The Honorable James L. Robart

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

GUSTAVO VARGAS RAMIREZ,

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant.

No. C13-2325-JLR

UNITED STATES' MOTION FOR SUMMARY JUDGMENT

Noted for Consideration:
February 6, 2015

I. INTRODUCTION

Plaintiff is an illegal alien who has lived and worked illegally in the United States for the last eighteen years. He has a fake green card, uses a false Social Security Number, and has never applied for any lawful status while he has been in the United States. In 2011, Plaintiff was detained and placed into removal proceedings. During his removal proceedings, the United States Department of Homeland Security agreed to jointly request that Plaintiff be considered for administrative closure by an immigration judge. The request was granted and Plaintiff's removal proceedings were closed, which removed the matter from the immigration judge's calendar and effectively ended Plaintiff's removal proceedings.[1]

Plaintiff then turned around and filed this complaint against the United States pursuant to the Federal Tort Claims Act ("FTCA") alleging: (1) false arrest; (2) false imprisonment; (3) abuse of process; and (4) negligent and intentional infliction of emotional distress. The United States moved to dismiss Plaintiff's claims based on the facts alleged in the complaint. But the Court found that the motion was premature because there were too many unknown or disputed

[1] *See* Exhibit E, pg. 2-6 and Exhibit F.

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facts that were critical to the Court's determination of reasonable suspicion and probable cause. The Court denied the United States' motion without prejudice to filing similar motions once the record is more fully developed. Discovery is now complete and trial is scheduled for April 6, 2015. The Court is the trier of fact under the FTCA. The United States submits that the record is now sufficiently developed for the Court to determine liability and moves for summary judgment on all of Plaintiff's claims.

II. FACTS

The facts of this case were previously set forth in Plaintiff's Complaint, the United States' motion to dismiss, and Plaintiff's opposition. *See* Dkts. No. 1, 15, 19. The material facts surrounding: (1) Plaintiff's initial traffic stop by the Anacortes Police Department ("APD"); (2) Plaintiff's detention by the APD; and (3) Plaintiff's detention by United States Border Patrol ("USBP"), as set forth in those pleadings, were largely undisputed but were also incomplete.[2] Discovery is now complete and the material actors involved in Plaintiff's detention have all been deposed. The deposition testimony provides additional facts surrounding Plaintiff's detention. These facts remain largely undisputed. The United States has woven these additional facts, which supplement the facts set forth in prior briefing, into the Argument Section below to address the Court's specific questions pertaining to Plaintiff's detention and the reasonable suspicion and probable cause analysis.

III. STANDARD OF REVIEW

Summary judgment is appropriate if there is no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). The moving party has the initial burden of demonstrating that summary judgment is proper. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970). The moving party must identify the pleadings, depositions, affidavits, or other evidence that it "believes demonstrates the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). "A material issue of fact is one that affects the outcome of the litigation and requires a trial to

[2] The United States does dispute several material facts surrounding USBP's actions once Plaintiff arrived at the Bellingham Border Patrol Station, including how USBP treated Plaintiff, processed Plaintiff for removal proceedings, and completed certain immigration forms. There are also discrepancies pertaining to specific statements Plaintiff claims he made during the course of his initial detention. The United States reserves the right to contest these facts at trial if any. These facts, however, are not material to the Court's determination of summary judgment on Plaintiff's false arrest, false imprisonment, abuse of process, and emotional distress claims.

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resolve the parties' differing versions of the truth." *S.E.C. v. Seaboard Corp.*, 677 F.2d 1301, 1306 (9th Cir. 1982).

The burden then shifts to the opposing party to show that summary judgment is not appropriate. *Celotex*, 477 U.S. at 324. The opposing party's evidence is to be believed, and all justifiable inferences are to be drawn in its favor. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). However, to avoid summary judgment, the opposing party cannot rest solely on conclusory allegations. *Berg v. Kincheloe*, 794 F.2d 457, 459 (9th Cir. 1986). Instead, it must designate specific facts showing there is a genuine issue for trial. *Id.*; *see also Butler v. San Diego District Attorney's Office*, 370 F.3d 956, 958 (9th Cir. 2004) (stating if defendant produces enough evidence to require plaintiff to go beyond pleadings, plaintiff must counter by producing evidence of his own).

IV. ARGUMENT

A. The United States is Entitled to Summary Judgment on Plaintiff's False Arrest and False Imprisonment Claims.

The FTCA provides liability only in "circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U.S.C. § 1346(b). Under Washington law, it is a complete defense to false arrest and false imprisonment if Plaintiff's detention was lawful. *See Hanson v. City of Snohomish*, 121 Wash.2d 552, 563-64 (1993); *Bender v. Seattle*, 99 Wash.2d 582, 592 (1983). Here, USBP's request that Officer Leetz detain Plaintiff for further questioning was lawful because it was supported by reasonable suspicion and USBP's subsequent detention of Plaintiff was lawful because it was supported by reasonable suspicion and probable cause.

i. Border Patrol Had Reasonable Articulable Suspicion to Request that Officer Leetz Detain Plaintiff for Further Questioning.

Immigration officers may detain a person for questioning if the officer has a reasonable suspicion, based on specific articulable facts, that the person being questioned is an alien illegally in the United States. 8 C.F.R. § 287.8(b)(2). Immigration officers "may make forcible detentions of a temporary nature for the purposes of interrogation under circumstances creating a reasonable suspicion, not arising to the level of probable cause to arrest, that the individual so detained is illegally in this country." *Au Yi Lau v. Immigration & Naturalization Serv.*, 445 F.2d 217, 223 (D.C.Cir. 1971); *see also United States v. Brignoni-Ponce*, 422 U.S. 873, 884

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(1975). "Utilizing the standards developed in *Terry*, such detentions are to be judged from case to case by reference to the particular facts of each." *Au Yi Lau*, 445 F.2d at 223.

