APPEAL NO. 05-14375-G

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

DONATO DALRYMPLE, *et al.*,

Plaintiffs-Appellants,

vs.

UNITED STATES OF AMERICA,

Defendant-Appellee.

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

APPELLANTS' BRIEF

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Counsel certifies that the following persons have an interest in the outcome of this case:

Hector S. Abelairas, Plaintiff-Appellant

Abel Ramon Alonso, Plaintiff-Appellant

Natalie Alonso, Plaintiff-Appellant

Nicole Alonso, Plaintiff-Appellant

Tanay Alonso, Plaintiff-Appellant

Leslie Alvarez, Plaintiff-Appellant

Elsa Anderson, Plaintiff-Appellant

Guillermo Arce, Plaintiff-Appellant

David Barmak, Counsel for Judicial Watch, Inc.

Joel Beltran, Plaintiff-Appellant

Teresa Benitez, Plaintiff-Appellant

Conception Maria Cabral, Plaintiff-Appellant

Thomas A. Camacho, Plaintiff-Appellant

Nancy Canizares, Plaintiff-Appellant

Meredith Cavallo, Counsel for Plaintiffs-Appellants

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Juan Francisco Chils, Plaintiff-Appellant

Yuliet Colon, Plaintiff-Appellant

Milagros Cruz, Plaintiff-Appellant

Cosme Damian Diago, Plaintiff-Appellant

Darianne Diago, Plaintiff-Appellant

Idail Diago, Plaintiff-Appellant

Ramon Diago, Plaintiff-Appellant

Norma Dominguez, Plaintiff-Appellant

Eva Espinosa, Plaintiff-Appellant

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Osmany Fernandez, Plaintiff-Appellant

Pastera Ferrer, Plaintiff-Appellant

Jose Antonio Freijo, Plaintiff-Appellant

Gilberto Gallarraga, Plaintiff-Appellant

Jose I. Garcia, Plaintiff-Appellant

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Ruben Garcia, Plaintiff-Appellant

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Martha Teresita Lara, Plaintiff-Appellant

Maria Eugenia Cabrera Lazo, Plaintiff-Appellant

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Reina Machado, Plaintiff-Appellant

Anaisa Machin, Plaintiff-Appellant

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Morgan Marcos, Plaintiff-Appellant

Alfredo Martell, Plaintiff-Appellant

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Felix R. Meana, Plaintiff-Appellant

Troadio Mesa, Plaintiff-Appellant

Mario Miranda, Plaintiff-Appellant

Julio Mondelo, Plaintiff-Appellant

Martha Mondelo, Plaintiff-Appellant

The Honorable K. Michael Moore, United States District Court Judge

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Neil Michael Nameroff, Counsel for Plaintiffs-Appellants

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Zaida Nunez, Plaintiff-Appellant

Francisco Ondarza, Plaintiff-Appellant

Roberto Orama, Plaintiff-Appellant

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Martha Lina Oropesa, Plaintiff-Appellant

Anna Teresa Ortega, Plaintiff-Appellant

Antonio Ortega, Plaintiff-Appellant

Antonio Ortega (a minor), Plaintiff-Appellant

Yusledis Ortiz, Plaintiff-Appellant

The Honorable John J. O'Sullivan, United States Magistrate Judge

Miriam Palacio, Plaintiff-Appellant

Cristobal Peraza, Plaintiff-Appellant

Madeleine Peraza, Plaintiff-Appellant

Sergio Perez-barroto, Plaintiff-Appellant

Angel Pina, Plaintiff-Appellant

Jennifer Pina, Plaintiff-Appellant

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Pedro Riveron, Plaintiff-Appellant

Eduardo Rodriguez, Plaintiff-Appellant

Manuel Rodriguez, Plaintiff-Appellant

Marta Rodriguez, Plaintiff-Appellant

Patricia Rodriguez, Plaintiff-Appellant

Tomas A. Rodriguez, Plaintiff-Appellant

Gloria Sanchez, Plaintiff-Appellant

Ileana Santana, Plaintiff-Appellant

Armanda Santos, Plaintiff-Appellant

Armanda Santos, Plaintiff-Appellant

Diego Tintorero, Plaintiff-Appellant

No. 05-14375-G, *Donato Dalrymple v. United States of America*

Angela Taina Toro, Plaintiff-Appellant

Alexei Torres, Plaintiff-Appellant

Carlos Treto, Plaintiff-Appellant

Carmen Valdés, Plaintiff-Appellant

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Anthony A. Yang, Counsel for Defendant-Appellee

Miriam A. Zaldivar, Plaintiff-Appellant

Carlos R. Zayas, Plaintiff-Appellant

Kimberly D. Ziropoulos, Counsel for Defendant-Appellee

STATEMENT REGARDING ORAL ARGUMENT

Plaintiffs-Appellants believe that oral argument would be of assistance to the Court, and, in light of the importance of the issues presented, respectfully request oral argument.

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JURISDICTIONAL STATEMENT

Plaintiffs-Appellants ("Plaintiffs") brought this action against Defendant-Appellee United States of America ("Defendant") pursuant to the provisions of the Federal Tort Claims Act ("FTCA"), 28 U.S.C. § 2671, *et seq.* Because this case arises under federal law and the United States of America is named as a defendant, the District Court had jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1346(b). On June 8, 2005, the District Court entered a final judgment against all Plaintiffs on all claims. Docket Number ("Doc") 169. This Court has jurisdiction over this appeal pursuant to 28 U.S.C. § 1291, as it arises from an order of the District Court that disposed of all of Plaintiffs' claims. Plaintiffs timely filed their notice of appeal on August 4, 2005, under Rule 4(a)(1)(A) of the Federal Rules of Appellate Procedure ("Fed.R.App.P."). Doc 179.

