UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
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LEONEL RUIZ, on behalf of his daughter, ER, a Minor,

Plaintiff,

— against —

UNITED STATES OF AMERICA,

Defendant.
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Assigned ECF Doc. No. ___

Civil Action
No. 13-CV-1241

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

DEFENDANT'S REPLY MEMORANDUM OF LAW IN FURTHER 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") argues that the limited immunity waiver provided by the Federal Tort Claims Act ("FTCA") encompasses his claim that United States Customs and Border Protection ("CBP") Officers improperly detained ER, his minor child, in the "secondary inspection area" at Dulles International Airport ("Dulles") on March 11-12, 2011 and thereafter effectively "deported" her to Guatemala. Leonel's arguments are unavailing, and this Court should dismiss this action for lack of subject matter jurisdiction or, in the alternative, failure to state a claim upon which relief may be granted. Alternatively, venue should be changed to the United States District Court for the Eastern District of Virginia.

ARGUMENT

A. Plaintiff's Claims are Barred by the Discretionary Function Exception ("DFE")

Leonel contends that the DFE does not apply here. Rather than address the detailed discussion demonstrating that that both prongs of the DFE test have been satisfied (*see* "Defendant's Memorandum of Law in Support . . . ," dated September 9, 2013 ("Def. Br.") 5-10), Leonel instead tries to escape his own pleadings and recast his Complaint as one sounding in constitutional law. *See* "Plaintiff's Memorandum of Law in Opposition . . . ," dated October 16, 2013 ("Pl. Br.") 6-8. According to Leonel, it is "entirely proper to assert ER's constitutional rights in response to an attempted invocation of the DFE." Pl. Br. 6. In making this assertion, he cites a few cases that he argues support this proposition. However, those cases do no such thing. Unlike the plaintiffs in these decisions,[1] Leonel has not pled (nor could he) a cause of action for

[1] Leonel's reliance upon *Rhoden v. United States*, 55 F.3d 428, 432 n.5 (9th Cir. 1995) is mistaken, as *Rhoden* did not address the DFE at all. *See Rhoden*, 55 F. 3d at 432 n.5 (reasoning that if "Rhoden's detention without a hearing was unconstitutional, then it was not legally justified or privileged" and, therefore, could establish the "state tort of false imprisonment"). In fact, the Ninth Circuit has recently addressed the DFE and applied it to preclude a false

either a constitutional or statutory violation. Aside from one brief mention of ER's constitutional right to be free from unreasonable searches and seizures (Comp. ¶ 68), Leonel's complaint is devoid of a constitutional or statutory claim. *See generally* Complaint. Instead, the complaint asserts three specific FTCA common law tort claims and nothing else. Comp. ¶¶ 70-75. For this reason alone, ER's effort to evade the FTCA's DFE bar, and assert a constitutional or statutory violation, fails.

Moreover, even if ER's complaint had stated a claim sounding in constitutional or statutory law against a proper defendant,[2] such claim would fail. ER was not detained, unreasonably or otherwise, by CBP Officers at Dulles. ER's reliance on Fourth Amendment decisions that address the constitutionality of a minor's confinement incident to a parent's confinement do not apply to this case. *See* Pl. Br at 6-7 (and cases cited therein). Neither ER nor her grandfather, Luis, was "arrested" or "detained" by anyone other than pursuant to the special circumstances incident to brief civil immigration detention at the border. That is, Luis arrived at Dulles as an inadmissible alien, applied for admission to the United States, and that

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imprisonment claim that challenged the discretionary decision to detain aliens pending removal proceedings. *See Mirmehdi v. United States*, 689 F.3d 975, 984 (9th Cir. 2012).

