UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
----------x
LEONEL RUIZ, on behalf of his daughter, E.R., a Minor,

Plaintiff

— against —

UNITED STATES OF AMERICA,

Defendant.
----------x

Assigned ECF Doc. No.
Service Date: September 9, 2013

NOTICE OF MOTION

Civil Action
No. 13-CV-1241

(Matsumoto, J.)
(Gold, M.J.)

PLEASE TAKE NOTICE that upon all pleadings and proceedings in this case, defendants will move this Court, before the Honorable Kiyo A. Matsumoto, United States District Judge, at the United States Courthouse for the Eastern District of New York, for an order pursuant to Fed. R. Civ. P. 12(b)(1) dismissing this action for lack of subject matter jurisdiction, or alternatively judgment on the pleadings pursuant to Fed. R. Civ. P. 12(c) for failure to state a claim, or alternatively for change of venue, and granting such other and further relief as this Court deems just and proper.

Dated: Brooklyn, New York
September 9, 2013

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Civil Action
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(Matsumoto, J.)
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DEFENDANT'S MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION TO DISMISS THE COMPLAINT FOR LACK OF JURISDICTION PURSUANT TO RULE 12(b)(1), MOTION FOR JUDGMENT ON THE PLEADINGS PURSUANT TO RULE 12(c), AND MOTION FOR CHANGE OF VENUE PURSUANT TO 28 U.S.C. § 1404(a)

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PRELIMINARY STATEMENT

Plaintiff Leonel Ruiz ("Leonel") brings this action pursuant to the Federal Tort Claims Act ("FTCA") on behalf of his minor United States citizen child ER, claiming that United States Customs and Border Protection ("CBP") Officers improperly detained ER in the "secondary inspection area" at Dulles International Airport ("Dulles") on March 11-12, 2011 and thereafter effectively "deported" her to Guatemala. However, the FTCA's limited waiver of sovereign immunity does not encompass these claims, as they challenge discretionary actions taken by federal officers that are grounded in policy choices. Even if this Court did have jurisdiction over Leonel's claims, this action should be dismissed for failure to state a claim upon which relief may be granted. Finally, even if subject matter jurisdiction did exist, and a valid claim for relief had been plausibly stated, venue would be neither proper nor appropriate in this Court.

BACKGROUND

On [redacted], [redacted], ER was born in the United States. Complaint (ECF Doc. 7-1) ("Comp.") ¶ 6; Ex. A[1] at 15. When ER was approximately one year old, ER's parents Brenda Dubon ("Brenda") and Leonel Ruiz ("Leonel") applied for a United States passport on ER's behalf. Ex. A at 14. On February 12, 2010, when ER was three years old, ER's parents signed a document, notarized in Suffolk County, New York, stating in Spanish that ER was authorized to travel to and from Guatemala with her maternal grandfather, Luis Dubon ("Luis"). Comp ¶ 14; Ex. A at 7, Ex. E at 27. This document provided an emergency contact telephone number, but no identifying information (other than what appears to be a foreign passport number) about Brenda, Leonel, or Luis. *Id.*

On October 22, 2010, according to the complaint, when ER was four years old, ER was

[1] Exhibits A to F are annexed to the accompanying Declaration of AUSA Margaret M. Kolbe, dated September 9, 2013.

sent to Guatemala for a "winter vacation" with her relatives. Comp. ¶ 12. Her parents remained in the United States. *Id.* The purpose of this trip was to provide ER the opportunity to spend time with her family, to practice her Spanish, and to benefit from the warmer climate for her asthma. Comp. ¶ 12. On February 12, 2011, while ER was in Guatemala, Luis applied for a temporary work visa. Ex. D at 25. On this application, Luis failed to disclose, among other things, that he had not previously been present in the United States. Ex. D at 25-26, Ex. C at 23.

On March 11, 2011, ER returned to the United States, accompanied only by Luis, on TACA Airlines Flight #56. Comp. ¶ 14. The airplane on which they were traveling, bound for John F. Kennedy International Airport ("JFK"), had been diverted to Dulles due to weather. Comp. ¶ 13. At Dulles, ER's United States passport was presented and stamped by CBP Officers. Comp. ¶ 15. While ER gained admission to the United States, Luis did not. Instead, he was directed to a "secondary inspection area." Comp. ¶ 16-18. ER accompanied Luis into this area. *Id.*

During the next approximate 12-hour period, CBP inspected Luis, determined that he was inadmissible to the United States, and processed him for removal pursuant to 8 U.S.C. § 1225(b)(1)(A)(i). Ex. D at 25-26, Ex. C at 23. According to Leonel's allegations on behalf of ER, Luis was not "free to leave" the secondary inspection area due to the fact that he was a "noncitizen not admitted to the United States." Comp. ¶ 22. ER, on the other hand, was restricted in her ability to leave because "as a minor, [she] could not leave on her own." Comp. 22. Leonel also alleges in the complaint that "throughout some or all of this time, [LUIS and ER] were under CBP guard." Comp. ¶ 22.

Meanwhile, in New York, Leonel and Brenda had arrived at JFK to meet ER and Luis. Comp. ¶ 23, Ex. A at 6 . ER's parents learned, at approximately 4 a.m., from the television

monitors at JFK, that the flight would not be arriving at JFK due to weather. Comp. ¶ 24, Ex. A at 6. Therefore, they returned home. *Id.* Leonel alleges in the complaint that he learned (without identifying the source of the information) that passengers from TACA Flight 566 would be arriving at 8:00 a.m. Comp. ¶ 23. Accordingly, he returned to JFK at 8:00 a.m.. *Id.* When he observed that other passengers who had been on TACA Flight 566 had arrived, but ER had not, he became concerned and sought information from the TACA office. Ex. A at 7. At approximately 12:00 p.m., Leonel learned from TACA that ER was being "held" at Dulles by CBP. Comp. ¶ 26. Upon learning this, according to the psychological report submitted with the administrative claim, Leonel "decided to call the news," and at 1:00 p.m. "contacted Channel 41 ('A Tu Lado') show." Ex B at 19-20.

