IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

Juneidy Mijangos Vargas, on behalf of minor J.A.M.; and Johana Gutierrez, on behalf of minors Y.S.G.R. and J.I.G.R.,	:	
Plaintiffs,	:	
	:	Civil Action No.
v.	:	
	:	1:17-CV-05052-SCJ
The United States of America,	:	
Defendant.	:	

DEFENDANT'S REPLY IN SUPPORT OF MOTION TO DISMISS

Defendant United States of America ("United States") hereby files its Reply in Support of its Motion to Dismiss. In Plaintiffs' Response to Defendant's Motion to Dismiss (Doc. 20, hereafter "Plaintiffs' Response"), Plaintiffs fail to justify the defects that doom their Amended Complaint ("Complaint"). In particular, it remains clear that Plaintiffs' Complaint is, at its heart, an improper attempt to: 1) cast constitutional tort claims as common law tort claims, which is barred by the Federal Tort Claims Act ("FTCA"); 2) bring claims for alleged wrongs against the alien plaintiffs who were already dismissed; and 3) weaponize tort law against law enforcement by using sympathetic child plaintiffs to mischaracterize the everyday actions necessary to enforce federal criminal and immigration law. Witnessing the arrest of family members is undoubtedly stressful and upsetting for anyone,

particularly children. Nevertheless, it is a necessary reality of law enforcement every day, not just in the immigration law context, and Plaintiffs' effort to turn this experience into an actionable tort would cripple immigration law enforcement, exceeds the scope of available remedies, and fails to state a claim.

A. Plaintiffs Fail to State a Claim For Relief.

1. False Imprisonment

There is no dispute that aliens subject to final removal orders were located in the homes entered by the U.S. Immigration and Customs Enforcement ("ICE") agents and those aliens were detained pursuant to those orders. *See* Complaint at ¶¶ 57, 63-79, 96; *see also* Doc. 19, Exhibits A & B. No reading of the Complaint permits a reasonable inference that the ICE agents lacked probable cause to believe that aliens subject to final orders of removal were in the subject homes and were subject to arrest.

Instead, Plaintiffs argue that the removal orders are silent as to them, as they were not the targets of the removal operation. *See* Plaintiff's Response at 7. This is true, but irrelevant. If the method by which the ICE agents entered the homes and detained the alien residents was lawful process, as Defendant's Motion establishes it was, then this inherently permits them to take reasonable steps to identify the individuals present and secure the premises. Plaintiffs appear to be arguing that even

if the ICE agents had lawful process to detain the aliens in the homes, to make the other residents of the home wait in the living room while the agents determined everyone's identity and processed the aliens for detention somehow exceeds their lawful authority and thus constitutes false imprisonment. Imagine the implications of such a rule. In any entry to a residence to lawfully detain a removable alien, or to detain any suspected criminal, law enforcement officers would be unable to secure the premises, identify those present, and ensure their own safety while locating and detaining the subject, without subjecting themselves to claims for false imprisonment.

Moreover, Plaintiff's reliance on Georgia law to govern whether the underlying federal legal process by which the ICE agents were conducting themselves raises fatal preemption issues. Though state law ordinarily governs in FTCA cases, the question of whether federal law enforcement agents have legal authority under federal law is indisputably a question of federal law, and state law cannot render unlawful that which is permitted under federal statute. *Denson v. United States*, 574 F.3d 1318, 1348 (11th Cir. 2009) ("application of state law, to the extent it unavoidably conflicts with federal law, has no effect"); *see also Valencia–Mejia v. United States*, No. CV 08–2943, 2008 WL 4286979, at *5 (C.D.Cal. Sept. 15, 2008) (noting that immigration officers have a "lawful privilege" to arrest aliens,

which bars a false imprisonment claim under California law); *Tovar v. United States*, No. 3:98–cv–1682, 2000 WL 425170, *7–8 (N.D. Tex. Apr. 18, 2000) (INS agents had "legal authority" to detain plaintiff under INA, barring false imprisonment claim under Texas law). Plaintiffs try to dismiss these cases in a footnote on the basis that "they did not apply Georgia law" (Plaintiffs' Response at 8, fn. 4), but this misses the point. The source of the state law does not matter because federal law trumps in each case; the opposite conclusion would impermissibly allow state tort law to control the enforcement of federal law and the authority granted to federal agents.

