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# United States Court of Appeals For the First Circuit

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No. 03-1113

NICOLAS NOGUERAS-CARTAGENA, ETC., ET AL.,  
Plaintiffs, Appellants,

v.

UNITED STATES DEPARTMENT OF JUSTICE, ET AL.,  
Defendants, Appellees.

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APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF PUERTO RICO  
[Hon. Daniel R. Domínguez, U.S. District Judge]

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Before

Selya, Circuit Judge,

Coffin, Senior Circuit Judge,

and Howard, Circuit Judge.

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Armando Porrata-Doria Harding, with whom Nicolás Nogueras, Jr.  
was on brief, for appellants.

Matthew L. Zabel, with whom Peter D. Keisler, Acting Assistant  
Attorney General, and Phyllis J. Pyles, Assistant Director, Torts  
Branch, Civil Division, were on brief, for the United States.

Charles A. De Monaco, with whom Kimberly L. Haddox and Dickie,  
McCamey & Chilcote, P.C. were on brief for appellees Gil-Bonar and  
Vega-Pacheco.

Cary M. Feldman, with whom Armelle N. VanDorp and Feldesman  
Tucker Leifer Fidell were on brief, for appellee Johnson.

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September 26, 2003

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**Per Curiam.** The case underlying this appeal arose in the wake of the failed prosecution of Nicolás Noguerras-Cartagena (Noguerras), a prominent politician who had been indicted on charges relating to tax fraud and violations of the Ethics in Government Act. Following the dismissal of the criminal case, Noguerras sought to recover money damages against the federal government, the prosecutors, and the two federal agents who had spearheaded the investigation. On January 4, 2000, Noguerras filed an administrative claim with the Internal Revenue Service (IRS). On June 21, 2000, he moved forward on that claim, suing the United States and alleging, inter alia, false arrest and malicious prosecution under the Federal Tort Claims Act (FTCA), 28 U.S.C. §§ 1346(b), 2671-2680. In the same action, he also sued four individual federal officers (two prosecutors, an FBI agent, and an IRS agent),<sup>1</sup> alleging constitutional violations under the doctrine of Bivens v. Six Unknown Agents of the Fed. Bureau of Narcotics, 403 U.S. 388 (1971).

The United States moved for dismissal of all claims against it. See Fed. R. Civ. P. 12(b)(1), 12(b)(6). A magistrate judge recommended the dismissal of most of the claims, Noguerras v. United States, Civ. No. 00-1778 (D.P.R. Sept. 10, 2001), and the

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<sup>1</sup>The prosecutors (Guillermo Gil-Bonar and Jorge E. Vega-Pacheco) and the FBI agent (John D. Johnson) are parties to this appeal. Noguerras has, however, abandoned his claims against the IRS agent (José E. González).

district court adopted that recommendation, Nogueras v. United States, 172 F. Supp. 2d 296 (D.P.R. 2001). Nogueras then submitted a further amended complaint. In due course, a second magistrate judge, responding to a new round of motions, recommended dismissal both of the remaining claims against the government and of the claims asserted against the individual defendants. Nogueras v. United States, Civ. No. 00-1778 (D.P.R. Sept. 18, 2002). The district court adopted the magistrate judge's report and recommendation and dismissed the action. Nogueras v. United States, Civ. No. 00-1778 (D.P.R. Nov. 27, 2002). This appeal ensued.

We need not tarry. We have carefully perused the record and find no reason to disturb the district court's rulings. And because this is a situation in which three judicial officers (two magistrate judges and a district judge) have analyzed Nogueras's arguments and written comprehensive, well-reasoned decisions, we are hesitant to wax longiloquent simply to hear our own words resonate. See In re San Juan Dupont Plaza Hotel Fire Litig., 989 F.2d 36, 38 (1st Cir. 1993) (taking a similar view). Consequently, we affirm substantially on the basis of the lower courts' rescripts, adding only a few brief comments.

