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

MARIA FERNANDA RICO ANDRADE, ET AL,

Plaintiffs,

v.

UNITED STATES OF AMERICA, ET AL,

Defendants.

Civil Action No. 2:15-cv-103

MOTION TO DISMISS COMPLAINT AGAINST ALL DEFENDANTS

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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 move this Court to dismiss the complaint filed in the above captioned matter for failure to state a claim and for lack of jurisdiction.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case arises out of a shooting incident in Bluntzer, Texas, involving two U.S. Border Patrol Agents, Defendants Eberto Cabello and Jose Tejeda.

Maria Fernanda Rico Andrade ("Plaintiff"), on behalf of the estate of Gerardo Lozano Rico ("Lozano") filed a civil action in this Court on February 27, 2015, naming the 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*, as Defendants. Plaintiff, who claims to be the heir of Lozano, asserts that two Border Patrol agents wrongfully shot and killed Lozano while he was transporting illegal aliens. Plaintiff filed her complaint on February 27, 2015.

The complaint states various claims against Defendants, including:

(1) "Law of Nations" claims against the government defendants, individually-named agents, and individually-named supervisors;

(2) Fifth Amendment Due Process Claims against the individually-named agents and individually-named supervisors;

(3) Fourth Amendment unreasonable seizure claims against the individually-named agents and individually-named supervisors;

(4) Wrongful death Federal Tort Claims Act claims based on assault and battery and negligence against the individually-named agents; and

(5) Wrongful death Federal Tort Claims Act claims based on negligence against the individually-named supervisors.

As explained in this motion, the Court should dismiss the claims against the federal defendants on the following grounds:

(1) Plaintiff's FTCA claims against the individually-named defendants should be dismissed on jurisdictional grounds because federal actors are immune from such claims and Plaintiff's exclusive remedy is against the United States.

(2) Plaintiff has not sufficient alleged personal jurisdiction over Defendants Janet Napolitano, David Aguilar, Alan Bersin, and Michael Fisher.

(3) Plaintiff's FTCA and *Bivens* claims are barred by the applicable statutes of limitations.

(4) Plaintiff's "Law of Nations" claims against the United States are barred by sovereign immunity.

(5) Plaintiff's "Law of Nations" claims against the individually-named defendants are barred by the Westfall Act, 28 U.S.C. § 2679(b)(1).

(6) Plaintiff's Fourth and Fifth Amendments claims against the individually-named supervisors (Defendants Janet Napolitano, David Aguilar, Alan Bersin, Michael

Fisher, Rosendo Hinojosa, David Couls, and Reyes Diaz) must be dismissed because Plaintiff has not alleged a violation of a clearly established constitutional right and Plaintiff has not alleged personal participation by the supervisors sufficient to state a plausible claim for relief.

(7) Plaintiff's Fifth Amendment unreasonable seizure claims against the individually-named agent defendants must be denied because only the Fourth Amendment is the proper vehicle with which to bring constitutional excessive force claims.

(8) Plaintiff's Fourth Amendment claim against Defendants Cabello and Tejeda must be dismissed on qualified immunity grounds.

FACTUAL BACKGROUND

Plaintiff filed a civil action in this Court on February 27, 2015. Plaintiff named as defendants the United States of America, U.S. Department of Homeland Security, U.S. Customs and Border Protection, U.S. Border Patrol, and nine former and current government official in their individual capacities. The complaint stems out of a shooting that occurred in Bluntzer, Texas. The complaint identifies Defendants Cabello and Tejeda as the shooters. The remainder of the individually-named Defendants are current or former supervisory employees of the Department of Homeland Security.

ARGUMENT

I. Applicable Legal Standards for Rule 12(b)(1) and Rule 12(b)(6) Motion

Dismissal under Federal Rule of Civil Procedure 12(b)(1) is appropriate if the Court lacks subject matter jurisdiction over the claim. *Whitmore v. Arkansas*, 495 U.S. 149, 154–55 (1990). Once the defendant objects to a lack of subject matter jurisdiction, a plaintiff bears the burden of establishing that the court has subject matter jurisdiction. *Lujan v. Defenders of Wildlife*, 504

U.S. 555, 561 (1992). To survive a motion to dismiss under Rule 12(b)(1), a plaintiff must prove that the Court has jurisdiction to hear the case. *Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375, 377 (1994) ("Federal courts are of limited jurisdiction . . . . It is to be presumed that a cause lies outside this limited jurisdiction, and the burden of establishing the contrary rests on the party asserting jurisdiction."). "Lack of subject matter jurisdiction may be found in any one of three instances: (1) the complaint alone; (2) the complaint supplemented by undisputed facts evidenced in the record; or (3) the complaint supplemented by undisputed facts plus the court's resolution of disputed facts." *Ramming v. United States*, 281 F.3d 158, 161 (5th Cir. 2001).

