The Honorable Benjamin H. Settle

UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

KAREN ESTEFFANY MADRIGALES VASQUEZ; JONATHAN HIDELBERTO ZETINO AGUIRRE; S.Z.M.; and T.Z.M.,

Plaintiffs,

v.

UNITED STATES OF AMERICA,

Defendant.

Case No. 3:23-cv-5397-BHS

UNITED STATES' REPLY IN SUPPORT OF MOTION TO DISMISS COMPLAINT

Noted for Consideration:
September 22, 2023

There is little conduct actually at issue here. Plaintiffs explain that they are not attacking the creation of TOPS itself or the government's authority to efficiently handle a historic surge of noncitizens entering the United States without authorization. Also, because Plaintiffs realize they cannot attack discretionary CBP conduct, their opposition relies on a narrower set of conduct than what is alleged in their complaint, which they claim is outside DFE. As shown in the government's opening brief and again below, at best Plaintiffs establish that CBP should have provided meals on a more regular basis at TOPS and bedding to minor-Plaintiffs.

But throughout their arguments, Plaintiffs appear to ignore their admissions that this is not about TOPS and continually impugn TOPS itself as inhumane and a systemic failure. They

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cannot have it both ways. To disparage TOPS generally is to fail on grounds of subject-matter jurisdiction and to acknowledge the limited conduct at issue fails to state a claim upon which the Court can grant relief. Few allegations can possibly survive the narrowing prism of Rule 12(b)(1), and those that might, do not form the basis of any tort.

I. Plaintiffs' allegations do not go beyond CBP as an agency.

Knowing they cannot bring a tort claim against CBP generally and that their claims must be based on some employees' allegedly tortious acts, Plaintiffs point to allegations that they attribute to specific CBP employees, but these examples only exemplify that this case is really about the creation and use of TOPS as a processing center. None of Plaintiffs' specific allegations involve conduct *unique* to them or based on an employee treating them in a specific way. No individual employee denied them mattresses, because TOPS was not designed for sleeping. No employee withheld food from them and not others. No CBP officer told Plaintiffs they could not have available amenities, but gave them to others. In truth, Plaintiffs want to make this case about TOPS itself, and they admit that they believe the failures at TOPS were not because of some wayward official but "a result of systemic non-compliance with the applicable federal policies." Opp., 10.

To demonstrate subject-matter jurisdiction, however, Plaintiffs must allege that CBP employees assigned to TOPS were either negligent or intended to cause Plaintiffs emotional distress. Plaintiffs do not do that because, despite them saying otherwise, their alleged harm stems directly from CBP (as an agency) creating and using TOPS. The Court lacks jurisdiction over such a case.

II. DFE applies to almost all of the alleged conduct.

With the possible exception of bedding for the minor-Plaintiffs and a two-hour delay between two of their hot meals, Plaintiffs' remaining allegations are barred by DFE and cannot

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be relied upon to support their tort claims. Dkt. 6 (Mot.), 6-14; Dkt. 12 (Opp.), 3-8. Absent a *specific* course of conduct that an employee was mandated to follow, however, the guidelines allow discretion that satisfies prong one of DFE. *Sabow v. U.S.*, 93 F.3d 1445, 1454 (9th Cir. 1996).

A. Shelter.

Plaintiffs acknowledge that the NSTEDS state only that "hold room temperatures" must be "reasonable and comfortable" when it is "within CBP control." Opp., 6. Outdoor temperature is beyond CBP control. There is no evidence that CBP failed to adhere to a mandatory directive about hold-room temperatures. Mot., 13-14. Thus, CBP did not violate any guideline because it lacked the ability to control the temperature. Further, the *Flores* settlement fails to prescribe a specific course of conduct and only applies to minors so the Court would lack jurisdiction over any allegations concerning adult-Plaintiffs.