**First:** The FTCA claims are completely barred because Nogueras failed to comply with the statutory requirements for administrative exhaustion. An action brought under the FTCA must

be presented to the appropriate federal agency (here, the IRS) in the first instance. See 28 U.S.C. § 2675(a). The claimant then must await a final disposition from that agency (or, in lieu thereof, the passage of six months without final agency action). Id. Only then may the claimant sue in federal court. Id.

Nogueras did not abide by this timetable, but, rather, sued in the absence of final agency action and in less than six months after he had filed his administrative claim with the IRS. That failure creates an incurable jurisdictional defect. See McNeil v. United States, 508 U.S. 106, 113 (1993); Gonzalez v. United States, 284 F.3d 281, 288 (1st Cir. 2002); Attallah v. United States, 955 F.2d 776, 779 (1st Cir. 1991).

**Second:** The Bivens claims against the individual defendants are forfeit because, despite clear and repeated direction from the district court, Nogueras failed to make focused, targeted objections to the second magistrate judge's report and recommendation. Failure to identify the particular portions of the report and recommendation to which objection is being made and to specify the basis for each such objection precludes appellate review. See Thomas v. Arn, 474 U.S. 140, 155 (1985); Henley Drilling Co. v. McGee, 36 F.3d 143, 150 (1st Cir. 1994); United States v. Valencia-Copete, 792 F.2d 4, 6 (1st Cir. 1986); see also Fed. R. Civ. P. 72(b); 28 U.S.C. § 636(b)(1)(C).

**Third:** Even had the claims against the individual defendants not been forfeited, we would uphold the district court's dismissal of those claims on the merits. As to the prosecutors, the record reflects that the actions of which Nogueras complains were, without exception, done in the officials' capacity as prosecutors. Consequently, those actions are shielded by the absolute immunity that attaches to exercises of prosecutorial discretion. Imbler v. Pachtman, 424 U.S. 409, 430 (1976); Reid v. State of N.H., 56 F.3d 332, 337 (1st Cir. 1995). The subjective intent of the prosecutors is irrelevant, especially in view of the fact that, here, the indictment provides irrefutable evidence of the existence of probable cause. See Forrester v. White, 484 U.S. 219, 224 (1988).

As to the FBI agent (Johnson), the district court dismissed the Bivens claims based on a finding of qualified immunity. With one possible exception, that decision appears to be unimpeachable. See Saucier v. Katz, 533 U.S. 194, 202 (2001); Malley v. Briggs, 475 U.S. 335, 341 (1986). The one exception relates to malicious prosecution. We must accept as true Nogueras's allegations and draw all reasonable inferences in his favor. See Aulson v. Blanchard, 83 F.3d 1, 3 (1st Cir. 1996) (setting forth applicable standard on motions to dismiss). Nogueras's allegations are pointed and, following the standard praxis, dismissing the claim of malicious prosecution under the

doctrine of qualified immunity might be problematic. See generally Rivera Marcano v. Nor meat Royal Dane Quality A/S, 998 F.2d 34, 37 (1st Cir. 1993) (describing the elements of such a claim under Puerto Rico law).

We need not probe this point too deeply, however, as we are free to uphold the ruling below on any independent ground made manifest by the record. See Gannett v. Carp (In re Carp), 340 F.3d 15, 22 (1st Cir. 2003); Houlton Citizens' Coalition v. Town of Houlton, 175 F.3d 178, 184 (1st Cir. 1999). We affirm here because, insofar as the malicious prosecution claim is concerned, Johnson's actions were shielded by absolute prosecutorial immunity.

The existence of absolute prosecutorial immunity is a matter of function; it depends not on the title or position of the official involved, but, rather, on the specific conduct in question. See Briscoe v. LaHue, 460 U.S. 325, 342 (1983). In this instance, the challenged conduct, as described in Nogueras's pleadings, was intimately associated with the judicial phase of the criminal process. It was, therefore, essentially prosecutorial in nature. See id. at 336. Hence, immunity attaches.

We need go no further. Concluding, as we do, that the district court correctly dismissed each and all of Nogueras's claims, we summarily reject his appeal.

**Affirmed.**