"Under Rule 12(b)(6), a claim may be dismissed when a plaintiff fails to allege sufficient facts that, taken as true, state a claim that is plausible on its face." *Amacker v. Renaissance Asset Mgmt. LLC*, 657 F.3d 252, 254 (5th Cir. 2011). To withstand dismissal, a complaint must contain "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). In addition, a motion to dismiss for failure to state a claim upon which relief can be granted can be based not only Plaintiffs' claims but on matters that support an affirmative defense. *See Kaiser Aluminum & Chemical Sales, Inc. v. Avondale Shipyards, Inc.*, 677 F.2d 1045, 1050 (5th Cir. 1982).

II. Plaintiff's FTCA claims must be dismissed

A. Plaintiff's FTCA claims are subject to dismissal because Plaintiff has impermissibly brought these claims against individually-named defendants instead of the United States.

The FTCA claims must all be dismissed because they are alleged against the individually-named Defendants who have absolute immunity from claims alleging common law torts committed in the course and scope of their employment.

In Plaintiff's Eighth, Ninth, Tenth, and Eleventh Claims, Plaintiff alleges various FTCA claims against the individually-named Defendants. None of Plaintiffs FTCA claims are labeled to be against the United States.

It is well-established law that tort claims must be brought against the United States and not its employees. 28 U.S.C. § 2679(a); *Currie v. Guthrie*, 749 F.2d 185, 187 (5th Cir. 1984) ("Federal courts have long recognized the rule that federal employees are immune from common law tort liability arising from acts within the scope of government employment."). Here, it is undisputed that all individually-named Defendants were acting within the scope of employment at the time of the alleged events. Accordingly, the common law tort claims against these individually-named federal employees must be dismissed with prejudice for lack of jurisdiction. *See Galvin v. Occupational Safety & Health Admin.*, 860 F.2d 181, 183 (5th Cir. 1988) ("[A]n FTCA claim against a federal agency or employee as opposed to the United States itself must be dismissed for want of jurisdiction").

B. Assuming, *arguendo*, that Plaintiff's FTCA claims are deemed to be against the United States and administrative agencies, they must be dismissed because the administrative claim was untimely filed.

The FTCA holds the Government liable for "injury or loss of property, or personal injury or death caused by the negligent or wrongful act" of federal employees acting within the scope of their employment. 28 U.S.C. § 1346(b)(1). The FTCA imposes liability on the Government "in accordance with the law of the place where the act or omission occurred," *id.*, making the Government liable "in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C. §§ 2674, 1346(b)(1).

The FTCA requires a claimant alleging a tort claim against the federal government to file an administrative claim with the relevant agency within two years after the claim accrues or "be

forever barred." 28 U.S.C. § 2401(b). As a general rule, "a statute of limitations begins to run at the moment a [claimant's] legally protected interest is invaded. This injury usually coincides with the tortious act." *DuBose v. Kansas City S. Ry. Co.*, 729 F.2d 1026, 1028–29 (5th Cir. 1984). "Often, however, [claimants] may be unaware that they have been injured, even though the tort has been completed. Courts thus developed the 'discovery rule' to mitigate the harshness of applying statutes of limitations strictly in cases involving medical malpractice, occupational diseases, and other types of latent injuries." *Id.* at 1029. The Supreme Court provided guidance on the discovery rule in *United States v. Kubrick*, 444 U.S. 111 (1979). In *Kubrick*, the Supreme Court rejected the argument that a claim does not accrue until the plaintiff learns or forms a reasonable opinion that he has been wronged. 444 U.S. at 118. The Court stated that where the plaintiff discovered the fact of his injury or its cause sometime after the injury took place, he benefits from a later accrual date; but where he merely learned of his legal rights sometime after his injury, he does not receive that benefit. *Id.* at 118–22. In *Johnston v. United States*, 85 F.3d 217, 222 (5th Cir. 1996), the Fifth Circuit held that "as a matter of federal law, . . . a wrongful death claim cannot accrue prior to death." *See also Fisk v. United States*, 657 F.2d 167, 170 (7th Cir. 1981) ("in an 'ordinary' wrongful death action under the FTCA, the federal rule is that the cause of action accrues upon the date of death").