Late that afternoon, at approximately 5:30 p.m., a CBP Officer communicated by telephone with Leonel. Comp. ¶ 27. Within an hour after that telephone call, Luis needed medical attention and was rushed to a nearby hospital, where he remained until approximately 9:30 p.m. Comp. ¶¶ 38-39. During this approximate four-hour period, ER allegedly was cared for by a person that Leonel believes was a TACA employee. Comp. ¶ 39. CBP Officers again communicated with Leonel by telephone, and Leonel consented to ER's return to Guatemala. Comp. ¶ 40-41, 46. Leonel alleges that CBP Officers obtained his consent by threatening that ER would be sent to an "adoption center." Comp. ¶ ¶ 43-44. Leonel also alleges that, at Dulles, an unidentified person attempted to separate ER from Luis, but that ER was "brought to tears" as a result. Comp. 34-35. Leonel further alleges that ER was given "only a cookie and a soda,"[2]

[2] While the defendant denies Leonel's allegations, and would offer a trier of fact overwhelming evidence demonstrating that these allegations mischaracterize the circumstances of the time ER spent in the secondary inspection area, these facts are not material to the instant motion. Nevertheless, it is worth stating that Leonel, himself, has variously characterized ER's experience in the secondary inspection area. According to a psychological report submitted in support of his

that the secondary inspection area was cold, and that ER was unable to sleep, never having been offered a blanket or a pillow. Comp. ¶¶ 49-51.

Late that evening, ER and Luis departed on a TACA flight and returned to Guatemala. Comp. ¶ 55. Thirteen days later, on March 29, ER returned to the United States, this time accompanied by a "local attorney," rather than her grandfather. Comp. ¶ 58.

Approximately one week later, on April 8, 2011, Leonel was interviewed, and ER was "observed" by Roy Aranda, Psy. D, J.D. Ex. B at 18-21. Dr. Aranda concluded, in a report dated July 13, 2012, that "the [March 11, 2011] incident proved traumatizing for [ER] and her family," and that ER "sustained an anxiety disorder known as Postraumatic Stress Disorder [PTSD]." Ex. B at 21.

On or about April 20, 2012, Leonel presented, on behalf of ER, a Claim for Damage, Injury or Death (SF-95) seeking $2,000,000.00 in damages. Ex. A at 3. On October 19, 2012, this claim was denied. Comp. ¶ 8.

On March 8, 2013, the instant action was filed. ECF Doc. 1. Leonel claims that ER "met with a psychologist" who diagnosed ER with "post-traumatic stress disorder," allegedly as a result of the events of March 11, 2011. Comp. ¶ 63. Leonel does not allege that ER met with a child psychologist on more than one occasion. According to Leonel, the CBP Officers falsely imprisoned ER (Comp. ¶¶ 70-71), intentionally inflicted emotional distress upon ER (Comp. ¶¶ 72-73), and acted negligently toward ER (Comp. ¶¶ 74-75). Leonel seeks "compensatory damages resulting from Defendant's unlawful conduct, in an amount to be proven at trial." Comp. (Prayer for Relief ¶ B).

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administrative claim, Leonel reported on April 8, 2011, a week after ER's return to the United States, that ER had been given a piece of chicken and an apple to eat. Ex. B at 20. In support of the administrative claim filed on April 20, 2012, Leonel alleged that ER had been given "extremely little" to eat. Ex. A at 9.

ARGUMENT

POINT 1: THIS ACTION MUST BE DISMISSED FOR LACK OF JURISDICTION OR, IN THE ALTERNATIVE, JUDGMENT ON THE PLEADINGS MUST BE GRANTED TO THE DEFENDANT

"A plaintiff asserting subject matter jurisdiction has the burden of proving by a preponderance of the evidence that it exists." *Makarova v. United States*, 201 F. 3d 110, 113 (2d Cir. 2000) (citation omitted). While the Court must accept as true all factual allegations in the complaint, *Morrison v. Nat'l Austl. Bank Ltd.*, 547 F.3d 167, 170 (2d Cir. 2008), the Court may not draw any jurisdictional inferences in favor of the plaintiff. *Fraser v. United States*, 490 F. Supp. 2d 302, 307 (E.D.N.Y.2007) (citation omitted). "Jurisdiction must be shown affirmatively, and that showing is not made by drawing from the pleadings inferences favorable to the party asserting it." *APWU v. Potter*, 343 F.3d 619, 623 (2d Cir. 2003) (internal quotation marks and citation omitted). Thus, in resolving a motion to dismiss for lack of subject matter jurisdiction under Rule 12(b)(1), a district court may consider evidence outside the pleadings. *Morrison*, 547 F.3d at 170.

A. ER's Claims Must be Dismissed for Lack of Jurisdiction Because She Challenges Actions by CBP Officers that are Subject to the Discretionary Function Exception

The decisions which the CBP Officers made regarding how best to ensure the well-being of ER, while processing Luis for removal, do not fall within the FTCA's limited waiver of sovereign immunity because such decisions fall within the "discretionary function exception" ("DFE") to the FTCA's limited waiver of sovereign immunity.

Under the DFE, the FTCA does not waive liability for claims against the United States which are "based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or employee of the Government, whether or not the discretion involved be abused." 28 U.S.C. § 2680(a). The DFE precludes

"claims based on day to day management decisions if those decisions require judgment as to which of a range of permissible courses is wisest." *Fazi v. United States*, 935 F.2d 535, 538 (2d Cir. 1991) (citing *United States v. Gaubert*, 499 U.S. 315 (1991)); *see also Molchatsky v. United States*, 713 F.3d 159, 162 (2d Cir. 2013) (and cases cited therein). It is a plaintiff's burden to plead facts that show that the alleged tortious acts of the federal officers falls outside the DFE. *See Gaubert*, 499 U.S. at 324 ("When established governmental policy, as expressed or implied by statute, regulation, or agency guidelines, allows a Government agent to exercise discretion, it must be presumed that the agent's acts are grounded in policy when exercising that discretion."); *see also, e.g., Wang v. United States*, 61 Fed. Appx. 757, 759 (2d Cir. 2003) ("Plaintiffs failed to meet their burden of pleading facts which would support a finding that the conduct of the investigative agents fell outside the scope of the [DFE]") (citing *Gaubert*, 499 U.S. at 324-25)).

