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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
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9 Carl West,

10 Plaintiff,

11 v.

12 Mesa, City of, et al.,

13 Defendants.
14

No. CV-12-00657-PHX-DGC

ORDER

15
16 Plaintiff and Defendant United States have filed motions for reconsideration.
17 Docs. 66, 68. Plaintiff joins in the United States' motion. The Court will grant the
18 motion of the United States and deny Plaintiff's motion.

19 **I. Legal Standard.**

20 Motions for reconsideration are disfavored and should be granted only in rare
21 circumstances. *Collins v. D.R. Horton, Inc.*, 252 F. Supp. 2d 936, 938 (D. Ariz. 2003). A
22 motion for reconsideration will be denied "absent a showing of manifest error or a
23 showing of new facts or legal authority that could not have been brought to [the Court's]
24 attention earlier with reasonable diligence." LRCiv 7.2(g)(1); *see Carroll v. Nakatani*,
25 342 F.3d 934, 945 (9th Cir. 2003). Mere disagreement with an order is an insufficient
26 basis for reconsideration. *See Ross v. Arpaio*, No. CV-05-4177-PHX-MHM, 2008 WL
27 1776502, at *2 (D. Ariz. 2008). Nor should reconsideration be used to ask the Court to
28 rethink its analysis. *United States v. Rezzonico*, 32 F. Supp. 2d 1112, 1116 (D. Ariz.

1 1998); *see N.W. Acceptance Corp. v. Lynnwood Equip., Inc.*, 841 F.2d 918, 925-26 (9th
2 Cir. 1988).

3 **II. The United States' Motion.**

4 On April 29, 2015, the Court dismissed for lack of subject-matter jurisdiction
5 Plaintiff's state law malicious prosecution claim (count four) brought against the United
6 States as substitute party defendant for failure to exhaust administrative remedies under
7 the Federal Tort Claims Act ("FTCA"). Doc. 64 at 15-16. The Court found that Plaintiff
8 has "failed to allege that he presented his claim to the FBI or other appropriate federal
9 agency and that it was denied," and thus the Court found it lacked jurisdiction over the
10 claim. Doc. 64 at 15. The United States now concedes that Plaintiff exhausted the claim
11 and asserts it did not move to dismiss for failure to exhaust. Doc. 66, ¶ 5. It points to
12 Exhibit F in Case No. 14-254, which is a copy of a complaint Plaintiff submitted to the
13 FBI. Case No. 14-254, Doc. 8-7.

14 Exhibit F contains the same allegations as all of Plaintiff's complaints in this
15 matter. *See* Docs. 1-2, 23, 26, 27-2, 65; Case No. 14-254, Docs. 1, 18. Plaintiff
16 submitted his administrative complaint to the FBI on August 19, 2013, approximately six
17 months before he filed his second action in this Court on February 10, 2014. Case No.
18 14-254, Doc. No. 1. Although there is no actual evidence that the claim was denied by
19 the FBI, the Court may treat the claim as denied if the agency fails "to make a final
20 disposition of [the] claim within six months after it is filed[.]" 28 U.S.C. § 2675(a).

21 With these facts in mind, the Court finds that Plaintiff exhausted his count four
22 claim. When Plaintiff filed his first complaint in Case No. 12-657, he did not bring
23 claims under the FTCA because the United States had not sought to substitute itself as
24 party defendant on count four. Before filing Case No. 14-254, Plaintiff sought to exhaust
25 his claim by submitting a complaint to the FBI. The two cases were then consolidated,
26 effectively serving to amend Plaintiff's first complaint. Given this unique procedural
27 posture, coupled with the fact that the United States concedes that Plaintiff properly
28 presented the claim to the appropriate agency, the Court will reinstate count four brought

1 against the United States as substitute party defendant. *See Valadez-Lopez v. Chertoff*,
2 656 F.3d 851, 855-56 (9th Cir. 2011) (finding claimant exhausted claims where the
3 original complaint did not seek relief under the FTCA, but plaintiff later amended the
4 complaint after exhaustion to include FTCA claim against the United States, and noting
5 “[t]here is nothing in the statute or case law that would prevent a plaintiff from amending
6 an existing complaint asserting non-FTCA claims to name the United States as a
7 defendant and include FTCA claims once those claims have been administratively
8 exhausted”). The individual Defendants remain dismissed from count four.

9 **III. Plaintiff’s Motion.**

10 Plaintiff first argues that the Court should have found that Defendants Brian
11 Truchon and Jeffrey Jacobs “were at times state actors and at other times federal actors.”
12 Doc. 68 at 2. He asserts this is a question of fact for the jury. But Plaintiff failed to argue
13 this point in his response to Defendants’ motions to dismiss, and the Court may reject the
14 argument solely on this ground. *See Motorola, Inc. v. J.B. Rodgers Mech.*
15 *Contractors*, 215 F.R.D. 581, 582 (D. Ariz. 2003) (“Motions for reconsideration are
16 disfavored, however, and are not the place for parties to make new arguments not raised
17 in their original briefs.”).