STATEMENT OF THE ISSUES PRESENTED

1. Whether the District Court erred in dismissing the claims of 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 for lack of subject matter jurisdiction because of the inadvertent omission of a "sum certain" on these Plaintiffs' administrative claim forms where the inadvertent

error was corrected and the sum certain was provided to Defendant more than one year before Defendant denied these Plaintiffs' claims?

2. Whether the District Court erred in concluding as a matter of law that Defendant's agent's use of a prohibited chemical agent known as CS gas to spray on and at Plaintiffs during the raid to seize custody of Elian Gonzalez was an objectively reasonable use of force, even though the use of such prohibited CS gas violated Defendant's own express policies and procedures, as well as Defendant's Operational Plan for the raid?

STATEMENT OF THE CASE

Plaintiffs initiated this action on March 13, 2003 and filed an Amended Complaint on August 30, 2004. Doc 1, 71. Plaintiffs and the other claimants sought compensatory damages for assault and battery, false imprisonment, intentional infliction of emotional distress, negligence, and negligent infliction of emotional distress. *Id.* Defendant filed an answer and asserted various affirmative defenses. Doc 9, 77.

On or about July 18, 2003, Defendant moved to dismiss the claims of 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 for lack of subject matter jurisdiction, citing the inadvertent omission of

a "sum certain" on these Plaintiffs' SF-95 administrative claim forms. Doc 15. On November 7, 2003, U.S. Magistrate Judge John J. O'Sullivan issued a report and recommendation recommending that the aforementioned Plaintiffs' claims be dismissed. Doc 41. On March 29, 2004, the District Court adopted Magistrate Judge O'Sullivan's recommendation and dismissed these Plaintiffs' claims. Doc 52.

On or about October 13, 2004, Defendant moved for summary judgment or, in the alternative, to dismiss Plaintiffs' Amended Complaint. Doc 87. On December 17, 2004, Magistrate Judge O'Sullivan issued a report and recommendation recommending that Defendant's motion be granted in part and denied in part. Doc 119. On January 18, 2005, the District Court adopted Magistrate Judge O'Sullivan's recommendation in part and dismissed, pursuant to Federal Rule of Civil Procedure ("Fed.R.Civ.P.") 56, all Plaintiffs' claims, except for the assault and battery claims of Plaintiffs Leslie Alvarez, Elsa Anderson, Nancy Canizares, Ramon Diago, Antonio Ortega, Madeline Peraza, Maria Riera, Eduardo Rodriguez, Gloria Sanchez, Armanda Santos, Ileana Santana, and Carmen Valdes. Doc 133.[1] Of importance here, the District Court adopted the

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[1] Plaintiff Sandra M. Cobas' assault and battery claims also survived summary judgment and were allowed to proceed to trial. Ms. Cobas is represented by other counsel and is not included in this appeal.

Magistrate's conclusion that Defendant's use of a prohibited chemical agent against Plaintiffs was a reasonable use of force, even though the use of this chemical agent violated Defendant's express policies and regulations. *Id.* at 1.

On May 6, 2005, after a six-day bench trial, the District Court entered findings of fact and conclusions of law dismissing the remaining Plaintiffs' assault and battery claims. Doc 169. On June 8, 2005, the District Court entered a final judgment against all Plaintiffs' claims. Doc 169. Plaintiffs appealed on August 4, 2005. Doc 179.

STATEMENT OF THE FACTS

Plaintiffs allege they were injured by federal agents during the April 22, 2000 raid conducted by Immigration and Naturalization Service ("INS") agents that forcibly removed six-year old Cuban shipwreck survivor Elian Gonzalez from the home of his relatives in Miami, Florida and returned him to the custody of his father. At the time of the raid, some of the Plaintiffs had gathered outside the home of Lazaro, Angela, and Marisleysis Gonzalez to show their support for the family's efforts to give Elian a life of freedom in the United States. Doc 1 - Pgs 24, 25, 33-62, ¶¶ 152, 153, 183-276 (Amended Complaint); Doc 103 and 106 - Pgs 1-16, 18, ¶¶ 1- 9, 14-19, 21-26, 32, 33, 35, 36, 38-40, 42-44, 46, 47, 49, 51, 53-55, 57-59, 62, 64-67, 69, 70, 77-79, 86-88, 93-95 (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 Attached Exhibits). Other Plaintiffs were neighbors of the Gonzalez family and were sleeping or going about their business on their own property. Doc 1 - Pgs 24, 25, 33-62, ¶¶ 152, 153, 183-276; Doc 103 and 106 - Pgs 1-17, ¶¶ 1-7, 10-13, 20, 27-31, 34, 37, 41, 45, 48, 50, 52, 56, 60, 61, 63, 68, 71-76, 80-85, 89-92. Another Plaintiff was sitting on a chair in front of a home on the street behind the Gonzalez home. Doc 1 - Pg 33, ¶ 199; Doc 89 - Pg 4, ¶ 21; Doc 103 and 106 Pg 9, ¶ 21.

