IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

MARIA FERNANDA RICO ANDRADE, ET AL,	)	
Plaintiff,	)	
v.	)	Civil Action No. 2:15-cv-103
UNITED STATES OF AMERICA, ET AL,	)	
Defendants.	)	

DEFENDANTS' REPLY IN SUPPORT OF MOTION TO DISMISS

TABLE OF CONTENTS

Defendants United States of America, United States Customs and Border Protection, United States Office of Border Patrol, Janet Napolitano, *individually*, David Aguilar, *individually*, Alan Bersin, *individually*, Michael Fisher, *individually*, Rosendo Hinojosa, *individually*, David Couls, *individually*, Reyes Diaz, *individually*, Jose Tejeda, *individually*, and Eberto Cabello, *individually*, respectfully submit this reply in support of their motion to dismiss.

ARGUMENT

I. There is no Border Patrol "Vehicle Policy"—Plaintiff has created this fictitious 'policy'. Further, the allegation of a "Vehicle Policy" is simply conclusory, devoid of any factual basis and should not be credited.

In Plaintiff's complaint and her response in opposition to the motion to dismiss, Plaintiff repeatedly makes reference to something that Plaintiff creates and self-titles as a "Vehicle Policy." [1] Of course, there is no actual Border Patrol policy titled "Vehicle Policy." As cited in Plaintiff's complaint, the U.S. Customs and Border Protection has a "Use of Force Policy Handbook" published in 2010 (more recently revised in 2014). This is the real policy and, as quoted in paragraph 34 of Plaintiff's complaint,[2] the relevant portions relating to the use of deadly force against the driver of a vehicle are as follows:

> Deadly force may be used against the driver or other occupant of a moving motor vehicle, vessel, aircraft or other conveyance only when:
>
> a. The officer/agent has a reasonable belief that the subject of such deadly force poses an imminent danger of death or serious physical injury to the officer/agent or to another person and the hazard of an uncontrolled conveyance has been taken into consideration before firing: or

1 Plaintiff references the "Border Patrol's "Vehicle Policy" in her Introduction paragraph of her response, (Dkt. 18 at 1), to the Motion to Dismiss and repeats it at least 25 more times in her brief as well as more than 40 times in her Complaint. Plaintiff's "Policy" is a fiction and should be disregarded.

2 *See Branch v. Tunnell*, 14 F.3d 449, 454 (9th Cir. 1994) ("[D]ocuments whose contents are alleged in a complaint and whose authenticity no party questions, but which are not physically attached to the pleading, may be considered in ruling on a Rule 12(b)(6) motion to dismiss."),

b. The public safety benefits of using deadly force outweigh the risks to the safety of the officers/agents and/or of other persons.

The relevant portion of the updated 2014 Use of Force Policy Handbook (issued after the underlying incident in this case and also quoted in Plaintiff's complaint at paragraph 56) provides as follows:

> Authorized Officers/Agents shall not discharge their firearms at the operator of a moving vehicle, vessel or aircraft unless deadly force is necessary – that is, when the officer /agent has a reasonable belief that the operator poses an imminent danger of serious physical injury or death to the officer/agent or to another person.
>
> a. Such deadly force may include a moving vehicle aimed at officer/agents or others present, but would not include a moving vehicle merely fleeing from officers/agents unless the vehicle or the escape of the subject poses an imminent threat of serious physical injury or death to the officer/agent or to another person.
> b. The hazard of an uncontrolled conveyance shall be taken into consideration prior to the use of deadly force.

Despite these actual CBP policies, Plaintiff states, but cannot reasonably believe, that Border Patrol agents:

> a. had a regular pattern and practice pursuant to which agents intentionally assumed positions in the paths of vehicles, thereby exposing themselves to additional risk and creating justification for the use of deadly force;
> b. understood the Supervisor Defendants to have, at a minimum, tacitly approved Border Patrol agents' shootings so long as the agents claimed a vehicle was in their path; and
> c. used the Vehicle Policy to justify the unlawful use of excessive force against persons of perceived Hispanic ancestry and Mexican nationality.

(Compl. ¶56.)

