "*any* plaintiff." The language of the statute itself mandates no such narrow construction. There is no requirement that *all* plaintiffs or class members reside in the forum district. *See Briggs II*, 2009 WL 113387, at *6-7 (rejecting the Government's argument that the Little Tucker Act and its venue provision were intended as a limited exception to exclusive Court of Claims jurisdiction simply to allow plaintiffs with small claims to bring their cases in the local judicial districts, and reasoning that "[c]ourts must look first and foremost not to the purpose of a statute but to its text, and this order is simply unable to derive the venue limitation urged by the government from the text of the venue provision.").

No appellate decisions have addressed the issue of what the Little Tucker Act's venue provision means by the term "the plaintiff resides." *Briggs II*, 2009 WL 113387, at *5. However, multiple courts,

[20] Defendants' attempt to distinguish *Transaero, Inc. v. La Fuerza Aerea Boliviana*, 162 F.3d 724 (2nd Cir. 1998), on the grounds that it deals with a waiver of personal jurisdiction, not venue, is unavailing. As with objections to venue, objections to personal jurisdiction are waived if not timely raised. Fed. R. Civ. P. 12(h)(1). This general principle is not analytically different depending on which objection has been waived.

including the Ninth Circuit, have interpreted the identical language in the context of 28 U.S.C. § 1391(e)'s venue provision for suits against the Government, which states that "a civil action in which a defendant is an officer of the United States . . . acting in his official capacity, . . . or the United States, . . . may be brought in any judicial district in which . . . *the plaintiff resides*." 28 U.S.C. § 1391(e)(3) (emphasis added). It is a fundamental canon of statutory construction that the same language used in different statutes should be given a consistent interpretation. *Leocal v. Ashcroft*, 543 U.S. 1, 11 (2004); *United States v. Alvarez-Hernandez*, 478 F.3d 1060, 1065-66 (9th Cir. 2007); *Jeldness v. Pearce*, 30 F.3d 1220, 1227 (9th Cir. 1994). Given that these statutes use the same language and are not in conflict,[21] it is appropriate for the Court to look to cases interpreting § 1391(e) for guidance as to how the Little Tucker Act's venue provision should be construed.

Cases interpreting § 1391(e) do not require all plaintiffs to reside in the same judicial district.[22] "For over thirty years federal courts have conclusively and consistently held that the statutory language in 28 U.S.C. § 1391(e)(3) regarding the residency of 'the plaintiff' should be interpreted to mean *any* plaintiff rather than *all* plaintiffs." *A.J. Taft Coal Co., Inc. v. Barnhart*, 291 F. Supp. 2d 1290 (N.D. Ala. 2003) (listing 20 cases that interpret "a plaintiff" to mean "any plaintiff"; concluding that venue in that case was proper even though only two out of ninety-eight plaintiffs resided in the district). This interpretation "is not only the majority view – it is the only view adopted by the federal courts since 1971" (*Sidney Coal Co., Inc. v. Massanari*, 427 F.3d 336, 345 (6th Cir. 2005)), including those in the Ninth Circuit. *See Ry. Labor Executives' Ass'n v. ICC*, 958 F.2d 252, 256 (9th Cir. 1991) (under § 1391(e)(3), venue need only be proper for one plaintiff in multi-plaintiff suit); *Finley v. Nat'l*

[21] It is a well settled canon of statutory interpretation that "to the extent that statutes can be harmonized, they should be." *United States v. Trident Seafoods Corp.*, 92 F.3d 855, 862 (9th Cir. 1996). The general venue statute for lawsuits against the United States, 28 U.S.C. § 1391(e)(3), provides that venue is proper in "any judicial district where (1) a defendant in the action resides, (2) a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of the property that is the subject of the action is situated, or (3) the plaintiff resides if no real property is involved in the action." 28 U.S.C. § 1391(e)(1)-(3). The Little Tucker Act venue provision, 28 U.S.C. § 1402(a)(1), does not conflict with these provisions – it merely removes the first two options and limits jurisdiction to "only . . . the judicial district where the plaintiff resides." 28 U.S.C. § 1402(a)(1). "The use of the word 'only' rather than 'any' quite plausibly refers to the fact that Section 1391 provides three venue options, while Section 1402(a)(1) provides only one." *Briggs II*, 2009 WL 113387, at *7.

[22] The proper venue for Plaintiffs' classwide injunctive and declaratory relief claims is also determined by 28 U.S.C. § 1391(e)(3). As such, this Court properly has venue over the equitable and declaratory relief claims of Plaintiffs and the putative class.