The DFE applies "only if two conditions are met: (1) the acts alleged to be negligent must be discretionary, in that they involve an 'element of judgment or choice' and are not compelled by statute or regulation and (2) the judgment or choice in question must be grounded in considerations of public policy or susceptible to policy analysis." *Coulthurst v. United States*, 214 F.3d 106, 109 (2d Cir. 2000) (internal quotation marks omitted).

Here, these two conditions have been met vis-à-vis ER. The CBP Officers at Dulles Airport on March 11 were tasked with enforcing the provisions of the Immigration and Nationality Act ("INA") and were, therefore, *required* by statute to ensure that Luis, ER's grandfather, was removed from the United States. *See* 8 U.S.C. § 1225(b)(1)(A)(i) ("If an immigration officer determines that an alien . . . who is arriving . . . is inadmissible . . . the officer *shall order the alien removed* . . . without further hearing or review.") (emphasis supplied). However, the provisions of the INA, and its implementing regulations, are silent with

respect to how an immigration officer must act with regard to a United States citizen child who arrives at an airport and is accompanied only by an individual, such as Luis, who is an inadmissible arriving alien. Therefore, the CBP Officers' actions in permitting ER to remain with her grandfather in the secondary area, and to remain with him while he was removed to Guatemala, are precisely the sort of actions by federal officers that the DFE shields from the FTCA's limited waiver of sovereign immunity. *See Bradley v. United States*, 164 F. Supp. 2d 437, 454 (D.N.J. 2001) (dismissing false imprisonment and IIED claims under the DFE, stating "[b]ecause this was a border search conducted by Customs officers who were using discretion and whose decisions were inherently based on public policy, this Court is convinced that the [DFE] applies").

The Fifth Circuit's decision in *Castro v. United States*, 608 F.3d 266, 274 (5th Cir. 2010) (en banc) (per curiam), *cert. denied*, ____U.S.____, 131 S. Ct. 902 (2011), provides an example that is particularly apt. In *Castro*, the plaintiff was a United States citizen mother who brought suit under the FTCA for damages allegedly resulting from a CBP Officer's decision to allow her United States citizen daughter to accompany her undocumented father during his repatriation to Mexico. *See Castro v. United States*, No. C-06-C1, 2007 WL 471095, at *3 (S.D. Tex. Feb. 9, 2007)). Affirming the district court's application of DFE, the Fifth Circuit found the "two prongs" of *Gaubert*, 499 U.S. at 322-23, to have been "satisfied" for the following reasons:

> [T]he Border Patrol Agents' decision to let R.M.G. accompany her father back to Mexico was the product of a judgment or choice, and the Border Patrol Agents' conduct in the situation was not mandated by any statute, regulation or policy . . . [T]he Border Patrol Agents' decision was unequivocally subject to policy analysis, as it involved the use of government resources and necessarily involved a decision as to what the Border Patrol should do with a United States citizen child in the unique circumstances presented by such a case.

Castro, 608 F.3d at 274 (quoting *Castro*, 2007 WL 471095, at *6, *8). That is, because the CBP

Officers faced unique circumstances in which their judgments and choices were not mandated by any statute, regulation, or policy, those actions fell within the DFE.

Similar to the "untenable decision" faced by the CBP Officers in *Castro* -- to "either forcibly remove R.M.G. from [her father] even though there was no custody order directing them to do so, or let [her father] continue with his possession of R.M.G." (2007 WL 471095, at *7) -- the CBP Officers at Dulles on March 11, 2011 also also were placed in the untenable position of deciding whether to separate ER from her grandfather or permit her to remain in the care of her grandfather. The dilemma that they faced was, indeed, a difficult one. This Court should recognize that the CBP Officers did not have any identifying information regarding Leonel beyond the notarized letter stating, in Spanish, that ER should be cared for by Luis. Comp. ¶ 14, Ex. E. Under these circumstances, where the parental guardian *was not even present*, but rather was only a voice on the other end of a telephone, it would have been impossible for Leonel to have appropriately "designated" someone else to retrieve four-year-old ER at Dulles or accompany ER on a flight to JFK.

Indeed, Leonel seems to imply in the complaint that a better course of action would have been for the CBP Officers to have allowed ER, a four-year-old child, to travel unaccompanied to New York, or to permit her to be placed in the care of another. *See* Comp. ¶ 30 (alleging that CBP Officers offered to "put" ER on a flight to JFK without specifying who would accompany her); ¶ 42 (alleging that an unidentified "friend. . . . was willing and able to pick up ER" and that Leonel would have "designated him as a custodian"). Even assuming that CBP could somehow verify that the voice on the other end of the telephone was ER's parent, and then, that this parent had properly designated a custodian, such course of action likely would have led to a traumatizing result for ER. Indeed, the complaint itself alleges that ER resisted being separated

from Luis, having been "brought to tears" at the prospect. Comp. ¶¶ 34-35. After all, ER had spent the previous 5 months with Luis -- and not her parents. In the end, it is difficult to imagine what option, short of CBP's allowing Luis to gain entry to the United States (an option that was not available to them) and accompany ER to her New York destination, would have been satisfactory. It is precisely this sort of conduct -- a federal officer, performing his or her day-to-day duties, and choosing from among a "range of permissible courses" and deciding which course is wisest -- that the DFE was designed to protect. *See Fazi*, 935 F. 2d at 537-38.