Plaintiff's implausible position that these agents "intentionally assumed positions in the paths of vehicles" without regard for their own lives (i.e., that the agents are suicidal and or homicidal) is unbelievable and cannot be credited. Plaintiff's repeated assertion regarding the existence of an alleged "Vehicle Policy"—regardless of whether that "policy" might be

attributed to any individual defendant—is not entitled to an assumption of truth. *See Ashcroft v. Iqbal*, 556 U.S. 662, 676 (2009) ("[A] court considering a motion to dismiss can choose to begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth."). As the Court in *Iqbal* concluded, "the purposeful, invidious discrimination [Plaintiff] asks us to infer . . . is not a plausible conclusion." *Id.* at 682.

II. Plaintiff's *Bivens* claims against the supervisory individually-named defendants remain deficient.

In Plaintiff's response, it is principally alleged that "[e]ach Supervisor Defendant is personally responsible for Lozano's death because of his or her failure to train or supervise." (Dkt. 18 at 11.) But such an argument is inconsistent with Supreme Court case law on *Bivens*. *See Iqbal*, 556 U.S. at 676 ("Because vicarious liability is inapplicable to *Bivens* . . . suits, a plaintiff must plead that each Government-official defendant, through the official's own individual actions, has violated the Constitution."). A supervisor may be held liable if there exists either (1) his personal involvement in the constitutional deprivation; or (2) he implements a policy so deficient that the policy itself is a repudiation of constitutional rights and is the moving force of the constitutional violation. *See Cozzo v. Tangipahoa Parish Council*, 279 F.3d 273, 289 (5th Cir. 2002) (citing *Thompkins v. Belt*, 828 F.2d 298, 304 (5th Cir. 1987)). Plaintiff's complaint fails to establish subjective or objective deliberate indifference on the part of any individually-named supervisor or that a causal link exists between any failure to train and any alleged violation of Plaintiff's rights.

In Plaintiff's response, it is asserted that "Defendants Concede That Plaintiff Sufficiently Alleges Facts Establishing Each Supervisor's Deliberate Failure to Train." (Dkt. 18 at 12.) But no such concession was ever made by Defendants, and Defendants flatly deny knowledge of the fabricated "Policy" or that its employees implemented such a policy. In any event, it is irrelevant

as "the Supreme Court squarely held in *Ashcroft v. Iqbal* that [*Bivens*] claims against supervisory officials cannot be premised merely upon their knowledge of subordinates' actions." *Hinojosa v. Livingston*, __ F.3d ___, 2015 WL 7422990, at *7 (5th Cir. Nov. 18, 2015). Plaintiff simply has not allegedly with plausible and non-conclusory allegations that the supervisory defendants acted pursuant to a federal custom or policy not to adequately train or supervise its employees.

III. Plaintiff's claims under the Fifth Amendment are foreclosed by *Graham v. Connor*, 490 U.S. 386, 395 (1989).

Plaintiff continues to argue that the "Agents deprived Lozano of his Fifth Amendment rights by using excessive, deadly force." (Dkt. 18 at 15.) Yet, such an argument is squarely contrary to the Supreme Court's instruction that "all claims that law enforcement officers have used excessive force—deadly or not—in the course of an arrest, investigatory stop, or other 'seizure' of a free citizen should be analyzed under the Fourth Amendment and its 'reasonableness' standard, rather than under a 'substantive due process' approach." *Graham*, 490 U.S. 386, 395 (1989); *see also Hernandez v. United States*, 785 F.3d 117 (5th Cir. 2015) (en banc) ("Whether a constitutional violation occurred here is a straightforward inquiry with a definite answer. First, if the plaintiffs have a constitutional claim at all, it arises under the Fourth Amendment, not the Fifth.").

IV. Plaintiff's contention that the individually-named agent defendants' use of force was excessive is contrary to the Supreme Court's recent decision in *Mullenix v. Luna*, 136 S. Ct. 305 (2015).

Plaintiff continues to wrongly assert that the individually named defendant agents are not entitled to qualified immunity. In support of this contention, Plaintiff cites *Lytle v. Bexar County*, 560 F.3d 404, 416 (5th Cir. 2009) for the proposition that a "suspect that is fleeing in a motor vehicle is not so inherently dangerous that an officer's use of deadly force is per se reasonable."