In the instant case, Gerardo Lozano Rico died on November 3, 2011. (Compl. ¶ 29). However, according to the Complaint, Plaintiff did not file the administrative tort claim with CBP until June 11, 2014—approximately two years and seven months after Gerardo Lozano Rico's death. (Compl. ¶ 23). This administrative claim was denied as untimely by CBP on August 29, 2014. (Compl. ¶ 23). No evidence has been submitted that Plaintiff was not aware of

Gerardo Lozano Rico's death on or about the date it occurred. Accordingly, the administrative claim is untimely and subject to denial pursuant to 28 U.S.C. § 2401(b).

Despite the administrative claim being untimely, Plaintiff alleges that the untimely filing should be excused under a tolling principle. Specifically, Plaintiff contends that:

> The Government and Supervisor Defendants' actual knowledge of the Vehicle Policy and the wrongful actions of agents acting pursuant to the Vehicle Policy, and their failure to document, follow up or address these incidents, as well as their intentional concealment of the unlawful conduct of agents, constitutes fraud that equitably tolls all applicable statutes of limitation. The Government and Supervisor Defendants are estopped from relying on the statute of limitations as a defense because they actively and fraudulently concealed the Vehicle Policy and unlawful conduct of the agents by, among other things, distorting and concealing the facts underlying each instance in which an agent applied deadly force against drivers of automobiles.

(Compl. ¶36.)

Following the filing of this complaint, the Supreme Court clarified in *United States v. Wong*, 135 S. Ct. 1625, 1638 (2015), that the FTCA's time limits are nonjurisdictional and subject to equitable tolling. Yet, equitable tolling applies only in "rare and exceptional circumstances." *Teemac v. Henderson*, 298 F.3d 452, 457 (5th Cir. 2002), and Courts have typically extended equitable tolling where "the claimant has actively pursued his judicial remedies by filing a defective pleading during the statutory period, or where complainant 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 & nn. 3–4 (1990). *Cf. Perez v. United States*, 167 F.3d 913, 919 (5th Cir. 1999) (tolling allowed when Texas National Guard violated its regulatory obligations to Plaintiff).

Plaintiff's complaint fails to state a claim for equitable tolling. Even taking the claims as true, Plaintiff's contention that Defendant United States concealed a policy or unlawful conduct in prior cases where excessive force was used is insufficient to satisfy the stringent requirements

for tolling. In this case, Plaintiff makes no contention that Defendant United States engaged in deceitful conduct that caused the filing deadline for the administrative claim to be missed. In addition, Plaintiff's complaint fails to demonstrate that she was pursuing her rights diligently and that the alleged fraudulent acts by the Government triggered the untimely administrative claim filing. *See Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005) (to demonstrate equitable tolling a plaintiff must show that (i) "he has been pursuing his rights diligently"; and (ii) "some extraordinary circumstance stood in his way").

Accordingly, all of Plaintiff's FTCA claims should be dismissed due to the untimely filing of the administrative claim.

III. Plaintiff has not sufficiently alleged personal jurisdiction over Defendants Napolitano, Bersin, Aguilar, and Fisher.

Plaintiff has brought claims against numerous defendants including Janet Napolitano, David Aguilar, Alan Bersin, and Michael Fisher. The complaint does not allege that Defendants Napolitano, Bersin, Aguilar, and Fisher reside in Texas. A federal court sitting in Texas may exercise personal jurisdiction over a foreign defendant only if the Texas long-arm statute applies and the due process clause of the Fourteenth Amendment is satisfied. *See Pervasive Software Inc. v. Lexware GmbH & Co. KG*, 688 F.3d 214, 220 (5th Cir. 2012). "Because the Texas Long Arm Statute is coextensive with the confines of due process, questions of personal jurisdiction in Texas are generally analyzed entirely within the framework of the Constitutional constraints of Due Process." *Religious Technology Center v. Liebreich*, 339 F.3d 369, 363 (5th Cir. 2003); *see Texas Long Arm Statute*, Tex. Civ. Prac. & Rem. Code Ann. § 17.041.

A plaintiff can establish personal jurisdiction through either: "specific jurisdiction", when the action arises out of, or is related to, a defendant's specific contacts with the forum State,

Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 414 n.8 (1984); or "general jurisdiction", when a defendant has engaged in "continuous and systematic" contacts with the forum State and, therefore, expects fairly to be haled into court there for any reason, *id.* at 414–15 (citing *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 770, 779–80 (1984)).

Regarding general jurisdiction, the complaint makes no attempt to allege that Defendants Napolitano, Bersin, Aguilar, and Fisher reside in Texas or have ongoing activities in Texas. Plaintiff does not even argue for general jurisdiction in the complaint. Thus, this Court should hold that Plaintiffs has failed to establish general jurisdiction over Defendants Napolitano, Bersin, Aguilar, and Fisher.

