

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION**

BLANCA GOMEZ ARELLANO	§	
Individually and as Representative of the	§	
Estate of Martin Gomez Arellano	§	
Plaintiff,	§	
	§	
v.	§	Civil Action No. 2:19-cv-00141
	§	
UNITED STATES OF AMERICA	§	
Defendant.	§	

MOTION TO DISMISS ORIGINAL COMPLAINT

COMES NOW, Defendant United States of America (“United States”), by and through Ryan K. Patrick, United States Attorney for the Southern District of Texas, and moves for dismissal of original complaint in the above-captioned lawsuit.

I. SUMMARY OF THE ARGUMENT

This motion to dismiss addresses claims against the United States by Blanca Gomez Arellano, individually and as representative of the estate of Martin Gomez Arellano (hereinafter “Plaintiff”). Plaintiff’s lawsuit, filed under the Federal Tort Claims Act (“FTCA”), arises from the death of an undocumented alien, Martin Gomez Arellano, who was found deceased by Border Patrol Agents in a hidden compartment of a tractor-trailer at the Falfurrias Border Patrol Checkpoint two days after a failed alien smuggling attempt. The claims against the United States essentially allege that had the Border Patrol agents more carefully inspected the tractor-trailer, the death of Martin Gomez Arellano could have been prevented.

Plaintiff’s claims should be dismissed as jurisdictionally barred by 28 U.S.C. § 2680(c)’s “customs duty exception,” which bars liability for “[a]ny claim arising in respect of . . . the

detention of any goods, merchandise, or other property by any officer of customs or excise or any other law enforcement officer.” 28 U.S.C. § 2680(c).

II. RELATED CASE

There is a related civil lawsuit in the Corpus Christi Division under Case No. 2:18-cv-00446. In that case, FTCA claims stemming from the same incident in this case have been filed against the United States by Veronica Ramirez, individually, and as representative of the estate of Martin Gomez Arellano, and as next friend of Axel Adrian Gomez, a minor, as well by a third-party petitioner, Juan Enrique Escobedo Moreno. The United States has moved to dismiss the claims in that case (for the same reason stated in this motion to dismiss), and the motions remain pending with the Court. Consistent with Local Rule 7.6, the United States will be filing a motion to consolidate the instant case with the matter in Case No. 2:18-cv-00446.

III. STATEMENT OF FACTS¹ AND STAGE OF PROCEEDING

Plaintiff filed this FTCA complaint on May 13, 2019, following the denial of her administrative claim by U.S Customs and Border Protection (“CBP”) on November 28, 2018. (Compl. ¶ 6.)

In her complaint, Plaintiff alleges that on or about October 3, 2017, CBP stopped a tractor-trailer for inspection at the Falfurrias Border Patrol Checkpoint. (Compl. ¶ 10.) CBP employees discovered an undocumented alien, Roberto Rico Duran (“Rico Duran”), inside an interior compartment of the vehicle in the sleeper cabin of the trailer. (Compl. ¶ 11.) CBP employees took the driver and Rico Duran into custody and then impounded the tractor-trailer. (Compl. ¶ 12.) The impounded tractor-trailer was within the custody and control of CBP. (Compl. ¶ 13.) CBP arrested

¹ Because this is a motion to dismiss, it is necessary to “accept[] ‘all well-pleaded facts as true, viewing them in the light most favorable to the plaintiff.’” *Martin K. Eby Constr. Co. v. Dallas Area Rapid Transit*, 369 F.3d 464, 467 (5th Cir. 2004) (quoting *Jones v. Greninger*, 188 F.3d 322, 324 (5th Cir. 1999)).

the driver, Juan Enrique Escobedo Moreno, and issued a criminal complaint charging him for the offense of transportation of an alien for private financial gain, in violation of 8 U.S.C. § 1324. *See United States v. Escobedo-Moreno*, 2:17-cr-00677, Dkt. 1 (S.D. Tex.).²

On or about October 6, 2017, while the tractor-trailer was still within the custody and control of CBP, fluids and a foul odor leaked from the impounded tractor-trailer. (Compl. ¶ 14.) Plaintiff claims that CBP agents contacted the Brooks County Sheriff's Office to investigate and that the Sheriff's Office found what was left of the decomposing body of Martin Gomez Arellano in an interior compartment inside the tractor-trailer. (Compl. ¶ 15-16.)