We acknowledge that the Second Circuit has held, in the context of an immigration officer's decision to arrest a person at the border, that a claim of false imprisonment did not fall within the discretionary function exception. *See Caban v. United States*, 671 F.2d 1230, 1233-34 (2d Cir. 1982). However, unlike the CBP Officers' actions in the instant case, the immigration officers in *Caban* were performing actions arising out of what the Court viewed as the "basically mechanical duty to ascertain whether an applicant meets the minimal standards for entry into this country." 671 F.2d at 1234. The Court in *Caban*, therefore, reasoned that, given this absence of discretion, the immigration officers were performing activities which were "not the kind that involve[d] weighing important policy choices." *Id.* at 1233. For the instant case, the CBP Officers' actions with respect to ER can hardly be characterized as "mechanical" in nature.

Moreover, the Supreme Court's development of the two-part test, as laid out in *Berkovitz v. United States*, 486 U.S. 531 (1988), and *Gaubert*, occurred subsequent to the1982 decision in *Caban*. Since *Caban*, it has been made abundantly clear that, in applying the second part of the test (*i.e.*, whether the judgment or choice in question is grounded in considerations of public policy or susceptible to policy analysis), courts need not decide whether competing policies were actually weighed, but rather only whether there was "room for policy judgment." *Valdez v.*

United States. No. 08 Civ. 4424 (RPP), 2009 WL 2365549, at *5 (S.D.N.Y. July 31, 2009) (citations omitted); *see also In re Joint E. & S. Dist. Abestos. Litig.*, 891 F.2d 31, 37 (2d Cir. 1989) ("We believe that it is unimportant whether the government actually balanced economic, social, and political concerns in reaching its decision. The discretionary function exception applies where there is room for policy judgment. Thus, the relevant question is not whether an explicit balancing is proved, but whether the decision is susceptible to policy analysis.") (internal quotation marks and citations omitted). The dicta in *Caban* regarding whether the policy choice was of a necessarily high level or "important," 671 F.2d at 1233, does not reflect the analysis which is to be applied by this Court. Indeed, the Supreme Court has made clear that the DFE applies to "day-to-day management" decisions and is "not confined to the policy or planning level." *Gaubert*, 499 U.S. at 325.

The alleged tortious conduct by the CBP Officers in the instant case implicates precisely the sort of day-to-day management decisions, susceptible to policy analysis, that the DFE was designed to protect. Accordingly, the FTCA's limited waiver of sovereign immunity does not apply, and ER's claims must be dismissed for lack of jurisdiction.

B. Alternatively, Even Assuming Jurisdiction Exists, Plaintiff Fails to State a Claim Upon Which Relief May Be Granted

The standard for deciding a motion pursuant to Rule 12(c) is the same as that of a Rule 12(b)(6) motion for failure to state a claim. *See Pelt v. City of New York*, No. 11–CV–5633 (KAM), 2013 WL 4647500, at *3 (E.D.N.Y. Aug. 28, 2013) (citations omitted). That is, "a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Id.* (quotation marks and citations omitted). Although this Court must "accept as true all factual statements alleged in the complaint and draw all reasonable inferences in favor of the non-moving party, mere conclusory allegations or "legal conclusions

masquerading as factual conclusions" will not defeat a motion to dismiss. *Id.*

1. Plaintiff Fails to State a Claim for False Imprisonment

False imprisonment is defined under Virginia law (the law governing this case, see 28 U.S.C. §§ 2671, 2674) as "the direct restraint by one person of the physical liberty of another without adequate legal justification." *Unus v. Kane*, 565 F.3d 103, 113 (4th Cir. 2009) (quoting *Figg v. Schroeder*, 312 F.3d 652, 637 (4th Cir. 2002) (citations omitted); *see also Jordan v. Shands*, 500 S.E. 2d 215, 218 (Va. 1998) ("[f]alse imprisonment is a wrong akin to the wrongs of assault and battery, and consists in imposing by force or threats an unlawful restraint upon a man's freedom of locomotion.") (internal citation and quotation marks omitted). Restraint upon a person's liberty cannot be vaguely asserted, but must be limited to confinement to a particular location. *See Goldstein v. Costco Wholesale Corp.*, No. Civ. 02–1520, 2003 WL 21954039, at *6 (E.D. Va. Jul. 21, 2003) ("confinement to some defined area is implicit in the tort of false imprisonment").

Here, ER was present in the secondary inspection area only because she was in the care of her grandfather who, in turn, was being inspected for admission to the United States. Plaintiff's vague allegation that she, along with her grandfather, were "under CBP guard" (Comp. ¶ 22) is insufficient to state a claim that ER was "confined" at all. Indeed, in the criminal context, it is well-recognized that the border presents special circumstances where ordinary notions of confinement do not apply. *See, e.g., United States v. Butler*, 249 F.3d 1094, 1098 (9th Cir. 2001) ("It is well recognized that special rules apply at the border."); *id.* at 1100–01 ("mere detention of a person in a border station's security office from which he or she is not free to leave, while a search of a vehicle occurs, is not 'custody' for these purposes"); *United States v. Doe*, 219 F.3d 1009, 1014 (9th Cir. 2000) (juvenile was not "in custody" when he merely sat on a

bench in the security office, but was in custody after marijuana was found in his car and he was placed in a locked cell).