During the raid, an INS agent use an Israeli gas gun to disperse a chemical compound called 0-chlorobenzalmalononitrile, otherwise known as "CS gas" or tear gas. Doc 1 - Pg 25, ¶¶ 154, 155, 183-276; Doc 89 - Pgs 1-2, ¶ 5 (United States' Statement of Material Facts Not in Issue in Support of its Motion for Summary Judgment); Doc 103 and 105 - Pgs 2-3, ¶ 5; Doc 115 - Pg 3, ¶¶ 5B and 5E (Joint Pretrial Stipulation). INS policies and procedures in effect at the time of the raid expressly prohibited the use of CS gas by federal agents. Doc 1 - Pg 26, ¶ 157; Doc 103 and 106 - Pgs 2-3, ¶ 5 and Pls.' Exhibit 21 at section IV (D) (2) (INS's Enforcement Standard: Use of Nondeadly Force). Additionally, in the Appendix to the INS's Operational Plan for the raid, the only chemical authorized

for use was oleoresin capsicum, otherwise known as "pepper spray." Doc 1 - Pg 26, ¶ 157; Doc 103 and 106 - Pgs 4-5, ¶ 6 and Pls.' Exhibit 22 (INS's Appendix to Operational Plan).

Plaintiffs submitted timely administrative claims by hand, delivering Standard Form 95 claim forms ("SF-95s") to the U.S. Department of Justice on April 22, 2002. Doc 1 - Pg 14, ¶ 110. Plaintiffs' SF-95s were submitted to the U.S. Department of Justice in a single box that contained a total of 108 SF-95 administrative claim forms executed by persons who had been injured during the raid. Doc 15 - Pgs 19-23, Tab A, Attachment 2 (United States' Memorandum in Support of Motion to Dismiss). The box also contained a cover letter identifying each claimant by name. *Id.* The same representative was identified on each of the 108 SF-95s. *Id.*

Each administrative claim was to have requested $250,000 in compensatory damages, including damages for personal injury, in Box 12d of the SF-95s. Of the 108 SF-95 forms submitted on behalf of Plaintiffs, the forms of 97 Plaintiffs set forth this $250,000 amount in Box 12d.[2] Due to an inadvertent administrative or clerical error, however, 11 SF-95 forms submitted on behalf of Plaintiffs did not

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[2] There is no dispute between the parties to this appeal that 97 SF-95 forms submitted on behalf of Plaintiffs reflected the amount of $250,000 in Box 12d on each form.

include the $250,000 "sum certain" amount in Box 12d, although the "sum certain" these Plaintiffs were seeking certainly could be ascertained from a review of the 97 other, nearly identical SF-95s contained in the same box and submitted with the same cover letter, at the same time and by the same representative.

In addition, attached to each SF-95 was a lengthy (52 pages) and detailed copy of an Amended Complaint filed in *Dalrymple, et al. v. Reno, et al.*, Case No. 00-1773-Civ-Moreno (S.D. Fla.). Doc 15 - Pg 65-116, Tab A, Attachment 14. The Amended Complaint described the facts and circumstances giving rise to the claimants' claims, described the injuries suffered by each of the 52 plaintiffs named in that action (including Plaintiffs Concepcion Maria Cabral, Alexei Torres and Carlos R. Zayas), and demanded a "sum certain" of $100,000,000 in damages (or approximately $2,000,000 per person), in compensatory and punitive damages, attorneys fees, costs, and pre- and postjudgment interest.[3] Doc 15 - Pg 52, Tab A, Attachment 14. Those claimants who were not named as plaintiffs in the prior *Dalrymple* action also included, in addition to a copy of the Amended Complaint in that action, a brief description of the facts that gave rise to their particular claim and the injuries they suffered. Doc 15 - Pg 31-41, 55-57, Tab A, Attachments 5-7,

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[3] The prior *Dalrymple* action was brought pursuant to *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

11. For example, attached to Appellant Mirtha Maria Falcon's SF-95 and the SF-95s of her minor children was a document stating that:

> Plaintiff Mirtha M. Falcon was asleep in her bedroom with her mother and two children. Plaintiff's house is next to the Gonzalez family home. When the raid began Plaintiff was awoken by screaming and noise, she then went to the window to see what is happening. Plaintiff's house commenced to fill with gas, she never left the apartment.
>
> As a proximate result of the raid, Plaintiff suffered substantial damages . . . In particular, Plaintiff Mirtha M. Falcon and her two children suffered eye, nose, throat and skin irritation and burning, coughing, difficultly breathing, nausea, vomiting, chest pain and anxiety among other ailments.

Doc 15 - Pg 31-33, Tab A, Attachment 5.

On or about May 3, 2002, the U.S. Department of Justice, by and through Aleta Bodolay (Paralegal Specialist, Torts Branch, Civil Division), mailed Plaintiffs' counsel a letter acknowledging receipt of the 108 administrative claim forms and advising that some forms did not appear to include specific amounts of damages being sought by the claimants. Doc 15 - Pgs 19-23, Tab A, Attachment 2. Upon receipt of the May 3, 2002 correspondence, Plaintiffs' counsel reviewed the forms at issue and discovered the inadvertent error in Box 12d. On May 21, 2002, Plaintiffs' counsel sent Ms. Bodolay a facsimile correcting the inadvertent error, advising her that each of the 11 claimants was seeking $250,000 in

compensatory damages, including damages for personal injury. Doc 15 - Pgs 118-119, Tab A, Attachment 15.