(Dkt. 18 at 17.) Yet, in *Mullenix v. Luna*, 136 S. Ct. 305, 311 (2015), the Supreme Court struck down the Fifth Circuit's denial of qualified immunity that relied on the decision in *Lytle, Id.*

> Cases decided by the lower courts since *Brosseau* likewise have not clearly established that deadly force is inappropriate in response to conduct like Leija's. The Fifth Circuit here principally relied on its own decision in *Lytle v. Bexar County*, 560 F.3d 404 (2009), denying qualified immunity to a police officer who had fired at a fleeing car and killed one of its passengers. That holding turned on the court's assumption, for purposes of summary judgment, that the car was moving away from the officer and had already traveled some distance at the moment the officer fired. *See id.*, at 409. The court held that a reasonable jury could conclude that a receding car "did not pose a sufficient threat of harm such that the use of deadly force was reasonable." *Id.*, at 416. But, crucially, the court also recognized that if the facts were as the officer alleged, **and he fired as the car was coming towards him, "he would likely be entitled to qualified immunity" based on the "threat of immediate and severe physical harm." *Id.*, at 412.** Without implying that *Lytle* was either correct or incorrect, **it suffices to say that *Lytle* does not clearly dictate the conclusion that Mullenix was unjustified in perceiving grave danger and responding accordingly, given that Leija was speeding towards a confrontation with officers he had threatened to kill.**

(Emphasis added).

Notwithstanding *Mullenix*'s holding that there is not a single Supreme Court case denying "qualified immunity because officers entitled to terminate a high-speed chase selected one dangerous alternative over another," *id.*at 310, Plaintiff argues that "[n]o facts here make this a special case in which a moving vehicle could reasonably cause an officer to fear for his or her life." (Dkt. 18 at 17.) Yet, the Supreme Court does not have such a requirement. Rather, for a right to be clearly established under the second prong of qualified immunity, "[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Kinney v. Weaver*, 367 F.3d 337, 349-50 (5th Cir. 2004) (en banc) (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)). "This requirement establishes a high bar." *Wyatt v. Fletcher*, 718 F.3d 496, 503 (5th Cir.2013). To hold that law is clearly established, we must "be able to point to 'controlling authority—or a robust consensus of persuasive

authority—that defines the contours of the right in question with a high degree of particularity.'" *Id*. (quoting *Morgan v. Swanson*, 659 F.3d 359, 371–72 (5th Cir.2011) (*en banc*)). Plaintiff's complaint simply has not met this "high bar."

V. The individually-named defendants have been certified by the Attorney General's designee as acting within the scope of their employment at the time of the incidents out of which Plaintiff's claims arose.

Defendants acknowledged in their Motion to Dismiss, (Dkt. 17 at 11), that "it is undisputed that all individually-named Defendants were acting within the scope of employment at the time of the alleged events." Now, Plaintiff contends that the individually-named Defendants are not immune from FTCA liability because they have not been certified as acting within the scope of employment by the Attorney or her designee. (Dkt. 18 at 14.) However, enclosed with this reply is a copy of such certification. (Exh. 1.) Pursuant to the Westfall Act, upon certification by the Attorney General that an individual defendant acted within the scope of his federal employment, the United States is substituted in the employee's place and becomes the sole defendant by operation of law. 28 U.S.C. § 2679(d)(1). This certification is "prima facie evidence" that the named individual indeed acted within the scope of his employment. *See Wuterich v. Murtha*, 562 F.3d 375, 381 (D.C. Cir. 2009); *see also Jackson v. Tate*, 648 F.3d 729, 735 (9th Cir. 2011) ("[I]f the Attorney General makes such a certification, then 'the United States must be substituted as the defendant."' (quoting *Osborn v. Haley*, 549 U.S. 225, 241 (2007))). Accordingly, all of the individually-named defendants are entitled to full immunity for the common law tort causes of action.