USBP Agent Hafstad does not have a specific recollection of asking Officer Leetz to detain Plaintiff for further questioning on the evening of the stop. *See* Exhibit A, pg. 25. But the record evidence indicates that Agent Hafstad did in fact request that Officer Leetz detain Plaintiff for USBP when he returned his call that evening. *See* Exhibit C, pg. 7, 34. Agent Hafstad testified that he believes he had reasonable suspicion to believe Plaintiff was an illegal alien at that time based on the following factors:

> (1) USBP's background checks revealed that the name and information Plaintiff provided were not in any of USBP's databases;
> (2) Officer Leetz's suspicion that Plaintiff was possibly an illegal alien;
> (3) the location and area Plaintiff was stopped in; and
> (4) the fact that there was no Social Security Number associated with the name Plaintiff provided.

Id. at pg. 26-29.

The United States' prior motion to dismiss addresses the significance of these factors to USBP's determination of whether an individual is illegally in the United States and the United States incorporates those arguments herein. *See* Dkt. No. 15, pg. 8-13, Dkt. No. 16, pg. 2-4. The United States provides the following additional briefing to address the Court's specific questions pertaining to USBP's reasonable suspicion at the time Agent Hafstad requested that Officer Leetz detain Plaintiff.

a. USBP Databases

In denying the United States' previous motion to dismiss, the Court found that it was unknown exactly what a search for Plaintiff's name in the USBP databases would have or could have revealed. *See* Dkt. No. 26, pg. 17. Agent Hafstad testified about the specific USBP databases that were checked, what information they revealed, and what the results meant to him. *See* Exhibit A, pg. 8-20. The record checks USBP performed that evening are documented in the three-page facsimile dated June 23, 2011 at 9:35, marked as Exhibit 1 to Agent Hafstad's deposition. *Id.* at pg. 50-52.[3]

[3] Exhibit 1 to Agent Hafstad's deposition also includes background checks performed after Plaintiff's fingerprints were taken at the Bellingham Border Patrol Station. This information was unavailable to Agent Hafstad before he requested that Officer Leetz detain Plaintiff.

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First, the USBP checks included checks of various state records and criminal databases for driving and criminal history. A check for "Wants/Warrants" revealed that the name Plaintiff provided did not have any outstanding warrants associated with it. *Id.* at pg. 9. A "Drivers' License" check revealed that a Washington drivers' license had been issued under the name Plaintiff provided. *Id.* at pg. 10. And a "Criminal History" check revealed that the name Plaintiff provided did not have an FBI number or State Identification Number associated with it. *Id.*

Second, the USBP checks also included checks of various immigration databases for immigration history. An "A Number" check revealed that no Alien Registration Number was associated with the name Plaintiff provided. *Id.* A "Class of Admission" check revealed that there was no record that a person with the name Plaintiff provided had been previously inspected and admitted to the United States. *Id.* at pg. 10-11. And a check of the "EARM" or Enforce Alien Removal Module (also known as "DACS" Deportable Alien Control System) database revealed that there was no record that a person with the name Plaintiff provided had ever been previously deported. *Id.* at pg. 11.

USBP Agent Wynn clarified that the EARM database includes all aliens that have been placed into removal proceedings or, at some point in their immigration history, have had some sort of action within the immigration system; including aliens who had run afoul of the system or had any sort of interaction with immigration officials. *See* Exhibit B, pg. 2-3. Thus, the fact that there was no record of the name Plaintiff provided in the EARM database showed that Plaintiff had never applied for any immigration benefits and had never been lawfully admitted to the United States.

Agent Hafstad testified that USBP also conducted a check of the "EADS" or Employment Authorization Documents database, which revealed that there was no record that an employment authorization card had ever been issued under the name Plaintiff provided. *See* Exhibit A, pg. 11. Similarly, a check of the "EOIR" or Executive Office of Immigration Review check revealed no records.[4] *Id.* Finally, a check of the "CLAIMS" or Computer Linked Application Information Management System database revealed that there was no

[4] The EOIR system contains information on immigration cases pending in Immigration Court or at the Board of Immigration Appeals ("BIA").

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record that there had ever been an application for lawful status filed by, or associated with, the name Plaintiff provided. *Id.*

USBP Agent Wynn clarified that the CLAIMS database encompasses active petitions for immigration benefits filed by an alien or on behalf of an alien, including any petitions for employment authorizations, and it shows the type of status an alien is in, be it immigrant or nonimmigrant employment status. *See* Exhibit B, pg. 4. Thus, the fact that there was no record of the name Plaintiff provided in the CLAIMS database showed that he had never applied for any immigration benefits and had never been lawfully admitted to the United States.

Finally, Agent Hafstad testified that additional checks were performed through "TECS" Treasury Enforcement Claims System, and "IBIS" Interagency Border Inspection System, which both contain port of entry information and would show whether an individual has previously been apprehended by USBP. *See* Exhibit A, pg. 11-12, 16. These checks revealed no information associated with the name Plaintiff provided. *Id.* at pg. 12.[5] Similarly, checks were run in "ENFORCE," a database that contains arrest information. *Id.* None of these checks revealed any information associated with the name Plaintiff provided. *Id.*

Agent Hafstad testified that the fact that the name Plaintiff provided did not appear in each database individually, did not, in and of itself, establish that Plaintiff was here illegally, but taken together they were indicators of illegal presence. *Id.* at pg. 13-16. He explained that "[p]eople that come here – people that come here and are inspected and admitted should be in – either in TECS or in CLAIMS. There should be a record of that legitimate entry." *Id.* at pg. 15. He stated, "[m]ost – I guess I'll make the statement that if somebody came – there are systems that would indicate that, if someone came here and was inspected and admitted, there are systems in here that would indicate that, that are checked here." *Id.* at pg. 18. In Agent Hafstad's opinion, "foreign-born non-U.S. citizens should be in one of these databases." *Id.* at pg. 18. This is consistent with Agent Wynn's prior declaration testimony where he stated, "[t]he fact that a suspected alien has no records in any of these systems is a strong indicator that the individual had not lawfully gained admission to the United States." *See* Dkt. No. 16, pg. 3-4, ¶11-12.