The other decisions cited by Leonel are also inapplicable here, as they involve plaintiffs who asserted constitutional claims in the complaint -- not in response to a dispositive jurisdictional motion. *See Meyers & Meyers, Inc. v U.S. Postal Serv.*, 527 F.2d 1252, 1261 (2d Cir. 1975) ("But here the appellants' argument is that the Postal Service has acted in contravention of its own regulations, if not unconstitutionally, in denying appellants a hearing prior to debarment from government contracting"); *El Badrawi v. Dep't of Homeland Sec.*, 579 F.Supp.2d 249, 275 (D. Conn. 2008) ("if El Badrawi succeeds in proving his false arrest/false imprisonment claim, he will have succeeded in showing that the defendants acted unconstitutionally"); *Garcia v. United States*, 896 F. Supp. 467, 474 (E.D. Pa. 1995) ("plaintiffs contend that the Customs inspectors' detention and search of them violated the Fourth Amendment"). ER's claims sound in common law tort, not the United States constitution.

[2] The United States, the only defendant in this action, has not waived sovereign immunity with respect to constitutional tort claims against the United States. *See, e.g., Castro v. United States*, 34 F.3d 106, 110 (2d Cir. 1994).

application was denied. That meant that he was prevented from entering the United States -- not that he was being processed for detention in the United States.

Because ER was a minor, and because her parents had placed her in the custody and care of Luis, ER remained with Luis (except for a short period of time when Luis received medical attention and ER was in the care of a TACA Airline employee). Comp. ¶ 39. Nowhere is it alleged that Luis (the only available guardian) did not consent to ER's being placed on the return flight to Guatemala with him. Instead, Leonel's allegation is only that CBP Officers "promised" ER's father by telephone that they would "facilitate E.R.'s travel to New York" and that they later "reneged on that promise." *See* Pl. Br. 7 (citing Comp. ¶¶ 27-31, 40-43). Even if this allegation were true, the Fourth Amendment does not require that CBP Officers fulfill such an oral promise, especially where ER was in the sole care of her grandfather, the only person authorized in writing to act as ER's guardian during her international travels.

Leonel further argues that the CBP Officers violated ER's "procedural and substantive Due Process rights" and "exceeded [their] statutory authority," citing to cases addressing the viability of causes of action challenging the actions of immigration officials in processing, detaining, and removing United States citizens from the United States. *See* Pl. Br. 8. However, these cases[3] have no applicability here, given that ER was, in fact, determined to be a United

[3] In *Lyttle v. United States*, 867 F. Supp. 2d 1256 (M.D. Ga. 2012), the court was addressing the Due Process rights of a United States citizen "who federal agents [knew had] a diminished mental capacity and who affirmatively claim[ed] citizenship, which the federal agents fail[ed] to attempt to confirm through readily available corroborating information." *Id.* at 1283. In *Hernandez v. Cremer*, 913 F.2d 230 (5th Cir. 1990), the court addressed the Fifth Amendment rights of a United States citizen who had been repeatedly denied entry into the United States, and ultimately concluded that "persons who present themselves at the border with facially adequate documentation of United States citizenship have a right to a fair procedure reasonably calculated to produce a *correct determination of their status*." *Id.* at 237 (emphasis added). Here, there was no issue regarding ER's status.

States citizen and granted admission to the United States. Proper procedures for making this determination of United States citizenship status, and permission to gain entry into the United States, are all that the constitution requires.

In the end, what Leonel attempts to assert here, in response to Defendant's invocation of the DFE, is a new right, which the constitution does not require -- and which is ultimately elusive. Leonel asserts that ER, once determined to be a citizen, should have been "*meaningfully permitted* to enter the United States," and to "*travel beyond* the secondary inspection area," despite the fact that there was no guardian at Dulles available to meet her. Pl. Br. 8 (emphasis added). Leonel cites no authority for this proposition, and there is none. The notion that the United States constitution requires CBP Officers to not only admit a United States citizen child to the United States, but to "facilitate her travel" to the domestic destination of her parents' choice, without the presence of a legal guardian -- or to allow her to wander unaccompanied beyond the secondary inspection area -- is preposterous.

