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 REPLY MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR RECONSIDERATION

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules

INTRODUCTION

Plaintiff, Maria Fernanda Rico Andrade, submits this reply in response to Defendants' opposition, ECF No. 33 ("D. Br."), to Andrade's motion for reconsideration, ECF No. 32-1 ("P. Br."). Reconsideration is warranted here to address to crucial arguments that were apparently overlooked by the Court, and nothing in Defendants' opposition remotely suggests otherwise.

First, regarding dismissal of Andrade's Federal Tort Claims Act ("FTCA") and *Bivens*[1] claims against the Supervisors, Defendants only argue that reconsideration is unwarranted because Andrade never pleaded that she diligently investigated her claim within the limitations period. The law does not require such an investigation from a plaintiff who, because of defendants' active concealment, had no reason to *suspect* defendants' causal link to the injury. Indeed, this Court never required from Andrade allegations of diligence, dismissing the claims instead for failing to plead concealment. But there is now no dispute that the Complaint *does* contain allegations of concealment and that the Court never considered them. Defendants' failure to contest this only further confirms that reconsideration is appropriate.

Second, Defendants oppose reconsideration regarding the Alien Tort Statute ("ATS") claims against the Agent and Supervisor defendants by re-hashing grounds already refuted in Andrade's opening brief. Defendants claim that *Hernandez v. United States*, 757 F.3d 249, 259 (5th Cir. 2014), renders reconsideration futile, but that case is not dispositive over challenges to scope-of-employment certifications. Furthermore, relying on allegations concerning the *FTCA claims*, Defendants continue to argue that Andrade conceded scope of employment for the *ATS claims*. But Defendants ignore the law that plainly permits Andrade to plead in the alternative. They also ignore Andrade's Complaint and opposition, which make clear that all of the conduct

---

[1] *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971).

giving rise to her ATS claims were *outside* the scope of employment. Andrade's opposition further makes clear that any scope-of-employment certification would be vigorously contested. It would thus be manifestly unjust to permit the scope-of-employment certification—which Defendants waited until their reply brief to submit—to go unchallenged.

Andrade's motion for reconsideration should therefore be granted.

ARGUMENT

I. Defendants' Opposition Confirms That Andrade's Unconsidered Allegations Establish the Supervisors' Affirmative Concealment, Warranting Tolling.

Defendants' opposition does not dispute that:

- Andrade plausibly alleged that the Supervisors affirmatively concealed the Vehicle Policy, and thus their involvement in her son's death, until after the limitations period expired. P. Br. at 5-6, 8 (citing Compl. ¶¶ 69-70, 71a-i, 72-73).
- Andrade urged the Court to deny Defendants' motion to dismiss based on those plausible allegations of concealment. P. Br. at 7.
- In granting Defendants' motion to dismiss, the Court overlooked that argument and only considered different allegations regarding Tomsheck's admissions. P. Br. at 6-7; *see also* Order, at 19 ("In support of the fraudulent concealment argument, Andrade cites Tomsheck's alleged admissions that CBP officials actively concealed Border Patrol's unlawful practices. Dkt. No. 18 at 16 (citing Compl. ¶ 42). It is Andrade's position that these allegations are enough to defeat the statute of limitations defense….").

Defendants instead argue that, even with the unconsidered allegations of concealment (Compl. ¶¶ 69-70, 71a-i, 72-73), Andrade cannot overcome the statute of limitations because, according to Defendants, she did not diligently investigate her claims against the Supervisors within two years of her son's death on November 3, 2011. D. Br. at 3 ("Plaintiff had notice of her son's death and the cause of death (the shooting), but failed to investigate, consult an attorney, or file a claim within two years of November 3, 2011."); D. Br. at 4 ("[T]he Court correctly concluded[] Andrade's claims were not diligently pursued.…"). That misses the point. The Supervisors' concealment prevented any reasonable plaintiff, including Andrade, from even

suspecting their involvement. P. Br. at 8-9. Andrade cannot be faulted for failing to investigate a claim that, because of Defendants' concealment, no reasonable person would have suspected to exist. *Id.*

Notably, the defendant in the *Piotrowski* made a similar argument as Defendants here, claiming the statute of limitations cannot be tolled because the plaintiff never investigated into the defendant's involvement following her injury. *Piotrowski v. City of Houston*, 51 F.3d 512, 516-17 (5th Cir. 1995) ("*Piotrowski I"*) ("The City argues that [plaintiff] … should have inquired into the actions of the police officers at that time" of the shooting); *Piotrowski v. City of Houston*, 237 F.3d 567, 576 (5th Cir. 2001) ("*Piotrowski II"*) (same).

The Fifth Circuit rejected that argument, making clear that the inquiry is focused not on the *plaintiff*'s investigation, but on *defendant's concealment* and whether a *diligent investigation conducted by a reasonable person* would have discovered defendant's involvement earlier. *Piotrowski I*, 51 F.3d at 517 ("When a defendant controls the facts surrounding causation such that a *reasonable person could not obtain the information even with a diligent investigation*, a cause of action accrues, but the statute of limitations is tolled.") (emphasis added) (citing *United States v. Kubrick*, 444 U.S. 111, 122 (1979) (tolling limitations period where "the facts about causation may be in the control of the putative defendant, unavailable to the plaintiff or at least very difficult to obtain."); *Frazier v. Garrison I.S.D.*, 980 F.2d 1514, 1521-22 (5th Cir. 1993) (affirming summary judgment on limitations grounds, stating that: "No facts indicate to us that the alleged discrimination was either hidden or for some reason not apparent to a reasonable prudent person," and contrasting to scenario in which defendant's actions would not lead a reasonably prudent person to suspect critical facts and investigate further)).