B. Medical care.

Plaintiffs point to no specific course of conduct CBP failed to adhere to by not providing Madrigales with cold medication. Having an unstaffed medical tent for two moments over a 40-hour period is not outside CBP's discretion. The government explained in its brief how it complied with the appropriate regulations, which Plaintiffs do not dispute. Instead, they rely on *other* noncitizens' experiences during *other* time periods that are unrelated to Madrigales. And Plaintiffs' argument that CBP policies do not "confer boundless discretion to CBP officers" is unpersuasive because DFE cannot shield the government from medical malpractice liability. *See Sigman v. U.S.*, 217 F.3d 785, 795 (9th Cir. 2000). But Madrigales has not asserted a medical malpractice claim regarding treatment of her common cold. Thus, her allegations about medical care are barred by DFE.

C. Basic hygiene.

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The government explained why CBP acted within its discretion concerning allegations about basic hygiene items. Mot., 10-11. And Plaintiffs' reliance on random photographs and video footage of TOPS, (Opp., 8) does not contradict the government's declaration that TOPS was equipped with hand-washing stations and had other hygiene supplies available. Mot., 10-11; *see also* DHS OIG Report, p. 14 https://www.oig.dhs.gov/sites/default/files/assets/2022-02/OIG-22-22-Feb22.pdf (OIG site inspection found that TOPS detainees had access to basic hygiene supplies). Plaintiffs also improperly rely on standards that apply to ICE and not to CBP. Opp., 9. CBP acted within its discretion providing basic hygiene to Plaintiffs.

D. Bedding and Food.

Defendant did not argue that DFE bars minor-Plaintiffs' claims about bedding. Mot., 10-11. It is an open question whether the bedding-regulations for minors would apply to an outdoor space, which is qualitatively different than an indoor facility where the government know the maximum number of people that could be housed there and can plan appropriately. Here, CBP did not intend for individuals to spend the night, which only happened because CBP was so overwhelmed by an exigent situation. Irrespective of how the policy applies to minors at TOPS, there clearly is no mandate requiring CBP to provide adult-Plaintiffs with bedding, nor do Plaintiffs refer to one. Thus, DFE at least bars adult-Plaintiffs' claims regarding bedding.

Regarding food, Plaintiffs do not submit their own sworn declarations to dispute Defendant's evidence that Plaintiffs were provided meals at the specific times or and that other snacks were readily available to them at all times. Dkt. 7, ¶¶ 22-23; *see also* DHS OIG Report, pg. 14, (OIG site inspection found that TOPS-detainees had access to water and snacks, and food for adults and children that was readily available). Nor did they submit evidence that they ever requested additional food or that such requests were denied. Rather, they take issue with an

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approximate two-hour delay between their time of apprehension and their first hot meal (thirty-minute delay for adult-Plaintiffs; 2.5-hour delay for minor-Plaintiffs), and because they weren't provided a meal before their release at 10:59 a.m. on February 23. Opp., 4-5. They also take issue with hot meals not being provided at "regularly scheduled meal times" without defining what that actually means. Plaintiffs do not address the availability of meals upon request or provided snacks or address how that complies with the guidelines. At most, however, Plaintiffs can only establish that minor-Plaintiffs were entitled to bedding for two nights and that some meals should have been more promptly delivered, even if they were otherwise available. It is only that conduct, then, that might fall outside and be at issue in this matter.

E. CBP's actions were grounded in policy.

As noted above, Plaintiffs repeatedly clarify that they do not challenge TOPS per se, presumably because CBP's decision to create TOPS in order to process a surge of migrant families during a global pandemic was undoubtedly an exercise of policy discretion. Instead, Plaintiffs say their claims are based solely on the general conditions at TOPS during their 40-hour detention. But one cannot separate the general conditions at TOPS from the concept of TOPS itself, and DFE requires Plaintiffs to "identify which specific actions or omissions…were negligent or wrongful." *Nanouk v. United States*, 974 F.3d 941, 945 (9th Cir. 2020). The problem is that the distinct actions that Plaintiffs allege caused their injuries cannot be separated from the creation and execution of TOPS; TOPS was never designed to be an overnight facility hence the lack of indoor facilities and sleeping materials. The concept and execution of TOPS as a *temporary* and *outdoor* processing center is the distinct action that Plaintiffs challenge. To agree that the government had discretion to create TOPS but no discretion how to staff or supply TOPS is contrary to prong two. This is why Plaintiffs so often attack TOPS itself, essentially arguing that the conditions were inhumane as to all detainees, rather than point to any officer's

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conduct directed specifically at Plaintiffs themselves.