In addition, Leonel does not meaningfully distinguish *Castro v. United States*, 608 F.3d 266, 274 (5th Cir. 2010), cited by Defendant in support of its argument (Def. Br. 7-8), from the facts of the instant case. That the immigration officials in *Castro* were presented with a "forced choice not of their own making" (Pl. Br. 11 n.7) represents, rather than a point of distinction, a point of similarity with the instant case. Here too the CBP Officers were presented with a choice that was entirely the making of ER's parents. It was ER's parents' decision to send their three-year-old child abroad, to pass the summer in Guatemala, and then have that child return to the United States five months later, accompanied by no one other than her undocumented grandfather. It was ER's parents' decision to sign a notarized document stating that Luis was to be ER's guardian during her travels. It was ER's parents' decision, when learning that TACA

Flight 566 had been diverted to Dulles, to contact TACA airlines and the news media, rather than government officials. It was ER's parents' decision to refuse to travel to Dulles upon learning that TACA Flight 566 had been diverted to Dulles. Indeed, as plaintiffs have mentioned repeatedly throughout this litigation, ER was at Dulles for 20 hours before she and her grandfather returned to Guatemala. Yet Leonel, who was in New York and allegedly worried about ER, made no effort to get to Dulles to pick up his child. In sum, the CBP Officers' actions in responding to this situation, which was not of their own making, are shielded by the DFE.

Finally, Leonel insists that Defendant must offer "evidentiary support" for its "re-cast[ing]" of the facts as alleged in the complaint as "reasoned responses to difficult choices." Pl. Br. 5-6. However, Defendant's arguments are grounded soundly in the administrative record and statements of the CBP Officers who encountered Luis and ER at Dulles. Further, Leonel's complaint sounds in tort, which turns on a standard of reasonableness. Nor should this Court accept Leonel's bald allegations regarding facts of which he necessarily would have no knowledge, such as a federal officer's motivations for verifying information in a database. For example, while the government does not dispute the fact that CBP Officers questioned Leonel regarding his immigration status, and attempted to locate him in their databases, Leonel would have no way of knowing their motivation for doing so. That they did so in order to verify Leonel's identity is the only plausible explanation, and a proper subject of this Court's inquiry at the pleading stage in deciding whether subject matter exists.[4] To describe the government's explanation in this regard -- based as it was upon counsel's diligent review of administrative

[4] Indeed, that would be true even if this motion were based solely on a failure to state a claim. *See, e.g., Starr Intern. Co. v. Federal Reserve Bank of New York*, 906 F. Supp. 2d 202, 218 (S.D.N.Y. 2012) (finding facts alleged in complaint to lead to only one "plausible" conclusion that was inconsistent with claim, warranting dismissal at the pleading stage) (citing *Ashcroft v. Iqbal*, 556 U.S. 662, 681 (2009), and *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 567–68 (2007)).

records and interview of government witnesses -- as a "purely invented factual complication" (Pl. Br. 11 n.5) is unwarranted.

B. Leonel Fails to State a False Imprisonment Claim.

Leonel gives the back of his hand to Defendant's argument that ER was never, in fact, restrained by CBP Officers, but rather was only in the custody of Luis, asserting that such argument is a "red herring," given that Luis, as a "practical matter," was not "free to leave" the secondary inspection area. Pl. Br. 15. This argument misperceives the special circumstance and nature of the confinement at issue in this case.

To the extent Luis was detained at all by CBP Officers, he was detained only for the limited purpose of his expeditious return to Guatemala. Indeed, the CBP Officers were required to do so. *See* Def. Br. 2 (citing 8 U.S.C. § 1225(b)(1)(A)(i)), 11-13; *see also* 8 C.F.R. 235.3 (b)(2)(iii) (requiring detention of aliens "pending determination [of inadmissibility] and removal" for expedited removal under 8 U.S.C. § 1225(b)). It has long been recognized that the confinement incident to a person's inspection for admission to the United States is qualitatively different from the confinement that occurs incident to an arrest after the border has been crossed. *See* Def. Br. 11-12; *see also, e.g.*, *Guzman v. Tippy*, 130 F.3d 64, 65 66 (2d Cir. 1997) (and cases cited therein)). In this sense, Luis was not restrained at all, but rather was free to leave -- by returning to his country of departure, and not the United States. For this reason, and especially given that Leonel does not challenge the lawfulness of this limited "custody," ER's confinement incident thereto cannot form the basis for a false imprisonment claim.

