UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

MARIA FERNANDA RICO ANDRADE, individually and on behalf of the estate of Gerardo Lozano Rico, deceased, *Plaintiff*, v. UNITED STATES OF AMERICA, UNITED STATES CUSTOMS & BORDER PROTECTION, UNITED STATES OFFICE OF BORDER PATROL, JANET NAPOLITANO, DAVID V. AGUILAR, ALAN BERSIN, MICHAEL J. FISHER, ROSENDO HINOJOSA, DAVID COULS, REYES DIAZ, JOSE TEJEDA, and EBERTO CABELLO, *Defendants*.	No. 15-cv-00103

PLAINTIFF'S MEMORANDUM IN OPPOSITION TO
DEFENDANTS' MOTION TO DISMISS

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INTRODUCTION AND SUMMARY OF THE ARGUMENT

This Court should deny every aspect of Defendants'[1] Motion to Dismiss.

Plaintiff's lawsuit seeks redress for the death of her son, Gerardo Lozano Rico ("Lozano"), who was killed as a result of Defendants Tejeda and Cabello's excessive use of force consistent with the Border Patrol's "Vehicle Policy." Pursuant to the Vehicle Policy, Border Patrol agents understood their Supervisors to approve the use of lethal force against vehicles so long as the agents claimed a vehicle was in their path. Compl ¶35. What developed was a regular pattern and practice of agents intentionally assuming positions in vehicles' paths, thereby exposing themselves to additional risk and creating a "justification" for them to use deadly force against the vehicles' occupants. Over 20% of all deadly force incidents between January 2010 and October 2012 involved agents asserting the Vehicle Policy as the justification for their use of deadly force.

Despite its prevalence, Plaintiff and the public were unaware of Vehicle Policy because of its self-concealing nature and the affirmative steps that agents and Supervisor Defendants took to distort and conceal the facts underlying each incident. The practice first came to light in a government-commissioned independent review conducted by the Police Executive Research Forum ("PERF"). Excerpted extensively in Plaintiff's Complaint, Plaintiff attaches hereto the full report as Exhibit A. Although the report is dated February 2013, Defendants concealed its findings from the public until November 5, 2013, when Defendant Fisher, Chief of Border Patrol, publicly rejected its specific recommendations. Defendant Fisher's November 5, 2013

[1] The Defendants fall into three groups. First, the **"Government Defendants"** are the United States of America, United States Customs and Border Protection ("CBP"), and United States Office of Border Patrol (Border Patrol). Second, the **"Supervisor Defendants"** are Janet Napolitano, David Aguilar, Alan Bersin, Michael Fisher, Rosendo Hinojosa, David Couls, and Reyes Diaz. Third, the **"Agent Defendants"** are Jose Tejeda and Eberto Cabello.

announcement was the first instance in which Plaintiff or any of the public had any notice of the existence of the Vehicle Policy—that was two years and two days after Lozano's death.

Plaintiff filed her administrative complaint on June 11, 2014. Compl. ¶23. After her claim was denied, she timely filed within 6-months a complaint in this Court on February 27, 2015. Plaintiff brings several causes of action arising under the Fourth and Fifth Amendments of the Constitution (*Bivens*[2] claims – Counts 4-7), state common law (FTCA claims – Counts 8-11), and international law (ATS or Law of Nations claims – Counts 1-3).

Defendants jointly moved to dismiss all claims on September 30, 2015.[3] This Court should deny the motion for the following reasons:

1) Dismissal of Plaintiff's Fourth and Fifth Amendment *Bivens* claims against Supervisor Defendants is unwarranted because the Complaint sufficiently alleges—and Defendants do not contest—that each Supervisor Defendant has deliberately failed to properly train the Agents.
2) Dismissal of Plaintiff's Fifth Amendment *Bivens* claims against the Agents is unwarranted because under *Graham v. Connor*, 490 U.S. 386 (1989), the Fourth Amendment is the exclusive avenue for redress only of *U.S. citizens*' excessive-force claims.
3) Dismissal of Plaintiff's Fourth Amendment *Bivens* claims against the Agents is unwarranted because it is clearly established that a law officer cannot jump into the exit path of a fleeing vehicle to justify deadly force against its occupants.
4) Dismissal of Plaintiff's FTCA claims against individually named Defendants is

[2] *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971).
[3] Defendants' brief was re-docketed under ECF No. 17 (Oct. 6, 2015). References to Defendants' brief are cited as "Def. Br."

unwarranted because there has not been a scope-of-employment certification.

5) The statute of limitations defense does not bar Plaintiff's FTCA and *Bivens* claims because Plaintif's claims against the Supervisors did not accrue until November 5, 2013, and because the Complaint raises a basis for tolling.

6) This Court has personal jurisdiction over Non-Resident Supervisor Defendants because their failure to train Texas border patrol agents caused Lozano's death in Texas.

7) Dismissal of Plaintiff's claims under the ATS against the Government Defendants is unwarranted because sovereign immunity is not available against *jus cogens* claims prosecuted against the sovereign in its own courts.

8) Dismissal of Plaintiff's claims under the ATS against Supervisor and Agent Defendants is unwarranted because they have not sought a scope-of-employment certification.

"To survive a Rule 12(b)(6) motion to dismiss, a complaint 'does not need detailed factual allegations,' but must provide the plaintiff's grounds for entitlement to relief—including factual allegations that when assumed to be true 'raise a right to relief above the speculative level.'" *Cuvillier v. Taylor*, 503 F.3d 397, 401 (5th Cir. 2007) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). That is, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009) (quoting *Twombly*, 550 U.S. at 570). A claim has facial plausibility "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* (citing *Twombly*, 550 U.S. at 556). The plausibility standard is *not* akin to a "probability requirement." *Id.*

ARGUMENT

I. *BIVENS* CLAIMS

Plaintiff brings *Bivens* claims under the Fourth and Fifth Amendments to the Constitution against the Agents and their Supervisors.

A. Plaintiff States *Bivens* Claims Against the Supervisor Defendants.

Defendants' argument that Plaintiff has not alleged any Supervisor Defendant "personally participated" in any constitutional violation is nonsense. Def. Br. at 21-23.