Plaintiff also has failed to allege any facts that would support specific jurisdiction over these defendants. Before a court will exercise specific personal jurisdiction over a nonresident defendant, a plaintiff must demonstrate "defendant has purposefully directed his activities at residents of the forum . . . and the litigation results from alleged injuries that arise out of or relate to those activities." *Clemens v. McNamee*, 615 F.3d 374, 378 (5th Cir. 2010).

Plaintiff has not satisfied this test because she has not alleged that any of these defendants purposefully directed any act at or consummated any transaction in the State of Texas giving rise to this case. In fact, the complaint does not make any direct reference to Texas whatsoever, except to allege that the shooting incident occurred in the state. And this allegation does not even remotely involve any purposeful contact by Defendants Napolitano, Aguilar, Bersin, and Fisher.

IV. Plaintiff's "Law of Nations" claims against the United States and individually-named Defendants must be dismissed.

A. Plaintiff's "Law of Nations" claims against the United States are barred by sovereign immunity.

In Plaintiff's first claim for relief she alleges a "Law of Nations" claim against the government defendants. This claim is foreclosed by *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.").

B. Plaintiff's "Law of Nations" claims against the individually-named defendants are barred by the Westfall Act.

The Westfall Act gives federal employees "absolute immunity" from torts "arising out of acts they undertake in the course of their official duties." *Osborn v. Haley*, 549 U.S. 225, 229 (2007) (citing 28 U.S.C. § 2679(b)(1)). There are only two limited exceptions to this absolute immunity. One is for constitutional claims against the federal employee, 28 U.S.C. § 2679(b)(2)(A). The other exception to this grant of absolute immunity is for a civil action "which is brought for a violation of a statute of the United States . . . ." 28 U.S.C. § 2679(b)(2)(B). *See Al Janko v. Gates*, 831 F.Supp.2d 272, 282 n.16 (D.D.C. 2011).

In this case, it is undisputed that the individually-named Defendants were acting within the scope of employment. (Compl. ¶¶9-19).

"[E]very 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). Accordingly, Plaintiff's "Law of Nations" claims against the individually-named Defendants are foreclosed by the Westfall Act.

V. Plaintiff's *Bivens claims* must be dismissed against all Defendants.

In *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 391 (1971), the United States Supreme Court held that the violation of a person's constitutional rights by a federal official may give rise to an action for monetary damages in federal court. Nevertheless, as recognized in common law, public officers require some form of immunity from suits for damages to shield them from undue interference with their duties and from potentially disabling threats of liability. *Harlow v. Fitzgerald*, 457 U.S. 800, 806 (1982). The Supreme Court has recognized two kinds of immunity defenses for government officials: absolute immunity and qualified immunity. *Id.* at 807. Absolute immunity has been extended to those officials whose special functions or constitutional status requires complete protection from suit, such as legislators, judges, prosecutors, and the President. *Id.* For other executive officials in general, qualified immunity is the norm. *Id.*

Under the qualified immunity doctrine established by the Supreme Court in *Harlow*, government officials performing official functions "are shielded from liability for civil damages insofar as their conduct does not violate clearly established constitutional rights of which a reasonable person would have known." 457 U.S. at 818; *see also Butz v. Economou*, 438 U.S. 478 (1978); *Bennett v. City of Grand Prairie, Texas*, 883 F.2d 400, 408 (5th Cir. 1989). Whether an official can be held personally liable for an allegedly unconstitutional official action turns on the objective legal reasonableness of the action at the time that it occurred. *Anderson v.*

Creighton, 483 U.S. 635, 640 (1987). The general rule of qualified immunity is intended to provide government officials with the ability reasonably to anticipate when their conduct may give rise to liability for damages; where that rule is applicable, officials can know that they will not be held personally liable as long as their actions are reasonable in light of current American law. *Id.* at 646.

Qualified immunity therefore protects all federal employees save those who are plainly incompetent or those who knowingly violate the law. *Malley v. Briggs*, 475 U.S. 335, 341 (1986). Allegations that do not meet this standard must be dismissed as a matter of law. *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985). Consequently, insubstantial claims against government officials should be resolved prior to discovery. *Harlow*, 457 U.S. at 818-19. This is so because qualified immunity is an entitlement not to stand trial or face the other burdens of litigation, as such, the privilege is an immunity from suit rather than a mere defense to liability, and like an absolute immunity, it is effectively lost if a case is erroneously permitted to go to trial. *Mitchell*, 472 U.S. at 526.