The tort of false imprisonment requires a plaintiff to plead that he was, in fact, confined in some way. Here, no such allegation is, or could fairly be, advanced with respect to ER. It is important to recognize what Leonel does *not* allege in the complaint. Leonel does not allege that CBP Officers touched ER, spoke with ER, or placed ER in a location where her physical movement was, in fact, restricted. Nor does Leonel allege that CBP Officers spoke to ER in a manner that would cause her to believe that her physical movement was, in fact, restricted. Instead, the Complaint asserts only generally that Luis was "sent" to "CBP's secondary inspection area" and that CBP Officers "chose" that ER be "detained with [Luis]." Comp. ¶ 17. Although the complaint contains one reference to a "door" that was allegedly being "guarded" by a CBP agent (Comp. ¶ 37), the physical characteristics of Luis's alleged detention location are not described in the complaint. Instead, the complaint refers only vaguely to such location as the "area" where Luis and ER were "held." Comp. ¶¶ 32, 33.[3]

In the end, the allegations contained in the complaint do not show anything other than the fact that *Luis*, not CBP, had custody of ER during his processing. According to the complaint,

[3] The absence of such a description could be due to the fact that most of the "secondary inspection area" at Dulles consists of an open processing area where CBP personnel are present, but others, including other passengers or other authorized persons, are also present. It is reasonable to expect the physical characteristics of the location where ER was allegedly detained to be described in the complaint, especially given that Leonel was aware of CBP's August 2008 Internal Directive No. 3340-030B, "Secure Detention, Transport and Escort Procedures at Ports of Entry," provided to him in response to his FOIA request**,** and referred to in the complaint (Comp. ¶ 53)). For example, this document defines, for the limited purpose of these internal procedures, terms such as "Attended Area," "Detention Cell," and "Hold Room." Plaintiff does not allege that ER was confined in an enclosed space, and the undersigned has confirmed with CBP that neither Luis nor ER was placed in either a "detention cell" or "hold room." Rather, they remained in a location within the secondary inspection area that, although attended by CBP personnel, was large and open such that they were able to move about.

the one time that Luis did *not* have custody of ER, it was a TACA employee -- not a CBP Officer -- who had custody of her. Comp. ¶ 39. Indeed, the complaint does not allege, with any degree of specificity, that ER was even *aware* of her alleged confinement. *See Estiverne v. Esernio-Jenssen*, 833 F. Supp. 2d 356, 381 (E.D.N.Y. 2011) (where nine-month-old child was not aware of his confinement, unlawful imprisonment claim brought by parents on behalf of child was precluded).

2. Plaintiff Fails to State a Claim for Intentional Infliction of Emotional Distress

Plaintiff fails to state a claim for intentional infliction of emotional distress ("IIED"), which requires a plaintiff to satisfy four elements of proof: (1) the wrongdoer's conduct was intentional or reckless; (2) the conduct was outrageous or intolerable; (3) there was a causal connection between the wrongdoer's conduct and the resulting emotional distress; and (4) the resulting emotional distress was severe. *See Supervalu, Inc. v. Johnson*, 276 Va. 356, 666 S.E.2d 335, 343 (2008). IIED claims are generally disfavored under Virginia law. *Id.*

Plaintiff has not sufficiently pleaded any one of these elements. The gravamen of Leonel's IIED claim is that CBP Officers acted outrageously by giving Leonel only the "Hobson's choice" of either sending ER to an "adoption center"[4] or to Guatemala with her grandfather and, therefore, failing to reunite ER with her parents. Comp. ¶¶ 43-44, 73(i). However, even assuming the truth of these allegations, a CBP Officers' actions in providing such

[4] According to the Preliminary Psychological Report submitted in support of the SF95, Leonel reported to Dr. Aranda (during his "clinical interview" of him on April 18, 2011) that the CBP Officer made reference to a "children's center in Virginia." Ex. B at 20. According to Leonel, it was Luis who "reportedly was told that they were going to take Emily and put her up for adoption in Virginia." *Id.* In the complaint filed almost a year later, Leonel alleges that by telephone "the CBP agent demanded that [he] permit CBP to return E.R. to Guatemala, threatening that otherwise CBP would send E.R. to an 'adoption center' (using those words, in English)." Comp. ¶ 43.

choice to Leonel does not amount to conduct that could be considered "outrageous or intolerable" toward ER. *See Russo v. White*, 400 S.E .2d 160, 162 (Va. 1991) (conduct must be "beyond all possible bounds of decency . . . atrocious . . . utterly intolerable in a civilized community."). That government officials would, in the absence of an available legal guardian, make reference to a State social service agency when conversing with someone claiming to be a child's parent over the telephone is, to the contrary, eminently reasonable. Under all the circumstances presented here, it too would have been a lawful course of action for CBP to have entrusted ER into the care of a State social services agency until a properly-identified custodian could take custody of her. Instead, CBP allowed ER to remain with her grandfather. It bears repeating here that the CBP Officers had no way of verifying Leonel's identity, having been provided nothing other than Luis' unlawfully obtained temporary visa, ER's passport, and a notarized letter (dated a month earlier), stating that ER should be cared for by Luis. Ex. E at 27.

The worst that can be said of the CBP Officers' alleged conduct is that, if they in fact presented such choice to Leonel, it perhaps was presented in an insensitive manner. Such allegations are insufficiently outrageous to state a claim for IIED under Virginia law. *See Harris v. Kreutzer*, 271 Va. 188, 204; 624 S.E.2d 24, 34 (2006) ("[i]nsensitive and demeaning conduct does not equate to outrageous behavior."); *Gaiters v. Lynn*, 831 F.2d 51, 54 (4th Cir. 1987) ("Lynn's alleged conduct, while possibly carelessly insensitive to its potential for hurt, involved no more than, at most, the kind of 'inconsiderate and unkind' act that the tort of 'outrage' does not encompass and that falls instead among those intended or unintended hurts that persons in our still 'rough-edged' society must simply abide without judicial remedy") (citing Restatement (Second) of Torts § 46 comment d)); *Weth v. O'Leary*, 796 F. Supp. 2d 766 (E.D. Va. 2011) ("to state a viable [IIED] claim . . . a plaintiff must meet the high burden of showing that . . . the

[defendant's] conduct was outrageous or intolerable).