The *Piotrowski* plaintiff was not required to have actually conducted an investigation because it would have been futile. The defendant had taken "active steps to suppress any information concerning" its involvement. *Id*. And only after later revelations could the plaintiff even *suspect* defendant's connection to her injury, and so the statute of limitations was tolled accordingly. *Piotrowski II*, 237 F.3d at 577 (noting that only after later revelations "could [plaintiff] suspect that the City, as opposed to individual officers" were linked to plaintiff's injury).

Defendants wrongly suggest that the Court dismissed Andrade's claim for failing to exercise diligence. *See* D. Br. at 4. The Court did no such thing. It held Andrade to the correct standard set forth in *Piotrowski* and simply held *Piotrowski* distinguishable on the belief that Andrade never pleaded the Supervisors' affirmative concealment of the Vehicle Policy. P. Br. at 7 (citing Order, at 22).

As Andrade explained, she *does* plead the Supervisors' affirmative concealment, just like in *Piotrowski*. P. Br. at 8-9. Tellingly, Defendants fail to cite, let alone distinguish, *Piotrowski*—despite Andrade's extensive discussion of it. *Id.* This silence only makes Andrade's motion for reconsideration even more compelling.

II. Defendants Fail to Explain Why Andrade's Challenge to Their Belated Scope-of-Employment Certification Should Go Ignored.

Defendants do not dispute that *Gutierrez de Martinez v. Lamagno*, 515 U.S. 417, 420 (1995), requires district courts to consider challenges to an Attorney General's scope-of-employment certification before conferring absolute immunity. P. Br. at 9-10. Defendants nevertheless argue that Andrade's challenge to their scope-of-employment certification should be ignored, claiming both that *Hernandez v. United States*, 757 F.3d 249, 259 (5th Cir. 2014),

renders any challenge futile and that Andrade otherwise conceded that the Agents and Supervisors were acting within the scope of their employment. D. Br. at 4-5. As Andrade already explained, neither of these points has merit.

First, *Hernandez* only ruled on an ATS claim against the United States, not against the individual employees. *Hernandez*, 757 F.3d at 258 (noting the ATS claim was "against the United States"). The plaintiffs in *Hernandez* never challenged the scope-of-employment certification, and so the issue before the court was whether *the United States* was shielded from sovereign immunity *after* it substituted itself for a federal employee. *Hernandez v. United States*, 785 F.3d 117, 142 (5th Cir. 2015) (en banc) (Haynes, J., concurring); P. Br. at 11. The court never addressed the issue pressed here: whether the United States may properly substitute itself for an employee alleged to have violated a *jus cogens* norm. P. Br. at 11. Indeed, Judge Haynes's *en banc* concurring opinion specially noted that the decision does not reach scope-of-employment challenges. *Hernandez*, 785 F.3d at 142 (Haynes, J., concurring) (concluding that such an argument still has "force."). *Hernandez* is thus not dispositive and does not render Andrade's reconsideration futile.

Second, nothing in the record comes remotely close to suggesting that Andrade conceded Defendants were acting within the scope of their employment as part of her *ATS claims*. Defendants simply cite additional allegations relating to Andrade's *FTCA claims*, which, by definition, are claims against federal employees acting within the scope of employment. D. Br. at 4. But Defendants completely ignore that Andrade also pleaded that the *jus cogens* violations giving rise to Andrade's ATS claims were committed *outside the scope of employment*. P. Br. at 10 (citing Compl. ¶¶ 61-65). Defendants also ignore the authority that plainly permits a plaintiff to plead alternative claims. P. Br. at 10 (citing Fed. R. Civ. P. 8 (d)(3); *Leal v. McHugh*, 731

F.3d 405, 414 (5th Cir. 2013); *Vasquez v. Bridgestone/Firestone, Inc.*, 325 F.3d 665, 674 (5th Cir. 2003)).

Remarkably, Defendants argue that Andrade never challenged the scope-of-employment certification. D. Br. at 4-5. But Defendants waited until their *reply brief* to file the certification. *See* ECF No. 21-1. Nevertheless, Andrade's opposition to Defendants' motion to dismiss could not have been more emphatic about vigorously contesting the validity of a certification. P. Br. at 11; *see also* ECF No. 18, at 25.

It would therefore be a manifest error of law and be manifestly unjust to ignore Andrade's specific, timely, and meritorious challenge to the scope-of-employment certification.

CONCLUSION

For the foregoing reasons, Andrade respectfully requests that the Court grant her motion for reconsideration.

Dated: September 13, 2017

/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
2407 S. Congress Ave., Suite E 122
Austin, TX 78704
Telephone: (855) 344-3298
Facsimile: (512) 233-2824