[5] Although the box containing the TECS/IBIS checks is crossed out on the Records Request Check Sheet, it appears the checks were run as each individual line is checked indicating that no information was found. *See* Exhibit A, pg. 50. Agent Hafstad testified that he was unsure why the person who completed this form crossed out the TECS/IBIS box. *Id.* at pg. 12.

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Therefore, at the time Agent Hafstad made his reasonable suspicion determination, he knew that there was no record of the name Plaintiff provided in either the EARMS or the CLAIMS database, which meant to him that Plaintiff had never applied for any immigration benefits and had never been lawfully admitted to the United States. Agent Hafstad testified that, in general, the databases should comprehensively cover all non-U.S. citizens that are in this country and have been lawfully admitted and inspected. *See* Exhibit A, pg. 18-19. Agent Hafstad conceded that there is a possibility that a foreign-born non-U.S. citizen may have derivative citizenship and may not show up in the databases, but he stated that would be a "remote" possibility. *Id.* at pg. 20. Thus, Agent Hafstad testified that when USBP's background checks revealed that the name Plaintiff provided was not in any of USBP's databases it made him believe that Plaintiff was possibly in this country illegally. *Id.*

b. Plaintiff's Ability to Speak English

In denying the United States' previous motion to dismiss, the Court also found that it was unknown how good or bad Plaintiff's command of the English language was on that day or in general, and whether or what Officer Leetz ever communicated to the USBP agent about Plaintiff's ability to speak English. *See* Dkt. No. 26, pg. 17. Officer Leetz testified that he specifically told Agent Hafstad that he was having a hard time communicating with Plaintiff and he specifically requested USBP's assistance in communicating with Plaintiff and providing translation assistance. *See* Exhibit C, pg. 23. Officer Leetz also specifically told Agent Hafstad that Plaintiff was speaking in broken English and Spanish. *Id.* pg. 3, 12-13. Officer Leetz testified that he requested translation assistance from Agent Hafstad both during the first call he placed to Border Patrol that evening and during the second call when Agent Hafstad called him back. *Id.* at pg. 28-30.

Officer Leetz testified that Plaintiff's ability to speak English was "relatively poor." *Id.* at pg. 17. He testified that he does not speak Spanish and he was unable to communicate with Plaintiff in English. *Id.* at pg. 15-18. Officer Leetz tried to speak to Plaintiff in English, but Plaintiff spoke broken English, and what he tried to understand in English was not enough for a conversation or enough for Officer Leetz to understand. *Id.* at pg. 3-4, 19. Officer Leetz testified that Plaintiff may have spoken some words in English, but he "wasn't even able to document a conversation because we couldn't communicate that way." *Id.* at pg. 17. He testified that did not think that Plaintiff understood what he was asking him or saying to him in

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English, and Officer Leetz did not understand what Plaintiff was saying in broken English or Spanish. *Id.* at pg. 19. Thus, one of the main reasons Officer Leetz contacted USBP in the first place was so that they could provide translation assistance during his stop. *Id.*

Specifically, Officer Leetz testified that he was hoping someone from USBP could communicate with Plaintiff to explain the traffic citation to Plaintiff or "say a few things on [Officer Leetz's] behalf to him." *Id.* at pg. 3-13. Officer Leetz explained that he was hoping that after he completed the traffic infraction, "someone could at least give [Plaintiff] a little better understanding of what he needed to do rather than handing him a piece of paper and saying, Here, deal with it." *Id.* at pg. 13. Officer Leetz testified that even though he was able to obtain the documents he needed from Plaintiff to complete the infraction, he was not sure if Plaintiff understood him or not. *Id.* at pg. 14.

Therefore, Officer Leetz remembers specifically telling Agent Hafstad that he was having a hard time communicating with Plaintiff, that Plaintiff was speaking in broken English and Spanish, and Officer Leetz twice asked Agent Hafstad to provide translation assistance; during the first call he placed and during the second call when Agent Hafstad returned the call. Thus, at the time Agent Hafstad made his reasonable suspicion determination he knew that Plaintiff spoke Spanish and broken English and his command of the English language was so poor that Officer Leetz could not even communicate with him to explain the details of the traffic infraction he was issuing.

c. Plaintiff's Demeanor and Appearance

The Court also found that it was unknown whether Officer Leetz communicated anything at all to the USBP agent about Plaintiff's demeanor, appearance, the fact that he is Hispanic, or anything else that might conceivably bear on the question of reasonable suspicion. *See* Dkt. No. 26, pg. 17. Officer Leetz testified that he told Agent Hafstad that he had a subject stopped, provided them his name and biographical information, and that he suspected he may not be legitimately in the United States. *See* Exhibit C, pg. 4. Officer Leetz initially testified that he did not tell Agent Hafstad anything about Plaintiff's race, ethnicity, demeanor, or appearance. *Id.* at pg. 4-5. But when asked if he told Agent Hafstad anything about whether Plaintiff appeared to be Mexican or look Hispanic, Officer Leetz testified, "[m]ost likely yes." *Id.* at pg. 23-24.

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Officer Leetz explained that he most likely told Agent Hafstad that Plaintiff appeared to be Mexican or Hispanic "because he was speaking what I probably understood as Spanish." *Id.* When asked whether he only told Officer Hafstad that Plaintiff spoke Spanish, or whether he also told him that he appears to be Hispanic based on his outside appearance, Officer Leetz testified that he would imagine he discussed Plaintiff's appearance as well. *Id.* at pg. 24. On re-direct, Officer Leetz clarified that he had no specific recollection of telling Agent Hafstad that Plaintiff looked Mexican or Hispanic, but he imagined he did tell him that and he very well could have told him that based on his understanding that people who speak Spanish are typically from Spain or Mexico. *Id.* at pg. 38-40. Thus, it is likely that Officer Leetz discussed Plaintiff's outside appearance as being Mexican or Hispanic with Agent Hafstad before Agent Hafstad made his reasonable suspicion determination.

d. Plaintiff's Phone Conversation with USBP

Finally, the Court found that it was unknown what questions the USBP agent asked Plaintiff over the phone or whether he answered any of them at all before refusing to cooperate. *See* Dkt. No. 26, pg. 17. Agent Hafstad has no recollection of speaking with Plaintiff over the phone. *See* Exhibit A, pg. 26. But Officer Leetz testified that Agent Hafstad did ask to speak with Plaintiff by phone, that he told Plaintiff that "[s]omeone from Border Patrol wants to talk to you," and he put his phone on speaker and held it in the window of Plaintiff's vehicle. *See* Exhibit C, pg. 6, 30-31.