On or about December 13, 2017, a grand jury returned a superseding indictment charging Escobedo Moreno for two counts of transportation of an alien within the United States, in violation of 8 U.S.C. § 1324. *See Escobedo-Moreno*, 2:17-cr-00677, Dkt. 26. Count one of the indictment pertained to the transportation of Rico Duran while count two pertained to the transportation of Gomez Arellano. *Id.* Count two specifically alleged that Escobedo Moreno's placed Gomez Arellano's life in jeopardy. *Id.*; *see* 8 U.S.C. § 1324(a)(1)(B)(iii) (providing a higher maximum penalty of 20 years of imprisonment for a smuggling offense that "causes serious bodily injury (as defined in section 1365 of title 18) to, or places in jeopardy the life of, any person").

On January 4, 2018, Escobedo-Moreno agreed to plead guilty to the indictment's second count. In exchange for his guilty plea, the Government agreed to recommend full credit for acceptance of responsibility and to dismiss the remaining count of the indictment. *See Escobedo-Moreno*, 2:17-cr-00677, Dkt. 32, 33, 36, 62.

² For additional context, the United States provides limited facts from public records generated in Escobedo Moreno's criminal case. *See, e.g., Norris v. Hearst Trust*, 500 F.3d 454, 461 n.9 (5th Cir. 2007) ("[I]t is clearly proper in deciding a 12(b)(6) motion to take judicial notice of matters of public record."); *Bauer v. Texas*, 341 F.3d 352, 362 n.8 (5th Cir. 2003) (noting that court may take judicial notice of public court records).

On April 10, 2018, Escobedo-Moreno was convicted as charged and sentenced by Senior U.S. District Judge Janis Graham Jack to 210 months of imprisonment. *See Escobedo-Moreno*, 2:17-cr-00677, Dkt. 55. In imposing this sentence, Judge Jack specifically applied the second-degree-murder guideline under U.S.S.G. § 2A1.2 finding that his recklessness and disregard for human life were extreme. *See Escobedo-Moreno*, 2:17-cr-00677, Dkt. 63.³

In Plaintiff's complaint, she claims that Border Patrol Agents "negligently failed to conduct a search, inspection and inventory of the tractor-trailer and its closed containers, as required by the governing CBP's Inspector Field Manual."⁴ (Compl. ¶ 22.) As an alternative allegation, Plaintiff alleges that "if CBP agents were not negligent and did search and inventory every compartment inside the tractor-trailer, then CBP agents intentionally, knowingly or recklessly left Mr. Gomez Arellano trapped in the compartment." (Compl. ¶ 34.)

Thus, pursuant to the FTCA, Plaintiff brings claims against the United States for negligence, gross negligence, assault and battery, false imprisonment, and intentional infliction of emotional distress. All of these claims arise from the search and detention of the tractor-trailer. (Compl. ¶ 35-86.)

IV. STATEMENT OF THE ISSUES

1. Whether the Federal Tort Claims Act's customs-duty exception, 28 U.S.C. § 2680(c), jurisdictionally bars Plaintiff's complaint against the United States.

³ Escobedo Moreno has appealed his judgment to the U.S. Court of Appeals for the Fifth Circuit. *See United States v. Escobedo-Moreno*, 18-40375 (5th Cir.). This appeal remains pending. On appeal, Escobedo Moreno's principal argument is that the Court erred in imposing the second-degree-murder guideline (U.S.S.G. § 2A1.2) instead of the involuntary manslaughter guideline (U.S.S.G. § 2A1.4).

