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CARLOS JUENKE
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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

DAVID NUNES,	)	CASE No. 96-3701
	)	CIV-MARCUS
Plaintiff,	)	
	)	Magistrate Judge Garber
vs.	)	
	)	
JEFFREY N. BRAUWERMAN	)	
and BRUCE MARMAR,	)	
	)	**DEFENDANT BRUCE MARMAR'S**
Defendants.	)	**EMERGENCY MOTION FOR**
	)	**PROTECTIVE ORDER STAYING**
______________________________	/	**DEPOSITION**

BRUCE MARMAR, District Adjudications Officer, United States Department of Justice, Immigration and Naturalization Service ("INS"), who has been named as an "individual capacity" defendant in the above-styled civil action, by and through his undersigned attorney, respectfully submits the within Emergency Motion for Protective Order Staying Deposition. This Emergency Motion is submitted pursuant to Rule 26(c)(2) of the Federal Rules of Civil Procedure and S.D.Fla.L.R. 7.1 E.

In support of the relief requested herein, defendant MARMAR respectfully states as follows:

1. On Thursday, May 8, 1997, the Office of the United States Attorney for the Southern District of Florida received a submission from plaintiff entitled "Notice of Taking Deposition." This document directed defendant BRUCE MARMAR to appear for deposition in relation to the above-styled civil action on Thursday, May 22,

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1997.[1]

2. On Monday, May 12, 1997, this Court issued its Order of Reference, wherein it was requested that Magistrate Judge Barry L. Garber "conduct an evidentiary hearing on whether Defendant Bruce Marmar was acting within the scope of his employment when the conduct underlying the Plaintiff's Complaint occurred" and "prepare a Report and Recommendation . . . on Defendant Bruce Marmar's Motion to Dismiss in View of Substitution of Proper Party defendant, filed February 18, 1997 . . ."

3. This Court issued the above Order in response to the legal issues addressed in the aforementioned Motion filed by defendant MARMAR. Specifically, defendant MARMAR has asserted in said Motion that he is absolutely immune from the civil action that has been directed against him by plaintiff by virtue of relevant provisions within the Federal Employees Liability Reform and Tort Compensation Act of 1988, Pub. L. No. 100-694, 102 Stat. 4563 (1988) (codified in part in various subsections of 28 U.S.C. §§ 2671; 2674; 2679). This statute, which serves to amend pertinent provisions within the Federal Tort Claims Act, 28 U.S.C. § 2671 et seq., dictates that federal employees are not proper party defendants with respect to civil actions arising out of acts and/or omissions by a federal employee that occurred within the "course and scope" of such an idividual's employment with the federal government. In addition, this same statute directs that the United States of America be substituted as the proper party defendant in

[1] Plaintiff's Notice of Deposition was received by undersigned counsel on the afternoon of the following day, Friday, May 9, 1997.

those instances where a federal employee has been named as a defendant in a common law tort action, provided that said employee's "course and scope" status has been established. See Defendant Bruce Marmar's Motion to Dismiss in View of Substitution of Proper Party Defendant (copy attached hereto as "Exhibit One").

4. Plaintiff, who is proceeding pro se, has chosen to contest defendant MARMAR'S entitlement to "course and scope" status. The Plaintiff has asserted this position, notwithstanding the filing of a "Certification" document executed by the Acting United States Attorney for the Southern District of Florida, which certified that defendant was "an employee of the United States Department of Justice, Immigration and Naturalization Service, at the time of the incident from which the claim asserted in this action arose [and that defendant MARMAR] was acting within the course and scope of his employment when he testified in his official capacity before the Florida Bar in regards to disciplinary proceedings initiated against the Plaintiff" [referring to the events concerning which the subject civil action has arisen].

MEMORANDUM OF LAW

Plaintiff's attempt at conducting a deposition of defendant MARMAR is, at the present time, improper and premature. Federal employees who have asserted an immunity defense, such as the absolute immunity at issue in the case at bar, must be afforded the opportunity to litigate this issue "before the commencement of discovery." Mitchell v. Forsyth, 472 U.S. 511, 526 (1985) (discovery in the context of an "individual capacity" civil action in which constitutional violations are alleged pursuant to the

Bivens doctrine is improper prior to a judicial determination concerning the individual defendant's entitlement to "qualified immunity").

In Harlow v. Fitzgerald, 457 U.S. 800 (1982), another case in which a "constitutional tort" claim pursuant to the Bivens doctrine was at issue, the Supreme Court set forth the standard for "qualified immunity" concerning such cases. For purposes of the issues presented by the within Emergency Motion, it should be noted that the Supreme Court also recognized that "broad-ranging discovery" is "peculiarly disruptive of effective government." Id. at 817. Accordingly, the Supreme Court expressly held that "discovery should not be allowed" until the "threshold immunity question is resolved." Id. at 818.