Endowment for the Arts, 795 F. Supp. 1457, 1466-67 (C.D. Cal. 1992), *aff'd* 100 F.3d 671 (9th Cir. 1996), *rev'd and remanded on other grounds* by 524 U.S. 569 (1998) (under the Privacy Act's venue provision allowing an action to be brought in the district "in which the complainant resides," "if any plaintiff satisfies the venue requirement, … the venue requirement is satisfied as to the remaining plaintiffs."); *Nat'l Air Traffic Controllers Ass'n v. Burnley*, 700 F. Supp. 1043, 1045 (N.D. Cal. 1988) (venue under § 1391(e)(3) was appropriate for all plaintiffs when two of the four resided in the judicial district); *see also* 14D Charles A. Wright, Arthur R. Miller and Edward H. Cooper, Federal Practice and Procedure, § 3815 (3d ed. 2004) (commenting that changing § 1391(e)(3) to read "a plaintiff" instead of "the plaintiff" is "unnecessary" because "courts have read the statute as if the change had been made and have held that only one plaintiff need satisfy the residency requirement."). The Court should similarly construe the Little Tucker Act's use of the term "where the plaintiff resides" to mean "any plaintiff" rather than "all plaintiffs."

Furthermore, because venue is proper for the named Plaintiffs, this Court is also the proper forum for all putative class members' monetary relief claims under the Little Tucker Act. There is no requirement that all class members reside within the judicial district where a class action case is filed; venue restrictions in class action suits are inapplicable to unnamed members of the putative class. *See Abrams Shell v. Shell Oil Co.*, 343 F.3d 482, 489-90 (5th Cir.2003) (stating that "the relevant venue question in such circumstances is whether venue is proper as among the parties who have in fact been brought personally before the court as named parties to the action, the parties representing and in effect standing in for the absent class members.") (quoting *United States v. Trucking Employers, Inc.*, 72 F.R.D. 98, 100 (D.D.C. 1976)); *see also Matsuo v. United States*, 416 F. Supp. 2d 982, 997 (D. Haw. 2006) (Hawaii district court was appropriate venue under § 1391(e) for proposed class action against the Government where proposed class included all federal employees, and only five of the ten named plaintiffs lived in Hawaii).

Defendants' attempts to distinguish *Whittington v. United States*, 240 F.R.D. 344, 348-49 (S.D. Tex. 2006), and *Briggs II*, are unavailing. Defendants try to differentiate *Briggs II* and *Whittington* (and the case it relied on, *Abrams*, 343 F.3d 482), by arguing that the special venue provision of the Little Tucker Act is entirely distinct from 28 U.S.C. § 1391(e) – this despite the striking similarities in

language in the two statutes. Defendants' "respectful disagreement" with these cases does not change either the law that they set forth or the fact that the Little Tucker Act's venue provision is wholly consistent with § 1391(e). Similarly, Defendants' attempt to find support in *Bywaters v. United States*, 196 F.R.D. 458, 464 (E.D. Tex. 2000) is unavailing. *Bywaters* simply rejects the notion that § 1402(a)(1) extends venue only to class members who reside in the judicial district.

Defendants' reliance on *Favereau v. United States*, 44 F. Supp. 2d 68 (D. Me. 1999), is also misplaced. There, the court assumed without analysis or discussion that absent class members are the same as "plaintiffs" under 28 U.S.C. § 1402(a)(2). *Id.* at 69. The court also distinguished § 1402(a)(2) from § 1391(e)(3) because § 1402(a)(2) provides that the civil action may be prosecuted *only* where the plaintiff resides, while § 1391(e)(3) allows the action to be brought in *any* district where the plaintiff resides. "The result urged by the government [and inferred by the *Favereau* court], however cannot be derived from this distinction." *Briggs II*, 2009 WL 113387, at *7. As established above, both provisions allow "the plaintiff" to bring an action where "the plaintiff resides." *Id.* Section 1402's use of the term "only" simply refers to the fact that § 1391(e) provides three venue options, while § 1402(a) provides only one. *Id.*; *see also* n. 21, *supra*. Accordingly, Defendants' attempt to narrow the scope of venue cannot succeed. *Cf. Stafford v. Briggs*, 444 U.S. 527 (1980). The Court should exercise its broad discretion and find that venue is proper for all plaintiffs and class members in this judicial district. *See, e.g.*, 28 U.S.C. § 1404(a); *Bywaters*, 196 F.R.D. at 464 ("federal courts are generally given great discretion in determining venue.").

3. Defendants' Argument that "Alien" Plaintiffs Have No Venue in This Judicial District Should Be Rejected

Defendants' argument that "alien" plaintiffs have no venue in this judicial district is a red herring. As argued in Section II above, Defendants have waived this argument by failing to raise it in their first responsive pleading and/or their initial motion to dismiss. Fed. R. Civ. P. 12(h). Additionally, this argument is baseless on its merits.