Here, the Court only needs to find that the conduct is *susceptible* to policy analysis. The government has explained why it created TOPS, including that the target processing time at TOPS was eight hours. Dkt. 7, ¶¶ 9-20, 29. Plaintiffs try and frame the alleged tortious conduct as "callousness, laziness, or negligence," rather than decisions susceptible to policy concerns, but this is unsupported by their allegations.[1] Opp., 11. Unlike the treatment received by the minor-Plaintiff in *Ruiz ex. rel. E.R. v. United States*, Plaintiffs' allegations fail to suggest that any CBP employee was callous or lazy toward them under these unique circumstances at TOPS. *See* 2014 WL 4662241, at *8 (E.D.N.Y. Sept. 18, 2014) (finding that the unwarranted detention of a sole four-year-old U.S. citizen at a U.S. airport for twenty hours was not the type of conduct that is susceptible to policy analysis).

Based on the allegations, there is no employee that could have done anything differently to prevent this lawsuit. The only real cure to Plaintiffs' complaints was for CBP to have created a larger, more robust, and presumably indoor facility that could comfortably house noncitizens while they were being processed. "In hindsight it may be easy to say" that CBP should have anticipated a larger number of migrant families during that time period resulting in longer processing times at TOPS, "but this is exactly the judicial second-guessing of government decision-making that the discretionary function exception is designed to prevent." *Bailey v. U.S.*, 623 F.3d 855, 863 (9th Cir. 2010); *see also Nanouk*, 974 F.3d at 948.

F. Plaintiffs have not alleged plausible Constitutional violations.

Plaintiffs reassert that their allegations regarding food, shelter, medical care, and safety

[1] DFE protects negligent conduct as long as it was discretionary and susceptible to policy analysis. Therefore, any allegation that Defendant negligently misjudged how long it would take to process migrant families at TOPS is not material to whether DFE applies.

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deprived them of their Constitutional due process rights. Opp., 13. Plaintiffs are wrong. "The Supreme Court and this court have observed that not every tort claim automatically becomes a constitutional wrong. Something more than an ordinary tort is required." *L.W. v. Grubbs*, 974 F.2d 119, 122 (9th Cir. 1992). Here, Plaintiffs do not have an ordinary tort—let alone conduct rising beyond that. Their reliance on the treatment and experience of other noncitizens at TOPS has nothing to do with the present facts.

The allegations, as they pertain to Plaintiffs, do not meet the high threshold of unconstitutional conduct. For example, a few-hour delay for meal does not plausibly allege a due process violation. And they do not dispute that food was readily available for them or that they requested more food but were denied. Further, allegations regarding medical care are insufficient because Madrigales does not allege any serious medical condition. *See Gordon v. County of Orange*, 888 F.3d 1118, 1125 (9th Cir. 2018) (alleged conditions must put plaintiff at "substantial risk of suffering serious harm"); *Vasquez v. Baca*, 323 Fed App'x 503, 504 (9th Cir. 2009) (affirming district court finding that allegations concerning treatment of a cold or a migraine did not implicate a serious medical need to support a claim of unconstitutional conditions of confinement).

Plaintiffs' primary allegations are that being outdoors with hundreds of other noncitizens subjected them to unsafe and inhumane conditions. But Plaintiffs do not dispute that they received welfare checks dozens of times while at TOPS and never reported that their family had any safety concerns or other needs. "The severity of the existing conditions of confinement, separately and aggregately, do not violate the Fifth Amendment to the extent that the duration of confinement does not exceed the time necessary for CBP to process a detainee to determine the appropriate transfer[.]" *Unknown Parties v. Nielsen*, 611 F. Supp.3d 786, 816 (D. Az. 2020) (enjoining CBP from holding detainees who have completed processing for more than 48 hours

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unless CBP provides conditions that meet basic human needs). Because Plaintiffs fail to allege a plausible due process violation, their tort claims cannot escape DFE and cannot based on discretionary government conduct.