The vitality of the above principle was again confirmed by the Supreme Court in Anderson v. Creighton, 483 U.S. 635, 646 n.6 (1987), in which the Court stated:

> [o]ne of the purposes of the Harlow qualified immunity standard is to protect public officials from the "broad-ranging discovery" that can be "peculiarly disruptive of effective government." 457 U.S. at 817 (footnote omitted). For this reason, we have emphasized that qualified immunity questions should be resolved at the earliest possible stage of a litigation.

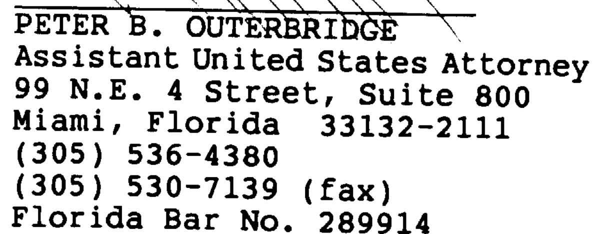
The argument in favor of preventing the onset of "disruptive" and "broad-ranging discovery" in the case at bar is even more compelling than that advanced by the Supreme Court in the Harlow, Mitchell, and Anderson decisions. In those cases, judicially created **qualified** immunity in the context of a Bivens action presented the relevant "threshold" issue that rendered discovery

improper. In the case at bar, statutorily created **absolute** immunity constitutes the applicable "threshold" issue. Since there is no legal distinction between immunity created by judicial decision from the equivalent of statutory immunity created pursuant to the Federal Employees Liability Reform and Tort Compensation Act of 1988, the aforementioned Supreme Court principles apply with equal, if not more compelling, force and effect.

WHEREFORE, for all of the reasons set forth hereinabove, defendant MARMAR respectfully requests that this Court grant the relief requested herein, and issue a temporary protective order restricting plaintiff's ability to take defendant's deposition until such time as Magistrate Judge Garber has had the opportunity to conduct the aforementioned "course and scope" hearing and this Court has had the opportunity to rule upon defendant Marmar's Motion to Dismiss in View of Substitution of Proper Party Defendant.

Respectfully submitted,

WILLIAM A. KEEFER
UNITED STATES ATTORNEY



BY:

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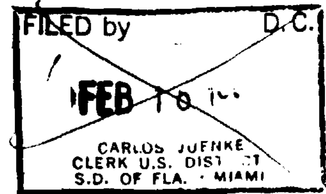
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and accurate copy of the foregoing Unilateral Status Report was sent by facsimile and mail this 15th day of May, 1997 to David Nunes, Esq., pro se, 3917 North Andrews Ave., Fort Lauderdale, FL, counsel for plaintiff, and Harris K. Solomon, Esq., 200 East Las Olas Boulevard, Suite 1800, Fort Lauderdale, FL 33301, counsel for co-defendant Jeffrey N. Brauwerman.

PETER B. OUTERBRIDGE
Assistant U.S. Attorney



UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

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CARLOS JUENKE
CLERK, USDC / SDFL / MIA

DAVID NUNES, Plaintiff, vs. JEFFREY N. BRAUWERMAN and BRUCE MARMAR, Defendants.	)	CASE No. 96-3701 CIV-MARCUS Magistrate Judge Garber **DEFENDANT BRUCE MARMAR'S MOTION TO DISMISS IN VIEW OF SUBSTITUTION OF PROPER PARTY DEFENDANT**

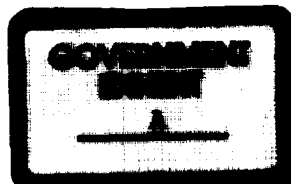
BRUCE MARMAR, District Adjudications Officer, United States Department of Justice, Immigration and Naturalization Service ("INS"), who has been named as an "individual capacity" defendant in the above-styled civil action, by and through his undersigned attorney, respectfully submits the within Motion to Dismiss in View of Substitution of Proper Party Defendant.

In support of the various arguments herein set forth, defendant MARMAR respectfully avers as follows:

PROCEDURAL HISTORY

1. On December 10, 1996, plaintiff NUNES initiated the instant civil action through his filing of a Complaint before the Circuit Court of the Eleventh Judicial Circuit of Florida, in and for Dade County, Florida, which was encaptioned David S. Nunes v. Jeffrey N. Brauwerman and Bruce Marmar, Case No. 96-24905.