First, each of the named Plaintiffs is an alien residing in the United States. The cases Defendants cite are inapposite because they involve the problem of venue as it relates to aliens who do not reside in the United States yet bring suit in United States courts. *See, e.g., Baca v. United States*,

No. EP74CA118, 1974 WL 704 (W.D. Tex. Oct. 18, 1974) (the Western District of Texas was not the proper venue for a case brought by a resident of Mexico, because a resident of Mexico (i.e., an "alien") has no residence in the United States for venue purposes); *Argonaut Navigation Co. v. United States*, 142 F. Supp. 489 (D.C.N.Y. 1956) (plaintiff, a Canadian corporation, did not reside in the judicial district); *Reid Wrecking Co. v. United States*, 202 F. 314 (N.D. Ohio 1913) (a Canadian corporation based in Canada, not an immigrant human who has documented residence in the United States, did not reside in the judicial district for purposes of determining proper venue).

Second, Defendants' argument does not account for the realities of the TPS registration requirements. To be eligible for TPS, an alien must prove he has "continuously resided in the United States." 8 U.S.C. § 1254a(c)(1)(A)(ii). Defendants fail to acknowledge that one of their own agencies – the USCIS – has already determined that Plaintiffs "reside" in the United States under 8 U.S.C. section 1254a(c)(1)(A)(ii). Moreover, the recent immigration cases cited by Defendants – *Ou v. Chertoff*, No. C-07-3676 (MCC), 2008 WL 686869 (N.D. Cal. Mar. 12, 2008) and *Li v. Chertoff*, No. C-08-03540 (MCC), 2008 WL 4962992 (N.D. Cal. Nov. 19, 2008) – dealt with asylum status for immigrants, not with the residency of TPS registrants. An asylum applicant does not need to show residence to receive benefits. *Li*, 2008 WL 4962992, at *3 (citing the provisions of 8 U.S.C. § 1158 and noting the absence of statutory language requiring residence in the United States for asylum benefits). These cases are thus inapposite in the instant matter.

E. 28 U.S.C. § 2502 Does Not Prevent the Court from Hearing this Case

In the last sentence of their legal argument, Defendants hint at the possible basis for their next potential motion to dismiss on the pleadings: 28 U.S.C. § 2502, which provides that "[c]itizens or subjects of any foreign government which accords to citizens of the United States the right to prosecute claims against their government in its courts may sue the United States in the United States Court of Federal Claims if the subject matter of the suit is otherwise within such court's jurisdiction." 28 U.S.C. § 2502(a). Defendants' suggestion that Plaintiffs cannot sue the United States because United States citizens do not have reciprocal rights to sue Honduras, Nicaragua, and El Salvador in those countries' courts must fail for two reasons.

First, Section 2502 does not represent a grant or a waiver of subject matter jurisdiction. Instead, it provides for the exercise of personal jurisdiction once subject matter jurisdiction has been satisfied. Federal Rule of Civil Procedure 12(h)(1) provides that a party waives any defense of lack of personal jurisdiction both by failing to raise it in an initial motion to dismiss, or by failing to raise it in its first responsive pleading. Defendants did not mention 28 U.S.C. § 2502 or reciprocity in their first Motion to Dismiss, nor did they refer to the statute in their first responsive pleading. Defendants have therefore waived this defense pursuant to Rule 12(h)(1).

Second, Defendants cannot successfully claim that Plaintiffs are unable to satisfy 28 U.S.C. section 2502 because United States citizens may sue the governments of Honduras, El Salvador, and Nicaragua in those nations' courts. The constitutions of Honduras, El Salvador, and Nicaragua all provide for equal treatment before the law, regardless of national origin. Declaration of Henry Saint Dahl ("Dahl Decl.") ¶ 13. The constitutions of Honduras, El Salvador, and Nicaragua also provide that acts that are not prohibited by law are permitted. Dahl Decl. ¶¶ 15, 17, and 19. There is no prohibition in Honduras, El Salvador, or Nicaragua against foreign citizens, including those from the United States, suing the governments of these countries in their courts. *Id.* at ¶¶ 16, 18, and 20. Thus, United States citizens have the same rights to sue the governments of Honduras, El Salvador, and Nicaragua in those countries' courts as do citizens of Honduras, El Salvador, and Nicaragua, respectively. *Id.* Any argument Defendants may raise regarding reciprocity is therefore unavailing.

IV. CONCLUSION

Defendants' latest Motion to Dismiss is a transparent attempt to move this case away from this Court, presumably because this Court has already made clear its views on Plaintiffs' likelihood of success on the merits. Defendants should not be allowed to engage in this kind of forum-shopping. Accordingly, and for the other reasons set forth in this Opposition, Plaintiffs respectfully request that this Court deny Defendants' most recent Motion to Dismiss. In the alternative, Plaintiffs ask that the Court grant Plaintiffs leave to amend their complaint. Plaintiffs further ask that the Court reset Plaintiffs' Motion for Class Certification for the earliest available hearing date. Finally, Plaintiffs ask that the Court schedule a Case Management Conference for the earliest available date, so that the parties may discuss setting a deadline for motions to dismiss on the basis of pleadings.

Dated: February 9, 2009

Respectfully submitted,

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