When a governmental official with discretionary authority is sued for damages and properly raises the defense of qualified immunity, the plaintiff bears the burden of rebutting that defense. *Johnson v. Deep East Texas Regional Narcotics Trafficking Task Force*, 379 F.3d 293, 301 (5th Cir. 2004). Moreover, a plaintiff's complaint must consist of more than mere conclusions to defeat a qualified immunity defense. *Schultea v. Wood*, 47 F.3d 1427, 1433-34 (5th Cir. 1995). A federal district court must insist that a plaintiff suing a public official for a civil rights violation file a short and plain statement in his complaint, and the statement must rest on more than mere conclusions alone. *Id.*

To defeat a claim of qualified immunity, a plaintiff must show: (1) the government official violated a statutory or constitutional right; and (2) the right was clearly established at the time of the challenged conduct. *Harlow*, 457 U.S. at 818.

In *Saucier v. Katz*, 533 U.S. 194, 202 (2001), the United States Supreme Court stated that qualified immunity analysis must begin with the question of whether the Deputies' conduct, as alleged, violated a constitutional right. More recently, however, the United States Supreme Court has held that rigid chronological adherence to the *Saucier* two-step methodology is not mandatory. *Pearson v. Callahan*, 555 U.S. 223, 236 (2009). As explained in *Pearson*, although the *Saucier* methodology will be "often beneficial", the lower courts now have discretion as to the order in which they may wish to address the two prongs of the qualified immunity analysis.

In a more recent en banc decision, *Morgan v. Swanson,* 659 F.3d 359 (5th Cir. 2011), the Fifth Circuit discussed the circumstances when it is appropriate to leap over *Saucier*'s first step. These include:

> (1) "cases in which the constitutional question is so factbound that the decision provides little guidance for future cases"; (2) "when it appears that the question will soon be decided by a higher court"; (3) "[a] constitutional decision resting on an uncertain interpretation of state law"; (4) "[w]hen qualified immunity is asserted at the pleading stage"; and "the precise factual basis for the plaintiff's claim or claims [is] hard to identify"; and (5) "circumstances in which the first step of the *Saucier* procedure may create a risk of bad decisionmaking."

Id. at 384-85.

As recognized by the *Morgan* court, the Supreme Court has instructed that courts "should 'think hard, and then think hard again' before unnecessarily deciding the merits of a constitutional issue, and thus risk 'turning small cases into large ones.' *Id.* at 385 (quoting *Camreta v. Greene*, 131 S. Ct. 2020, 2032 (2011)); *see also Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2080 (2011) ("Courts should think carefully before expending 'scarce judicial resources' to

resolve difficult and novel questions of constitutional or statutory interpretation that will 'have no effect on the outcome of the case.'" (quoting *Pearson*, 555 U.S. at 237-242)).

"When a defendant invokes qualified immunity, the burden is on the plaintiff to demonstrate the inapplicability of the defense." *McClendon v. City of Columbia*, 305 F.3d 314, 323 (5th Cir. 2002) (internal citation omitted). "Heightened pleading in qualified immunity cases requires that plaintiffs rest their complaint on more than conclusions alone and plead their case with precision and factual specificity." *Nunez v. Simms*, 341 F.3d 385, 388 (5th Cir. 2003) (citing *Reyes v. Sazan*, 168 F.3d 158, 161 (5th Cir. 1999)).

A. Plaintiff's *Bivens* claims must be dismissed as untimely.

Claims Four, Five, Six, and Seven of the complaint allege *Bivens* claims against the various individually-named Defendants.

"[A] *Bivens* action is controlled by the applicable state statute of limitations." *Spotts v. United States*, 613 F.3d 559, 573 (5th Cir. 2010). Because there is no federal statute of limitations for *Bivens* claims, federal courts apply the general personal injury limitations period and tolling provisions of the forum state. *See Brown v. Nationsbank Corp.*, 188 F.3d 579, 590 (5th Cir. 1999); *Gartrell v. Gaylor*, 981 F.2d 254, 256 (5th Cir. 1993) ("In applying the forum state's statute of limitations, the federal court should also give effect to any applicable tolling provisions.").

The Fifth Circuit, "applying Texas law, has held that the statute of limitations period on a *Bivens* claim is two years, the statute of limitations governing personal injuries in Texas." *Spotts*, 613 F.3d at 537 (citing *Brown*, 188 F.3d at 590; *Pena v. United States*, 157 F.3d 984, 987 (5th Cir. 1998)). Specifically, Tex. Civ. Prac. & Rem. Code § 16.003(b) provides that "[a] person must bring suit not later than two years after the day the cause of action accrues in an action for

injury resulting in death," and that "[t]he cause of action accrues on the death of the injured person."