Moreover, while it is true that Virginia courts have stated that a person with an actionable false imprisonment claim need not necessarily be "confined in a jail or placed in the custody of an officer" (Pl. Br. 14, quoting *Zayre of Va., Incl. v. Gowdy*, 297 Va 47, 50-51 (1966)), such

person must have possessed a "reasonable apprehension that force will be used unless [she] willingly submits." 297 Va at 50. Leonel makes no allegation that ER, in fact, had any apprehension that the CBP Officers would use force against her if she left the secondary inspection area. Indeed, as had been recognized by this Court in the context of a New York State false imprisonment claim brought on behalf of a minor child, a plaintiff must establish not only that the child was distressed upon being separated from her guardian, but actually possessed an awareness of his or her confinement. *See Graham v. City of New York*, No. 08-CV-3518 (KAM), 2011 WL 3625074, at *10 (Aug. 17, 2011) ("Plaintiff has not offered any admissible evidence, however, that he was aware of his confinement. Rather, J.G. testified that he was aware of being separated from his father, who was outside the car"). No such awareness has been alleged here.[5]

C. Defendant has Established that Venue is not Convenient in the EDNY

The costs to the government of maintaining this action in the EDNY would be substantial. In order to properly defend against this lawsuit, the undersigned would be required to travel to Virginia to inspect where the incident occurred, interview government witnesses, and make contact with third-party witnesses. The documents relevant to this action are maintained by government offices located in Virginia and the District of Columbia. The multiple government witnesses to the events at Dulles, in order to properly prepare for their deposition and /or trial testimony, will be required to travel hundreds of miles to Brooklyn, requiring overnight stays in hotels, expenses -- and therefore more time away from their duty stations as

[5] Puzzlingly, Leonel alleges instead that ER was brought to tears at the prospect of being separated from her grandfather. Comp. ¶ 35. This allegation of ER's "distress at being temporarily separated" from her grandfather (*Graham*, 2011 WL 3625074, at *10) does nothing to plausibly assert that ER had any appreciation of any confinement.

CBP Officers. All of these costs will be borne by the United States taxpayer. It is wholly within this Court's discretion to decide that these costs should be minimized, and that this action should be transferred to Virginia.

Further, in this regard, this Court should recognize that Leonel does not assert that he is, in fact, of limited means or that he otherwise would be financially burdened by bringing this lawsuit in Virginia. Instead, counsel for Leonel asserts only that maintaining this action in this district would be "the least costly and least difficult" of two alternatives, and asserts that the "costs of travel" to the Eastern District of Virginia would be "financially burdensome" to her client. *See* "Declaration of Sheryl B. Shapiro . . . ," dated October 16, 2013 at ¶¶ 6-7.[6]

Leonel argues that the government witness affidavits are "underwhelming" and too "generic" to support defendants' motion to change venue. Pl. Br. 25-26. However, there is no requirement that affidavits submitted in support of a venue motion contain detail beyond that necessary to describe the substance of that witness' testimony and why the transferee forum would be more convenient to that witness. Indeed, the moving corporate party in *Pall Corp. v. PTI Technologies*, 992 F. Supp. 196, 198 (1998), the only cased cited by Leonel in support of his assertion in this regard, provided this Court with *no* supporting affidavits. 992 F. Supp. at 199 ("PTI Advances several theories in favor of transfer, without supplying any supporting affidavits") and 201 ("PTI does not provide the requisite supporting affidavits . . . "). That is not the case here.