1. The Supervisor's Are Personally Responsible for Causing Lozano's Death.

Each Supervisor Defendant is personally responsible for Lozano's death because of his or her failure to train or supervise. *See Estate of Davis ex rel. McCully v. City of N. Richland Hills*, 406 F.3d 375, 381 (5th Cir. 2005) (claim for failure to train sufficient to establish personal responsibility for liability). The Fifth Circuit has long held that a plaintiff pleads a claim for failure to train or supervise by alleging the following elements: "(1) the supervisor either failed to supervise or train the subordinate official; (2) a causal link exists between the failure to train or supervise and the violation of the plaintiff's rights; and (3) the failure to train or supervise amounts to deliberate indifference." *Id.* (internal quotations omitted). In shorthand, this is the familiar "deliberate indifference standard," which a plaintiff sufficiently pleads by alleging facts that give rise to a "reasonable inference" that a supervisor had knowledge of "at least a pattern of similar incidents" in which others were injured, and the supervisor's failure to train or supervise reflects a deliberate or conscious choice. *Id.*; *see, e.g., Harvey v. Montgomery Cnty., Tex.*, 881 F. Supp. 2d 785, 796 (S.D. Tex. 2012).

Plaintiff's Complaint easily meets this requirement. Each of the Supervisor Defendants had actual knowledge of a pattern of nearly identical shootings that were unconstitutionally

excessive. Compl. ¶¶33-45. As discovered by PERF, "CBP practice allows shooting at the driver of any suspect vehicle that comes in the direction of agents" even when "the subject driver [is] attempting to flee from … agents who intentionally put themselves into the exit path of the vehicle." Ex. A, at 8. Indeed, over 20% of all use of deadly force incidents PERF reviewed involved the specific "policy and practice" of agents shooting at vehicles. Ex. A. at 2, 8. Despite knowing of this clearly unlawful practice across the southern border, Supervisor Defendants disciplined not one agent; modified not one aspect of training; changed not one policy; and otherwise failed to do anything in their supervisory powers to prevent agents from acting pursuant to this practice in the future. Compl. ¶¶36, 38, 39, 42, 51-60.

And this failure to train was clearly deliberate. *Id.* For example, PERF concluded that "the public's safety will be enhanced by policy changes" that "restrict agents from shooting at vehicles" and require that "agents … be trained to get out of the way of oncoming vehicles as opposed to intentionally assuming a position in the path of such vehicles." Ex. A at 6. Defendant Fisher publicly *rejected* all of these recommendations. Compl. ¶52. It is a reasonable inference that when the Agents killed Lozano on November 3, 2011, they did so knowing that Supervisor Defendants would find their actions in conformity with policy, no different than the others before them. Compl. ¶37. Through their failure to train and supervise the Agents, Supervisor Defendants' personal responsibility for Lozano's death is palpable.

2. Defendants Concede That Plaintiff Sufficiently Alleges Facts Establishing Each Supervisor's Deliberate Failure to Train.

Defendants concede much through their silence.[4] Defendants do not argue that the Complaint fails to provide enough detail to establish their knowledge of the Vehicle Policy

[4] *United States v. Aguirre-Villa*, 460 F.3d 681, 683 (5th Cir. 2006) ("Court will not ordinarily consider arguments raised for the first time in a reply brief."); *Housdan v. JPMorgan Chase Bank, N.A.*, No. 3:13-cv-0543, 2014 WL 4814760, at *8 (S.D. Miss. Sept. 24, 2014) (striking

before Lozano's death. Nor do they contest that the Complaint sufficiently alleges that their failure to train or supervise was deliberate, and causally connected to Lozano's death. Supervisor Defendants thus concede that the Complaint, as alleged, is sufficient to meet the requirements under the deliberate indifference standard.

3. Nothing Supports Defendants' Attempt to Depart from Clearly Established Law Governing Supervisor Liability.

Notwithstanding their deliberate indifference, and ignoring the hundreds of cases in this Circuit applying the clearly established deliberate indifference standard of supervisor liability, Defendants argue that they, and all other supervisors who condone policies of excessive force, are immunized so long as they are absent from the scene at the time the excessive force occurs. Def. Br. at 22. Of course, nothing comes remotely close to supporting this absurd proposition.

First, *Whitley v. Hanna*, 726 F.3d 631 (5th Cir. 2013), did not hold that a supervisor claim for failure to train requires a supervisor be at the scene of the incident. It merely reiterated the unremarkable and irrelevant rule that a claim for *bystander liability* requires that defendant be a bystander. *Id.* at 646.

Second, Defendants misrepresent the holding of *Ashcroft v. Iqbal*, 556 U.S. 662, 666 (2009), arguing that it "reaffirmed that … 'knowledge and acquiescence' is 'insufficient to satisfy' the standard for supervisory liability in the *Bivens* context." Def. Br. at 22. *Iqbal* merely ensured that the level of intent necessary for supervisor liability was not less than that which was required for the underlying constitutional tort. *See* 556 U.S. at 678. Unlike *Iqbal*'s underlying claim for *purposeful discrimination*, Plaintiff's excessive-force claims here do not require proof of discriminatory purpose or intent—officers may be liable regardless of their subjective state of mind. *See Herring v. U.S.*, 555 U.S. 135, 145-46 (2009) (Fourth Amendment "look[s] to an

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reply brief that raised new issues; "It is well settled that a party may not raise an argument for the first time in a rebuttal.").

officer's knowledge and experience, but not his subjective intent"). And clearly established Fifth Circuit law both before and after *Iqbal* holds that the level of intent necessary to establish a supervisor's culpable training is deliberate indifference. *Brumfield v. Hollins*, 551 F.3d 322, 329 (5th Cir. 2008); *E.A.F.F. v. United States*, 955 F. Supp. 2d 707, 739 (W.D. Tex. 2013) (for failure to train claim, "[b]oth parties agree, and the case law is clear, that the relevant standard of culpability for such supervisory liability is deliberate indifference"), *aff'd sub nom*. *E.A.F.F. v. Gonzalez*, 600 F. App'x 205 (5th Cir. 2015). It is no surprise courts throughout the country routinely reject Defendants' argument: "*Iqbal* does not preclude *Bivens* claims premised on deliberate indifference when the underlying constitutional violation requires no more than deliberate indifference." *Turkmen v. Hasty*, 789 F.3d 218, 250 (2d Cir. 2015) (quoting *Starr v. Baca*, 652 F.3d 1202, 1206-07 (9th Cir. 2011)); *see also Dodds v. Richardson*, 614 F.3d 1185, 1204–05 (10th Cir. 2010); *Sandra T.E. v. Grindle*, 599 F.3d 583, 590-91 (7th Cir. 2010); *Sanchez v. Pereira–Castillo*, 590 F.3d 31, 49 (1st Cir. 2009).

