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APPEAL NO. 05-14375-G

IN THE UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT

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**DONATO DALRYMPLE, *et al.*,**

Plaintiffs-Appellants,

vs.

**UNITED STATES OF AMERICA,**

Defendant-Appellee.

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ON APPEAL FROM THE U.S. DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF FLORIDA

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**APPELLANTS' REPLY BRIEF**

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Paul J. Orfanedes  
Meredith L. Cavallo  
Dale L. Wilcox  
JUDICIAL WATCH, INC.  
Suite 500  
501 School Street, S.W.  
Washington, D.C. 20024  
Tel.: (202) 646-5172  
Fax.: (202) 646-5199

*Counsel for Appellants*

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## ARGUMENT AND CITATIONS OF AUTHORITY

### **I. The Absence of a “Sum Certain” on Plaintiffs’ SF-95s Did Not Deprive the District Court of Jurisdiction.**

As explained in their initial brief, Plaintiffs satisfied the purpose of the FTCA by putting Defendant on notice of their claims prior to the expiration of the statute of limitations. See Appellants’ Brief at 13-17. Defendant makes no argument that the absence of a sum certain on Plaintiffs’ SF-95 claim forms in any way prevented it from considering or investigating Plaintiffs’ claims or that this inadvertent omission caused it any prejudice. Even though Plaintiffs promptly corrected this inadvertent omission and Defendant suffered no prejudice, Defendant asks this Court to uphold the dismissal of Plaintiffs’ claims because the correction of the error was made after the statute of limitations had run. See Appellee Brief at 15-16. This hyper-technical argument rings hollow and denies Plaintiffs basic fairness and justice.

#### **A. Plaintiffs’ Inadvertent Omission of the “Sum Certain” Can Be, and Was, Cured.**

Immediately upon receiving correspondence from Defendant of the inadvertent omission in Plaintiffs’ SF-95 claim forms, Plaintiffs promptly corrected the error within one month after submitting their SF-95s and more than one year before Defendant denied these claims together with all other Plaintiffs’

claims. *Id.* Nevertheless, Defendant contends that Plaintiffs’ error deprives this Court of jurisdiction to hear this case because the error was corrected one month after the two-year statute of limitation for Plaintiffs to file their claims had expired. See Appellee Brief at 14-16. Although the administrative claim submission requirement contained in 28 U.S.C. § 2675(a) is jurisdictional and cannot be waived, Defendant’s argument holds no weight because Plaintiffs filed their claims within the statute of limitations and the technical and procedural requirements of the regulations promulgated thereunder are not always strictly enforced.<sup>1</sup>

Indeed, several courts have held that the “sum certain” requirement should not be applied inflexibly where, as here, the government has suffered no prejudice from such omission. *See, e.g., Crow v. U.S.*, 631 F.2d 28, 30 (5th Cir. 1980) (“It is clear however, that neither a Form 95 nor any other particular form of claim is required...”); *Erxleben v. U.S.*, 668 F.2d 268, 273 (7th Cir. 1981) (per curiam)

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<sup>1</sup> The regulation of interest here is 28 C.F.R. § 14.2(a), which contains the sum certain requirement. It provides in pertinent part:

A Federal agency receives from a claimant, his duly authorized agent or legal representative, an executed Standard Form 95 or other written notification of an incident, accompanied by a claim for money damages in a sum certain for injury to or loss of property, personal injury, or death alleged to have occurred by reason of the incident . . .