Finally, Leonel fails to adequately allege emotional distress that is either "severe" or caused by the actions of CBP Officers. Although Leonel claims that ER on one occasion "met with a psychologist" who diagnosed her with "post-traumatic stress disorder," he does not allege that ER was under a doctor's care for any length of time. Comp. ¶ 63. Likewise, while Leonel alleges that ER "[a]fter returning to the United States developed symptoms" such as overeating, tantrums, soiling her pants, and nightmares, he fails even to state the length of time that ER exhibited such symptoms. Indeed, ER already had been separated from her parents for the five months preceding March 11, 2011. That her alleged "forced separation" from her parents for 18 days[5] caused her greater anxiety than the voluntary separation from her parents for the 5 months preceding March 11, 2011 does not amount to a plausible claim of emotional distress that is either severe or caused by the defendant. *See McPhearson v. Anderson*, 873 F. Supp. 2d 753, (E.D. Va. 2012) (dismissing IIED claim at the pleading claim because "plaintiff has not alleged concrete symptoms of his emotional distress in any detail") (internal quotation marks and citations omitted) (collecting cases).

3. Plaintiff Fails to State a Claim of Negligence that has a "Private Analogue" Under Virginia Law

CBP was neither responsible for ER's arrival at Dulles with an undocumented individual, nor was CBP responsible for conveying ER to her parents in New York once it was determined that ER had, in effect, become "unaccompanied" on her trip to the United States. While it was perhaps the contractual duty of TACA Airlines -- not the government -- to decide how ER would reach her destination once her grandfather's removal to Guatemala became necessary, the

[5] Leonel does not allege facts stating why it took 18 days for ER to return to the United States, or why such delay would have been attributable to CBP.

government's duty to ER did not extend beyond granting her admission to the United States and permitting the guardian who was present at the time -- Luis, her grandfather -- to continue to care for her.[6] The allegations contained in the complaint do not present a case of negligence on the part of the government.

In the end, ER's claim for negligence (Comp. ¶¶ 74-75) -- alleging that the CBP Officers "breached their duty of reasonable care of ER by negligently acting or failing to act such that ER was detained under unsuitable conditions" (Comp. ¶ 75(i)) -- amounts to a claim for "negligent false imprisonment." However, such a tort is not recognized under Virginia law. *See Markel American Ins. Co. v. Staples*, No. 3:09–CV–435, 2010 WL 370304, at *1 n.2 (E.D. Va. Jan. 28, 2010) (stating, in context of deciding whether a tort claim fell within an insurance policy's intentional acts exclusion, that it was "unable to find any support for a claim of . . . negligent false imprisonment under Virginia law"); *see also, e.g., Baggett v. National Bank & Trust Co.*, 174 Ga. App. 346, 330 S.E.2d 108, 110 (Ga. App. 1985) (rejecting "negligent false imprisonment claim" and discussing the necessity for actual damages to be shown where such tort is recognized).

For this reason alone, ER's negligence claim must be dismissed, as it lacks a "private analogue" under Virginia law. The FTCA's waiver of sovereign immunity is limited to only those negligence claims that have been recognized against private parties in the State where the alleged tort occurred. *See United States v. Olson*, 546 U.S. 43, 44 (2005) (explaining "that the United States waives sovereign immunity 'under circumstances' where local law would make a 'private person' liable in tort.") (emphasis in original); *Appleton v. United States*, 180

[6] Notably absent from the complaint is any allegation that Luis did not also acquiesce in ER's return to Guatemala. Also notably absent from the complaint is any allegation that Leonel offered to come to Dulles to retrieve ER.

F. Supp. 2d 177, 184 (D.D.C. 2002) (“The [FTCA] does not create a new or novel cause of action; it waives sovereign immunity for acts of government officers which, if they were private non-government employees, would be recognized under state law as tortuous.”). As ER's negligence finds no analogue in Virginia law, this Court is divested of any jurisdiction to adjudicate it, and therefore, as a matter of law, the claim must be dismissed. *See C.P. Chemical Co. v. United States*, 810 F.2d 34, 37 (2d Cir. 1987) (“The United States cannot be held liable when there is no comparable cause of action against a private [person.]”).

Finally, even if Plaintiff could demonstrate that a comparable negligence cause of action existed under Virginia law, it is well-established that such cause of action will not lie where, as here, only emotional damages are alleged. Indeed, "the general rule in tort cases in Virginia is that damages for emotional distress are not recoverable without an accompanying physical harm or proof of wanton and willful conduct consistent with the intentional infliction of emotional distress." *Goddard v. Protective Life Corp.*. 82 F. Supp. 2d 545 (E.D. Va. 2000). Claims for emotional injuries are not cognizable under Virginia law under a general negligence theory. *See Myseros v. Sissler*, 239 Va. 8, 12-13; 387 S.E.2d 463, 466 (Va. Sup. Ct. 1990) (setting aside jury verdict on negligence claim, and entering judgment in favor of defendant, finding plaintiff, who proffered evidence of PTSD, only presented “typical symptoms of an emotional disturbance for which there can be no recovery . . . in the absence of resulting physical injury.").

Here, Leonel claims to be seeking only "compensatory damages" on behalf of ER (Comp. at Prayer for Relief ¶ B), and alleges specifically that ER "suffered injury in the form of emotional distress, psychological injury, and damage to the parent-child relationship." Comp. ¶ 75(ii). Under Virginia law, ER may not recover compensatory damages for such injuries. *See Hickman v. Lab. Corp. of Am*, 460 F. Supp. 2d 693, 700 (W.D. Va. 2006) ("In Virginia, it is clear

that recovery is prohibited for emotional damages resulting from negligence in cases that do not involve a willful, wanton or vindictive act, unless there has been a contemporaneous physical injury.") For this reason alone, ER's negligence claim fails.