⁴ Although it is not relevant to the disposition of this motion, the United States notes that referenced policy, "Inspector Field Manual," is a now-defunct policy that previously applied to CBP's Office of Field Operations (OFO) (i.e., the ports of entry) and not the U.S. Border Patrol. Indeed, it well settled that there are different legal standards for searches conducted at an interior Border Patrol checkpoint as opposed to a port of entry. *See, e.g., United States v. Jackson*, 825 F.2d 853 (5th Cir. 1987) (interior checkpoint is not the functional equivalent of the border and does not fall within the "border search" exception to the Fourth Amendment).

V. APPLICABLE LAW AND ARGUMENT

A. Rule 12(b)(1) Standard.

Federal courts are courts of limited jurisdiction. *Howery v. Allstate Ins. Co.*, 243 F.3d 912, 916 (5th Cir. 2001) *cert. denied*, 534 U.S. 993 (2001). A party may move for dismissal based on lack of subject matter jurisdiction pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure. FED. R. CIV. P. 12(b)(1); *see also* Fed. R. Civ. P. 12(h)(3) (“If the court determines at any time that it lacks subject matter jurisdiction, the court must dismiss the action.”). The burden of proof for a Rule 12(b)(1) motion is on the party asserting jurisdiction. *Ramming v. U.S.*, 281 F.3d 158, 161 (5th Cir. 2001). The court may find that subject matter jurisdiction is lacking based on “(1) the complaint alone; (2) the complaint supplemented by undisputed facts evidenced in the record; or (3) the complaint supplemented by undisputed facts plus the court’s resolution of disputed facts.” *Willoughby v. United States ex rel. U.S. Dep’t of the Army*, 730 F.3d 476, 479 (5th Cir. 2013).

B. Federal Tort Claims Act.

The United States is immune from suit except in the manner and to the degree that sovereign immunity has been waived. *FDIC v. Meyer*, 510 U.S. 471, 477 (1994); *In re FEMA Trailer Formaldehyde Prods. Liab. Litig.*, 668 F.3d 281, 287 (5th Cir. 2012). The FTCA, 28 U.S.C. § 2671 et seq., provides a limited waiver of immunity from common law torts. *United States v. S.A. Empresa de Viacao Aerea Rio Grandense*, 467 U.S. 797, 808 (1984). Under the FTCA, the United States may be liable for personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable in accordance with the law of the place where the act or omission occurred. 28 U.S.C. §§ 1346(b)(1),

2674; *Castro v. United States*, 560 F.3d 381, 386 (5th Cir. 2009). As with all waivers of sovereign immunity, the waiver is jurisdictional and must be strictly construed in favor of the Government. *In re FEMA*, 668 F.3d 281, 287 (5th Cir. 2011).

C. The Customs Duty Exception Jurisdictionally Bars Plaintiff's Claims Against the United States.

The FTCA “contains numerous exceptions to the general waiver of immunity, among them the customs-duty exception found in [28 U.S.C.] § 2680(c).” *Jeanmarie v. United States*, 242 F.3d 600, 602 (5th Cir. 2001). As written, the customs-duty exception bars liability for “[a]ny claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods, merchandise, or other property by any officer of customs or excise or any other law enforcement officer.” 28 U.S.C. § 2680(c).