In this case, Plaintiff's suit was filed well after the expiration of the two-year statute of limitations provided by Tex. Civ. Prac. & Rem. Code § 16.003(b).

Any contention by Plaintiffs that the deadline should be equitably tolled is meritless. The Texas Supreme Court has stated that equitable tolling applies specifically "when the plaintiff could not, despite the exercise of reasonable diligence, have discovered all the information he needed in order to be able to file his claim on time." *In re United Servs. Auto. Ass'n*, 307 S.W.3d 299, 311 (Tex. 2010) (quoting *Taliani v. Chrans*, 189 F.3d 597, 597 (7th Cir. 1999)). Equitable tolling also applies "where a claimant actively pursued his judicial remedies but filed a defective pleading during the statutory period, or where a complainant was induced or tricked by his adversary's misconduct into allowing filing deadlines to pass." *Bailey v. Gardner*, 154 S.W.3d 917, 920 (Tex.App.-Dallas 2005, no pet.).

None of these situations apply in this case. Plaintiff does not allege that the individually named defendants prevented Plaintiff from discovering the information needed to file the complaint on time. Nor do they allege that the individually-named defendants tricked Plaintiff into allowing the filing deadline to pass. Accordingly, the *Bivens* causes of action should all be dismissed as barred by the relevant Texas statute of limitations.

B. Plaintiff's Fourth and Fifth Amendments claims against the individually-named supervisors must be dismissed because Plaintiffs have not alleged a violation of a clearly established constitutional right and Plaintiffs have not alleged personal participation by the supervisors sufficient to state a plausible claim for relief.

In Plaintiff's Fourth Claim and Sixth Claims for relief it is alleged that the individually-named supervisory Defendants (Napolitano, Aguilar, and Bersin, Fisher, Hinojosa, Couls, and

Diaz) committed Fourth and Fifth Amendment violations by promulgating and overseeing something Plaintiff self-describes as the "Vehicle Policy"[1] and by failing to establish adequate training procedures, failing to properly discipline agents, and by failing to investigate misconduct. (Compl. ¶117.) Plaintiff does not allege that any of these individually-named supervisory Defendants were personally responsible for the alleged specific Constitutional violations at issue in this case; indeed, it is undisputed that none of them were at the scene of the alleged constitutional violation. *See Whitley v. Hanna*, 726 F.3d 631, 464 (5th Cir. 2013) ("[L]iability will not attach where an officer is not present at the scene of the constitutional violation").

In *Ashcroft v. Iqbal,* 556 U.S. 662, 676 (2009), the Supreme Court reaffirmed that "vicarious liability is inapplicable to *Bivens*' actions, and that "knowledge and acquiescence" is "insufficient to satisfy" the standard for supervisory liability in the *Bivens* context. Indeed, the Fifth Circuit in *Hernandez* squarely held that such allegations are insufficient to establish a violation of clearly established Constitutional law:

> Finally, we address the constitutional claims against Agent Mesa's supervisors. "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." *Ashcroft v. Iqbal*, 556 U.S. 662, 676, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009). The Appellants allege that the supervisors promulgated policies they knew were inadequate regarding the use of deadly force and also failed to train officers regarding the appropriate use of their firearms. As the district court noted, however, neither of the remaining supervisors was shown to have any personal involvement in the alleged constitutional violation. Specifically, the district court found that Agent Cordero "had not served as a line supervisor for agents in Agent Mesa's position since 2006"—four years before the incident—and that it had been at least eight months since Agent Manjarrez had supervised Agent Mesa. The Appellants do not challenge these findings and point to no specific policy nor any other evidence that would suggest that the supervisors were personally responsible for the alleged

[1] To be clear, there is no DHS written policy titled the "Vehicle Policy." Rather, it is just a label created by Plaintiff to cover alleged conduct by government officials.

> constitutional violation. Under these circumstances, the district court properly granted summary judgment in favor of the supervisors.

Hernandez, 757 F.3d 249 at 258-59, *aff'd in part*, 785 F.3d at 119 (5th Cir.) (en banc) (reinstating part of VI of the three-member panel decision).

Accordingly, the *Bivens* claims against the supervisory-named Defendants are subject to dismissal for failure to state a clearly established violation of Constitutional law.

C. Plaintiff's Fifth Amendment claim against the individually-named agents must be dismissed in light of *Graham v. Connor*'s instruction that all claims that law enforcement officers have used excessive force in the course of an arrest should be analyzed under the Fourth Amendment.

In Plaintiff's Fifth Amended Claim for Relief she alleges that the individually-named agents violated the Fifth Amendment by using excessive force against Lozano.