Moreover, that third-party witnesses would be inconvenienced by litigating this case in this Court is hardly "speculative." *See* Pl. Br. 27 (citing *Excelsior Designs, Inc. v. Sheres*, 291 F. Supp. 2d 181, 187 (E.D.N.Y.2003)). Subsequent to Luis's and ER's arrival at Dulles airport

[6] That Dr. Aranda's one examination of ER was performed on a pro bono basis (Pl. Br. 27) has no significance, given that Plaintiff does not assert that he is of limited means.

on March 11, 2011, numerous persons from both governmental and private entities interacted with them at Dulles Airport in inspecting their passports, communicating with them, processing Luis' removal paperwork, arranging for their return flight to Guatemala, transporting Luis to the hospital, and caring for ER during Luis' processing and trip to the hospital. If this case were to proceed to discovery (which it should not), multiple witnesses -- surely beyond those eight witnesses identified by the government for the purpose of this venue motion -- will be identified throughout the course of discovery. It would be unreasonable to expect such third-party witnesses to have been identified at this juncture, prior to the commencement of discovery, especially where it is well-established that venue motions must be brought at the earliest possible stage of litigation. *See Index Fund, Inc. v. Hagopian*, 107 F.R.D. 95, 101 (S.D.N.Y. 1985) ("The purpose of Rule 12(h)(1) is to insure that the specified defenses are asserted at the earliest possible date. A defendant must exercise great diligence in challenging personal jurisdiction, venue, or service of process.") (internal citations and quotation marks omitted)).

Even though not required, Defendant has nevertheless identified at least one of the TACA Airline employees who witnessed the events at Dulles that are underlying this complaint. *See* Declaration of Dayse Hernandez, dated October 28, 2013. Ms. Hernandez, a ticketing agent, observed ER during an approximate 8 to 10 hour period on March 11, 2011, when she had an opportunity to observe, interact, and sit with her. *Id.* Further, Ms. Hernandez recalls that another TACA employee interacted with ER on that day, although such TACA employee has not yet been identified. *Id.* To be sure, Ms. Hernandez (and probably other third-party witnesses) will likely provide highly relevant testimony regarding the events at question in this case. That these witnesses are not present in the EDNY is critical to this Court's discretionary determination of whether venue is proper here.

Finally, Leonel argues that the location of third-party witnesses, including TACA airline employees and Reston hospital personnel, weighs against transfer because their testimony (in contrast to that of psychologist Dr. Aranda)[7] is of "doubtful relevance." Pl. Br. 26-27. *But of course* the testimony of these third-party witnesses to the events at Dulles would be relevant. These third-parties witnessed the treatment of ER and Luis on March 11-12, and would be able to testify as to those material events, such as Leon's allegation that Luis was denied the opportunity to call him (Comp. ¶ 17, ¶ 19), that ER allegedly was given "only a cookie and a soda" to eat, and that the conditions in the secondary inspection area were unsuitable conditions (Comp. ¶¶ 49-51) . Indeed, it is Leonel who alleged that it was a TACA employee (Comp. ¶ 39) who sat with ER during Luis' hospital treatment. That *not one* of these witnesses is located in the EDNY is sufficient for this Court to transfer. As stated by the Court in *Excelsior*, "[t]he convenience of the witnesses is probably the single most important factor in the transfer analysis." 291 F. Supp. 2d at 187.

CONCLUSION

For all of the foregoing reasons, and the reasons stated in Defendant's principal brief, we respectfully request that the Court dismiss this action for lack of jurisdiction or, in the alternative, grant judgment on the pleadings to Defendant. Alternatively, this action should be

[7] Leonel argues that this Court should consider the location of Dr. Aranda's office in its determination. However, it is well-established that the location of an expert witness is entitled to little or no consideration on a motion to transfer venue. *See, e.g., Glass v. S & M NuTec, LLC*, 456 F. Supp. 2d 498 (S.D.N.Y. 2006); *Matra et Manhurin v. International Armament Co.*, 628 F. Supp. 1532 (S.D.N.Y. 1986); *Helfant v. Louisiana & Southern Life Ins. Co.*, 82 F.R.D. 83 (E.D.N.Y. 1979). Dr. Aranda's testimony providing his "professional opinion" (see "Declaration of Dr. Roy Aranda . . .," dated October 13, 2013, at ¶ 6) would constitute expert testimony under Fed. R. Evid. 702.

transferred to the United States District Court for the Eastern District of Virginia.

Dated: Brooklyn, New York
October 30, 2013

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