2. On December 18, 1996, defendant Marmar was served with a copy of the aforementioned state court Complaint, together with an



accompanying summons, which had been issued by the Clerk of the Eleventh Judicial Circuit.

3. On December 30, 1996 defendant MARMAR, through Assistant United States Attorney Rene D. Mateo, filed a "Notice of Removal" before the Clerk of the United States District Court for the Southern District of Florida. This submission, which corresponds to the first in a series of steps contemplated by 28 U.S.C. § 1446, consisted of the following documents:

(a) "Notice of Removal," signed pursuant to Rule 11 of the Federal Rules of Civil Procedure, and containing a short and plain statement of the grounds for removal,

(b) a copy of the aforementioned Complaint and applicable summons,

(c) a "Certification" document executed by the Acting United States Attorney for the Southern District of Florida, which certified that defendant was "an employee of the United States Department of Justice, Immigration and Naturalization Service, at the time of the incident from which the claim asserted in this action arose [and that defendant MARMAR] was acting within the course and scope of his employment when he testified in his official capacity before the Florida Bar in regards to disciplinary proceedings initiated against the Plaintiff" [referring to the events concerning which the subject civil action has arisen], and

(d) a "Civil Action Cover Sheet" and "Civil Action Certification," as required by applicable provisions of the Local Rules of the United States District Court for the Southern District of Florida.

4. On the same day that defendant MARMAR submitted the aforementioned removal documents (December 30, 1996), defendant MARMAR also submitted before the Circuit Court of the Eleventh Judicial Circuit in and for Dade County, Florida a "Notice to State Court of Removal." This submission, which corresponds to the second step set forth within the procedure for removal of state

court civil actions contemplated by 28 U.S.C. § 1446, consisted of the following documents:

(a) a "Notice to State Court of Removal," which placed the Clerk of the Eleventh Judicial Circuit of Florida upon notice that the subject state court civil action had been removed, and

(b) exhibit attachments to the aforementioned state court "Notice" submission, which consisted of a copy of the aforementioned "Notice of Removal" (complete with attachments) that had been filed before the United States District Court for the Southern District of Florida.

5. In addition to the steps outlined in the previous two paragraphs, defendant MARMAR also, consistent with applicable obligations imposed pursuant to 28 U.S.C. § 1446, served copies of the aforementioned submissions upon both counsel for plaintiff and counsel for co-defendant Jeffrey N. Brauwerman. Furthermore, defendant MARMAR documented his compliance with all of the aforementioned procedures by filing with this Court a document entitled "Defendant Bruce Marmar's Notice of Compliance with Title 28, United States Code, Section 1446(d)."

6. On January 14, 1997, plaintiff filed his "Opposition to Notice of Removal & Motion to Remand" and, on January 27, 1997, plaintiff supplemented the aforementioned Motion by virtue of a submission entitled "Supplemental Motion to Remand With Memorandum of Law," (hereinafter collectively referred to as plaintiff's "Motions to Remand" or by specific name where appropriate).

7. On February 6, 1997, defendant MARMAR submitted his "Omnibus Response to Plaintiff's Opposition to Notice of Removal, Plaintiff's Motion to Remand, and Plaintiff's Supplemental Motion

to Remand" (hereinafter referred to as defendant MARMAR'S "Response to Plaintiff's Opposition to Removal").

SUMMARY OF PLAINTIFF'S CLAIMS

1. According to pertinent averments in the subject Complaint, plaintiff DAVID S. NUNES was a member of the Bar of the State of Florida during the time period at issue in the instant civil action. Complaint at 1 para. 3.

2. On or about July 18, 1996, the Supreme Court of the State of Florida expressly adopted the findings of a Florida Bar grievance referee's report, which had been issued at the conclusion of certain disciplinary proceedings in which plaintiff appeared as the subject. Complaint at 2-6 and Per Curiam Opinion of the Supreme Court of Florida in The Florida Bar v. David Smith Nunes, Case No. 85,451, dated July 18, 1996 at 2 (opinion attached as the first "exhibit" to the instant Complaint).

3. In addition to adopting the factual findings and conclusions of the Bar referee, the Florida Supreme Court also ordered that plaintiff be suspended from the practice of law for a period of ninety (90) days, to be followed by a one year probationary period and twenty-five (25) hours of continuing legal education, as well as repayment of legal fees to certain of plaintiff's former clients who had brought the grievance charges in question. The Florida Bar v. David Smith Nunes, Case No. 85,451, dated July 18, 1996 at 2-3 (hereinafter "Florida Supreme Court's Opinion").