(FTCA “intended to provide a framework conducive to the administrative settlement of claims, not to provide a basis for a regulatory checklist which, when not fully observed, permits the termination of claims regardless of their merits.”); *Molinar v. U.S.*, 515 F.2d 246 (5th Cir.1975); *Williams v. U.S.*, 693 F.2d 555 (5th Cir.1982); *Blue v. U.S.*, 567 F. Supp. 394 (D.D.C. 1983); *Koziol v. U.S.*, 507 F. Supp. 87 (N.D. Ill. 1981); and *Apollo v. U.S.*, 451 F. Supp. 137 (M.D. Pa. 1978). Many courts have also held that the jurisdictional requirements of the statute should be distinguished from the technical requirements of the regulations promulgated thereunder relating to the administrative adjustment of claims, particularly where, as here, the government has suffered no prejudice. *Id.*

In *Apollo*, a case strikingly similar to the case at bar, the plaintiff failed to include a sum certain in her administrative claim. The defendant agency informed the plaintiff by letter that she had failed to include a sum certain. About two months and 22 days after the two-year statute of limitations had expired, the plaintiff amended her claim to include a sum certain. The agency denied the claim as untimely so the plaintiff brought suit in federal court.

As Defendant argues here, the defendant agency in *Apollo* contended that the court was deprived of jurisdiction because the plaintiff failed to provide a sum certain pursuant to 28 C.F.R. § 14.2(a) within the two-year statute of limitations.

*Id.* at 138. The court disagreed, stating that “[s]ince the policy behind the rule of resort to the appropriate administrative agency is to give the agency a chance to consider the claim and to settle the claim without litigation, *cf. Interboro Mut. Indem. Ins. Co. v. U.S.*, 431 F. Supp. 1243, 1246 (E.D.N.Y. 1977), **it should not be necessary to have submitted a claim that is technically perfect and in conformity with all the associated regulations so long as defects are corrected and so long as the claim as considered contains the essential elements necessary to permit settlement.**” *Id.* at 138-39 (emphasis added). The court added further that “the most logical way of resolving, on the one hand, the liberality that the courts have shown to defective tort claims in appropriate circumstances with the notion that the filing of a claim within two years is jurisdictional, on the other, is by limiting the requirements considered to be “jurisdictional” to those strictly stated in the statute, and allowing agency and court consideration of corrected claims even if the claim as initially submitted does not meet all the technical requirements of the regulations.” *Id.* at 139 n. 11. Even though the plaintiff did not provide the agency with a sum certain until two months and 22 days after the statute of limitation had expired, the court upheld its jurisdiction to hear the plaintiff’s claim because she had given notice of the claim within the two-year statute of limitation and provided a prompt correction of the

technical omission within about 10 weeks of filing her claim, which left the agency five and one-half months for consideration of the claim.

As in *Apollo*, Plaintiffs gave notice of their claims within the two-year statute of limitation and provided a prompt correction (more prompt even than in *Apollo*) of the technical omission of a sum certain. Furthermore, as in *Apollo*, Defendant had ample opportunity to consider Plaintiffs' claims in the ten months between May 21, 2002, when Plaintiffs corrected this inadvertent omission, and June 9, 2003, when Defendant denied Plaintiffs' claims. Defendant does not allege that it could not consider or investigate Plaintiffs' claims because of this inadvertent error, nor does Defendant allege that it denied any of the claims at issue because of this inadvertent error. Indeed, Defendant did not suffer any prejudice at all. As a result, this Court should reinstate Plaintiffs' claims.

Defendants reliance upon *Adkins v. U.S.*, 896 F.2d 1324 (11<sup>th</sup> Cir. 1990), is misplaced because *Adkins* is easily distinguishable from the instant case. See Appellee Brief at 15. In *Adkins*, the plaintiffs did not promptly correct the sum certain omission when notified of its absence by the agency. In *Adkins*, the plaintiffs waited for two whole years before correcting the omission. As a result, the agency was prejudiced and could not consider the plaintiffs' claims within the six month period allowed by statute. *See* 28 U.S.C. § 2675(a). Because Plaintiffs

promptly corrected their error so Defendant could consider their claims within the six month period allowed by statute and because Defendant suffered no prejudice in the instant case, *Adkins* is inapposite and not controlling here.