III. CBP's conduct was not tortious.

Should Plaintiffs demonstrate subject-matter jurisdiction for their claims, or a subset of their claims, their factual allegations still fail to state a claim upon which relief can be granted. Not every distress merits a tort remedy. Here, CBP put forth its best efforts to manage an impossible situation and there are no allegations that any CBP official specifically mistreated or injured Plaintiffs in anyway.

A. Negligence.

Neither of Plaintiffs' two arguments in support of negligence succeed, in large part because both points are almost entirely rhetorical in nature and do not address the caselaw the government provided in its opening brief. Plaintiffs first argue that their discomfort and cold symptoms are "physical injuries" under Texas law. Opp., 18. This argument is advanced without any case citations. But courts interpreting Texas law have never held that "physical injury" is so broad as to encompass transient and minor cold symptoms or bodily discomfort. *See* MTD, 16-17. Plaintiffs' argument is rooted in a theory that anything affecting one's body is a physical injury. To adopt this, however, means subsuming and nullifying the "physical injury" limitation entirely. A physical injury must be exactly that, physical—some observable damage or trauma to one's body. Discomfort is based on how one feels about their current conditions or the environment around them—how one perceives their environment through their senses. It does not create any tangible harm to one's physical body. There is no recovery for being in a "perilous position," absent some actual physical injury. "A person who is placed in peril by the negligence of another, but who escapes without injury, may not recover damages simply because

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he has been placed in a perilous position." *Temple-Inland Corp. v. Carter*, 993 S.W.2d 88, 91 (Tex. 1999). For example, in *Andrade v. Chojnacki*, 65 F. Supp. 2d 431 (W.D. Tex. 1999), the district court considered numerous claims brought against the government by survivors of the Branch Davidian compound in Waco, Texas. The court explained that those inside the compound were purposefully made as uncomfortable as possible in order to force their surrender but such discomfort was not "physical injury." *Id.* at 459-460; *see also Aguilar v. United States*, 2017 WL 6034652, at *3 (S.D. Tex. June 7, 2017) (discomfort from one week detention is not a physical injury).

Similarly, while a cold may affect the body on a microscopic level, its symptoms are transient and do not cause any observable harm to the body itself, and is not the type of injury for which Texas law allows recompense. *See Chapa v. Traciers*, 267 S.W.3d 386, 397 (Tex. App. 2008) (chest pain, numbness, and anxiety were not sufficient because physical manifestations of distress are not physical injuries). This is borne out not just by the negligence cases cited by the government previously, but by federal law that considers "physical injuries" in related contexts as well. *C.f. Ervin v. Hill*, 2005 WL 3742791, at *3 (N.D. Tex. Nov. 10, 2005) (determining that under the PLRA an inmate who needed treatment "for…cold and flu-like symptoms, infection, and migraine headaches" was not able "to establish 'physical injury'"); *Canell v. Multnomah Cnty.*, 141 F. Supp. 2d 1046, 1054 (D. Or. 2001) (winter cold symptoms are "insufficient to constitute physical injury for purposes of the PLRA"). Plaintiffs never allege any detail about the cold symptoms themselves or how CBP made them worse. Colds get worse before they get better, with or without medicine. Even if the Court accepted that a cold is a physical injury, there is no factual support for any allegation that Plaintiffs' temporary detention had any effect on Madrigales's cold.

Second, Plaintiffs argue that a physical injury is unnecessary because there is a special