Officer Leetz testified that he could hear "some" of the conversation between Plaintiff and Agent Hafstad. *Id.* at pg. 6, 31. He heard Agent Hafstad identify himself. *Id.* at pg. 31. He also heard Plaintiff speak to Agent Hafstad, but Officer Leetz testified that he did not understand what Plaintiff was saying, so it must have been in Spanish. *Id.* The only statement Officer Leetz understood Plaintiff make was that he was not going to say anything without a lawyer because he made that statement in English. *Id.* Officer Leetz testified he believed Plaintiff made this statement in response to two questions by Agent Hafstad. *Id.* at pg. 33.

Plaintiff testified that Agent Hafstad asked him what his name was, how long he had been in the United States, and whether he had papers. *See* Exhibit E, pg. 7-10. Plaintiff maintains that he answered every question posed to him, in English, by stating that he was not going to answer any questions without an attorney. *Id.*

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Thus, according to Officer Leetz's testimony, Plaintiff did speak to Agent Hafstad in Spanish before saying he would not answer any questions without a lawyer in English. *See* Exhibit C, pg. 31. Plaintiff, however, denies speaking in Spanish. *See* Exhibit E, pg. 9. There is no evidence that Plaintiff provided Agent Hafstad any substantive information before refusing to cooperate. But the undisputed evidence shows that, at a minimum, Agent Hafstad heard Plaintiff speak after Officer Leetz had told Agent Hafstad that Plaintiff spoke in broken English and Spanish, that Officer Leetz was having a hard time communicating with Plaintiff, and Officer Leetz had specifically requested that Agent Hafstad provide translation assistance during the stop.

Therefore, at the time Agent Hafstad requested that Plaintiff be detained for further investigation into his immigration status, he knew that Plaintiff was speaking to Officer Leetz in Spanish and broken English. He knew that Plaintiff's command of the English language was so poor, that Officer Leetz could not even carry on a conversation with Plaintiff or explain the citation he was about to issue. Agent Hafstad knew that Officer Leetz had asked USBP to perform translation assistance for him during his traffic stop. Agent Hafstad also knew that when Officer Leetz ran a driver's check on Plaintiff it came back with no Social Security Number and that Officer Leetz suspected Plaintiff was an illegal alien. It is likely that Agent Hafstad also knew that Plaintiff appeared to be Mexican or Hispanic by his outward appearance, his name, and the fact that he was speaking Spanish.

Agent Hafstad also knew that a check of USBP databases revealed that the name and information Plaintiff provided to Officer Leetz did not appear in any of USBP's databases. Agent Hafstad knew that, had Plaintiff been lawfully admitted to the United States, had he obtained lawful status in the United States, or had he even applied for any type of status in the United States, Plaintiff's name would have shown up in the CLAIMS or EARMS database. Furthermore, when Agent Hafstad tried to ascertain Plaintiff's immigration status by speaking to him directly, Plaintiff refused to cooperate at all. Once Plaintiff was informed by Officer Leetz that Agent Hafstad was a Border Patrol Agent, he refused to even provide his name, tell Agent Hafstad where he was from, or state whether or not he had any valid immigration documents.

All of this information known to Agent Hafstad at that time, as well as the fact that Plaintiff was located in an area near an international border with a non-functioning Border

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Patrol checkpoint and a large illegal immigration population, factored into Agent Hafstad's reasonable suspicion analysis. These facts, taken together, were sufficient to establish reasonable suspicion to believe that Plaintiff was an illegal alien and Agent Hafstad lawfully requested that Officer Leetz detain Plaintiff for further questioning pursuant to 8 C.F.R. § 287.8(b)(2).

ii. Border Patrol Had Reasonable Articulable Suspicion and Probable Cause to Detain Plaintiff for Further Questioning After Agent Orr Interviewed Plaintiff in Person.

Not only may immigration officers detain a person for questioning if the officer has a reasonable articulable suspicion that the person being questioned is an alien illegally in the United States, 8 C.F.R. § 287.8(b)(2), immigration officers may arrest any alien in the United States, if they have probable cause to believe that the alien so arrested is in the United States illegally and is likely to escape before a warrant can be obtained for his arrest. 8 U.S.C. § 1357(a)(2). Here, USBP had reasonable suspicion, as well as probable cause, to detain Plaintiff for further investigation at the close of Agent Orr's interview at the APD.