18 The Court also noted in the order that such an argument would have failed
19 “because ‘it is legally inconsistent to allow simultaneous claims for violations of Section
20 1983 and *Bivens* against the same defendants.’” Doc. 64 at 13-14 n.7 (quoting
21 *Amoakohene v. Bobko*, 792 F. Supp. 605, 608 (N.D. Ill. 1992)). In addition, Plaintiff
22 failed to rebut the Scope Certification, which was prima facie evidence that both Truchon
23 and Jacobs were acting within the scope of their *federal* employment. *See Billings v.*
24 *United States*, 57 F.3d 797, 800 (9th Cir, 1995). Thus, to the extent that Plaintiff asserts
25 the “Court misapplied the law as it relates to the employment context,” the Court
26 disagrees.

27 Plaintiff further argues the Court erred in finding that Jacobs was acting under
28 color of federal law. During briefing, the parties argued this issue extensively and the

1 Court found that Plaintiff failed to rebut the Scope Certification. Plaintiff merely asks the
2 Court to rethink its analysis, which the Court declines to do. *See Rezzonico*, 32 F. Supp.
3 2d at 1116.

4 Plaintiff argues that the Court improperly dismissed his abuse of process claim.
5 He claims that Defendants’ scheme to have two witnesses killed and continue an affair
6 constitutes an improper use of the judicial process. “Abuse of process is a definite act or
7 threat not authorized by the process, or aimed at an objective not legitimate in the course
8 of the process.” *Donahue v. Arpaio*, 869 F. Supp. 2d 1020, 1060 (D. Ariz. 2012)
9 (internal quotation marks omitted). Plaintiff does not allege that Defendants began any
10 legal process intending a result not contemplated by the process, such as prosecuting an
11 individual in order to extort money. The allegations simply state that Defendants sought
12 to prosecute Plaintiff without probable cause. As the Court noted in the order, initiating a
13 prosecution without justification is not an improper purpose sufficient for a claim of
14 abuse of process. *See Crackel v. Allstate Ins. Co.*, 92 P.3d 882, 888 (Ariz. Ct. App.
15 2004).

16 Plaintiff also appears to argue that new evidence demonstrates direct involvement
17 by Truchon sufficient to state a *Bivens* claim. The evidence submitted by Plaintiff
18 consists of two exhibits. Doc. 69-1, Exs. 3, 4. The first exhibit details the role of
19 Truchon as supervisor and states that he is in charge of the “day-to-day operation and
20 administrative control” of the Violent Street Gangs Task Force. The second exhibit is a
21 memo written by Truchon notifying Oklahoma City that he was sending a cooperating
22 witness with a suspect who was traveling to Oklahoma City. In its order, the Court
23 dismissed the *Bivens* claim against Truchon because Plaintiff set forth the exact same
24 allegations that the Court had previously found deficient. The evidence now presented by
25 Plaintiff does not change the insufficiency of his pleading. Nor does it demonstrate more
26 than mere “supervisory liability” alleged against Truchon, which the Supreme Court has
27 repeatedly held insufficient, *see Ashcroft v. Iqbal*, 556 U.S. 662, 677 (2009) (holding that
28 individuals may only “be held liable [if] they themselves acted in violation of [a] citizen’s

1 constitutional rights”) (internal quotations omitted). Plaintiff fails to allege that Truchon
2 took any direct action that violated his constitutional rights, and the additional evidence
3 does not aid Plaintiff’s argument.

4 Plaintiff finally requests that the Court permit him to amend his § 1985 conspiracy
5 claim. The Court dismissed the claim because the complaint contained no allegations
6 about “Plaintiff’s race, the race of Defendants, the race of other participants in the state
7 prosecution, or any other facts that would suggest that the wrongs alleged were in any
8 way related to race.” Doc. 64 at 16 (internal quotation omitted). Plaintiff has repeatedly
9 failed to correct his deficient pleading in this case, even when the Court specifically
10 identified the deficiency. *See* Doc. 27-2, ¶¶ 65-68; Doc. 23, ¶¶ 65-68; Case No. 14-254,
11 Doc. 18, ¶¶ 65-68. Plaintiff now seeks leave to allege his own race, but he does not
12 request that he be permitted to allege any other facts that would suggest racial animus or
13 motive behind the alleged wrongful conduct, nor does he seek to include any facts the
14 Court noted would be relevant to such a claim. The Court denies Plaintiff’s request.

15 In sum, Plaintiff has failed to show manifest error in the Court’s decision. He has
16 also failed to provide new facts or legal authority that would have changed the outcome.
17 Plaintiff’s motion will be denied.

18 **IT IS ORDERED** that Defendant United States’ motion for reconsideration
19 (Doc. 66) is **granted** and Plaintiff’s motion for reconsideration (Doc. 68) is **denied**.
20 Count four will be reinstated against the United States.

21 Dated this 15th day of May, 2015.

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26 David G. Campbell
27 United States District Judge
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