Finally, *Hernandez v. United States,* 757 F.3d 249, 280 (5th Cir. 2014), did not abandon the deliberate indifference standard; it applied that standard and it dismissed the supervisor claims for reasons not applicable here. Def. Br. at 22-23. *Hernandez* held plaintiffs failed to establish the causal link from the supervisor's failure to train, noting it had been months, if not years, since the defendants were the shooter's supervisors. *Id.* By contrast, Supervisor Defendants here were all supervisors of Agents Cabello and Tejada on the day of the shooting. Compl ¶¶12-18. And the *Hernandez* plaintiffs could not establish the existence of an unlawful policy, whereas here Plaintiff alleges extensive facts establishing the existence of an unlawful policy that Supervisor Defendants condoned. Compl. ¶¶36-53.

In sum, while Defendants are correct to note that supervisors may not be vicariously liable for the actions of subordinates, the Fifth Circuit specifically crafted the deliberate indifference standard to ensure that courts are always holding supervisors accountable for their own conduct. And by satisfying that standard, Plaintiff alleged each Supervisor Defendant's personal responsibility for Lozano's death.

B. Plaintiff States *Bivens* Claims Against the Agents.

1. The Fourth Amendment Is Not Exclusive.

Plaintiff alleges that the Agents deprived Lozano of his Fifth Amendment rights by using excessive, deadly force. Compl. ¶¶123-131. This claim implicates the substantive component of the Fifth Amendment's Due Process Clause. *United States v. Salerno*, 481 U.S. 739, 746 (1987).

Defendants argue that Lozano lacks any Fifth Amendment rights on the ground that *all* excessive-force claims are cognizable only under the Fourth Amendment. Def. Br. at 23. Defendants quote *Graham v. Connor,* 490 U.S. 386, 395 (1989), for the proposition that "all claims that law enforcement officers have used excessive force—deadly or not—in the course of an arrest, investigatory stop, or other 'seizure' of a free citizen should be analyzed under the Fourth Amendment and its 'reasonableness' standard, rather than under a 'substantive due process' approach [under the Fifth Amendment]." Def. Br. at 23. But *Graham* by its own terms relegates certain claims to the Fourth Amendment only if they are brought by "free [U.S.] citizens." *Graham*, 490 U.S. at 395. Lozano was not a U.S. citizen, Compl. ¶3, so the *Graham* limitation simply does not apply.

Defendants cannot avoid this outcome by asserting that *Graham*'s reference to "free citizens" was inadvertent or should somehow be ignored. The Fifth Circuit noted in *Martinez-Aguero* that "*Graham* by its own terms applies only to 'free citizens.'" *Martinez-Aguero v. Gonzalez*, 459 F.3d 618, 624 n.5 (5th Cir. 2006) (citing *Graham*, 490 U.S. at 395). Accordingly,

despite *Graham*, the Fifth Amendment's guarantee of substantive due process "may sweep more broadly than does the Fourth Amendment guarantee." *Id.*; *see also Lynch v. Cannatella*, 810 F.2d 1363, 1372 (5th Cir. 1987) ("[T]he due process clause protects all 'persons' not merely those who are citizens or legal residents."). Thus for the same reasons Plaintiff states a *Bivens* claim under the Fourth Amendment, she also states a claim under the Fifth Amendment.

2. The Agents' Use of Force Was Excessive Under the Fourth Amendment.

Qualified immunity offers no safe haven for the Agents' conduct here because, first, considering the allegations in a light most favorable to the Plaintiff, a constitutional right has been violated and, second, "the right was clearly established." *Brown v. Miller*, 519 F.3d 231, 236 (5th Cir. 2008).

a. The Agents' Killing Pursuant to the Vehicle Policy Was Objectively Unreasonable.

Defendants do not dispute that Lozano had a Fourth Amendment right to be free from excessive use of force. Instead, all Defendants join in brazenly arguing that the facts of the Complaint, "even when viewed in the light most favorable to plaintiff, … do not establish a constitutional violation by Defendants Cabello and Tejeda." Def. Br. at 26. These arguments confirm that border patrol supervisors and agents collectively support a patently unlawful use of force policy. Under the facts of Plaintiff's Complaint, no reasonable officers in defendants' positions would have believed that Lozano "pose[d] a threat of serious physical harm, either to the officer[s] or to others." *See Tennessee v. Garner*, 471 U.S. 1, 11 (1985).

Plaintiff's Complaint provides no support for Defendants' self-serving statements that they reasonably believed Lozano would kill them. Def. Br. at 26. None of the vehicle's occupants possessed any weapons, and no officer had any reason to suspect otherwise. Compl ¶31. In addition, none of the vehicle's occupants otherwise presented an imminent threat of

death or serious injury to the agents or to anyone else. *Id.* And Lozano simply did not create any risk of death or serious injury to the agents or to anyone else to justify the use of deadly force. *Id.*

Remarkably, Defendants assert that they needed to kill Lozano in order to "halt [the] threat" of his vehicle. Def. Br. at 26. It is positions like this that compelled PERF to emphasize in its report: "*A moving vehicle in and of itself is not a presumed threat that justifies the use of deadly force*." Ex. A, at 11 (emphasis in original). The Court of Appeals agrees. *Lytle v. Bexar Cnty., Tex.*, 560 F.3d 404, 416 (5th Cir. 2009) ("[A] suspect that is fleeing in a motor vehicle is not so inherently dangerous that an officer's use of deadly force is per se reasonable."). So do other courts across the country. *See, e.g., Adams v. Speers*, 473 F.3d 989, 991 (9th Cir. 2007); *Smith v. Cupp*, 430 F.3d 766, 770 (6th Cir. 2005); *Vaughan v. Cox*, 343 F.3d 1323, 1326–27 (11th Cir. 2003); *Tubar v. Clift*, 286 F. App'x 348, 351 (9th Cir. 2008); *Kirby v. Duva*, 530 F.3d 475, 482-83 (6th Cir. 2008); *Murray-Ruhl v. Passinault*, 246 F. App'x 338, 346 (6th Cir. 2007); *Jones v. City of Atlanta*, 192 F. App'x 894, 897 (11th Cir. 2006); *Sigley v. City of Parma Heights*, 437 F.3d 527, 536 (6th Cir. 2006); *Cowan ex rel. Cooper v. Breen*, 352 F.3d 756, 763 (2d Cir. 2003); *Lewis v. Boucher*, 35 F. App'x 64, 69-70 (4th Cir. 2002) (per curiam); *Ribbey v. Cox*, 222 F.3d 1040, 1043 (8th Cir. 2000); *McCaslin v. Wilkins*, 183 F.3d 775, 779 (8th Cir. 1999).