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relationship between CBP and its detainees. This argument has been twice rejected by this District. For example, Judge Jones found there was no special relationship between CBP and noncitizens in an FTCA matter claiming negligence based on the prior administration's family-separation policy. "The Court agrees that Plaintiffs did not allege that any duty was owed to Plaintiffs with respect to the family separation. Plaintiffs have failed to identify any Texas case law to support the existence of such a duty." *E.L.A. v. United States*, 20-cv-1524-RAJ, 2022 WL 2046135, at *6 (W.D. Wash. June 3, 2022); *see also Luna v. United States*, 20-cv-1152-RSL, 2021 WL 673534, at *4 (W.D. Wash. Feb. 22, 2021) (finding that a "custodial relationship, in and of itself" does not create a special relationship between CBP and a noncitizen detainee). While some Texas courts talk about a special relationship in a custodial setting, that only applies "in cases involving harms inflicted by third parties, and it is not applicable when it is the conduct of a state actor that has allegedly infringed a person's rights. Accordingly, Plaintiffs' negligence claims are dismissed with prejudice because Texas does not recognize a duty to avoid inflicting mental anguish arising out of a 'special relationship' between jailers and prisoners or detainees." *Aguilar*, 2017 WL 6034652, at *4 (S.D. Tex. June 7, 2017) (quoting *Leo v. Trevino*, 285 S.W.3d 470, 486 (Tex. App. 2006)); *see also Barry v. United States*, 2023 WL 2996101, at *7 (S.D. Tex. Mar. 31, 2023). Thus, there is no special relationship here that allows Plaintiffs to circumvent alleging an actual physical injury.

B. IIED.

Plaintiffs state that they are only pleading IIED as an alternative to negligence. Opp., 21. This misunderstands the role of IIED as an "either/or" proposition with negligence. Texas courts are clear that IIED must be cognizable on its own irrespective of whether negligence is valid or not, and based on a distinct set of core facts. The government demonstrated in some detail that both claims are rooted in the same facts. Mot., 18-19. Plaintiffs admission that there "is no basis

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to bring the IIED claim if the Court rejects Defendant's argument that the negligence claims are barred" (Opp., 21) demonstrates that Plaintiffs' IIED claim is "really another tort" and thus IIED "should not be available." *Hoffmann-La Roche Inc. v. Zeltwanger*, 144 S.W.3d 438, 447 (Tex. 2004); *see also May v. City of Arlington*, 2018 WL 1569888, *12 (N.D. Tex. Mar. 30, 2018) ("[I]f a plaintiff's intentional infliction of emotional distress claim is based on another tort, he cannot maintain an action for such claim, regardless of whether he chooses to assert the alternative claim, succeeds on the alternative claim, or the alternative claim is barred.").

Plaintiffs try to distinguish these cases as disallowing for "double recovery," but neither *Hoffman* nor *May* make any such distinction. *Hoffman* specifically states that IIED cannot be used to "circumvent" the limitations of another tort and cannot "invade some other legally protected interest." *Hoffmann*, 144 S.W.3d at 447. The jury awarded damages for sexual harassment and IIED, but the trial court disallowed one award because of double recovery. Separately, the Texas Supreme Court overturned the IIED verdict because it would otherwise "circumvent the legal limitations on the amount of mental anguish and punitive damages recoverable in a sexual harassment suit." *Id.* at 446. So a party cannot use IIED to undo what has already been done by statute or common law, which is precisely what Plaintiffs seek to do by overcoming limitations on recovery for emotional distress caused by negligence based on the same set of facts. And *May* says the opposite of what Plaintiffs suggest. *May*, 2018 WL 1569888, *12.

Even if their IIED claim were proper, Plaintiffs have not shown that they alleged the elements sufficiently to state a claim. Plaintiffs' analysis gives short attention to these elements and the government will not belabor the points repeating arguments from its opening brief. But nothing in Plaintiffs' opposition establishes that CBP acted intentionally, that the conduct was outrageous, that the conduct caused extreme distress, or even that Plaintiffs suffered extreme

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emotional distress, beyond making conclusory arguments.

The only *intentional* conduct alleged is the creation of TOPS itself, which Plaintiffs say is not at issue. There are no allegations that any line officer or CBP personnel staffing TOPS did anything intentional or reckless. Nor is there any factual allegation demonstrating that "the primary risk" of the conduct at issue was to cause extreme emotional distress. Really, there are no allegations about any CBP line officials doing something allegedly outrageous or even any allegations that CBP singled Plaintiffs out and purposefully denied them any services. At most, the allegations imply that officials might have been negligent in providing some services in a timely or efficient manner as Plaintiffs wished, but without physical injury. This falls far short of IIED. As discussed above, Plaintiffs have provided some contours of conduct they claim was tortious and explained it is not the creation of TOPS or certain other discretionary activity. As explained above, the potential non-discretionary conduct was (1) failure to provide a mattress to the juveniles and (2) tardy meals and snacks. Everything else was discretionary. Even still, there is no allegation that the primary risk of *any of the alleged conduct* was to cause severe emotional distress. *See Garcia v. United States*, 686 F. App'x 497, 500 (9th Cir. 2017).