The U.S. Department of Justice failed to respond to the 108 administrative claims within six months, as required by law. Consequently, Plaintiffs filed this suit. On or about June 9, 2003, Defendant denied all 108 administrative claims *en masse*, citing claimants' lawsuit, not any failure on the part of particular claimants to include a "sum certain" on their SF-95s. Doc 17 - Pg 12 (Plaintiffs' Response in Opposition to Defendant's Motion to Dismiss).[4]

SUMMARY OF THE ARGUMENT

The first issue on appeal concerns whether a technical deficiency in an administrative claim form is necessarily fatal to a FTCA claim. Many courts, including courts in this circuit, have looked beyond the mere technicalities of filing a FTCA administrative claim form and focused on whether the *purpose* of the statute has been satisfied by the claimant. In this case, certain Plaintiffs' SF-95s inadvertently did not contain a sum certain. When Plaintiffs' counsel discovered this error, it immediately supplied the missing information to Defendant. Defendant was provided with the sum certain for these Plaintiffs more

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[4] While the fact of Defendant's administrative denial was set forth in the record (Doc. 1, ¶ 110; Doc. 71, ¶ 100), Defendant's June 9, 2003 letter was not included. It is being included in an addendum for the Court's convenience.

than one year before Defendant denied these claims. Defendant cannot contend that it did not know the sum certain sought by these Plaintiffs.

The missing information also was readily ascertainable and available to Defendant by reviewing the 97 other administrative claim forms submitted at the same time, by the same representative, and in the very same box as these Plaintiffs' SF-95s. It also was ascertainable and available to Defendant by reviewing the Amended Complaint attached to each SF-95 form. This additional information was sufficient to put Defendant on notice as to the amount of damages sought by Plaintiffs, thereby satisfying the purpose of the FTCA.

Additionally, Defendant suffered no prejudice from the inadvertent omission of a sum certain on Plaintiffs' SF-95s. The inadvertent omission was immediately corrected by Plaintiffs' counsel and in no way inhibited Defendant from considering and ultimately denying Plaintiffs' claims. The omission was corrected shortly after being discovered, and only one month after the forms were submitted to the U.S. Department of Justice and more than one year prior to Defendant's denial of all Plaintiffs's claims. To hold that such an inadvertent, clerical error or technical deficiency in an administrative claim form is fatal to a FTCA claim elevates form over substance and frustrates the overall purpose of the FTCA.

The second issue on appeal concerns whether the INS's use of a prohibited chemical substance in violation of express INS policies and regulations was an objectively reasonable use of force in this case. It is undisputed by the parties, and the evidence shows, that one of Defendant's agents used an Israeli gas gun to spray Plaintiffs with CS gas during the raid. Initially, the District Court erred in finding, contrary to the stipulation of the parties, that the Israeli gas gun was filled with oleoresin capsicum, *i.e.*, pepper spray. It is also undisputed that Defendant's agent's deployment of CS gas during the raid violated INS express policies and procedures in effect at the time of the raid, as well as the Appendix to the INS's own Operational Plan for the raid. The District Court erred by adopting the Magistrate Judge's conclusion in his Report and Recommendation that the use of prohibited CS gas was objectively reasonable under the circumstances. Each case relied upon by the Magistrate Judge and the District Court is factually distinguishable from the instant case and is not controlling or persuasive. Unlike in the instant case, in each case cited by the Magistrate Judge and relied upon by the District Court, use of the chemical agent deployed was not expressly prohibited by the defendant's own policies and procedures. Here, the prohibited use of CS gas by Defendant's agent in direct violation of the INS's own policies

and procedures and contrary to the INS's Operational Plan for the raid cannot constitute an objectively unreasonable use of force.

ARGUMENT

I. Standard of Review.

The District Court's dismissal of Plaintiffs' claims for lack of subject matter jurisdiction is subject to *de novo* review. *See Williams-Russell & Johnson, Inc. v. U.S.*, 371 F.3d 1350, 1352 (11th Cir. 2004); *see also Barnett v. Okeechobee Hospital*, 283 F.3d 1232, 1238 (11th Cir. 2002). "A complaint should not be dismissed for lack of subject matter jurisdiction unless the federal claim is 'immaterial and made solely for the purpose of obtaining jurisdiction or . . . is wholly insubstantial and frivolous.'" *Meason v. Bank of Miami*, 652 F.2d 542, 546 (5th Cir. 1981).

The District Court's rulings and dismissal of Plaintiffs' claims on summary judgment is also subject to *de novo* review, applying the same legal standards as the District Court. *See McCormick v. City of Fort Lauderdale*, 333 F.3d 1234, 1242-43 (11th Cir. 2003). "Summary judgment is appropriate if the evidence establishes 'no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.' Fed.R.Civ.P. 56(c). The evidence, and all

reasonable inferences, must be viewed in the light most favorable to the nonmovant." *Id.*

II. The Absence of a "Sum Certain" on Certain Plaintiffs' SF-95 Forms Did Not Deprive the District Court of Jurisdiction.

Plaintiffs satisfied the purpose of the FTCA by putting Defendant on notice of their claims. The absence of a sum certain, while a technical deficiency under the FTCA, did not prevent Defendant from considering or investigating Plaintiffs' claims. Nor did it cause Defendant any prejudice.

A. Litigating A Federal Tort Claims Act Claim.

In order to assert a claim against the United States, a claimant must first "present the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency in writing and sent by certified or registered mail." 28 U.S.C. §2675(a). "Presentment" of the claim is not defined in the FTCA but, rather, is defined in the Code of Federal Regulations. A FTCA claim is presented when:

> 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 . . ..