No facts here make this a special case in which a moving vehicle could reasonably cause an officer to fear for his or her life. Defendants were not trapped in tight quarters. They were not involved in a high speed chase. Nor was Lozano's vehicle speeding towards anyone. The incident occurred on a rural country road and the vehicle was stopped. Compl. ¶¶25-27. Lozano then *reversed to get out of Agent Cabello's way*. Compl. ¶28. Upon hitting a fence, Lozano shifted from reverse to drive. *Id.* Defendant Cabello then unholstered his gun, and without

warning, began shooting at Lozano simply because Lozano started to move forward. Compl. ¶¶28-29. Tejeda quickly joined the barrage of fire. *Id.* The Agents killed Lozano before he was even able to get his vehicle off the shoulder and back onto the road. *Id.* It is thus a reasonable inference that the vehicle was nowhere near any speed one could consider deadly. In these circumstances, if an officer were to fear for his life (regardless of how unreasonable), he simply could have moved out of the way.

But neither agent moved out of the way. Instead, Agent Cabello moved *into the way*. It was thus Agent Cabello's conduct that created the encounter that he contends permitted the use of deadly force to protect himself. Such actions are objectively unreasonable. *See Estate of Starks v. Enyart*, 5 F.3d 230, 234 (7th Cir. 1993) (cannot jump into exit path of vehicle in order to justify use of force against vehicle). Indeed, this is the very CBP policy and practice that the PERF report unequivocally condemns. Ex. A, at 6, 8.

The Agents then doubled down on their objective unreasonableness, continuing to shoot even after the vehicle had passed. Compl ¶28. Indeed, of the 15 rounds that both Agents Tejada and Cabello fired, only one bullet entered the vehicle from the front passenger side. All other bullets were fired at the side or rear. Compl. ¶¶29-30. Moreover, all the fatal shots entered Lozano from the side, when any arguable threat posed by the vehicle had already passed. *Id.* This is again precisely the situation criticized by PERF where "shots at suspect vehicles are taken out of frustration when agents who are on foot have no other way of detaining suspects who are fleeing in a vehicle." Ex. A, at 8.

Defendants argue that they were nevertheless justified to shoot after Lozano's car passed because he was an "uncooperative subject" and "their lower level of force did not slow down" his flight. Def. Br. at 26. But any fleeing suspect can be described as "uncooperative." And yet

it has long been clearly established that an officer cannot shoot suspects simply because they flee. *Walker v. Davis*, 649 F.3d 502, 503 (6th Cir. 2011) ("It has been settled law for a generation that, under the Fourth Amendment, '[w]here a suspect poses no immediate threat to the officer and no threat to others, the harm resulting from failing to apprehend him does not justify the use of deadly force to do so.'") (quoting *Tennessee v. Garner*, 471 U.S. 1, 11 (1985)). And only the plainly incompetent would think killing someone is acceptable whenever a lower level of force does not slow down that flight. *Garner*, 471 U.S. at 11.

Finally, Defendants argue that Plaintiff has failed to allege Agent Tejeda's personal involvement in Lozano's death, or otherwise allege a conspiracy with Cabello to kill Lozano. Def. Br. at 24-25. But the Complaint clearly states that the fatal gunshot wounds entered from both the right and left sides of the vehicle. Compl. ¶ 30. Clearly one person could not do that; Agent Tejeda is responsible for firing at least one fatal round at Lozano. Thus, Tejeda and Cabello are both jointly responsible for killing Lozano. Plaintiff has therefore stated a violation of Lozano's right to be free from excessive force against both the Agents.

b. The Agents' Actions Taken Pursuant to the Vehicle Policy Violated Clearly Established Law.

The Agents' actions pursuant to the Vehicle Policy also violate clearly established law. This second step of the qualified immunity analysis is an objective inquiry asking whether "it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Lytle*, 560 F.3d at 410. There is no doubt that a reasonable officer would find the Agents' conduct pursuant to the Vehicle Policy unlawful.

Who better to represent that "reasonable officer" than the very experts that Defendants themselves retained to review the reasonableness of agents actions? PERF noted that U.S.

jurisdictions have had "clear and unambiguous" rules forbidding such conduct "for over 40 years." Ex. A, at 6.

In any event, we "need not dwell on this issue. It has long been clearly established that, absent any other justification for the use of force, it is unreasonable for a police officer to use deadly force against a fleeing felon who does not pose a sufficient threat of harm to the officer or others." *Lytle*, 560 F.3d at 417. And here, the fatal rounds fired were simply not needed to "halt [the] threat" of a vehicle—those shots clearly came after the "threat" had passed. It is clearly established that "an exercise of force that is reasonable at one moment can become unreasonable in the next if the justification for the use of force has ceased." *Id*. at 413; *Waterman v. Batton*, 393 F.3d 471, 483 (4th Cir. 2005) (same); *Abraham v. Raso*, 183 F.3d 279, 294 (3d Cir. 1999) (same); *Ellis v. Wynalda*, 999 F.2d 243, 247 (7th Cir.1993) (same).

Finally, the Complaint unambiguously alleges that the Agents specifically placed themselves in a position for the specific purpose of "justifying" their lethal shots. It has been clearly established for decades that an otherwise excessive use of force is not justified where, as here, officers intentionally create the circumstances that they claim "justify" that force. *See, e.g*., *Starks*, 5 F.3d at 234.

II. FTCA CLAIMS

Defendants argue that Counts 8-11 should be dismissed with prejudice because they are common law tort claims against individually-named government employees who are absolutely immune from liability under the Westfall Act. Def. Br. at 9-10.