**B. The 97 Other SF-95s Submitted With Plaintiffs' Administrative Claim Forms Put Defendant On Notice of the Amount of Plaintiffs' Claims.**

In *Tidd v. U.S.*, 786 F.2d 1565, 1568, n.6 (11th Cir. 1986), this Court noted that the law in this Circuit takes a “somewhat lenient approach to the ‘sum certain’ requirement.” This more lenient approach was demonstrated in *Suarez v. U.S.*, 22 F.3d 1064 (11th Cir. 1994), – a case cited by the Defendant – in which the Court held, “[T]he FTCA requires, at a minimum, that a claimant expressly claim a sum certain *or provide documentation which will allow an agency to calculate or estimate the damages to the claimant.*” *Id.* at 1066 (emphasis added). In *Suarez*, the Court dismissed the plaintiff’s claim because the plaintiff stated only that he sought “unliquidated” damages and failed to submit any documentation from which the agency could ascertain the amount of the damages he was seeking.

Defendant’s reliance on *Suarez*, however, is misplaced. Unlike the plaintiff in *Suarez*, Plaintiffs here provided Defendant with adequate information to satisfy the “sum certain” requirement. Again, the specific “sum certain” missing from Box 12d of the SF-95 forms could have been ascertained for each of the Plaintiffs

by referring to the nearly identical SF-95 forms submitted by the other 97 Plaintiffs on the same date, at the same time, in the same box, arising from the same set of circumstances, and by and through the same counsel.

Defendant contends that Plaintiffs' inadvertent omission of a sum certain cannot be cured by the claims of the 97 other plaintiffs because each claimant must satisfy the FTCA's administrative prerequisites. See Appellee's Brief at 16. Defendant bases this argument solely on two non-controlling cases from other jurisdictions *i.e.*, *Haceesa v. U.S.*, 309 F.3d 722 (10<sup>th</sup> Cir. 2002), *cert. denied*, 540 U.S. 814 (2003) and *Muth v. U.S.*, 1 F.3d 246 (4<sup>th</sup> Cir. 1993).<sup>2</sup> Defendant's reliance on these non-controlling cases is misplaced. Neither case stands for the proposition that an inadvertent omission of the sum certain on a claimant's SF-95 form cannot be cured by additional SF-95's filed by other claimants involved in the same incident and filed as one single packet. Instead, in both *Haceesa* and *Muth*, the plaintiffs' claims were dismissed because they wholly failed to file an FTCA claim within the two year statute of limitations. The *Haceesa* and *Muth* courts held that the claims were then forever barred by the statute of limitations. *See Haceesa*, 309 F.3d at 732-35 and *Muth*, 1 F.3d at 249. This is clearly not the

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<sup>2</sup> These cases are from other circuits and are, therefore, not binding or controlling. Defendant cites no Eleventh Circuit law as legal authority.

case here. It is undisputed that each Plaintiff here filed an SF-95 claim with a description of the injuries that they personally sustained in the raid within the two year statute of limitations. As the *Haceesa* and *Muth* holdings do not concern inadvertent omissions by claimants, they are uninformative and inapposite, and Defendant can draw no support from them.

**C. The Documentation Submitted With Plaintiffs’ Administrative Claim Forms Put Defendant On Notice of the Amount of Plaintiffs’ Claims.**

As noted in Plaintiffs’ initial brief, the “sum certain” Defendant alleges is missing from Box 12d could have been ascertained for each Plaintiff here by referring to the copy of the extremely lengthy and detailed, 52-page amended complaint from the prior *Dalrymple* action attached to *each* Plaintiffs’ SF-95 claim form. See Appellant’s brief at 21-24. Indeed, Defendant clearly could have ascertained a “sum certain” from the amended complaint as it specifically requested \$100,000,000 in damages, or approximately \$2,000,000 per claimant.

Defendant contends that seven of the Plaintiffs here were not parties to the earlier *Dalrymple* action so the complaint adds nothing to their claim. See Appellee Brief at 17. Defendant’s contention has no merit because, even though the seven Plaintiffs were not parties in the prior *Dalrymple* action, *each* of the seven Plaintiffs attached a copy of the amended complaint in the prior *Dalrymple*

action to their SF-95 claim form, indicating they were adopting the sum certain contained in the amended complaint as their own.