28 C.F.R. § 14.2(a). The "purpose of notice is 'to protect the (government) from the expense of needless litigation, give it an opportunity for investigation, and

allow it to adjust differences and settle claims without suit.'" *Adams v. U.S.*, 615 F.2d 284, 289 (5th Cir. 1980) (citations omitted).[5]

Incorporated into the overall purpose of giving notice to the government of a claim is the more specific purpose played by the "sum certain" element. Case law demonstrates that the purpose of identifying a "sum certain" is to provide the government with notice of the amount of damages being sought. In order to properly assess a claim, a federal agency must know the amount of the claim being made. As the U.S. Court of Appeals for the Fifth Circuit has held:

> Moreover, the filing of a 'sum certain' facilitates administrative disposition of the claim, since it both allows the agency better to evaluate whether the settlement will require the approval of the Attorney General . . . and provides the agency with the information necessary to act upon it within six months . . ..

Molinar v. U.S., 515 F.2d 246, 249 (5th Cir. 1975) (citations omitted).

A "sum certain" can be stated in more than one way. While the SF-95 may be the preferred method, courts have permitted claimants to identify a "sum certain" by other means. *See 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 . . .."). Courts have permitted claimants to identify a "sum certain" by

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[5] "The Eleventh Circuit has adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to October 1, 1981." *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc).

providing additional information in the form of attached medical bills or letters from attorneys, among other means. *See Molinar*, 515 F.2d at 249; *Santiago-Ramirez v. Sec. of the Dep't of Defense*, 984 F.2d 16, 19-20 (1st Cir. 1993); *Romulus v. U.S.*, 160 F.3d 131, 132 (2d Cir. 1998); *Williams v. U.S.*, 693 F.2d 555, 558 (5th Cir. 1982); *Adams v. U.S.*, 615 F.2d at 289; *Thompson v. U.S.*, 749 F. Supp. 299, 300 (D.D.C. 1990); *Blue v. U.S.*, 567 F. Supp. 394, 397 (D.D.C. 1983); *Koziol v. U.S.*, 507 F. Supp. 87, 90-91 (N.D. Ill. 1981).

The statutory purpose of the FTCA is served "as long as a claim brings to the Government's attention facts sufficient to enable it thoroughly to investigate its potential liability and to conduct settlement negotiations with the claimant." *Rise v. U.S.*, 630 F.2d 1068, 1071 (5th Cir. 1980); *see also Romulus v. U.S.*, 160 F.3d at 132 ("A claimant must provide more than conclusory statements which afford the agency involved no reasonable opportunity to investigate.").

In *Tidd v. U.S.*, 786 F.2d 1565, 1568, n.6 (11th Cir. 1986), the 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), 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. Unlike the plaintiff in *Suarez*, Plaintiffs in this case provided Defendant with the necessary information to satisfy the "sum certain" requirement.

B. Plaintiffs Corrected the Inadvertent Error on Their SF-95s Within One Month and Provided the Sum Certain to Defendant More Than One Year Before Defendant Denied Their Claims.

Plaintiffs corrected the technical deficiency in the SF-95s at issue within one month after submitting the SF-95s. They provided Defendant with the sum certain information within one month after submitting the SF-95s and more than one year before Defendant denied these claims together with all other Plaintiffs' claims. See *supra* at pp. 8-9. Courts have recognized that as long as an agency is put on notice, a "technically perfect" claim is not absolutely necessary as long as "defects are corrected and so long as the claim as considered contains the essential elements necessary to permit settlement." *Apollo v. U.S.*, 451 F. Supp. 137, 138-39 (M.D. Pa. 1978). In *Apollo*, the plaintiff failed to include a sum certain in his administrative claim. The court found that the plaintiff made a "prompt correction of the technical omission when the amended notice was filed about 10 weeks later.

Consequently, the [agency's counsel] had ample opportunity during the next five and a half months for consideration of plaintiff's technically complete claim." *Id.* at 139.

Plaintiffs here corrected the inadvertent omission as soon as they learned of it in May 2002. Doc 15 - Pg 118-119, Tab A, Attachment 15 (United States's Memorandum in Support of Motion to Dismiss). The one month between the submission of the SF-95s and the correction of this inadvertent omission is *de minimis* and did not frustrate Defendant's consideration of these claims, which were not denied until June 9, 2003, more than one year after the omission had been corrected. Thus, Defendant had the sum certain information in ample time to assess Plaintiffs' claims. Defendant does not claim that it did not understand these Plaintiffs were seeking $250,000, or that it would have acted any differently if Plaintiffs had included this same "sum certain" in Box 12d instead of receiving this information on May 21, 2002. Nor does Defendant claim that it denied any of the claims at issue because of this inadvertent error, which was corrected within a month. For purposes of Defendant's consideration of these Plaintiff's claims, Defendant was provided the sum certain information in a timely manner.

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

As stated in *Molinar*, the purpose of the "sum certain" requirement is to put the government on notice of the potential value of a claim and to give the agency the information it needs to consider the disposition of the claim. *See Molinar*, 515 F.2d at 249. Despite the inadvertent clerical error in certain Plaintiffs' SF-95 administrative claim forms, the SF-95 forms of the other Plaintiffs and other information submitted therewith provided Defendant with sufficient information to consider Plaintiffs' claims within the meaning of *Suarez*.