In addition, Plaintiffs misapply the federal law at issue. They correctly point out that, under 8 U.S.C. § 1357(a), a warrantless arrest is permitted only if the ICE agent has a "reason to believe" an individual is removable from the United States and determines that the individual "is likely to escape before a warrant can be obtained for his arrest." 8 U.S.C. § 1357(a); *see* Plaintiff's Response at 8-9. They analogize this to the state law requirement for exigent circumstances in the case of a warrantless arrest. *See* Plaintiff's Response at 8. But Plaintiffs ignore the additional element present in this case, which is the orders of removal signed by federal immigration judges. *See* Doc. 19, Exhibits A & B. Thus the detentions at issue were not made solely on the basis of the ICE agent's probable cause, but the issuance of

a removal order by the immigration judge. This context, undisputed by Plaintiffs, takes this case outside the scope of false imprisonment under Georgia law.

2. Trespass

Plaintiffs cannot dispute that "[u]nder Georgia law, a state officer does not commit trespass when he acts within the scope of his official duties." *Lavassani v. City of Canton, Ga.*, 760 F. Supp. 2d 1346, 1371 (N.D. Ga. 2010) (citing *Morton v. McCoy*, 420 S.E.2d 40 (Ga. App. 1992)). Instead, Plaintiffs argue that ICE agents detaining aliens subject to orders of removal were not acting with the scope of their duties because entrance into the homes constituted a "violation of the 4th Amendment." *See* Opposition at 13. This again reveals that Plaintiffs are trying improperly to shoehorn allegations of constitutional violations into common tort law claims. *See Federal Deposit Ins. Co. v. Meyer*, 510 U.S. 471, 478 (1994) (constitutional tort claim is not cognizable under jurisdictional grant of FTCA).

Moreover, Plaintiffs' citations do not support their position. They cite to *Rosas v. Brock*, 826 F.2d 1004 (11th Cir. 1987), a class action § 1983 suit arising out of the denial of benefits under the Disaster Relief Act, which has no bearing on this case. Their reliance on *Mancha v. Immigration & Customs Enf't*, No. 106-CV-2650-TWT, 2009 WL 900800 (N.D. Ga. Mar. 31, 2009), is also misplaced. There, the court analyzed whether the trespass claim was barred by the discretionary function

question, but conducted no substantive legal analysis of Georgia trespass law. *Id.* at *4. Contrary to Plaintiffs' claims, for the same reasons discussed in the section above regarding false imprisonment, the actions of the ICE agents in entering the homes pursuant to valid legal process vest these actions squarely within their discretionary authority and preclude the elements of "willfulness, malice, or corruption" necessary to remove the protection of Georgia law. *See Morton*, 420 S.E.2d at 42. More fundamentally, this same lawful process precludes Plaintiffs from pleading the necessary element of *unlawful* interference required to establish a *prima facie* trespass claim under O.C.G.A. § 51–9–1.

3. Negligence

Plaintiffs assert a state law "duty by law enforcement officers to exercise ordinary care when conducting an arrest or seizure." *See* Opposition at 14. They plainly admit that they are relying upon "an ordinary duty of care" imposed "on law enforcement officers." *Id.* at 15-16. Plaintiffs thereby mistakenly rely on a duty owed by Georgia *governmental* entities, rather than a private person. The FTCA only "waives sovereign immunity 'under circumstances where the United States, if a private person,' not 'the United States, if a state or municipal entity,' would be liable." *United States v. Olson*, 546 U.S. 43, 45–46 (2005). Where "a plaintiff's effort to base liability [rests] solely upon the fact that a State would impose liability

upon a municipal (or other state governmental) entity… nothing in the Act's context, history, or objectives or in the opinions of this Court suggest[s] a waiver of sovereign immunity solely upon that basis." *Id.*

Additionally, because the FTCA's limited waiver of sovereign immunity extends no farther than the limits of private tort liability under state law, a claim based exclusively on federal law may not be invoked under the Act. *See Washington v. Drug Enforcement Admin.*, 183 F.3d 868 (8th Cir. 1999) (holding Fourth, Fifth, and Fourteenth Amendment violations stemming from DEA search cannot be remedied through FTCA because state law cannot create liability for violation of federal constitutional rights). This is precisely what Plaintiffs attempt to do here, to turn a constitutional tort claim into a common law tort/negligence claim where the only wrongdoing alleged against the ICE agents is an unlawful search and seizure under the Fourth Amendment.