Defendant also contends that the sum certain contained in the *Dalrymple* amended complaint is of no help to Plaintiffs because the damages are stated in an aggregate amount. See Appellee Brief at 17, 18. This contention also lacks merit and fails to take into consideration the Eleventh Circuit's "somewhat lenient approach to the 'sum certain' requirement". *Tidd*, 786 F.2d at 1568, n.6; *see also Molinar*, 515 F.2d at 249-250; *Wadsworth v. U.S.*, 721 F.2d 503, 505-506 (5<sup>th</sup> Cir. 1983); *Emery v. U.S.*, 920 F. Supp. 788, 792 (W.D. Mi. 1996) ("In light of the flexible approach mandated by the legislative history underlying the statute [the FTCA], many courts have held that a lump sum amount for multiple claimants satisfies the 'sum certain' requirement.") Thus, the aggregate amount contained in the *Dalrymple* amended complaint attached to *each* Plaintiff's SF-95 claim forms satisfies the purpose of the statute. "To rule otherwise would be to elevate form over function in direct contravention of the Congressional policy underlying the statute." *Id.*

**II. The District Court Erred as a Matter of Law in Concluding That Defendant's Agents' Use of Tear Gas Was Objectively Reasonable Even Though Their Use of Tear Gas Violated Defendant's Own Express Policies and Procedures and Operational Plan for the Raid.**

Defendant fails to challenge Plaintiffs' argument that the use of tear gas by its agents in the instant case violated the Immigration and Naturalization Service's ("INS's") own Policies and Procedures, as well as the Operational Plan for the raid. In their initial brief, Plaintiffs clearly demonstrated that Defendant's agents' use of force against them was not objectively reasonable as Defendant's agents violated Defendant's own policies and procedures and the Operational Plan for the raid by spraying Plaintiffs with and/or otherwise exposing them to a prohibited chemical agent, *i.e.*, tear gas, during the raid. See Appellant's Brief at 27-33. Defendant argues that, even if Defendant's agents violated its own policies and procedures, nevertheless a federal employee's violation of federal policies, regulations, or even statutory obligations does not create a cause of action under the FTCA. See Appellee Brief at 19-23. Defendant's argument misses the mark because it wholly misconstrues Plaintiffs' claims.

Plaintiffs have not alleged a cause of action based on Defendant's agents' violation of Defendant's own policies and procedures and Operational Plan. Instead, Plaintiffs alleged tort causes of action such as assault and battery,

negligence, and intentional and negligent infliction of emotional distress under Florida common law.<sup>3</sup> Plaintiffs cited Defendant's violation of its own policies and procedures and Operational Plan as evidence that Defendant's agents acted unreasonably, which is a necessary showing to prevail on the aforementioned causes of action.

For instance, “[t]o succeed on a negligence claim in Florida, a plaintiff must ‘show that the defendant owed a duty of care to the plaintiff, that the defendant breached the duty, that the breach caused the plaintiff’s injury, and that damages are owed.’” *Miles*, 289 F.3d at 722 (11th Cir. 2002). “Florida law provides that the duty element of negligence focuses on whether the defendant’s conduct foreseeably created a broader ‘zone of risk’ that poses a general threat of harm to others.” *Id.* at 723. “[W]hen a defendant, including a police officer, by his or her

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<sup>3</sup> See *Sullivan v. Atlantic Fed. Sav. & Loan Ass'n*, 454 So.2d 52, 54 (Fla. Dist. Ct. App. 1984), *rev. denied*, 461 So.2d 116 (Fla.1985) (tort of assault and battery recognized under Florida law); *Chorak v. Naughton*, 409 So.2d 35, 39 (Fla. Dist. Ct. App. 1981) (same); *Miles v. Naval Aviation Museum Foundation, Inc.*, 289 F.3d 715, 722 (11th Cir. 2002) (citing *Ewing v. Sellinger*, 758 So. 2d 1196, 1197 (Fla. Dist. Ct. App. 2000)) (tort of negligence recognized under Florida law); *Gonzalez-Jimenez de Ruiz v. U.S.*, 231 F. Supp.2d 1187, 1199 (M.D. Fl. 2002) (tort of intentional infliction of emotional distress recognized under Florida law); and *Mistretta v. Volusia County Dep't of Corrections*, 61 F. Supp. 2d 1255, 1265-66 (M.D. Fla. 1999) (citing *Reynolds v. State Farm Mutual Automobile Ins. Co.*, 611 So. 2d 1294, 1296 (Fla. Dist. Ct. App. 1992), *rev. denied*, 623 So. 2d 494 (Fla. 1993)) (tort of negligent infliction of emotional distress recognized under Florida law).