In *Kosak v. United States*, 465 U.S. 848, 854 (1984), the United States Supreme Court determined that 28 U.S.C. § 2680(c) includes within its scope any claim “arising out of” the detention of goods, and includes a claim resulting from negligent handling or storage of detained property.” This includes any claim related “to the detention of imported goods in appraisers’ warehouse or customs houses, as well as seizures by law enforcement officers, internal revenue officers, and the like.” *Id.* at 856 (internal quotation marks omitted). For instance, in *Ali v. Fed. Bureau of Prisons*, 552 U.S. 214, 216, 227-28 (2008), the United States Supreme Court held that claims against corrections officers who are accused of mishandling an inmate’s property fall within the FTCA’s customs-duty exception to the United States’ waiver of sovereign immunity. Likewise, in *Chapa v. U.S. Dep’t of Justice*, 339 F.3d 388, 390 (5th Cir. 2003) (per curiam), the Fifth Circuit held that the process of inspecting and inventorying property constitutes a detention under 28 U.S.C. § 2680(c). Similarly, the courts have interpreted 28 U.S.C. § 2680(c) broadly to encompass any activity “remotely related to [an officer’s] official duties.” *Capozzoli v. Tracey*, 663 F.2d 654,

658 (5th Cir. 1981). Accordingly, it now is well established that 28 U.S.C. § 2680(c) “forecloses lawsuits against the United States for the unlawful detention of property by ‘any, not just ‘some,’ law enforcement officers.” *Ali*, 552 U.S. at 228 (emphasis added). Moreover, the Fifth Circuit has repeatedly held that 28 U.S.C. § 2680(c) applies to intentional torts such as assault and battery. *See Jeanmarie*, 242 F.3d at 604 (“[N]otwithstanding the fact that intentional tort claims arising out of arrests are not barred by § 2680(c), and are in fact permitted by § 2680(h), such claims *are barred* by the [detention-of-goods] exception if the alleged torts arose from the inspection, seizure, or detention of goods by a [law enforcement officer] because such claims involve conduct covered by § 2680(c.)”); *see also Davila v. United States*, 713 F.3d 248, 256 (5th Cir. 2013) (“[E]ven intentional torts committed by law enforcement officers are exempt from FTCA suits when such torts were committed during circumstances that would warrant a detention-of-goods exception.”).

In this case, the 28 U.S.C. § 2680(c) framework clearly applies to preclude liability against the United States. Plaintiff’s complaint alleges negligence and intentional torts committed by U.S. Border Patrol Agents when the agents at the Falfurrias Border Patrol Checkpoint detained Escobedo-Moreno’s tractor-trailer following its seizure in connection with his arrest for alien smuggling. *See Jeanmarie*, 242 F.3d at 604 (noting that “detention” encompasses the “inspection, seizure, or detention of goods.”). Here, is it undisputed that under 8 U.S.C. § 1324(b), U.S. Border Patrol had authority to seize and detain the tractor-trailer following discovery of an illegal alien in the vehicle. *See* 8 U.S.C. § 1324(b) (“Any conveyance, including any vessel, vehicle, or aircraft, that has been or is being used in the commission of a violation of [§ 1324](a), the gross proceeds of such violation, and any property traceable to such conveyance or proceeds, shall be seized and subject to forfeiture.”). This type of seizure has been held to squarely fall within the custody-duty exception. *See Ysasi v. Rivkind*, 856 F.2d 1520, 1525 (Fed. Cir. 1988) (holding that “seizures

pursuant to [8 U.S.C.] § 1324(b)(1) are ‘sufficiently akin to the functions carried out by Customs officials to place the agents’ conduct within the scope of section 2680(c)’”); *Halverson v. United States*, 972 F.2d 654, 656 (5th Cir. 1992) (holding that § 2680(c) precluded a claim that Border Patrol Agents failed to follow proper inventory search procedures in connection with a search at a checkpoint). Moreover, because 28 U.S.C. § 2680(c) applies to “any claim ‘arising out of’ the detention of goods,” *Kosak*, 465 U.S. at 854, including claims involving “assault and battery and for false arrest and imprisonment,” *Jeanmarie*, 242 F.3d at 604, there is little question that the alleged tortious conduct in this case is covered by the customs-duty exception, *Halverson*, 972 F.2d at 656 (“The Supreme Court has interpreted § 2680(c) to cover not only damages occurring in the act of detention itself, but also those flowing from the detention, such as the negligent storing of antiques or art objects.”); *Metz v. United States*, 788 F.2d 1528, 1533 (11th Cir. 1986) (recognizing that section 2680(c) “sweeps within the exception all injuries associated in any way with the detention of goods.”) (internal quotation marks omitted).