4. During the course of the aforementioned Bar grievance

proceedings, defendant MARMAR testified as an expert witness (presumably on behalf of the Florida Bar). See generally Florida Supreme Court's Opinion. See also Complaint at 3. This testimony was subsequently relied upon to some degree by the Bar referee, as well as the Florida Supreme Court, in determining that plaintiff had failed to provide competent legal representation to former clients Gloria and Leon Burton by virtue of his having charged for services that he should have known to have been futile from the outset. Florida Supreme Court's Opinion at 6-7. According to the Florida Supreme Court and the Bar referee, the Burtons had retained plaintiff to obtain lawful, permanent residence in the United States for their son, Mark Burton, notwithstanding the fact that their son had been deported from the United States approximately five years earlier on account of his conviction for possession of cocaine. Id.

5. In support of their determination concerning the legal futility of plaintiff's legal "services" with respect to the Burton's son, the Florida Supreme Court and the Bar referee made the following observations concerning defendant MARMAR's testimony:

> According to the unrebutted testimony of Bruce Marmar, the Senior Immigration Examiner for the INS in Miami, there are no procedures available for someone in Mark Burton's position that would lead to the obtaining of a green card because a person who has been convicted in the United States for possession of cocaine is permanently barred from [obtaining] permanent residence.

Complaint at 3 and Florida Supreme Court Opinion at 2.

6. In addition to making certain conclusory claims in the

subject Complaint to the effect that defendant MARMAR "carried a grudge against the Plaintiff," and "conspired [with co-defendant BRAUWERMAN] to have plaintiff's attorney's license to be suspended," plaintiff also appears to be questioning the accuracy of defendant MARMAR's testimony. In this regard, plaintiff alleges in his Complaint that defendant MARMAR "knew or should have known that there are procedures available" for individuals such as Mark Burton "that would lead to the obtaining of a green card." Complaint at 3-4.

7. By virtue of defendant MARMAR's allegedly inaccurate testimony, plaintiff claims, in Count III of his Complaint, that defendant MARMAR has committed a purported act of common law negligence by breaching "a duty to the Plaintiff to exercise due care in his testimony before the Florida Bar." Complaint at 7-8. Accordingly, plaintiff contends that "as a direct and proximate cause of the breach, plaintiff was unjustly suspended from the practice of law for ninety (90) days with other sanctions and costs accumulated." Id. For this alleged act of negligence, plaintiff seeks "compensatory and exemplary damages in a sum in excess of FIVE MILLION DOLLARS ($5,000,000.00)." Id.

8. In addition to the above, plaintiff contends, in Count IV of his Complaint, that defendant MARMAR allegedly conspired with co-defendant BRAUWERMAN "for the purpose of committing by their joint efforts, the suspension of the Plaintiff from the practice of law, and in furtherance to [sic] their conspiracy, did conspire with the Florida Bar, to have the Plaintiff suspended." Id. at 8.

ARGUMENT

I.

DISMISSAL OF THE INSTANT CIVIL ACTION IS WARRANTED SINCE PLAINTIFF'S "INDIVIDUAL CAPACITY" CLAIMS AGAINST DEFENDANT MARMAR FALL SQUARELY WITHIN THE ABSOLUTE IMMUNITY PROVISIONS OF 28 U.S.C. 2679(b)(1) AND 2679(d).

In Westfall v. Erwin, 484 U.S. 292 (1988), the Supreme Court called into question the extent of the common law absolute immunity from suit that had previously protected federal employees from common law tort actions arising from acts committed within the course and scope of their employment. In response to Westfall, Congress enacted certain amendments to the Federal Tort Claims Act ("FTCA") that served to ensure that federal employees enjoy a broad absolute immunity from suit concerning such claims. Accordingly, on November 18, 1988, the President signed into law the Federal Employees Liability Reform and Tort Compensation Act of 1988, Pub. L. No. 100-694, 102 Stat. 4563 (1988) (codified in part in various subsections of 28 U.S.C. §§ 2671; 2674; 2679).

The "Westfall Act," as it has come to be known, sets forth various amendments to the FTCA, which were designed by Congress to protect Federal employees from personal liability for common law torts committed within the scope of their employment. The Supreme Court has, therefore, construed the Westfall Act as providing the broad absolute immunity from suity under state tort law which the Court refused to make available in Westfall. See United States v. Smith, 499 U.S. 161, 163 (1991).