While the Westfall Act "accords federal employees absolute immunity from common-law tort claims arising out of acts they undertake in the course of their official duties" 28 U.S.C. § 2679(b)(1), the Act does not apply by default. Rather, the Westfall Act "empowers the Attorney General to certify that the employee 'was acting within the scope of his office or employment at

the time of the incident out of which the claim arose.'" *Osborn v. Haley*, 549 U.S. 225, 229-30 (2007) (quoting 28 U.S.C. § 2679(d)(1), (2)). "*Upon the Attorney General's certification*, the employee is dismissed from the action, and the United States is substituted as defendant in place of the employee. The litigation is thereafter governed by the Federal Tort Claims Act (FTCA)." *Id.* (emphasis added).

Here, the Attorney General has made no such certification. Nor has any Defendant successfully petitioned the Court for the same.[5] Without any proper certification, there is no basis to find the individually named Defendants absolutely immune from Counts 8-11.

III. A LIMITATIONS DEFENSE DOES NOT BAR PLAINTIFF'S *BIVENS* AND FTCA CLAIMS.

This Court should reject Defendants' arguments that Plaintiff's FTCA and *Bivens* claims are time-barred as a matter of law. Def. Br. at 10-13, 19-20. A defendant cannot succeed in asserting a limitations defense under on a Rule 12(b)(6) motion unless it is "evident from the plaintiff's pleadings that the action is barred" and the complaint "fail[s] to raise some basis for tolling…." *Jones v. Alcoa, Inc.*, 339 F.3d 359, 366 (5th Cir. 2003).

Here, the Complaint establishes that Plaintiff's FTCA and *Bivens* claims against the Supervisors did not even accrue until November 5, 2013—putting her August 29, 2014 administrative filing well within the two-year statute of limitations. And in any event, the Complaint is replete with detailed allegations that raise a basis for tolling Plaintiff's claims against the Agents and Supervisors on the theories of equitable estoppel and equitable tolling. Defendants' limitations defense therefore does not "clearly appear[] on the face of the complaint" and thus their motion should be denied. *See Camp v. RCW & Co.*, 05-cv-03580, 2007 WL

[5] "In the event that the Attorney General has refused to certify" the Westfall Act enables the employee "at any time prior to trial" to "petition the court to find and certify that the employee was acting within the scope of his office or employment" and, if successful, deem the proceeding as brought against the United States. 28 U.S.C. § 2679(d)(1).

1306841, at *7 (S.D. Tex. May 3, 2007) (Tagle, J.) (motion to dismiss not valid means to pursue limitations defense when defense does not "clearly appear[] on the face of the complaint"), *aff'd*, 342 F. App'x 980 (5th Cir. 2009).

A. Plaintiff's FTCA and Bivens' Claims Against the Supervisors Did Not Accrue until the PERF Report Exposed the Self-Concealing Vehicle Policy.

Defendants assert that Plaintiff's FTCA and *Bivens*[6] claims against the Supervisors accrued on November 3, 2011 because "[n]o evidence has been submitted that Plaintiff was not aware of Gerardo Rico's death on or about the date it occurred." Def. Br. at 12-13. But the Fifth Circuit has made clear that accrual does not start merely when Plaintiff becomes aware of an injury; instead, accrual starts "when the plaintiff is, or should be, aware of *both* the injury *and its connection with the acts of defendant*." *Lavellee v. Listi*, 611 F.2d 1129, 1131 (5th Cir. 1980).

Particularly instructive is the Fifth Circuit's decision in *Piotrowski v. City of Houston*, 237 F.3d 567, 576 (5th Cir. 2001). While the plaintiff was injured in a shooting that occurred in 1980, the Fifth Circuit upheld the jury's finding that she reasonably could not know until 1993 of "the causal connection" between her injuries and a policy for which the defendant police department was responsible. *Id.* at 577. Notably, the police department had a "code of silence," that plaintiff causally linked to her injury, and that code "precluded her from knowing pertinent facts" necessary to discover her claim. *Id.* at 576-77 n.12. The policy was thus self-concealing, and where "concealment is involved, the statute of limitations does not begin to run until the relevant facts, which are in the control of the defendant, become known to the plaintiff." *Id*. at 577 n.13. The Court found that only after the policy was publicly disclosed could plaintiff then

[6] Defendants incorrectly assert that state law governs accrual of Plaintiff's *Bivens* claims. Def. Br. at 20-21. "Federal law … determines when a *Bivens* cause of action accrues." *Adrian v. Selbe*, 364 F. App'x 934, 937 (5th Cir. 2010).

suspect that defendant was liable for her injuries. *Id.* at 577. Her action against defendant, therefore, was timely filed because it was filed within two years of her "learning of the ostensible causal connection" between her injuries and the self-concealing policy. *Id.*

Here, while Plaintiff was aware of Lozano's death on November 3, 2011, she could not reasonably connect it to any acts by the Supervisor Defendants, or to the potential liability of the Agents, until November 5, 2013. November 5, 2013 was the first time that Plaintiff or any of the public had any notice of the existence of the Vehicle Policy. Compl. ¶53. Similar to *Piotrowski*, only when the Vehicle Policy was publicly disclosed could Plaintiff suspect a "causal connection" between Lozano's death and the acts of Supervisor Defendants or the potential liability of the Agents. Plaintiff's claims are therefore timely because they were filed within two years after November 5, 2013.

Plaintiff could not reasonably discover the Vehicle Policy sooner because of its inherent self-concealing nature. Over the years, CBP became notorious for its lack of transparency and accountability regarding border patrol agents' use of deadly force. Compl. ¶59. According to the former head of CBP's internal affairs, CBP officials actively concealed the Border Patrol's unlawful practices. Compl. ¶42. They would distort the narratives around fatal shootings to cover up wrongdoing by border agents. Compl. ¶42a. And rather than respond to the shootings appropriately, supervisors, such as Defendant Aguilar, would intentionally thwart the internal affairs' investigation and turn a blind eye to the consistent pattern of unjustified killings. Compl. ¶42b-d, 43, 44. With agents knowing that Supervisor Defendants would approve and conceal their excessive use of deadly force against vehicles, Supervisor Defendants perpetuated excessive force pursuant to a self-concealing Vehicle Policy. Compl. ¶60. When Lozano was killed by Agents implementing the Vehicle Policy, there was no reason to suspect a causal

connection with any policy because other instances involving the Vehicle Policy had successfully been concealed from the public. Compl. ¶60.