In denying the United States' previous motion to dismiss, the Court found that it was unknown what specific questions Plaintiff answered and the specific questions he gave during his interview with Agent Orr, and specifically whether Plaintiff revealed to Agent Orr that he was born in Mexico. *See* Dkt. No. 26, pg. 18. The Court noted that whether or not Plaintiff admitted he was born in Mexico was critical to the determination of probable cause. *Id.* The Court also noted that at oral argument counsel for Plaintiff represented that Plaintiff denies that he made this admission to Agent Orr and has previously denied this fact in other court proceedings. *Id.* But at his deposition, Plaintiff freely admitted that [redacted]

Plaintiff testified that he told Agent Orr "that my name was Gustavo Vargas, [redacted] *See* Exhibit E, pg. 15. Plaintiff maintains that Agent Orr asked him what his name was, how many years he had been living in the United States, and whether he had papers several times and that each time Plaintiff refused to answer without an attorney. *Id.* at pg. 13-15. He states that he only answered Agent Orr's questions when he "felt he had no way out," but Plaintiff concedes that Agent Orr did not threaten him in any way, did not show is weapon to him, and did not tell

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him that he had to answer the questions. *Id.* at pg. 15-17. Plaintiff also maintains the entire conversation was in English and that he answered Agent Orr's questions truthfully. *Id.* Thus, it is undisputed that Plaintiff told Agent Orr [redacted]

When Agent Orr interviewed Plaintiff in person, he observed Plaintiff's limited ability to speak English first hand. Agent Orr testified that he conducted his interview of Plaintiff in both English and Spanish stating, "[b]oth of our - - his English was very poor, my Spanish is not great, so we were going back and forth the best we could." *See* Exhibit D, pg. 9-10. Agent Orr initially spoke to Plaintiff in English, but switched to Spanish because he "could tell [Plaintiff] was not very comfortable with English" and when Agent Orr asked if he could speak Spanish, Plaintiff said, "yes." *Id.* at pg. 10. Agent Orr testified that when Plaintiff spoke to him in English he could "sometimes" understand was he was saying. *Id.* at pg. 19.

At the close of his interview, Agent Orr contacted his supervisor, Agent Hafstad, and advised him of the additional facts he learned during the in-person interview.[6] *See* Exhibit D, pg. 14-15. Agent Hafstad and Agent Orr discussed whether Plaintiff should be detained for further investigation, which would include running his fingerprints through IDENT. *Id.* at pg. 15. Agent Hafstad discussed with Agent Orr that he had previously tried to run the identifying information Plaintiff provided to Officer Leetz through USBP's system and the information was not coming back and registering in any system. *Id.* Thus, both Agent Hafstad and Agent Orr determined that there was reasonable suspicion to detain Plaintiff for further investigation into his immigration status by bringing him to the Bellingham Border Patrol Station and running his actual fingerprints through IDENT to see if there was a match and further determine Plaintiff's immigration status. *Id.* at pg. 15-18.

Agent Orr testified that he believed they had reasonable suspicion to believe that Plaintiff was illegally in the United States based on the following factors: (1) the records checks Officer Leetz performed based on the identifying information Plaintiff provided revealed that no Social Security Number was associated with that individual; (2) the records

[6] In addition to the information learned in the interview, Officer Leetz also provided Agent Orr with the plastic bag containing Plaintiff's belongings including his driver's license. *See* Exhibit D, pg. 6-7. Officer Leetz also informed Agent Orr that he was having trouble communicating with Plaintiff due to the language barrier. *Id.* at pg. 7. And he informed Agent Orr that he had run Plaintiff's information through his system and the check came back with no Social Security Number. *Id.* at pg. 5-7.

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check Agent Hafstad performed based on the identifying information Plaintiff provided showed no record of that individual being in the USBP's databases; (3) Plaintiff had a limited knowledge of the English language; (4) Plaintiff admitted he was born in Mexico; and (5) Plaintiff did not possess any documents showing that he was legally in the United States. *Id.* at pg. 13, 15-16.

Therefore, USBP had reasonable suspicion as well as probable cause to believe that Plaintiff was an illegal alien at the close of Agent Orr's interview at the APD. The information known to Agents Orr and Hafstad was sufficient to establish probable cause because (1) Plaintiff admitted he was from Mexico and had been in the United States approximately ten to twelve years; (2) Plaintiff was not in any of USBP's databases, which means that when he entered the United States from Mexico he was not inspected or lawfully admitted; and (3) Plaintiff did not have any valid immigration documents, which he was required to carry if he had been lawfully admitted to the United States. Most importantly, once it was confirmed that Plaintiff was from Mexico, the fact that Plaintiff was not in any of USBP's databases established probable cause for USBP to believe that Plaintiff illegally entered the United States and was in the United States unlawfully. It is undisputed that Plaintiff admitted to Agent Orr [redacted] and that he was unable to present any valid immigration documents. These admissions, coupled with the information already known to Agent Hafstad, constituted reasonable suspicion as well as probable cause to believe Plaintiff was an illegal alien.

iii. The United States Cannot be Held Liable for Officer Leetz's Actions Under the FTCA.

Plaintiff argues that he was unlawfully arrested and falsely imprisoned at the point where he was handcuffed, placed in the back of a patrol car, transported to the Anacortes Police Department, and detained in a holding cell until USBP Agents arrived. *See* Dkt. No. 19, pg. 7-11. Officer Leetz testified that after Agent Hafstad requested that Plaintiff be detained, or that APD "hold onto him for us," he secured Plaintiff in handcuffs, patted him down, and placed in him his patrol car. *See* Exhibit C, pg. 8. Officer Leetz, however, is not an employee of the United States government. Although it appears Agent Hafstad requested that Officer Leetz detain Plaintiff, Agent Hafstad did not direct Officer Leetz to take any of the specific actions that Plaintiff alleges escalated the detention into an arrest. Agent Hafstad also had no control

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over Officer Leetz when he took these specific actions. Furthermore, Plaintiff has already received a settlement from the APD based on Officer Leetz's actions for $7,000 - $8,000. *See* Exhibit E, pg. 18-19. Plaintiff is not entitled to a double-recovery from the United States based on Officer Leetz's actions.