The heart of the Westfall Act is found within Section 5 of the Act, which is codified in Section 2679(b)(1) of Title 28, United States Code. This portion of the Westfall Act, which is commonly referred to as the "exclusive remedy provision," states as follows:

> The remedy against the United States provided by sections 1346(b) and 2672 of this title for injury or loss of property, or personal injury or death arising or resulting from the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment is exclusive of any other civil action or proceeding for money damages by reason of the same subject matter against the employee whose act or omission gave rise to the claim or against the esate of such employee. Any other civil action or proceeding for money damages arising out of or relating to the same subject matter against the employee or the employee's estate is precluded without regard to when the act or omission occurred.

The procedural companion to Section 5 of the Westfall Act is found in Section 6 of the Act. This portion of the Act, which is commonly referred to as the "certification and substitution" provision, is codified at Section 2679(d)(1) of Title 28, United States Code, and states as follows:

> (d)(1) Upon certification by the Attorney General that the defendant employee was acting within the course and scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a United States district court shall be deemed an action against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant.
>
> (2) Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of

> which the claim arose, any civil action or proceeding commenced upon such claim in a State curt shall be removed without bond at any time before trial by the Attorney General to the district court of the United States for the district and division embracing the place in which the action or proceeding is pending. Such action or proceeding shall be deemed to be an action or proceeding brought against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant. This certififation shall conclusively establish scope of office or employment for purposes of removal.

In light of the above statutory provisions, as well as the submission of an appropriate scope "Certification" by the acting United States Attorney, defendant MARMAR respectfully submits that he is entitled to be dismissed as a party defendant from the instant civil action. Furthermore, defendant respectfully requests that, once this Court has taken appropriate action with regard to the United States' contemporaneously submitted "Notice of Substitution of Proper Party Defendant," this Court should enter a final Order of dismissal with regard to defendant MARMAR.

II.

PLAINTIFF'S CAUSES OF ACTION CONCERNING DEFENDANT MARMAR DO NOT STATE ANY CLAIM UPON WHICH RELIEF CAN BE GRANTED, NOR ARE THE SAME ACTIONABLE PURSUANT TO RELEVANT FLORIDA LAW.

Plaintiff's claims with respect to defendant MARMAR are also fatally defective as a matter of Florida law. First, plaintiff's alleged "conspiracy" claim is, by plaintiff's own assertions in his Complaint, an alleged actionable type of tortious conduct. Thus,

the arguments made in the previous section with regard to the applicability of the Westfall Act's absolute immunity provisions apply with equal force and effect to plaintiff's conclusory "conspiracy" Count. In addition, however, it should be noted, as co-defendant BRAUWERMAN points out in his pending Motion to Dismiss, that the "conspiracy" to which plaintiff refers in his complaint is not cognizable or justiciable as a cause of action in the State of Florida. Accordingly, plaintiff has no remedy before this Court in light of the chosen alleged "causes of action" that plaintiff has initiated.

In support of the above argument, plaintiff MARMAR expressly adopts the argument set forth by his co-defendant, JEFFREY BRAUWERMAN, in that defendant's "Motion to Dismiss and Memorandum of Law in Support Thereof," and requests that this Court consider the same as equally applicable to defendant MARMAR.

WHEREFORE, for all of the reasons set forth hereinabove, defendant MARMAR respectfully requests that this Court dismiss the instant civil action as the same relates to this defendant.

Respectfully submitted,

WILLIAM KEEFER
UNITED STATES ATTORNEY

By: ______________________________
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and accurate copy of the foregoing Notice of Substitution as Proper Party Defendant was sent by mail this 19th day of February, 1997 to David Nunes, Esq., pro se, 3917 North Andrews Ave., Fort Lauderdale, FL, counsel for plaintiff, and Harris K. Solomon, Esq., 200 East Las Olas Boulevard, Suite 1800, Fort Lauderdale, FL 33301, counsel for co-defendant Jeffrey N. Brauwerman.

PETER B. OUTERBRIDGE
Assistant U.S. Attorney

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

DAVID NUNES, Plaintiff, vs. JEFFREY N. BRAUWERMAN and BRUCE MARMAR, Defendants.	)	CASE No. 96-3701 CIV-MARCUS Magistrate Judge Garber **ORDER GRANTING DEFENDANT BRUCE MARMAR'S EMERGENCY MOTION FOR PROTECTIVE ORDER STAYING <u>DEPOSITION</u>**

THIS CAUSE having come on to be heard upon Defendant Bruce Marmar's Emergency Motion for Protective Order Staying Deposition, and the Court having reviewed the same, and being otherwise duly informed in the premises, it is hereby

ORDERED AND ADJUDGED that the aforementioned Motion is hereby GRANTED.

DONE AND ORDERED this _______ day of May, 1997 in Miami, Florida.

____
STANLEY MARCUS
United States District Judge

cc: Counsel of Record