Therefore, the discovery rule applies here because it is the wrongdoing upon which the Plaintiff's claim is founded that prevented Plaintiff from knowing the causal connection to Lozano's injury. *See Cada v. Baxter Healthcare Corp.*, 920 F.2d 446, 451 (7th Cir. 1990) (Posner, J.). The self-concealing nature of the Vehicle Policy postponed the date of accrual by preventing Plaintiff from discovering that Lozano was a victim of an unlawful policy and unlawful conduct.

B. Plaintiff's Claims Against the Agents and Supervisors Are Tolled under Theories of Equitable Estoppel and Equitable Tolling.

Defendants' motion should also be denied because Plaintiff's claims against the Agents and Supervisors are tolled under the doctrines of equitable tolling or equitable estoppel (fraudulent concealment). Although tolling of *Bivens* and FTCA claims are governed under state and federal law, respectively, they both unite under the same common principles. "'Equitable tolling focuses on the plaintiff's excusable ignorance of the [defendant's wrongful conduct]. Equitable estoppel, in contrast, examines the defendant's conduct and the extent to which the plaintiff has been induced to refrain from exercising his rights.'" *In re Enron Corp. Sec., Derivative & ERISA Litig.*, 310 F. Supp. 2d 819, 856 (S.D. Tex. 2004) (quoting *Rhodes v. Guiberson Oil Tools Div.*, 927 F.2d 876, 878 (5th Cir. 1991)). "Equitable estoppel does not hinge on intentional misconduct on the defendant's part. Rather, the issue is whether the defendant's conduct, innocent or not, reasonably induced the plaintiff not to file suit within the limitations period." *Id.* (internal quotations omitted); *see also Gonzales v. S.W. Olshan Found. Repair Co., LLC,* 400 S.W.3d 52, 58 (Tex. 2013) ("The doctrine of fraudulent concealment tolls limitations

because a person cannot be permitted to avoid liability for his actions by deceitfully concealing wrongdoing until limitations has run.").

Notwithstanding the self-concealing nature of the practice, the Supervisor Defendants also wrongfully and affirmatively concealed the existence of the Vehicle Policy from Plaintiff and the public by, among other things:

- Publicly defending agents' use of deadly force by misrepresenting the agents were in life-threatening situations. Compl. ¶61a.
- Refusing to undertake any meaningful review of agents' actions pursuant to the vehicle policy. Compl. ¶61b.
- Refusing to take disciplinary measures, or otherwise publicly reprimand, agents' actions pursuant to the Vehicle Policy. Compl. ¶61c.
- Thwarting efforts by internal affairs representatives to conduct a review of agents' use of force that would otherwise have exposed the unlawful practices. Compl. ¶61d.
- Concealing from the public the PERF report, which specifically concluded that CBP's use of force guidelines are deficient. Compl. ¶61e.
- Concealing PERF's underlying finding that CBP permits a practice of shooting at the drivers of suspect vehicles that come in the direction of agents. Compl. ¶61f.
- Concealing PERF's underlying finding that agents were intentionally putting themselves in the exit paths of vehicles thereby exposing themselves to additional risks and creating a justification for the use of deadly force. Compl. ¶61g.
- Redacting a September 2013 OIG report that exposed PERF's findings of the unlawful Vehicle Policy. Compl. ¶61h.
- Refusing requests for information, or otherwise responding to such requests by providing heavily redacted files from which meaningful information could be ascertained about CBP's use of force policies and practices. Compl. ¶61i.

Because the Vehicle Policy was both self-concealing and affirmatively concealed by Defendants until November 2013, Plaintiff had no knowledge of the Vehicle Policy or of any facts or information that would have caused a reasonably diligent person to investigate whether

(1) the unlawful policy existed and (2) the Agents' actions were taken pursuant to that unlawful policy. Compl. at ¶72. Plaintiff's allegations thus establish that all applicable statutes of limitations affecting Plaintiff's claims have been tolled. That Defendants wish to deny or dispute the truth of Plaintiff's allegations has no bearing here. The Complaint is more than sufficient to overcome Defendants' affirmative defense on a motion to dismiss.

IV. PERSONAL JURISDICTION

Defendants' personal jurisdiction argument defies all reasoning and common sense. Defendants argue that Plaintiff fails to allege personal jurisdiction over every Defendant not stationed in Texas at the time Lozano died, namely Napolitano, Bersin, Aguilar, and Fisher. According to Defendants, specific jurisdiction is lacking because Plaintiff does not allege their wrongful conduct relates to a "purposeful contact" with Texas.[7] That makes no sense. The Complaint alleges each of these Supervisor Defendants is personally responsible for causing a tortious injury *within Texas*. It is hornbook law that such allegations are sufficient to establish personal jurisdiction. *McFadin v. Gerber*, 587 F.3d 753, 761 (5th Cir. 2009) ("an act outside the state that causes tortious injury within the state…amounts to sufficient minimum contacts with the state" to establish personal jurisdiction).

Defendants' only argument is that the Plaintiff's allegation that the shooting incident occurred in Texas "does not even remotely involve any purposeful contact" by these Supervisors Defendants. Def. Br. at 14. But this simply ignores nearly every allegation establishing the Supervisors' Defendants wrongful conduct. Their wrongful conduct is not the shooting, but the training of the shooters. It is their *failure to train* border patrol agents *in Texas,* which caused

[7] For the standard governing personal jurisdiction, see *Casares v. Agri-Placements Int'l, Inc.*, 12 F. Supp. 3d 956, 965 (S.D. Tex. 2014) (Tagle, J.); *Vanderbilt Mortg. and Fin., Inc. v. Flores*, 692 F.3d 358, 375 (5th Cir. 2012). Defendants do not contest that the exercise of personal jurisdiction in this forum would be fair and reasonable.