Defendant clearly had notice of the amount of these Plaintiffs' claims. The SF-95s at issue were not submitted to Defendant in a vacuum. They were submitted together with 97 other SF-95s which all contained the exact same "sum certain" of $250,000 in Box 12d arising from the same incident, the April 22, 2000 raid. Defendant was able to ascertain a "sum certain" for each of the 11 Plaintiffs by referring to the other nearly identical SF-95s submitted by the other 97 claimants on the same date, at the same time, arising from the same set of facts and circumstances, and by and through the same representative. *Id.*

Submitting the additional SF-95s provided notice to Defendant in the same way that submitting additional information such as medical bills or letters provides

notice. In *Molinar*, the plaintiff was in an automobile collision with another vehicle owned by the United States. *Molinar*, 515 F.2d at 247. Plaintiff's attorney wrote a letter to the General Services Administration "making a demand for property damage and personal injury." *Id.* The letter stated that the plaintiff's automobile was a total loss and that he had "incurred considerable medical bills." *Id.* Nowhere in the letter was an exact sum or amount of damages stated. Instead, the plaintiff attached copies of medial bills and car repair estimates. *Id.* The Court held that "we are persuaded that plaintiff here complied with the procedure for filing a claim. The letter of October 19, 1971, included bills which totaled $1462.50. This was a 'sum certain.'" *Id.* at 249. Like the plaintiff in *Molinar*, Plaintiffs provided notice of the amount of their claims by submitting additional documentation with their SF-95s from which Defendant could determine the amount of their claims, namely, each of the 97 other SF-95 forms seeking $250,000 in damages arising from the same facts and circumstances.

The Eleventh Circuit is not the only jurisdiction to place less weight on the form of the "sum certain" and more on whether the agency had sufficient notice of the claimant's claim. In *Koziol*, 507 F. Supp. at 89-91, the court held that technical defects in the form of the claim (*i.e.*, the SF-95 form) do not necessarily mean an agency was without notice. The plaintiff in *Koziol* advised the U.S.

Postal Service of injuries he sustained as a result of a rear end collision with a postal truck. *Id.* at 90. The plaintiff attached medical bills and a surgeon's report to his claim. *Id.*

The *Koziol* court held that the U.S. Postal Service had "sufficient information to initiate an investigation to determine if the Postal Service may have been at fault, to deny the claim if it concluded that the Postal Service was not at fault and to enter into settlement negotiations if it concluded that the Postal Service was legally vulnerable." *Id.* The court stated further:

> [C]ongress . . . evidenced no intention that the courts should act with greater rigidity with respect to claims against the sovereign than with respect to claims against the sovereign's minsters or servants . . . The Federal Tort Claims Act requires that the claimant give notice to permit the government to investigate the matter in a timely fashion and to permit negotiations in an effort to resolve the claim without litigation if the government determines there is some merit to the claim.

Id. at 91.

The SF-95s of the other 97 Plaintiffs -- which were submitted concurrently with Plaintiffs' SF-95s and which arose from the same facts and circumstances as Plaintiffs' SF-95s -- obviously constitute additional documentation of which Defendant had timely notice and clearly permitted the government to investigate and negotiate a resolution of all 108 claims without litigation. *See also Thompson*, 749 F. Supp. at 300 ("In the instant case, although plaintiff's SF-95 did not

technically state a sum certain, the accompanying letter sufficiently supplemented the claim in order to give notice and adequately state a cause of action upon with relief may be granted."). *Cf. Keene Corp. v. U.S.*, 700 F.2d 836, 840-43 (2d Cir. 1983) (claims denied because the plaintiff filed an aggregate amount as to all plaintiffs on the SF-95 form); *Caidin v. U.S.*, 564 F.2d 284, 287 (9th Cir. 1977) (claim denied because the plaintiffs attempted to file a class action administrative claim). Defendant cannot legitimately claim that it lacked notice of the amount of Plaintiffs' claims or was denied the opportunity to investigate those claims and negotiate a resolution before litigation resulted.

D. The Documentation Submitted With Plaintiffs' Administrative Claim Forms Put Defendant On Notice of the Amount of Plaintiffs' Claims.

Even more compelling is the fact that a copy of the Amended Complaint in the prior *Dalrymple* action, which expressly sought $100,000,000 or approximately $2,000,000 per plaintiff (including Plaintiffs Concepcion Maria Cabral, Alexei Torres and Carlos Zayas) in compensatory and other damages, also was attached to each SF-95 and clearly constitutes a "sum certain." Defendant certainly was capable of calculating or estimating a "sum certain" for each claimant based upon the demand for $100,000,000 or approximately $2,000,000

per plaintiff in compensatory and other damages made in the Amended Complaint. *Suarez*, 22 F.3d at 1066.

The Fifth Circuit recognized the significance of an attached complaint in *Williams*. In *Williams*, the plaintiff was involved in an automobile accident with a U.S. postal worker. 693 F.2d at 556. The plaintiff filed a complaint alleging negligence on the part of the defendant postal worker. *Id.* The complaint described the property damage to the car and contained a detailed list of the personal damages that the plaintiff sought to recover. *Id.* The U.S. Attorney informed the plaintiff that he had to file an administrative claim prior to filing any lawsuit. *Id.* The plaintiff voluntarily dismissed his complaint and filed an SF-95 form with the U.S. Postal Service ("USPS"). *Id.* The plaintiff's SF-95 form included the sum of $70,000 in property damages, but failed to include an amount for personal injuries. *Id.*

Two months after filing his SF-95 form, the plaintiff's attorney sent the USPS a letter detailing the property and personal damages sought by the plaintiff. *Id.* USPS denied the plaintiff's claim and a federal lawsuit was filed. *Id.* The district court dismissed the plaintiff's lawsuit for lack of subject matter jurisdiction. *Id.* The court held that the plaintiff had failed to file a proper

administrative claim within the statutory two-year period. *Id.* Specifically, the court stated that the plaintiff had failed to include a sum certain. *Id.*

The Fifth Circuit reversed and remanded, finding that the USPS was indeed on notice of the amount of the claim and holding that "no particular form or manner of giving such notice is required as long as the agency is somehow informed of the fact and amount of the claim within the two-year period prescribed . . .." *Id.* at 557. The Fifth Circuit further held that "complete notice" did not need to be found in the SF-95 form. *Id.* at 558. Instead, the plaintiff's complaint adequately supplemented the SF-95 and filled in the missing information in such a way as to constitute proper notice. *Id.* The Fifth Circuit held that the plaintiff:

> [D]oes not seek to rely on the his filing of the state complaint as notice to the Postal Service; he in fact filed an administrative claim through means of a Form 95 and merely seeks to supplement the information contained in that form with facts contained in his complaint from the state action.
>
> In this case, it is clear that Williams filed an administrative claim within two years of the date he was injured; it is also clear that the government was apprised of the specifics of that claim by the information contained in his state court complaint. Both of these acts, taken together, satisfy the notice requirement of § 2675 of the Tort Claims Act.