conduct creates a foreseeable zone of risk, the law imposes a duty owed by the defendant to all individuals within the zone **to act with reasonable care.**” *Id.* (emphasis added). The Florida Supreme Court has clearly stated that, while “written agency protocols, procedures and manuals do not create an independent duty of care,” “a written policy or manual may be instructive in determining whether the alleged tortfeasor acted negligently in fulfilling an independently established duty of care.” *Pollack v. Florida Department of Highway Patrol*, 882 So. 2d 928, 936-37 (Fla. 2004).

In this case, Plaintiffs provided ample evidence below that Defendant owed them a common law duty of reasonable care. That duty arose from the “zone of risk” Defendant created when it undertook a large-scale search and seizure operation with 151 heavily-armed agents with the knowledge that Plaintiffs were innocent bystanders to the government operation at the scene and could be harmed, especially by the use of prohibited tear gas.<sup>4</sup> Defendant breached its duty of reasonable care under Florida law, and this breach caused harm to Plaintiffs. Defendant’s breach is shown by Defendant’s agents’ violation of Defendant’s own policies and procedures and Operational Plan prohibiting the use of tear gas that

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<sup>4</sup> The harm associated with exposure to CS gas was known to Defendant, as is evidenced by its policies outlawing its use.

were created to ensure Plaintiffs' safety and well being. *Pollack*, 882 So. 2d at 936-37. The district court erred by finding otherwise.

Similarly, to succeed on a battery claim in Florida, Plaintiffs must show infliction of harmful or offensive contact with the intent to cause such contact or the apprehension that such contact is imminent. *Sullivan*, 454 So.2d at 54; *Chorak*, 409 So.2d at 39. To succeed on a battery claim in Florida, a plaintiff must show an intentional, unlawful offer of corporal injury by force, or exertion of force under such circumstances as to create a reasonable fear of imminent peril. *Sullivan*, 454 So. 2d at 54. As a matter of Florida law, a law enforcement officer may *only* use an amount of force as reasonably appears necessary to "defend himself or another from bodily harm while making the arrest." Florida Statute § 776.05. "Whether the force used is reasonable is a question of fact to be determined in light of the circumstances of each particular case. In any case the officer can never use more force than reasonably appears to be necessary, or subject the person arrested to unnecessary risk of harm." *Miami v. Albro*, 120 So. 2d 23, 26 (Fla. Dist. Ct. App. 1960). As noted, the Florida Supreme Court has clearly stated that the violation of written policies or manuals may be instructive in determining whether the alleged tortfeasor acted unreasonably, as Defendant's agents did in the instant case. *Pollack*, 882 So. 2d at 936-37.

Here, Defendant does not dispute that its own policies and procedures expressly barred the use of tear gas during the raid.<sup>5</sup> In addition, it is undisputed that Defendant's Operational Plan for the raid did not authorize the use of tear gas during the raid for any reason.<sup>6</sup> It is also undisputed that INS agent Daniel Dargan was armed with an Israeli Gas Gun containing tear gas and deployed the Israeli Gas Gun to spray Plaintiffs with the tear gas.<sup>7</sup> As a result, under Florida law, it was patently unreasonable for Defendant's agents to violate Defendant's own express policies and procedures, as well as its own express Operational Plan, by spraying Plaintiffs with and/or exposing them to tear gas. *Pollack*, 882 So. 2d at 936-37.