Notably, unlike *Lyttle v. United States*, upon which Plaintiffs rely so heavily, nowhere in Plaintiffs' Complaint do they adequately allege facts showing any negligent conduct by ICE agents. *See Lyttle v. United States*, 867 F. Supp. 2d 1256, 1301 (M.D. Ga. 2012) (noting that plaintiff "alleges specifically that the Defendants were negligent in performing their duties by: failing to review available documentation of Lyttle's citizenship; failing to investigate Lyttle's claims of being

born in the United States; coercing and manipulating him into signing a Notice of Rights form without assisting him in understanding his rights, reading the form, or protecting him from coercion despite his mental disabilities; failing to adequately train and supervise ICE officers…"). By contrast, the specifics facts plead by Plaintiffs, as opposed to their unsupported conclusions of law, are that the ICE agents knowingly and willfully violated Georgia law and the Constitution. *See* Complaint at ¶¶ 125, 127-128. These additional failures go not just to Plaintiffs' inability to identify a duty owed by the United States and negligent breach thereof, but implicate Plaintiffs' failure to provide sufficient facts to state a claim. Instead, Plaintiffs' negligence claim, while also defective for the reasons stated above, consists of nothing more than "naked assertion[s]," "labels and conclusions, [or] a formulaic recitation of the elements of a cause of action." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 557 (2007).

4. Intentional Infliction of Emotional Distress

As stated above, it is undoubtedly stressful and upsetting to witness family members being detained by law enforcement. But this is insufficient to sustain an action in tort. Plaintiffs argue that a different standard applies to children. But the sole case cited by Plaintiffs for that proposition, *Delta Finance Co. v. Ganakas*, 91 S.E.2d 383 (Ga. App. 1956), does not support their position. Plaintiffs mistakenly

cite a reference to the plaintiff being "a child of very tender years" as being relevant to the objective standard of whether the defendant's conduct was sufficiently extreme. As a threshold matter, this quote comes from a summary of the allegations, not the opinion of the court. *Id.* at 383 ("The material allegations of her petition as finally amended are substantially these."). Moreover, the reference is to the "result" of the outrageous conduct. *Id.* at 384. The cited sentence states that, after the conduct at issue, the "plaintiff is in constant fear" because of the plaintiff's "tender years" and because she "must remain at home unprotected" as "her mother must work away from home." *Id.* This allegation already assumes the outrageousness of the conduct and is focused on the distress element of the case. It is also clear that the other references to the child's age are important because they were known to and motivated the defendant's actions. *Id.* at 384 ("The defendant deliberately intended to frighten the plaintiff in her mother's absence and thus to gain possession of the television set illegally."). Since it was part of the defendant's intent to target the *Delta Finance* plaintiff because of her age, that fact became relevant to judging the outrageousness of his conduct. No such allegation exists in this case.

To the extent it is relevant, the facts of *Delta Finance* are easily distinguished. In *Delta Finance*, the plaintiff alleged that the defendant finance company's agent, seeking to collect a television set owned by plaintiff's mother, intentionally came to

the house when he knew plaintiff was alone, and demanded that she, "although she was alone and unprotected, unlock the front door to the apartment where the plaintiff and her mother resided, stating to the plaintiff that he had come to remove the television set and to take it away with him." *Id.*at 384. Then, after "the plaintiff refused to unlock the front door, [defendant] went to the rear of the apartment building, climbed the rear stairs and came to the rear door of the apartment in which the plaintiff and her mother resided." *Id.* When the plaintiff again refused to open the door, the defendant "shook and rattled the door in an effort to gain admission to the apartment… [and] then wrote on a piece of paper the following words: 'If you don't unlock this door so that I can get the television set, I will get the police and have you locked up in jail.'" *Id.* On this basis, the court found malicious and intentional conduct on the part of the defendant. *Id*. at 385.