In *Graham v. Connor*, 490 U.S. 386, 395 (1989), however, the Court held 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." This is because the "the Fourth Amendment provides an explicit textual source of constitutional protection against this sort of physically intrusive governmental conduct, that Amendment, not the more generalized notion of 'substantive due process,' must be the guide for analyzing these claims." *Id.*; *Martinez-Aguero v. Gonzalez*, 459 F.3d 618, 623 (5th Cir. 2006) (same).

Accordingly, consistent with *Graham*, Plaintiff's Fifth Amended Claim for Relief should be dismissed.

D. Defendants Cabello and Tejeda are entitled to qualified immunity on Plaintiff's Fourth Amendment claim because the use of force did not constitute a clearly established violation of Constitutional law.

In Plaintiff's Seventh Claim for relief she alleges that Defendants Tejeda and Cabello violated Lozano's Fourth Amendment rights by means of an unreasonable seizure (i.e., the deadly shooting).

As an initial matter, Plaintiff's complaint does not allege with sufficient detail that Defendant Tejeda was personally responsible for Lozano's death. Rather, fairly read, Plaintiff's complaint alleges that such actions were carried out by Defendant Cabello. Accordingly, because Plaintiff has failed to allege facts that establish Defendant Tejeda personally and directly violated his Fourth Amendment rights, any Fourth Amendment claims against him must be dismissed for failure to state a claim for which relief can be granted.

Plaintiff also alleges that Defendant Tejeda is liable for the Fourth Amendment violation because he "conspired with Agent Cabello to commit and/or cover-up this excessive use of force Against Lozano in violation of his Fourth and Fifth Amendment rights." (Compl. ¶141.) The problem with this argument is that—even if true—it is well-established that ratifying and covering up an alleged constitutional violation do not state a viable claim for secondary liability. *See Bentz v. Cowan*, No. 13-1259, 2013 U.S. Dist. LEXIS 181240, *5 (S.D. Ill. Dec. 30, 2013) ("Plaintiff shall also be allowed to proceed on his excessive force claims, but a conspiracy to 'cover up' those acts after the fact does not amount to a constitutional violation in and of itself."); *Henderson v. City of Fairfield*, No. 12-10-70, 2013 U.S. Dist. LEXIS 19506, *29-30 (N.D. Ala. Feb. 13. 2013) (ratification after-the-fact is not actionable as a standalone constitutional violation); *Lang v. County of Sonoma*, No. 12-983, 2012 U.S. Dist. LEXIS 142746, *7 (N.D. Cal. Oct. 2, 2012) ("But Plaintiff cites no case law to support the proposition that a cover-up of unconstitutional conduct is properly viewed as violative of the underlying constitutional right."); *Green v. New Jersey State Police*, No. 4-7, 2006 U.S. Dist. LEXIS 55334,

*13-14 (D.N.J. Aug. 9, 2006) ("Green may not bootstrap the other officers' alleged Fourth Amendment violations into a claim against Schusler by merely alleging a conspiracy to cover-up the Fourth Amendment violations after the fact."); *James v. Rednour*, No. 10-1083, 2012 U.S. Dist. LEXIS 119889, *9-10 (S.D. Ill. Aug. 24, 2012) ("Covering up the use of excessive force by other persons does not violate the Plaintiff's constitutional rights.").

As to the "conspiracy" argument, the complaint utterly fails to allege what "conspiracy" Defendant Tejeda engaged in with Defendant Cabello. Although the complaint alleges that Defendant Tejeda engaged in a conspiracy to violate Defendant Lozano's "Fourth and Fifth Amendment rights," (Compl. ¶141), this claim itself is insufficient to state a claim. See *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557 (2007) ("conclusory allegation of agreement at some unidentified point does not supply facts adequate to show illegality").

Plaintiff's Seventh Claim further fails because, as pled, it fails to demonstrate the seizure of Lozano constituted a violation of clearly established Fourth Amendment rights.