Moreover, Defendant made no showing during trial that, during the course of the raid itself, some emergency or exigent circumstances arose requiring the use

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<sup>5</sup> See Doc 103 and 106 - Pgs 2-3, ¶ 5 (Plaintiffs' Concise Statement of Material Facts In Genuine Dispute and Response to Defendant's Statement Of Material Facts as to Which There Is No Genuine Dispute) and Pls.' Exhibit 21 (INS's Enforcement Standard: Use of Nondeadly Force) at section IV (D)(2), attached thereto.

<sup>6</sup> See Doc 103 and 106 - Pgs 4-5, ¶ 6 and Pls.' Exhibit 22 (INS's Appendix to Operational Plan), attached thereto.

<sup>7</sup> See Doc 103 and 105 - Pgs 2-3, ¶ 5 and Pls.' Exhibit 18 (Deposition Testimony of Daniel Dargan) at 25-28, 36; Doc 115 - Pg 3, ¶¶ 5B and 5E (Joint Pretrial Stipulation).

of tear gas in addition to pepper spray. There was never any dispute that other agents who participated in the raid were armed with pepper spray, and there was no demonstration that pepper spray was insufficient to control the crowd during the raid. As a result, the use of tear gas during the raid was not reasonable as a matter of law, and the district court erred by finding otherwise.

The district court dismissed Plaintiffs' claims for intentional and negligent infliction of emotional distress for the same reasons that it dismissed Plaintiffs' assault and battery claims, that is, it found Defendant's agents' conduct to be reasonable under the circumstances.<sup>8</sup> As Plaintiffs have demonstrated that Defendant's agents' conduct was not reasonable under the circumstances, this Court should reverse the district court's findings and remand Plaintiffs' intentional and negligent infliction of emotional distress claims for further proceedings.

### **CONCLUSION**

For the foregoing reasons, Plaintiffs Conception Maria Cabral, Mirtha Maria Falcon and her minor children, Antonio Ortega and Yuliet Colon, Alexei Torres, Angela Taina Toro, and Carlos R. Zayas respectfully request that the Court

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<sup>8</sup> See Doc 119, pgs 39, 40 (December 17, 2004 Magistrate Report and Recommendation); Doc 133, pg 3 (January 18, 2005 District Court Order Adopting in Part Magistrate's Report and Recommendation); Doc. 163, pgs 18, 19 (May 6, 2005 Findings of Fact and Conclusions of Law).

reverse the dismissal of their claims for failure to include a “sum certain” on their SF-95 forms. In addition, all Plaintiffs respectfully request that the Court reverse the aforementioned erroneous findings of fact and conclusions of law regarding the reasonableness of the use of tear gas and remand this matter for further proceedings.

Respectfully submitted,

JUDICIAL WATCH, INC.

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Dale L. Wilcox  
Paul J. Orfanedes  
Suite 500  
501 School Street, S.W.  
Washington, D.C. 20024  
Tel.: (202) 646-5172  
Fax.: (202) 646-5199

*Counsel for Appellants*

**CERTIFICATE OF COMPLIANCE**

Pursuant to Fed.R.App.P. 32(a)(7)(C), I hereby certify that the foregoing Appellants' Reply Brief complies with the type-volume limitations in Fed.R.App.P. 32(a)(7)(B). The brief contains 4,358 words, as counted by Corel WordPerfect 11.

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Dale L. Wilcox

**CERTIFICATE OF SERVICE**

I hereby certify that on November 14, 2005 two true and correct copies of the foregoing Appellants' Reply Brief were served, via first class U.S. mail, postage prepaid, on the following:

Barbara Herwig, Esq.  
Michael Raab, Esq.  
Mark Freeman, Esq.  
Civil Division, Appellate Staff  
U.S. Department of Justice  
Room 7237 MAIN  
950 Pennsylvania Avenue, N.W.  
Washington, DC 20530-0001

\_\_\_\_\_  
David Rothstein