VI. Plaintiff's arguments for tolling of the FTCA and *Bivens* statutes of limitations are deficient.

Plaintiff argues that the FTCA and *Bivens* actions did not accrue "until the PERF Report exposed the Self-Concealing Vehicle Policy."[3] (Dkt. 18 at 15.) But this argument is simply not accurate. For purposes of the FTCA, the Supreme Court held in *United States v. Kubrick*, 444 U.S. 111 (1979) that a claim accrues as soon as the plaintiff is sufficiently "armed with the facts" of his injury's existence and its cause to alert him to the possibility of negligence. *Id.* at 123–24. The Court in *Kubrick* specifically rejected the notion that the accrual of a claim "must await awareness by the plaintiff that his injury was negligently inflicted." *Id.* at 123. Rather, as soon as the plaintiff is "in possession of the critical facts that he has been hurt and who has inflicted the injury," the two year clock begins to run. Plaintiff's contention of not learning of the "Policy" until a later date is simply irrelevant to the accrual question; the tort claim accrued on the date Lozano died. Plaintiff admits that she knew her son was shot and killed on November 3, 2011 by Border Patrol Officers. Nothing prevented Plaintiff from timely initiating actions under the FTCA or *Bivens*. Upon learning other details of the shooting, real or imaginary, including the "Vehicle Policy," she could certainly request leave to file an amended complaint to join all newly discovered persons and claims. Most importantly, her FTCA would be intact.

Plaintiff's reliance on equitable tolling and equitable estoppel also fail. Equitable tolling is only available where Plaintiff "has actively pursued his judicial remedies by filing a defective proceeding during the statutory period, or where the [Plaintiff] has been induced or tricked by his adversary's misconduct **into allowing the filing deadline to pass**." *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 96 (1990) (emphasis added). Although Plaintiff makes several conclusory allegations regarding Defendants conduct regarding the PERF report, they are irrelevant. There is

[3] Defendants agree with Plaintiff that federal law governs to determine when a *Bivens* claim accrues. *See Harris v. Hegmann*, 198 F.3d 153, 157 (5th Cir.1999). Thus, the date of accrual is the same under both the FTCA and *Bivens*.

simply no contention that Plaintiff was tricked by any Defendant in allowing the filing deadline to pass.

Plaintiff also has failed to demonstrate that she pursued her rights diligently. *See United States v. Wong*, 135 S. Ct. 1625, 1631, 1638 (2015) (litigant seeking equitable tolling of FTCA's limitation provisions must establish (1) that she has been pursuing her rights diligently, and (2) that some extraordinary circumstance stood in her way). Plaintiff asserts that "she had no knowledge of the unlawful Vehicle Policy and the Agents' unlawful actions taken pursuant thereto and could not have discovered these facts through the exercise of reasonable diligence during the applicable limitations periods." (Compl. ¶69.) Notwithstanding that the PERF advisory on which she relies was issued in February 2013—two years prior to the filing of the instant lawsuit—whether Plaintiff knew about an alleged "Vehicle Policy" is irrelevant to whether she acted with due diligence. Indeed, courts have held that tolling is not even available if Plaintiff is unaware of the tortfeasor's status as a federal employee. *See, e.g., T.L. v. United States*, 443 F.3d 956, 964 (8th Cir. 2006) ("The statute of limitations is not tolled . . . simply because a plaintiff is unaware that an alleged tortfeasor is a federal employee."); *Gonzalez v. United States*, 284 F.3d 281, 292 (1st Cir. 2002) ("reject[ing] the plaintiff's claim that the statute of limitations should be tolled on the ground that the plaintiff was unaware of the defendants' status as federal employees"). Plaintiff's contention that she acted with due diligence because she was not aware of a "Policy" simply does not overcome the Supreme Court's holding that "the general rule under the [FTCA] has been that a tort claim accrues at the time of the plaintiff's injury." *See Kubrick*, 444 U.S. 111 at 120.