The facts of *Delta Finance* offer a convenient vehicle for exploring three important distinctions that doom Plaintiffs' claim. First, it is clear that all of the conduct at issue in *Delta Finance* was intentionally directed at the plaintiff herself, satisfying the key requirement that, in the absence of any "physical impact" to his person, a plaintiff seeking to recover for emotional distress must also show that the conduct in question was directed at him. *Johnson v. Grantham*, No. 1:17-CV-2758-WSD, 2017 WL 4402169, at *3 (N.D. Ga. Oct. 4, 2017). By contrast, in this case,

Plaintiffs allege virtually no conduct directed toward them at all. Instead, Plaintiffs try to avoid the clear lack of outrageous conduct toward them by repeating their allegations of conduct directed toward other individuals as if such conduct was somehow directed at them. *See, e.g.*, Complaint at ¶¶ 138-145. Plaintiffs admit as much, arguing that it is sufficient for them to allege that, simply because they were present, they were "forced to witness the agents—who had visible guns on their person—search, threaten and frighten them and their family." Plaintiffs' Response at 19. But this does not constitute an intentional act directed toward them. Instead, Plaintiffs' characterization makes clear that their presence was incidental to the conduct at issue. Put another way, Plaintiffs make no allegations to suggest the actions of the ICE agents would have been any different had Plaintiffs been absent.[1]

The facts of *Delta Finance* are instructive in a second respect, regarding whether the alleged conduct is sufficiently outrageous. In *Delta Finance*, the allegation was that the defendant was specifically targeting plaintiff because of her young age, and because she was home alone, and he then subjected her to a series of

[1] The one exception works directly against Plaintiffs' claims. The only allegation in Plaintiffs' Complaint that shows Plaintiffs' presence materially motivated or altered the conduct of the ICE agents is their admission that, although ICE agents came to the residence to arrest J.A.M.'s mother, Juneidy Mijangos Vargas, the agents "decided not to bring… Juneidy Mijangos Vargas, with them, because she is the mother of J.A.M. who was an infant at the time." *Id.* at 56.

escalating intimidations and threats with the goal of frightening her. *See* Delta Finance, 91 S.E.2d at 384 ("The defendant deliberately intended to frighten the plaintiff in her mother's absence and thus to gain possession of the television set illegally."). Nothing remotely similar is alleged in this case. None of the purportedly outrageous conduct in Plaintiffs' Complaint was directed at Plaintiffs at all, let alone targeting them because of their age or with the express intent of frightening them.

Instead, the sole specific allegation in the Complaint about conduct directed at Plaintiffs is the claim that J.A.M. was "aggressively" told to give one of his toys to his mother after offering it to an ICE agent. Complaint at ¶ 55; Plaintiffs' Response at 18. This sole comment directed at J.A.M. in the context of a law enforcement removal operation, (as opposed to the intentional targeting of a vulnerable child through the use of escalating threats to recover a television), cannot meet the high standard of being "so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." *Cornelius v. Auto Analyst, Inc.*, 476 S.E.2d 9, 11 (Ga. App. 1996). Again, in emphasizing the extremely high nature of this standard, Georgia courts have held that "[t]t is not enough to show that the defendant acted with an intent which is tortious or even criminal, or that he ... intended to inflict emotional distress, or even that his conduct [was] characterized by malice, or a degree of

aggravation that would entitle the plaintiff to punitive damages for another tort." *Jones v. Fayette Family Dental Care, Inc.*, 718 S.E.2d 88, 90 (Ga. App. 2011).

Finally, the facts of *Delta Finance* illustrate the absence of severe emotional distress in this case. In *Delta Finance*, the plaintiff alleged she "is afraid to go to school or to be left alone in the apartment or to leave the apartment." 91 S.E.2d at 384. She further alleged that she "is in a constant state of fear[,] cannot sleep at night and she has nervous spasms during the time she is awake and is extremely nervous, excitable, and fearful." *Id.* Plaintiffs allege some unfortunate consequences of their presence when their family members were detained, but these allegations do not approach those alleged in *Delta Finance*, are isolated in nature, and are not sufficient to meet the high standard of severe emotional distress. Emotional distress alone, which "includes all highly unpleasant mental reactions such as fright, horror, grief, shame, humiliation, embarrassment, anger, chagrin, disappointment, worry, and nausea," is insufficient. *Jones*, 718 S.E.2d at 91; *see also id.* (allegations that plaintiff "stopped showing affection toward [her husband], experienced 'bursts of anger,' and 'wasn't the same person, just—not the outgoing person, not the social person that she used to be'" did not "rise to the level of severity necessary.").