Similarly, children sleeping on the ground or having to wait a few hours extra for a meal is unfortunate but is not the type of conduct that makes a reasonable person exclaim: outrageous! The one case that Plaintiffs cite is *Gonzales v. Willis*, 995 S.W.2d 729 (Tex. App. 1999), where a defendant made "vile sexual advances" to the plaintiff over an extended period of time. The defendant repeatedly enticed the plaintiff to dinners and events with promises of potential employment only to bombard her with graphic sexual advances. The Texas court of appeals let the jury's verdict stand as to the extreme conduct, but noted that even this was a close case. *Id.* at 736. Having to endure "vile sexual advances" over a lengthy period of time is quite different than what Plaintiffs allege here.

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A more on-point case, and one of the many that Plaintiffs neglect to discuss, is *Villafuerte v. United States*, 2017 WL 8793751, (S.D. Tex. Oct. 11, 2017), which considered a noncitizen's IIED claim after being detained by CBP. Like Plaintiffs, Villafuerte's IIED claim was premised on the "unsafe and inhumane conditions" of her detention. *Compare id.* at *3 with Opp., 24 ("The unsafe and inhumane conditions and deprivations…rise to the level of extreme and outrageous conduct."). Villafuerte, a 16-year old minor female, alleged a longer detention with more extreme conditions than those in Plaintiffs' allegations. She also alleged she had no mattress and she had to sleep on the "hard, cold floor" with a dirty blanket, the temperature was extremely cold, the center was overcrowded, for her first night she was only given a "cold hamburger" to eat and that her meals overall were inadequate leaving her "constantly hungry throughout her detention." *Id.* at *3-4. Further, she was not provided with any basic hygiene products and that there was only one toilet and sink for all the minors to share. All of the deprivations that Plaintiffs allege, Villafuerte alleges, but worse. She allegedly endured more nights without adequate bedding, and more days without adequate food or basic sanitation. Moreover, Villafuerte alleged that she was denied contact with her parents, that she had to use the bathroom in front of other detainees, that she could not sleep because the lights were so bright, and that CBP officials *purposefully* made the conditions unbearable. That more extreme conduct could not, as a matter of law, form the basis of an IIED claim. *Id.* at *14. This accords with other IIED matters in other jurisdictions based on fact patterns involving detentions of short durations. For example, the Seventh Circuit said conduct was not outrageous where a plaintiff's probable cause hearing was delayed for almost 48 hours and he was handcuffed to the wall in his cell during that duration. "Here, the record is devoid of any evidence supporting a finding of extreme or outrageous conduct by defendants…." *Bailey v. Chicago*, 779 F.3d 689, 696 (7th Cir. 2015); *see Smith v. United States*, 121 F. Supp. 3d 112, 125 (D.D.C. 2015) (finding that

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allegations that officers misrepresented facts leading to plaintiff's detention "comes anywhere *close* to the kind of extreme and outrageous conduct by government authorities that establishes a claim for intentional infliction of emotional distress") (emphasis in original) (per-then District Judge Ketanji Brown Jackson); *Saucedo-Carrillo v. United States*, 983 F. Supp. 2d 917, 925 (N.D. Ohio 2013); *Harding v. San Francisco*, 602 F. App'x 380, 384 (9th Cir. 2015). If plaintiffs could not demonstrate IIED in these situations, then neither can they here.

For these reasons, and those provided in the government's motion, the Court should dismiss Plaintiffs' complaint.

DATED this 22nd day of September, 2023.

Respectfully submitted,

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I certify that this memorandum contains 4,198 words, in compliance with the Local Civil Rules.