Id.

Similar to the plaintiff in *Williams*, the copy of the Amended Complaint attached to Plaintiffs' SF-95 forms, which plainly set forth a "sum certain" for

damages, gave Defendant sufficient notice of a "sum certain." Again, Defendant cannot claim that it lacked notice of the amount of Plaintiffs' claims or was denied the opportunity to investigate those claims and negotiate a resolution before litigation resulted.

E. Defendant Suffered No Prejudice From the Lack of An Express "Sum Certain" on Plaintiffs' SF-95s.

Defendant did not suffer any prejudice from the inadvertent omission of a dollar figure in Box 12d of the SF-95s at issue here.[6] *See Executive Jet Aviation, Inc. v. U.S.*, 507 F.2d 508 (6th Cir. 1974) ("Nevertheless they (the cases) do support our conclusion that technical failure to comply with the administrative claim procedures is not necessarily fatal to recovery, particularly when the Government is not prejudiced by the noncompliance.").

Defendant suffered no prejudice because the missing information was provided to Defendant on May 21, 2002, only one month after the SF-95s were submitted and more than one year before Defendant denied all Plaintiffs claims *en masse*. Therefore, the one month delay in providing Defendant with a definitive

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[6] Defendant is not immune from making clerical errors. The version of the SF-95 used by Plaintiffs, and which was obtained from Defendant, states in Box 12d "TOTAL (Failure to specify may." What is omitted from this phrase is any description of what may result from any "failure to specify." Doc 15 - Tab A, Attachment 3 - Pg 1 (United States's Memorandum in Support of Motion to Dismiss).

sum certain information for these Plaintiffs did not inhibit Defendant's ability to consider Plaintiffs' claims. *See Blue*, 567 F. Supp. at 399 ("Tyson's failure to specify to the Bureau of Prisons how much money he sought for his injuries caused no prejudice to the government, did not preclude or hinder pretrial settlement, nor further congest this Court's docket with unnecessary litigation."); *see also Champagne v. U.S.*, 573 F. Supp. 488, 494 (E.D. La. 1983) ("The government has not been prejudiced and the policy favoring settlement has not been deterred."). When Plaintiffs' counsel learned of the inadvertent omission of the sum certain on the SF-95s at issue, it sent a facsimile to Defendant correcting the error, advising that each of these 11 claimants was seeking a sum certain of $250,000, just like the other 97 claimants. Doc. 15 - Pg.118-19, Tab A, Attachment 15. Therefore, as of May 21, 2002, Defendant had all the information it needed to consider these 11 Plaintiffs' administrative claims.

Ironically, but importantly, the absence of this information on the SF-95s did not serve as Defendant's reason for denying these Plaintiffs' claims as Defendant did not deny Plaintiffs' claims for any substantive reason but, rather, denied all 108 administrative claims *en masse* on June 13, 2003, after the claimants filed suit. Doc 17 - Pg 12 (Plaintiffs' Response in opposition to Defendant's Motion to Dismiss). Thus, the inadvertent omission of the sum

certain on the SF-95s at issue which was cured more than one year before Defendant denied these claims could not, and did not, prejudice Defendant's consideration of these claims.

F. Clerical Errors Are Not Necessarily Fatal.

Other courts have recognized that clerical errors in SF-95s do not render a claim invalid. In *Rabovsky v. U.S.*, 265 F. Supp. 587, 588 (D. Conn. 1967), the plaintiff filed an SF-95 form in which he listed $953.42 in property damages and $25.00 in personal injury damages. *Id.* The plaintiff in *Rabovsky* described his personal injuries as injuries to his head, neck, back, and knees that left him partially, if not permanently disabled. *Id.* The defendant was informed of the name, address, and contact information of the plaintiff's doctor as well. *Id.* Based on this information, the Court found it was clear that the $25.00 in personal injury damages referenced on the plaintiff's SF-95 was a mistake that "should have been apparent to the government," and, as a result, the plaintiff was not precluded from a recovery." *Id.*; *see also Executive Jet*, 507 F.2d at 516, ("Technical failure to comply with the administrative claim procedures is not necessarily fatal to recovery, particularly when the Government is not prejudiced by the noncompliance."); *Champagne*, 573 F. Supp. at 494 ("Strict adherence with the technicalities is not always required by adult claimants."); *Little v. U.S.*, 317 F.

Supp. 8, 10 (E.D. Pa. 1970). These cases recognize that, when a "sum certain" can be ascertained by an agency, a clerical error in the "sum certain" should not prevent a claim from proceeding.

III. The District Court Erred as a Matter of Law in Concluding That Defendant's Use of Prohibited CS Gas Was an Objectively Reasonable Use of Force, Even Though Use of CS Gas Was a Direct Violation of Express INS Policies and Procedures and the INS's Own Operational Plan For the Raid.