POINT 2: VENUE IS NEITHER PROPER NOR APPROPRIATE IN THIS DISTRICT, AND THIS ACTION SHOULD BE TRANSFERRED TO THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA WHERE THE OPERATIVE EVENTS TOOK PLACE

A. Venue is not Proper in the Eastern District of New York Because Plaintiff, who is not Lawfully Present in the United States, Cannot Base Venue on His Place of Residence

Leonel brings this action on behalf of ER. Under the Federal Rules, while ER is considered the "Real Party in Interest," Leonel is nevertheless considered the "plaintiff." *See* Comp. ¶ 10; Fed. R. Civ. P. 17(a)(1)(C). Indeed, he is referred to as "the plaintiff" throughout the complaint. The complaint asserts that Leonel and ER "reside" within the confines of the territorial jurisdiction of the Eastern District of New York. Comp. ¶ 9. They assert, therefore, that venue is proper here pursuant to 28 U.S.C. § 1402(b), the venue provision applicable to FTCA actions. *Id.*

Under the FTCA, venue is proper "only in the judicial district where *the plaintiff* resides or wherein the act or omission complained of occurred." 28 U.S.C.A. § 1402(b) (emphasis added). The general venue provisions, as amended in 2011,[7] provide that "a natural person, including *an alien lawfully admitted for permanent residence* in the United States, shall be deemed to reside in the judicial district in which that person is domiciled." 28 U.S.C. § 1391(c)(1),(2) (emphasis added). However, this provision does not address where undocumented aliens

[7] *See Kiwanuka v. Bakilana*, 844 F. Supp. 2d 107, 114 n.1 (D.D.C. 2012) (discussing how the amendment changed the venue rules as applied to alien defendants).

may be deemed to reside for venue purposes.

As Leonel is the plaintiff in this action, venue is proper here only if he is deemed to "reside" here within the meaning of 28 U.S.C. § 1402(b). Some courts have held, in the contest of reviewing agency immigration actions, that even lawfully resident aliens cannot premise venue upon their place of residence. *See Zhang v. Chertoff*, No. C 08-02589, 2008 WL 5271995 (N.D. Cal. Dec. 15, 2008); *Ou v. Chertoff*, No. C-07-3676, 2008 WL 686869, *2 (N.D. Cal. Mar. 12, 2008); *Li v. Chertoff*, No. C-08-3540, 2008 WL 4962992, *2-3 (N.D. Cal. Nov. 19, 2008); *but see Gu v. Napolitano*, Civ. A. No. 09-2179, 2009 WL 2969460, *2-3 (N.D. Cal. Sept. 11, 2009) (distinguishing cases on ground that specific venue provisions take precedence over the more general venue provision of Section 1391(e)).

It also is true that Courts generally recognize the principle that undocumented aliens cannot be presumed to "reside" in the place where they, in fact, live. *See Arevalo-Franco v. INS*, 889 F.2d 589, 590 (5th Cir. 1989) (stating that federal courts have interpreted 28 U.S.C. §§ 1391, 1402 "to deny venue to aliens, holding that for purposes of venue, aliens are not residents of any district despite where they might live," citing *Williams v. United States*, 704 F.2d 1222 (11th Cir. 1983), and *Galveston H. & S.A.R. Co. v. Gonzales*, 151 U.S. 496 (1894)).

Here, given that Leonel is, in fact, the plaintiff in this action, and given that he is not lawfully present here, and does not provide in the complaint even the location of his domicile, he cannot be presumed to reside in the Eastern District of New York for venue purposes. For this reason alone, transfer to the Eastern District of Virginia, where "the act or omission complained of occurred," 28 U.S.C.A. § 1402(b), would be proper.

B. Even Assuming that Plaintiff "Resides" in the Eastern District of New York, this Action Should be Transferred to the Eastern District of Virginia Under Principles of *Forum Non Conveniens*

Even assuming arguendo that venue is proper here, it would not make venue otherwise appropriate. The Eastern District of New York is not a convenient forum for any of the witnesses to the events leading to the claims in this case. Indeed, all of the material events in this case took place, and all of the third-party witnesses to this action are located, in Virginia. Accordingly, this action should be transferred to the Eastern District of Virginia.

The statute at 28 U.S.C. § 1404(a) provides that "[f]or the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought." 28 U.S.C. § 1404(a). Whether to transfer involves a two-part inquiry. Courts examine, first, whether the action is one which "might have been brought" in the proposed transferee court, and second, whether the transfer would promote "the convenience of parties and witnesses" and would be "in the interest of justice." *United States Fidelity and Guar. Co. v. Republic Drug Co.*, 800 F. Supp. 1076, 1079 (E.D.N.Y. 1992) (Spatt, J.) (citations omitted); *Aktiengesellschaft v. Milwaukee Elec. Tool Corp.*, No. 04-CV-629, 2004 WL 1812821, at *2 (E.D.N.Y. July 19, 2004) (Ross, J.).

In determining whether a transfer under Section 1404(a) is appropriate, courts must engage in a fact-specific inquiry into various factors, including: "(1) convenience of the parties; (2) convenience of witness; (3) relative means of the parties; (4) locus of operative facts and relative ease of access to sources of proof; (5) attendance of witnesses; (6) the weight accorded the plaintiff's choice of forum; (7) calendar congestion; (8) the desirability of having the case tried by the forum familiar with the substantive law to be applied; (9) practical difficulties; and (10) how best to serve the interest of justice, based on an assessment of the totality of material

circumstances." *Neil Bros. Ltd v. World Wide Lanes, Inc.*, 425 F. Supp. 2d 325, 327-28 (E.D.N.Y. 2006).

This Court has "broad discretion" in weighing these factors. *Id.* (citations omitted). For example, this Court has transferred a case arising out of alleged unlawful inspection activities by CBP Officers that occurred in the Northern District of New York primarily for the reasons that the non-party witnesses were located, and the operative facts took place, in the Northern District of New York, and not the Eastern District. *See Tabbaa, et al., v. Michael Chertoff,* No. 05-CV-1919 (E.D.N.Y. Aug. 11, 2005) (Ross, J.) (annexed to Defendant's pre-motion conference letter (ECF Doc. 14)).

Applying these 10 factors to the instant case, the Eastern District of Virginia is the most convenient forum for this action.