Lozano's death *in Texas*. *See, e.g.,* Compl ¶¶ 37, 39, 40. By sufficiently alleging Supervisor Defendants' personal responsibility in failing to train Texas border patrol agents, it necessarily follows that Supervisor Defendants have sufficient contacts with Texas to establish personal jurisdiction. *See, e.g., Arar v. Ashcroft*, 532 F.3d 157, 174-75 (2d Cir. 2008) (personal jurisdiction exists over supervisors because complaint sufficiently alleged supervisors' personal responsibility over policy that led to subordinates' unlawful forum-related actions), *vacated and superseded on reh'g en banc on other grounds*, 585 F.3d 559, 563 (2d Cir. 2009); *Iqbal v. Hasty*, 490 F.3d 143, 177 (2d Cir. 2007) (in a *Bivens* action against supervisor, personal involvement and personal jurisdiction are so intertwined that plaintiffs' pleading of facts establishing personal involvement "suffices to establish personal jurisdiction"), *rev'd and remanded on other grounds sub nom Ashcroft v. Iqbal*, 556 U.S. 662 (2009).

Defendants cannot avoid this result by arguing that their failures to train were not acts directed at Texas "purposely." Plaintiff does not allege their failure to train impacted Texas by accident; it was a purposeful act. Comp. ¶¶ 37-40, 45. Indeed, it is uncontested that the Complaint establishes a deliberate failure to train by alleging these supervisors consistently condoned border patrol agents' actions pursuant to the Vehicle Policy "all along the southern border," the effects of which caused agents Tejeda and Cabello—Texas border patrol agents—to unlawfully kill Lozano pursuant to the Vehicle Policy. Compl. ¶¶ 35, 37. Personal jurisdiction is established because the Supervisors' wrongful conduct had the highly likely—and thus purposeful—consequence of causing injury in Texas. *See McFadin*, 587 F.3d at 761 ("[e]ven an act done outside the state that has consequences or effects within the state will suffice as a basis for jurisdiction in a suit arising from those consequences if the effects are seriously harmful and were *intended or highly likely to follow* from the nonresident defendant's conduct."") (quoting

Guidry v. United States Tobacco Co., 188 F.3d 619, 628 (5th Cir. 1999)) (emphasis added); *see, e.g., Argueta v. U.S. Immigration & Customs Enforcement*, 08-cv-01652, 2009 WL 1307236 (D.N.J. May 7, 2009) (condoning pattern of unlawful Fourth Amendment violations in forum state sufficient to establish personal jurisdiction).

V. LAW OF NATION CLAIMS

The Alien Tort Statute ("ATS") empowers district courts to hear "any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350. In *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), the Supreme Court held that "federal courts can recognize a 'limited' number of international common law torts that fall within the rubric of the ATS"—what plaintiffs refer to here as *jus cogens* norms. Plaintiff alleges Defendants' conduct violates the *jus cogens* norm against extrajudicial killing, which Defendants do not dispute for purposes of this motion. Instead, Defendants argue that a *jus cogens* claim may never be asserted against the United States because it has not provided its consent to suit via a waiver of sovereign immunity. Defendants then argue that no official may be sued under the ATS as well, because the Westfall Act provides absolute immunity to officials acting within the scope of their employment. The Westfall Act then substitutes the United States as a party defendant, which again can assert the defense of sovereign immunity.

This perfunctory analysis ignores the essential nature of *jus cogens* norms: they bind the sovereign regardless of its consent. Put another way, the United States *has no sovereign immunity to waive* because a violation of a *jus cogens* norm, by its definition, cannot be an act authorized by a sovereign. Consequently, courts have consistently held that sovereign immunity is not available against a *jus cogens* claim.

A. Congress Provided for Tort Claims for Violating Norms that Bind the Sovereign.

The ATS provides for tort claims against sovereigns to enforce international norms whose defining characteristic is that they bind the sovereign regardless of its consent. To permit a defense of sovereign immunity where Congress has authorized a tort claim to enforce a sovereign-binding norm would literally be a contradiction in terms. Sovereign immunity plainly is not available against *jus cogens* claims prosecuted against the sovereign in its own courts.

The courts have consistently so held. For example, *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 715 (9th Cir. 1992), considered an ATS claim that the government of Argentina violated the jus cogens norm against torture. The Court held:

> [*J*]*us cogens* embraces customary laws considered binding on all nations, and is derived from values taken to be fundamental by the international community, rather than from the fortuitous or self-interested choices of nations. Whereas customary international law derives solely from the consent of states, the fundamental and universal norms constituting *jus cogens* transcend such consent, as exemplified by the theories underlying the judgments of the Nuremberg tribunals following World War II.

965 F.2d at 715 (citations and quotations omitted). The Ninth Circuit concluded that a state that violates a *jus cogens* norm is not entitled to sovereign immunity:

> International law does not recognize an act that violates *jus cogens* as a sovereign act. A state's violation of the *jus cogens* norm prohibiting official torture *therefore would not be entitled to the immunity afforded by international law*.

Id. at 718 (emphasis added);[8] *see also Sarei v. Rio Tinto, PLC*, 671 F.3d 736, 757 (9th Cir. 2011) (en banc) (rejecting defendants' assertions that they were immune from ATS claims under the Act

[8] *Siderman* concluded that with respect to *foreign* sovereign immunity—immunity of foreign states or officials in U.S. courts—Congress had occupied the field through the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1330, 1602–11. 965 F.2d at 718-19. Congress has not enacted a similar comprehensive scheme regulating U.S. sovereign immunity for international law

of State doctrine because a "violation of a *jus cogens* norm is not a sovereign act.") *judgment vacated on other grounds,* 133 S. Ct. 1995 (2013); *In re Estate of Ferdinand E. Marcos Human Rights Litig.,* 978 F.2d 493, 502 (9th Cir. 1992) (although defendant "controlled the military intelligence personnel" and "was acting under color of the martial law … her actions were not those of the Republic of the Philippines for purposes of sovereign immunity").

The Fourth Circuit reached the same conclusion in an unequivocal, concise, and determinative holding: "*jus cogens* violations are not legitimate official acts and therefore do not merit foreign official immunity." *Yousuf v. Samantar*, 699 F.3d 763, 777 (4th Cir. 2012). *Yousuf* reasoned that "as a matter of international and domestic law, *jus cogens* violations are, by definition, acts that are not officially authorized by the Sovereign." *Id*. at 776; *see also Enahoro v. Abubakar*, 408 F.3d 877, 893 (7th Cir. 2005) (Cudahy, J., dissenting in part) ("[O]fficials receive no immunity for acts that violate international *jus cogens* human rights norms (which by definition are not legally authorized acts).").