The United States recognizes that in *Davila v. United States*, 713 F.3d 248 (5th Cir. 2013), the Fifth Circuit held that tortious conduct that occurs well after the completion of the search or detention of vehicle is not protected by the customs-duty exception. *See id.* at 257. In that case,

[the plaintiff was] searched at the primary inspection checkpoint and for two additional hours while the Border Patrol agents waited for a K-9 unit to be brought in from a different checkpoint for additional screening. He [did] not allege that the Border Patrol agents committed any intentional tort during this time. After the two hours lapsed, [plaintiff] left in the vehicle, leaving [plaintiff’s son] and [girlfriend] behind at the inspection site, and was pursued and caught by Brewster County officers. The intentional tort against [plaintiff] occurred only after [his son] had left the checkpoint in the vehicle. The false imprisonment claim arose out of the officers’ arrest and detention of [plaintiff] in a county jail, located away from the checkpoint. No contraband had been found in the vehicle, the search had long since ended, and [his son] had been caught by the time that [plaintiff] was arrested and detained.

Id. at 257.

By contrast, in the present case Plaintiff alleges that the tortious conduct arose directly from the seizure and detention of the tractor-trailer. (Compl. ¶ 38) (“CBP officers breached the duty they owed to Mr. Gomez Arellano when they violated a mandatory, non-discretionary duty by failing to thoroughly inspect the impounded tractor-trailer as mandated by agency policy.”); *id.* at ¶ 48 (“Mr. Gomez Arellano’s injuries and death were caused by the grossly negligent or wrongful acts or omissions of CBP employees when they failed to inspect the tractor-trailer as mandated by agency policy.”); *id.* at ¶ 58 (alleging for the assault claim that Border Patrol Agents “intentionally, knowingly, or recklessly failed to abide by a nondiscretionary CBP mandate by not searching the inside compartments of the impounded tractor-trailer”); *id.* at ¶ 67 (alleging for the false imprisonment claim that the Border Patrol Agents “who searched and impounded the tractor-trailer left Mr. Gomez Arellano inside the container of the tractor-trailer without his consent.”); *id.* at ¶ 75 (alleging for the intentional infliction of emotional distress claim that “CBP employees acted intentionally or recklessly by refusing to abide by CBP manual mandates to search and inventory every compartment in the tractor-trailer.”)).

Indeed, it is undisputed in this case that the detention of the tractor-trailer was ongoing when the alleged tortious conduct arose. (Compl. ¶ 13) *See Davila*, 713 F.3d at 256 (“We [have] held that [a] claim [is] barred by the detention-of-goods exception because it occurred while the search was ongoing.” (citing *Jeanmarie*, 242 F.3d at 604)); *Mireles v. United States Customs & Border Prot.*, No. 1:13-CV-00197, 2014 WL 12770213, at *7 (S.D. Tex. Sept. 11, 2014) (Morgan, J.), *report and rec. adopted*, 2014 WL 12770112 (S.D. Tex. Nov. 10, 2014) (Hanan, J.) (“[I]f the detention of the vehicle is ongoing, then the actions stemming from that detention are covered under § 2680(c)—as in *Jeanmarie*.”). Therefore, the customs-duty exception clearly applies to bar consideration of the tortious conduct alleged in Plaintiff’s complaint.

VI. CONCLUSION AND PRAYER

For the foregoing reasons, Defendant United States respectfully requests that the Court dismiss Plaintiff's complaint against the United States.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on May 31, 2019, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which sends notice of electronic filing to all record counsel.

s/ Lance Duke
Lance Duke
Assistant United States Attorney