In the complaint, Plaintiff concedes that when the Defendants Cabello and Tejeda attempted to pull over the vehicle in which Lozano was traveling, all of the occupants—including Lozano—began to flee. (Compl ¶26.) At this point, it became reasonable for the Defendant Agents to use a certain amount of force to apprehend the fleeing subjects, including Lozano. *See Poole v. City of Shreveport*, 691 F.3d 624, 629 (5th Cir. 2012) (arrestee or suspect who refuses to comply with officers' commands poses an immediate threat to the safety of the officers such that use of force is not clearly excessive). In an effort to stop Lozano from fleeing, Plaintiff alleges that Defendant Cabello then "slammed the driver's side passenger door shut, preventing Lozano from exiting the vehicle" and also "slammed his baton into the window at Lozano, shattering the window into pieces." (Compl. ¶27). Taking this allegation as true for

purposes of this motion, there was nothing unreasonable about Defendant Cabello shutting the vehicle's door and breaking the window to prevent Lozano from absconding. (Compl ¶27.) *See Burkins v. Rudloff*, 2002 WL 31016514 (N.D. Tex. Sep. 6, 2002) ("A police officer's use of force, including striking a person fleeing from an attempted arrest with a flashlight or baton can neither be categorized as an excessive use of force, nor force which was objectively unreasonable.").

However, this lower level of force did not slow down Lozano. Instead, Lozano began driving the vehicle, ultimately in the direction of Defendant Cabello. (Compl ¶27.) Defendant Cabello also believed that the vehicle was headed in his direction. (Compl ¶28.). It is clear from the Complaint that both defendants feared that they would be run over. It was only then that the Defendants fired their weapons resulting in Lozano's death. (Compl ¶28-29.).

Even when viewed in the light most favorable to plaintiff, the facts of this case do not establish a constitutional violation by Defendants Cabello and Tejeda. At the time of the incident, the agents reasonably believed that Lozano might kill them. They fired at Lozano to halt this threat. In these circumstances, Defendants' use of force was reasonable. This is because "if threatened by [a] weapon (which may include a vehicle attempting to run over an officer), an officer may use deadly force." *Thomas v. Durastanti*, 607 F.3d 655, 664 (10th Cir. 2010).

Plaintiff asserts that Defendants should have allowed Lozano to flee or use other alternatives, other than deadly force. . (Compl ¶32.) But that is not right. When dealing with a hostile and uncooperative subject, as took place "[u]nder these circumstances, a reasonable officer could well fear for his safety and that of others nearby." *Reese v. Anderson*, 926 F.2d 494, 501 (5th Cir. 1991); *see also Draper v. Reynolds*, 369 F.3d 1270, 1278 (11th Cir. 2004) (affirming grant of summary judgment for defendant where use of a taser to effectuate plaintiff's

arrest was reasonably proportionate to the difficult and tense circumstances facing defendant at a traffic stop, and did not constitute excessive force; plaintiff was hostile, uncooperative and refused to comply with defendant's request for documentation). This is especially true in this case where the individually-named defendants are Border Patrol agents who "are often forced to make split-second judgments--in circumstances that are tense, uncertain, and rapidly evolving-about the amount of force that is necessary in a particular situation." *Graham*, 490 U.S. at 396–397; *United States v. Rideau*, 969 F.2d 1572, 1575 (5th Cir. 1992) ("We are unwilling to tie the hands of police officers operating in potentially dangerous situations by precluding them from taking reasonable steps to ensure their safety when they have legitimately detained an individual."); *see also Menuel v. City of Atlanta*, 25 F.3d 990, 995 (11th Cir. 1994) ("From the vantage of an officer whose life is jeopardized, a potential arrestee who is neither physically subdued nor compliantly yielding remains capable of generating surprise, aggression, and death.").

It must be further emphasized that even though the facts in the complaint are viewed in a light most favorable to Plaintiff, "the burden remains on [Plaintiff] 'to negate the [qualified immunity] defense once properly raised.'" *Poole*, 691 F.3d at 630 (quoting *Brumfield v. Hollins*, 551 F.3d 322, 326 (5th Cir. 2008)); *Pierce v. Smith*, 117 F.3d 866, 872 (5th Cir. 1997) ("We do not require that an official demonstrate that he did not violate clearly established federal rights; our precedent places that burden upon plaintiffs." (internal quotation marks omitted)).

In sum, viewed objectively, Defendants Cabello and Tejeda responded with "measured and ascending" actions that corresponded to Lozano's escalating resistance and threatening conduct. *See Poole*, 691 F.3d at 629. Given Lozano's behavior, it was objectively reasonable for Defendants to consider Lozano a threat to their lives that required use of deadly force. Indeed,

the "subjective merits of an officer's actions" are irrelevant to the qualified immunity analysis, *Poole*, 691 F.3d at 633, which "'gives ample room for mistaken judgments' by protecting 'all but the plainly incompetent or those who knowingly violate the law,'" *Mendenhall v. Riser,* 213 F.3d 226, 230 (5th Cir. 2000) (quoting *Malley,* 475 U.S. at 343).

CONCLUSION

For the foregoing reasons, the complaint and all claims against all Defendants should be dismissed with prejudice.

Respectfully submitted,

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