In denying the United States' previous motion to dismiss, the Court noted that it was unknown what the USBP agent said to Officer Leetz when he requested that Officer Leetz detain Plaintiff. *See* Dkt. No. 26, pg. 17. Similarly, it was unknown whether the USBP agent suggested any form or manner of detention, whether he asked Officer Leetz to use handcuffs or place Plaintiff in a cell, whether he requested that Plaintiff be transported – either assisted or unassisted – to the Anacortes Police Station, or whether he suggested Plaintiff was free to leave or insisted he be put in the back of Officer Leetz's patrol car. *Id.*

Agent Hafstad does not recall requesting that Officer Leetz detain Plaintiff. *See* Exhibit A, pg. 25. Officer Leetz testified that after Agent Hafstad spoke to Plaintiff on the phone, he asked Officer Leetz to detain Plaintiff and transport him to the Anacortes Police Department. *See* Exhibit C, pg. 7. He testified that he believes Agent Hafstad's words were "[h]old onto him for us." *Id.* at pg. 34. Officer Leetz states that Agent Hafstad stated that a USBP Agent would come down to Anacortes from Bellingham and meet him at the APD. *Id.* at pg. 7-8, 34-35. But Agent Hafstad did not give Officer Leetz any instructions on how to detain Plaintiff, whether to handcuff him, or whether to put him in the back of his patrol car. *Id.* at pg. 36. Officer Leetz testified that all of these decisions were his decisions, based on a variety of reasons. *Id.* And he confirmed that Agent Hafstad never told him to "arrest" Plaintiff. *Id.* at pg. 37.

The United States cannot be held liable under the FTCA if Officer Leetz's actions, and the methods he used to detain Plaintiff, transformed the requested detention into an unlawful arrest. In order to state a claim within the FTCA's waiver of sovereign immunity, Plaintiff must allege negligence (1) by officers or employees of a federal agency, which includes executive departments such as the Department of Homeland Security but which does not include contractors, 28 U.S.C. § 2671; (2) by persons acting on behalf of a federal agency in an official capacity; or (3) by a government contractor over whose "day-to-day operations" the government maintains "substantial supervision." *See Valadez-Lopez v. Chertoff*, 656 F.3d 851,

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858 (9th Cir. 2011); *Letnes v. United States*, 820 F.2d 1517, 1519 (9th Cir. 1987); *Ducey v. United States*, 713 F.2d 504, 516 (9th Cir. 1983).

Here, Officer Leetz is clearly not an officer or employee of a federal agency or a government contractor. The question is whether he was acting on behalf of a federal agency in an official capacity when he decided to take the actions that Plaintiff argues transformed his detention into a false arrest and false imprisonment - handcuffing Plaintiff, placing him in the back of a patrol car, transporting him to the Anacortes Police Department, and detaining him in a holding cell until USBP Agents arrived. Officer Leetz testified that he was not acting at USBP's direction when he made these decisions. *See* Exhibit C, pg. 36-37. As such, Officer Leetz was not acting on behalf of USBP when he took the specific actions of handcuffing Plaintiff, placing him in the back of a patrol car, transporting him to the Anacortes Police Department, and detaining him in a holding cell until USBP Agents arrived.

In *Means v. U.S.*, 176 F.3d 1376, 1379 (11th Cir. 1999), the Eleventh Circuit addressed a similar situation. There, the plaintiff brought claims based on the execution of a search warrant and argued that the county officials who executed the search warrant were acting on behalf of the Federal Bureau of Investigation ("FBI"). The court found that when determining whether an individual is an "employee of the government" under the FTCA, courts have adopted what is called the "control test."[7] *Id.* (*citing Carrillo v. United States*, 5 F.3d 1302, 1304-05 (9th Cir. 1993)). Under this test, a person is not an "employee of the government" for FTCA purposes unless the government controls and supervises the day-to-day activities of the individual. *Id.* (*citing Logue v. United States*, 412 U.S. 521, 526-32 (1973)). The court held:

> The undisputed record evidence shows that the Jefferson County Sheriff's deputies were the persons who entered the appellants' residence and secured the premises. The SWAT team and the county deputy sheriff commanding the team made all tactical decisions as to the best method of entering the house and the appropriate amount of force to use to secure the premises. While federal agents provided background information about Wendall Means and a previous search of his residence, they did not participate in the raid. We therefore conclude that the district court correctly held that the fact that FBI agents informed county officials as to the circumstances surrounding the previous search "fall[s] short of supporting a finding that the F.B.I. had control over

[7] The appellants in *Means* contended that the *Logue* control test was inapplicable to determine if the officers were acting on behalf of a federal agency and was limited to cases concerning independent contractors. *Id.* at 1379. The Eleventh Circuit disagreed and applied the *Logue* control test to determine whether the county officers involved in the execution of the search warrant were acting on behalf of the government.

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> or directed the actions taken or methods used by the county SWAT team in entering and then securing the Means' residence."

Id. at 1379.

Similar to the *Means* case, although the evidence indicates that Agent Hafstad requested that Officer Leetz detain Plaintiff, Agent Hafstad had no control over and did not direct the actions taken by Officer Leetz or the methods he used to detain Plaintiff. Nor did Agent Hafstad have the authority to control Officer Leetz's actions and methods used to detain Plaintiff. *See also George v. Rehiel*, 738 F.3d 562, 584 (3rd Cir. 2013) (finding that TSA officers had no legal or functional control over the decisions and actions of Philadelphia police officers who detained a plaintiff at an airport while awaiting Agents from the Joint Terrorism Task Force to arrive and question him).

The phrase "acting on behalf" was designed "to cover special situations such as the 'dollar-a-year' man who is in the service of the Government without pay, or an employee of another employer who is placed under direct supervision of a federal agency pursuant to contract or other arrangement." *Logue*, 412 U.S. at 531. It was not at all designed to cover a situation where USBP merely requests that a local law enforcement officer detain an individual until they can arrive and conduct an in-person interview. Under these circumstances, the local law enforcement officer is not acting on behalf of USBP. Thus, the United States cannot be held liable for any tortious or wrongful act Officer Leetz committed when he employed certain methods to detain Plaintiff. Plaintiff has already been compensated for Officer Leetz's actions and is not entitled to double-recovery from the United States.