These cases hold that the force of *jus cogens* norms is so strong that it withholds sovereign immunity from governments and officials of *foreign nations* for jus cogens claims prosecuted *in U.S. courts*. That is—jus cogens norms so clearly deprive conduct of its sovereign character as to permit another sovereign to sit in judgment of that conduct in a foreign court. Those cases *a fortiori* deprive the United States of sovereign immunity for jus cogens norms prosecuted in our own courts. *See Sosa*, 542 U.S. at 727-28 (it is more consequential for federal courts to enforce norms against foreign sovereigns and officials than against the United States and its officials).

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violations prosecuted in our own courts. Having not been displaced by any such statutory framework, the general rule established by *Siderman* applies.

Indeed, four judges in the Fifth Circuit's recent en banc decision in *Hernandez* agree. *Hernandez v. United States*, 785 F.3d 117 (5th Cir. 2015) (en banc) (Haynes, J. joined by Southwick J. and Higginson, J. concurring; Graves, Jr., J. concurring). Judge Haynes's concurrence found that "it seems logical that cognizable *jus cogens* norms may preclude a sovereign immunity defense"—even for the United States and its officials. In such circumstances where "acts cannot be authorized by the sovereign, then a country would lack any such immunity to waive or would not be permitted to substitute for one of its officers." *Id.* at 140.

B. Defendants Offer No Viable Argument to Justify Immunity for Both the United States and Its Officials.

Defendants' arguments urging dismissal based on immunity cannot be squared with the applicable international standards of law.

As to the United States, Defendants argue that *Hernandez v. United States*, 757 F.3d 249, 258-59 (5th Cir. 2014), *aff'd in part and vacated in part*, 785 F.3d 117, 119 (5th Cir. 2015) (en banc), forecloses these arguments, stating that that the Fifth Circuit held nothing in the ATS indicates Congress intended to waive the United States' sovereign immunity. But that misses the point. Plaintiff's argument is that there is no sovereign immunity to waive for *jus cogens* violations. *Hernandez* therefore did not address the issue Plaintiff raises here. Indeed, Judge Haynes's en banc concurrence specifically noted that "neither the reinstated panel nor the en banc opinion addresses" the argument that "sovereign immunity may be unavailable for a category of *jus cogens* torts…." *Hernandez*, 785 F.3d at 142 (Haynes, J., concurring). The opinion then concludes that Plaintiff's argument still has "force." *Id.*

As to the officials, Defendants argue that the claims against them are barred because the Westfall Act provides them absolute immunity (with only two exceptions). Def. Br. at 16-17. But the Westfall Act applies only when either the Defendants petition or the Attorney General

certifies to the Court that the employees were acting in the scope of their official federal employment. *See supra*, Part II. Neither has yet occurred.

Defendants cannot avoid the certification requirement by arguing that "it is undisputed that the individually-named Defendants were acting within the scope of employment." Def. Br. at 16. Plaintiffs vigorously dispute that Defendants were acting within the scope of employment *so as to confer immunity under the Westfall Act*. Insofar as Plaintiff pleads that Defendants were acting in the scope of their employment, Plaintiff merely contends that defendants were acting *under color of law,* **not** that defendants had *actual authority to commit a jus cogens violation*. *See* Restatement (Third) of Foreign Relations Law §§ 702(c), 711(a) (1987). The complaint plainly alleges that *jus cogens* violations are ultra vires. Compl. ¶ ¶61-65.

It is vitally important that the Court insist on the proper procedure here. If and when the individual Defendants seek under the Westfall Act to substitute the United States as the named defendant in the ATS claim, Plaintiff will vigorously contest that substitution. *Gutierrez de Martinez v. Lamagno*, 515 U.S. 417, 434 (1995).By definition, no sovereign does *or can* properly assert that its employees had authority to commit a *jus cogens* violation. "Indeed, given Plaintiff's argument that *jus cogens* violations are not legitimate official acts, Plaintiff[has] a strong basis for raising such a challenge." *Hernandez*, 785 F.3d at 142 (Haynes, J. concurring). But because no certification has been made, the question of whether immunity is conferred under the Westfall Act is not ripe for determination.

CONCLUSION

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

Dated: November 16, 2015

/s/ Robert C. Hilliard
Robert C. Hilliard
State Bar No. 09677700
Federal ID No. 5912
HILLIARD MUNOZ GONZALES, LLP
719. S. Shoreline Blvd. Ste. 500
Corpus Christi, Texas 78401
Telephone: (361) 882-1612
Fax: (361) 882-3015
Email: bobh@hmglawfirm.com

ATTORNEY-IN-CHARGE FOR PLAINTIFF

OF COUNSEL:

Catherine D. Tobin
State Bar No. 24013642
Federal ID No. 25316
Email: catherine@hmglawfirm.com

Rudy Gonzales, Jr.
State Bar No. 08121700
Federal ID No. 1896
rudy@hmglawfirm.com

Marion M. Reilly
State Bar No. 24079195
Federal ID No. 1357591
marion@hmglawfirm.com

HILLIARD MUNOZ GONZALES, LLP
719. S. Shoreline Blvd. Ste. 500
Corpus Christi, Texas 78401
Telephone: (361) 882-1612
Fax: (361) 882-3015

Steve D. Shadowen (admitted pro hac vice)
Pennsylvania State Bar No. 41953
steve@hilliardshadowenlaw.com

Matthew C. Weiner (admitted pro hac vice)
Pennsylvania State Bar No. 314453
matt@hilliardshadowenlaw.com

HILLIARD & SHADOWEN LLP
39 W. Main Street
Mechanicsburg, PA 17055
Telephone: (855) 344-3298
Facsimile: (512) 233-2824

CERTIFICATE OF SERVICE

I, Robert C. Hilliard, hereby certify that I caused a copy of the foregoing Plaintiff's Opposition to Defendants' Motion to Dismiss to be filed electronically via the Court's electronic filing system. Those attorneys who are registered with the Court's electronic filing system may access this filing through the Court's system, and notice of this filing will be sent to these parties by operation of the Court's electronic filing system.

Dated: November 16, 2015

Respectfully Submitted,

/s/ Robert C. Hilliard
Robert C. Hilliard