If it was sufficient for a plaintiff to allege that they were "forced to witness the agents—who had visible guns on their person—search, threaten and frighten

them and their family," (Plaintiffs' Response at 19), the courts would be filled with tort claims from the family members of criminal suspects. Likewise if it were sufficient to allege that a member of law enforcement spoke "aggressively" toward a child during a law enforcement operation, or that someone became "frightened and nervous around law enforcement," or even that they no longer like to answer the door or participate in sports *See* Complaint at ¶¶ 55, 58, 80-81. These allegations may be unpleasant or regrettable, but they do not meet the high standard of "extreme and outrageous" conduct or "severe emotional distress" necessary to state a claim.

5. Negligent Infliction of Emotional Distress

Plaintiffs argue that physical impact is unnecessary where the conduct alleged is "malicious, willful, or wanton." Plaintiff's Response at 21. But such a claim, alleging a higher level of culpability than negligence, is no longer a claim for negligent infliction of emotional distress. As the court held in *Clarke v. Freeman*: "A party claiming negligent infliction of emotional distress must therefore show a physical impact resulting in physical injury. On the other hand, where the defendant's conduct is malicious, wilful, or wanton, recovery can be had without the necessity of an impact." 692 S.E.2d 80, 84 (Ga. App. 2010). The court is distinguishing between two types of claims, which Plaintiffs have separately alleged. *See, e.g., Hill v. City of Fort Valley*, 554 S.E.2d 783, 785–86 (Ga. App. 2001) (noting

requirement for showing of "malicious, willful, or wanton" conduct in connection with a claim for intentional infliction of emotional distress, and finding "there is nothing in the record to raise such conduct to the degree of wilfulness or wantonness that is necessary for a claim of intentional infliction of emotional distress."). Because Plaintiffs do not allege that the United States "caused plaintiff[s] any physical injury, a negligent infliction of emotional distress claim necessarily fails." *Bullard v. MRA Holding, LLC*, 890 F. Supp. 2d 1323, 1330-31 (N.D. Ga. 2012).[2]

B. Plaintiffs May Not Recover Attorneys' Fees.

Plaintiffs claim "the FTCA specifically allows for attorneys' fees to be paid out of any settlement or recovery." Opposition at 22. This is irrelevant. Attorneys' fees, as a separate item of recovery as sought in Plaintiffs' Complaint, are unavailable. *See Joe v. United States*, 772 F.2d 1535 (11th Cir. 1985).

CONCLUSION

For all of the foregoing reasons, the United States requests that the Court dismiss the First Amended Complaint.

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[2] Even if the "malicious, willful, or wanton" exception is construed as part of a negligent infliction of emotional distress, Plaintiffs' claim still fails. As with their intentional infliction claim, Plaintiffs "[i]n addition to alleging facts that could show that the defendants' behavior was malicious, wilful, or wanton, … also must allege sufficient facts that could show that the defendants' behavior was directed at them." *Clarke* 692 S.E.2d at 84–85 (emphasis added). As discussed above, all of the alleged conduct plausibly characterized as outrageous, malicious, or wanton was directed at the alien residents already dismissed from this case, not at Plaintiffs.

Respectfully submitted,

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The United States of America,	:	
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CERTIFICATE OF COMPLIANCE

I certify that the documents to which this certificate is attached have been prepared with one of the font and point selections approved by the Court in LR 5.1B for documents prepared by computer.

Respectfully submitted,

s/ Gabriel Mendel
Gabriel Mendel
Assistant U.S. Attorney

IN THE UNITED STATES DISTRICT COURT
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The United States of America,	:	
Defendant.	:	

CERTIFICATE OF SERVICE

I certify that I electronically filed the within and foregoing with the Clerk of Court using the CM/ECF system.

This 16th day of October, 2018.

Respectfully submitted,

s/ Gabriel Mendel
Gabriel Mendel
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