B. The United States is Entitled to Summary Judgment on Plaintiff's Abuse of Process Claim.

The tort of abuse of process is disfavored in Washington. *Oreskovich v. Eymann*, 2005 WL 2271885, *3 (Div. 1, 2005) (unpublished) (citing *Batten v. Abrams*, 28 Wash.App. 737, 745 (1981)). To state a claim for abuse of process, Plaintiff must prove that after the process has been issued or the suit has been instituted the legal process was abused. Abuse of process is the misuse or misapplication of the process, after it has once been issued, for an end other than that which it was designed to accomplish. *Hough v. Stockbridge*, 152 Wash.App. 328, 343 (Div. 1, 2009); *Loeffelholz v. Citizens for Leaders with Ethics and Accountability Now (C.L.E.A.N.)*, 119 Wash.App. 665, 699 (Div. 2, 2004); *Batten*, 28 Wash.App. 737 at 745.

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"[T]here must be an act after filing suit using legal process empowered by that suit to accomplish an end not within the purview of the suit." *Batten*, 28 Wash.App. at 748.

It is generally accepted that "the judicial process must in some manner be involved" before a claim for abuse of process will lie. *Oreskovich*, 2012 WL 2271885 at *3 n.2 (*citing* W. Page Keeton et al., Prosser and Keeton on the Law of Torts § 121 at 898 (5th ed. 1984) and *Sea-Pac Co. v. United Food and Commercial Workers Union 44*, 103 Wn.2d 800 (1985) (holding that unfair labor practice charges could not form basis of action for abuse of process because no process was issued by Washington courts and that whether union misused process of National Labor Relations Board for an improper purpose was for the Board to decide)). Similarly, the Washington Court of Appeals has held that Washington State Bar proceedings are not *judicial* proceedings where an abuse of process claim may be applied. *Id.* at *3.

Here, Plaintiff has failed to identify any act taken after a judicial proceeding or legal process was issued or a suit was filed. Rather, all of the acts Plaintiff challenges under his abuse of process claim took place before removal proceedings were instituted against him. Under his abuse of process claim, Plaintiff challenges: (1) his transfer to the Bellingham Border Patrol Station; (2) the taking of his fingerprints; (3) the alleged pressure to sign immigration forms; and (4) the alleged falsifications in the I-213. Dkt. No. 1, pg. 21-22, ¶117-120. He argues these actions were done for "the improper purpose of covering up USBP's unlawful arrest and imprisonment" of Plaintiff. *Id.* at ¶121. But even if Plaintiff could prove that these acts were done with malicious intent, all these acts occurred *before* any legal process was issued against Plaintiff.

The "mere institution of a legal proceeding even with a malicious motive does not constitute an abuse of process." *Loeffelholz*, 119 Wash.App. at 699. Instead, "[t]he gist of the action is the misuse or misapplication of the process, *after it has once been issued*, for an end other than that which it was designed to accomplish." *Id.* "[T]he gist of the tort is not commencing an action or causing process to issue without justification, but misusing, or misapplying process justified in itself for an end other than that which it was designed to accomplish." *Batten*, 28 Wn.App. at 745.

Investigating an individual's immigration status by running their fingerprints through the Department of Homeland Security's Automated Biometric Identification System, completing various immigration forms regarding removal proceedings, and preparing an I-213

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are all actions that are taken in the process of presenting an illegal alien for removal proceedings to U.S. Customs and Immigration Enforcement ("ICE"). The actual removal proceedings, or legal process, do not formally begin until ICE files a Notice to Appear with the immigration court through the Executive Office of Immigration Review. 8 C.F.R. § 1003.14; *see also Lazaro v. Mukasey*, 527 F.3d 977, 980 (9th Cir. 2008) ("The Immigration Court's jurisdiction vests 'when a charging document is filed with the Immigration Court by the Service.'"). Thus, even if Plaintiff could prove that the USBP's actions in processing him for removal and preparing the I-213 were done with a malicious motive, he must prove some additional improper act *after the legal process has been issued* to establish a valid abuse of process claim and he has not.

"[T]he initiation of vexatious civil proceeding, although baseless, is not an abuse of process." *Saldivar v. Momah*, 145 Wash.App. 365, 389 (Div. 2, 2008). There must be an act after filing suit using legal process empowered by that suit to accomplish an end not within the purview of the suit. *Id.* (*citing Batten*, 28 Wash.App. at 749). In *Ressy v. State, Dept. of Corrections*, 2013 WL 5430516 (Div. 1, 2013) (unpublished), a prisoner alleged that department of corrections personnel filed a false declaration and probation violation report in retaliation for grievances he filed against his community corrections officer. *Id.* at *1. The Washington Court of Appeals found that the plaintiff failed to state a claim for abuse of process because the act of filing a false declaration and probation violation report were acts that *initiated* the violation process. *Id.* at *5. "An abuse of process claim must be based on an act in the use of process that is not proper in the regular prosecution of the proceedings." *Id.*

Therefore, the United States is entitled to summary judgment on Plaintiff's abuse of process claim because Plaintiff has not shown that an act was taken after an actual *judicial* proceeding was instituted, using the legal process empowered by that suit, to accomplish an end not within the purview of the suit. Rather, Plaintiff's claims regarding his abuse of process claim all pertain to actions taken by USBP during the process of presenting Plaintiff, an illegal alien, for removal proceedings. These claims cannot support an abuse of process claim under Washington law and must be dismissed for lack of subject-matter jurisdiction.

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C. The United States is Entitled to Summary Judgment on Plaintiff's Negligent Infliction of Emotional Distress Claims.

Plaintiff brings claims for negligent infliction of emotional distress arguing that USBP requested that he be detained without reasonable suspicion and arrested him without probable cause. Dkt. No. 1, pg. 17-19, ¶99-107. The tort of negligent infliction of emotional distress ("NIED") has five elements under Washington law: first, the plaintiff must prove the traditional elements of negligence - duty, breach, proximate cause, and damage or injury. *See Montero v. Washington State Patrol*, 2007 WL 675855, *6 (W.D.Wash., Jan. 29, 2007) (*citing Snyder v. Med. Serv. Corp.*, 35 P.3d 1158, 1164 (Wash. 2001)). In addition, the alleged injury must meet an "objective symptomatology" requirement by being both "susceptible to medical diagnosis and proved through medical evidence." *Id.* (*citing Hegel v. McMahon*, 960 P.2d 424, 431 (Wash. 1998)).