(i) Convenience to the Parties and Witnesses

"Convenience of both the party and non-party witnesses is probably the single-most important factor in the analysis of whether transfer should be granted." *ESPN, Inc. v. Quiksilver, Inc*., 581 F. Supp. 2d 542, 547 (S.D.N.Y. 2008) (internal quotation marks and citation omitted). Moreover, "[t]he convenience of non-party witnesses is accorded more weight than that of party witnesses." *Id.*

It is inconvenient for the witnesses to the underlying events for this action to remain in the Eastern District of New York. While both Leonel and ER claim to reside here, neither one of them actually witnessed the events that occurred on March 11, 2011 at Dulles Airport. According to the complaint, during this approximate 20-hour period, the following persons witnessed the events at Dulles: Luis (who currently resides in Guatemala), CBP Officers stationed at Dulles, unidentified third-party witnesses from TACA airlines, and unidentified

witnesses at a Virginia hospital. Other than ER, who was only 4 years old at the time, no witnesses to the events at Dulles reside within the Eastern District of New York. While Leonel alleges that he resides within the Eastern District, he could not have witnessed the events at Dulles other than to have communicated by telephone with at least one CBP Officer.

At this juncture, the defendant has identified eight CBP Officers who witnessed the events that are the subject of this lawsuit. *See* Ex. F. All but one of these employees is stationed in the Washington, D.C. / Northern Virginia area. *Id.* Not one of these CBP Officers regularly travels to the New York area on business. *Id.* What this means, in practical terms, is that these officers would be required to travel to New York to be prepared for depositions, to then be present for depositions, and subsequently, perhaps, to be present for a lengthy trial. This would entail not only traveling expenses that would, ultimately, be borne by the taxpayer, but also would require the additional expense of securing the appearance of third party witnesses -- most notably, the as-yet unidentified TACA airline employees (Comp. ¶ 39) who cared for ER during Luis' hospital visit. As *all* of the witnesses to the events in this action -- with the possible exception of ER (whose recall of the events likely will be limited) and Leonel (whose knowledge is limited to his telephone communication with CBP) -- are located in Virginia, it is beyond doubt that Virginia would be a much more convenient forum for the witnesses to the events in this case.

(ii) Relative Means of the Parties

The defendant is not aware of the means of Leonel. This factor, at present, is neutral.

(iii) Locus of Operative Facts and Relative Ease of Access to Sources of Proof

The operative facts in this case took place in the secondary inspection area at Dulles Airport in Virginia. Not only is the secondary inspection area physically located at Dulles, but

all the records of activities at Dulles airport on March 11, 2011, are located either in Virginia or the Washington, D.C. area. This is true not only for the government entities such as TSA and CBP, but also for the non-federal entities such as TACA airlines, the Dulles Airport authority, and the Virginia hospital where Luis was treated. Where, as here, the "'principal events occurred and the principal witnesses are located in another district,' the locus of facts provides a strong reason to transfer." *Jones v. United States*, No. 02-CV-1017, 2002 WL 2003191, at *3 (E.D.N.Y. Aug. 26, 2002) (Gleeson, J.) (quoting *Berman v. Informix*, 30 F. Supp. 2d 653, 658 (S.D.N.Y. 1998)).

(iv) Attendance of Witnesses

Given that there are potentially multiple third-party witnesses to the events in question -- including hospital employees and TACA Airline employees -- it cannot be assured that any one of these witnesses would attend proceedings in the Eastern District of New York. Under Fed R. Civ. P. 45(b)(2), a district court may compel the appearance only of those witnesses who reside in the district in which the court sits, or within 100 miles of the place of trial. For this reason, the government would be unfairly prejudiced in having to defend against this lawsuit in a forum where material witnesses -- such as the TACA employee who allegedly tended to ER during Luis' hospital stay -- would have to be compelled to attend proceedings in the Eastern District of New York, but would lie beyond this Court's subpoena power *See Jones*, 2002 WL 2003191, at *3 ("When a moving party can demonstrate that important witnesses would be beyond the subpoena power of the court, that fact weighs heavily in favor of a transfer.") (citations omitted).

(v) Weight to be Accorded Plaintiff's Choice of Forum

For the reasons set forth above, Leonel, who is not lawfully present in the United States, should not be permitted to choose his forum based on his residence. Accordingly, very little

weight should be accorded to Leonel's choice of forum.

(vi) Forum's familiarity with the substantive law to be applied

Here, the substantive law to be applied is Virginia law regarding the common law torts of false imprisonment, IIED, and negligence. To be sure, the United States District Court for the Eastern District of Virginia has more familiarity with this law, given that it must apply it in various types of actions, including FTCA actions (such as the instant case) and in diversity actions. Thus, this factor weighs heavily in favor of transferring this case to Virginia.

(vii) The Interests of Justice

Given all of the above factors, the interests of justice would be served by having this case heard in the forum where the alleged tortious actions occurred. This case challenges the actions of the CBP officers who serve at Dulles Airport in Northern Virginia. Not one of the witnesses to the events that occurred at Dulles on March 11, 2011 is located in New York. Leonel witnessed those events only tangentially through telephone calls, and ER only as a young child.

In weighing whether the interests of justice are served, courts consider not only the interests of the party, but also the interests of the public, and in particular the "local interest in having localized controversies decided at home" *Coultman v. National R.R. Passenger Corp.* 857 F. Supp. 231, 236 (E.D.N.Y. 1994) (citation omitted). Here, this case presents a controversy that implicates CBP's operations at Dulles airport -- and not any activities in New York. It would better serve the public for this case to be heard by the local Court who is familiar with those local activities. In the same way that this Court has experience with litigation arising out of JFK, the United States District Court for the Eastern District of Virginia has ample experience with criminal and civil actions arising out of activities at Dulles airport.

CONCLUSION

For all of the foregoing reasons, the Court must dismiss this action for lack of jurisdiction or, in the alternative, grant judgment on the pleadings to the defendant. Alternatively, this action should be transferred to the United States District Court for the Eastern District of Virginia.

Dated: Brooklyn, New York
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