In addition to equitable tolling, Plaintiff argues that the deadlines are tolled under the doctrine of equitable estoppel. Plaintiff cites no case for the proposition that equitable estoppel

applies in the FTCA and *Bivens* contexts—and there is no reason that it should. *See generally Andrade v. Gonzales*, 459 F.3d 538, 545 n. 2 (5th Cir.2006) ("It is unclear whether equitable estoppel can ever apply to the Government, but in any event, equitable estoppel will not lie against the Government as against private litigants." (citation and internal quotation marks omitted)). Assuming it does apply, under Texas law the elements of equitable estoppel are: "(1) a false representation or concealment of material facts; (2) made with knowledge, actual or constructive, of those facts; (3) with the intention that it should be acted on; (4) to a party without knowledge or means of obtaining knowledge of the facts; (5) who detrimentally relies on the representations." *Johnson & Higgins of Texas. Inc. v. Kenneco Energy, Inc.*, 962 S.W.2d 507, 515–16 (Tex. 1998). In the complaint Plaintiff cites the elements but does not plead any facts that correlate to those elements. Rather, Plaintiff merely parrots the argument that a purported "Vehicle Policy was both self-concealing and affirmatively concealed by Defendants until November 2013, [and] Plaintiff had no knowledge of the Vehicle Policy or of any facts or information that would have caused a reasonably diligent person to investigate whether (1) the unlawful policy existed and (2) the Agents' actions were taken pursuant to that unlawful policy." (Dkt. 18 25-26.) Plaintiff's effort to gain application of equitable estoppel by manufacturing a "Policy" and then arguing without any support that it is "self-concealing" simply cannot be credited.

VII. Plaintiff still has failed to persuade that the court has personal jurisdiction over Defendants Napolitano, Bersin, Aguilar, and Fisher.

Plaintiff's only argument that the Court has personal jurisdiction over these defendants—not located in Texas—is that they failed to train the Border Patrol agents located in Texas. (Dkt. 18 at 26-27.) Plaintiff cites no case law for the proposition that this is enough to establish personal jurisdiction over these upper level defendants. It is blackletter law that these nonresident

defendants can only be subjected to personal jurisdiction in Texas if they have committed intentional acts outside the state with the intent that harm occur in Texas. *See Calder v. Jones*, 465 U.S. 783, 790 (1984). To be sure, "it is difficult to see how a failure to act could meet the purposeful availment requirement needed to establish personal jurisdiction." *Brocail v. Anderson*, 132 S.W.3d 552, 556 (Tex. App. - Houston [14th Dist] 2004, pet. denied).

VIII. Plaintiff's Law of Nations Claims must be dismissed.

As explained in Defendants' motion to dismiss, "every court to consider the issue has determined that the Westfall Act's exemption for statutory claims does not include claims brought pursuant to a treaty." *Sobitan v. Glud*, 589 F.3d 379, 386 (7th Cir. 2009); *see also Ali v. Rumsfeld*, 649 F.3d 762, 776 (D.C. Cir. 2011) ("[W]e hold that the plaintiffs' claim under the ATS alleges a violation of the law of nations, not of the ATS, and therefore does not violate a statute of the United States within the meaning of [the Westfall Act]."); *Harbury v. Hayden*, 444 F.Supp.2d 19, 37 (D.D.C. 2006) ("International law, however characterized (i.e., the law of nations, federal common law), falls outside of these clearly enumerated exceptions [to the Westfall Act]."), *aff'd*, 522 F.3d 413 (D.C. Cir. 2008). In addition, while Plaintiff argues that dismissal of the Law of Nations claims based on immunity grounds "cannot be squared with the applicable international standards of law," (Dkt. 18 31), such an argument is clearly contrary to controlling precedent. *See Hernandez v. United States*, 757 F.3d 249, 258-59 (5th Cir. 2014), *aff'd*, 785 F.3d 117, 119 (5th Cir. 2015) (en banc) (reinstating part of II of the three-member panel decision), which squarely held that "[n]othing in the ATS indicates that Congress intended to waive the United States' sovereign immunity." *See also Nino v. United States*, 2014 WL 4988472, *5 (S.D. Cal. 2014) ("Controlling case law is clear that the United States has not waived its sovereign immunity under the ATS.").

CONCLUSION

For the foregoing reasons, Defendants' motion to dismiss should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this December 22, 2015 a true and correct copy of the foregoing instrument was forwarded to all interested parties in accordance with the Federal Rules of Civil Procedure as stated below.

s/ *Virgil H. Lewis, II*
VIRGIL H. LEWIS, II
Assistant United States Attorney