Here, Plaintiff's claim of NIED fails in two respects. First, Plaintiff cannot show that USBP Agents owed him a duty. Under Washington law, the general rule is that "law enforcement activities are not reachable in negligence." *Keates v. City of Vancouver*, 73 Wash.App. 257, 267 (1994). Police officers owe no duty of reasonable care to avoid the inadvertent infliction of emotional distress on the subjects of criminal investigation. *Id.* at 269. Thus, no action can lie for NIED based on a police interrogation that was so harsh the exonerated suspect developed post-traumatic stress disorder. *Id.* Similarly, no action for NIED can lie based on police officers' conduct during the execution of search warrants. *See Brutsche v. City of Kent*, 2006 WL 1980216, *3 (Wash.App. Div. 1, 2006) (unpublished) ("We are aware of no considerations of logic, common sense, justice, policy, or precedent that support making the execution of warrants an exception to the general rule that law enforcement activities are not reachable in negligence."). Furthermore, no action for NIED can lie based on police officers' completion of police reports that contained errors that Plaintiff did not prove were intentional. *See Montero*, 2007 WL 675855 at *6.

Second, even if Plaintiff could establish that USBP Agents owed him a duty, he cannot premise a negligence claim on alleged intentional acts such as false arrest and false imprisonment. *See Lawson v. City of Seattle*, 2014 WL 1593350, *13 (W.D.Wash. April 24, 2014) (*citing Willard v. City of Everett*, C12-14-TSZ, 2013 U.S. Dist. LEXIS 126409 at *5 (W.D.Wash. Sep. 4, 2013)). Here, Plaintiff's NIED claims are based solely on alleged

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intentional acts - that USBP requested that he be detained without reasonable suspicion and arrested him without probable cause. Dkt. No. 1, pg. 17-19, ¶99-107. Under Washington law, Plaintiff cannot base a NIED on intentional acts. *See St. Michelle v. Robinson*, 52 Wash.App. 309, 314-16 (Wash.App. 1988) (intentional acts of sexual abuse did not give rise to cause of action for negligent infliction of emotional distress).

D. The United States is Entitled to Summary Judgment on Plaintiff's Intentional Infliction of Emotional Distress Claims.

Plaintiff also brings claims for intentional infliction of emotional distress ("IIED") arguing that USBP intentionally detained Plaintiff without reasonable suspicion and arrested him without probable cause. *See* Dkt. No. 1, pg. 19-21, ¶108-113. To prevail on a claim for the tort of IIED, also known as outrage, under Washington law Plaintiff must prove that: (1) USBP Agents engaged in extreme and outrageous conduct, (2) they intentionally or recklessly inflicted emotional distress on Plaintiff, and (3) it actually resulted in severe emotional distress to Plaintiff. *Kloepfel v. Bokor*, 149 Wash.2d 192, 195-96 (2003) (*citing Reid v. Pierce County*, 136 Wash.2d 195, 202 (1998)). Any claim of outrage must be predicated on behavior so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community. *Id.* at 196.

Here, Plaintiff's IIED/outrage claim must fail for two reasons. First, Plaintiff cannot establish, as a matter of law, that USBP Agents engaged in "extreme and outrageous conduct" when they detained him because the detention was supported by reasonable suspicion and probable cause and was lawful under 8 C.F.R. § 287.8(b)(2) and 8 U.S.C. § 1357(a)(2).

Second, if the Court finds that Plaintiff's detention by USBP Agents was unlawful, Plaintiff cannot bring a separate independent claim for IIED/outrage based on the same conduct as the alleged false arrest and false imprisonment because it may result in double recovery. *See Lawson*, 2014 WL 1593350, *11 (*citing Rice v. Janovich*, 109 Wash.2d 48, 61-62 (1987) (finding error in jury instruction allowing for "possibility of double recovery" on both assault and tort of outrage for same conduct)). Plaintiff bases his IIED claim on his false arrest and false imprisonment arguing that "arresting someone without any legal justification is intolerable in a civilized community governed by the rule of law." Dkt. No. 1, pg. 19, ¶109. He argues that arresting him without probable cause or reasonable suspicion constituted

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outrage. *Id.* at pg. 19-20, ¶109-110. Plaintiff may recover damages for emotional distress, if proven, for the intentional torts of false arrest/imprisonment. *See Gurno v. Town of LaConner*, 65 Wash.App. 218, 229-30 (Wash.App. 1992). But he may not maintain a second intentional tort claim for IIED based on the same allegations because that could result in double recovery.

V. CONCLUSION

This Court is the trier of fact under the FTCA. The record is sufficiently developed with regard to the facts pertaining to Plaintiff's detention and these facts are largely undisputed. Thus, the Court can and should decide that Plaintiff's detention by USBP Agents was lawful. The Court should also find, as a matter of law, that Plaintiff cannot bring a NIED claim based on the alleged intentional acts of false arrest/imprisonment. The Court should also dismiss Plaintiff's IIED claim because Plaintiff's detention by USBP Agents was lawful. In the event the Court finds that Plaintiff's detention was unlawful, it should dismiss Plaintiff's IIED claim because it is based on the same intentional acts of false arrest/imprisonment and Plaintiff cannot obtain double recovery based on the same acts. Finally, the Court should dismiss Plaintiff's abuse of process claim because no legal process was instituted against him until the NTA was filed in immigration court, and Plaintiff makes no claims regarding the actual removal proceedings.

DATED this 15th day of January, 2015.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that she is an employee in the Office of the United States Attorney for the Western District of Washington and is a person of such age and discretion as to be competent to serve papers;

That on the below date she electronically filed the foregoing document(s) with the Clerk of Court using the CM/ECF system, which will send notification of such filing to the attorney(s) of record as follows:

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DATED this 15th day of January, 2015.

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