The FTCA provides that the "United States may be liable for the conduct of its employees 'in the same manner and to the same extent as a private individual under like circumstances.'" *Pate v. Oakwood Mobile Homes*, 374 F.3d 1081, 1083 (11th Cir. 2004) (quoting 28 U.S.C. § 2674). Thus, a court must look to the law of the jurisdiction in which the wrongs are alleged to have occurred in analyzing FTCA claims. It is undisputed that the acts that gave rise to the instant case occurred in the State of Florida. Doc 115 - Pg 3, ¶ 1 (Joint Pretrial Stipulation). Accordingly, Florida law governs this case.

In the instant case, Plaintiffs brought claims against Defendant for assault and battery, false imprisonment, intentional infliction of emotional distress, and negligent infliction of emotional distress arising from the use of CS gas by INS agents against Plaintiffs and other actions taken by the INS agents during the April 22, 2000 raid. Doc 1, ¶¶ 297-314; Doc 71, ¶¶ 278-298. Defendant asserted

as an affirmative defense that the force used by the INS agents to carry out the raid was reasonable and, therefore, was privileged under Florida law. Doc. 77, p. 2, Seventh Defense.

As a matter of Florida law, the question of whether the force used by law enforcement personnel was 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). Plaintiffs alleged, *inter alia*, that the INS's use of CS gas against Plaintiffs during the raid was not objectively reasonable because the use of CS gas violated the INS's own policies and procedures in effect at that time, as well as the INS's Operational Plan for the raid. Doc 1 - Pgs 25, 26, 77-79, ¶¶ 154, 155, 157, 278-286.

It is undisputed that the INS borrowed an Israeli Gas Gun from the Miami Police Department and that the gas gun contained CS gas. Doc 115 - Pg 3, ¶¶ 5B and 5E (Joint Pretrial Stipulation). Other evidence submitted by Plaintiffs in opposition to Defendant's Motion for Summary Judgment corroborates this stipulated fact, such as the deposition testimony of Miami Police Department Lt. Armando Guzman, who testified that he loaned the Israeli gas gun to the INS and

pre-loaded it with CS gas. 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.' Ex. 15 (Deposition Testimony of Armando Guzman) at 9-11. Nonetheless, the District Court made a clearly erroneous finding of fact that the Israeli gas gun contained oleoresin capsicum ("OC spray"), *i.e.*, pepper spray. Doc 163 - Pg 4, ¶ 32 (Findings fo Fact and Conclusions of Law). As this finding of fact is contrary to the aforementioned Joint Pretrial Stipulation and other evidence, it is clearly erroneous and must be overturned.

In addition, it is undisputed that, during the raid, INS agent Daniel Dargan ("Dargan") was armed with the Israeli Gas gun containing CS gas and deployed the Israeli Gas Gun to spray Plaintiffs with CS gas. Doc 103 and 106 - Pgs 2-3, ¶ 5 and Pls.' Exhibit 18 (Deposition Testimony of Dargan) at 25-25, 36. It is also undisputed that the INS's use of CS gas against Plaintiffs during the raid violated express INS policies and procedures then in effect prohibiting the use of CS gas. Doc 103 and 106 - Pgs 2-3, ¶ 5 and Pls.' Exhibit 21 (INS's Enforcement Standard: Use of Nondeadly Force) at section IV (D) (2). In addition, it is undisputed that the INS's use of CS gas against Plaintiffs during the raid violated the INS's

Operational Plan which authorized only the use of OC spray. Doc 103 and 106 - Pgs 4-5, ¶ 6 and Pls.' Exhibit 22 (INS's Appendix to Operational Plan).

On or about October 13, 2004, Defendant moved for summary judgment or, in the alternative, to dismiss Plaintiffs' Amended Complaint. Doc 87. On December 17, 2004, Magistrate Judge O'Sullivan issued a report and recommendation recommending that Defendant's motion be granted in part and denied in part. Doc 119. Pertinent here is that the Magistrate Judge found Defendant's use of both CS gas and OC spray against Plaintiffs during the raid was a reasonable use of force, even though the use of CS gas violated Defendant's express policies and regulations. *Id.* at 22-25. On January 18, 2005, the District Court adopted Magistrate Judge O'Sullivan's recommendation in part, including the Magistrate Judge's conclusion that the INS's use of CS gas against Plaintiffs during the raid was a reasonable use of force, notwithstanding that the use of CS gas violated the INS's own express policies and procedures. Doc 133, at 1. This ruling was erroneous as a matter of law.

In adopting the Magistrate Judge's finding that the use of CS gas was objectively reasonable under the circumstances, the District Court relied on cases cited in the Magistrate Judge's report and recommendation holding that the use of CS gas and OC spray by law enforcement personnel under the circumstances of

those cases constituted a reasonable use of force. Doc 119 - Pgs 18-20. However, none of those cases held that a government agent's use of CS gas was an objectively reasonable use of force where the government's own express policies and procedures prohibited the agent from using CS gas. Furthermore, none of these cases held that a government agent's use of CS gas was reasonable to accomplish his mission where the government's own mission plan did not authorize the use of CS gas. Thus, the cases relied on by the District Court are inapposite to the instant case and fail to justify the use of CS gas in the instant case.

Each of the cases relied on by the District Court also is factually distinguishable from the instant case and is not controlling or persuasive. The outcome determinative distinction is that, in each case relied on by the District Court, the defendant's use of CS gas or OC spray was not prohibited by the government's own policies and procedures. *See McCormick v. City of Fort Lauderdale*, 333 F.3d 1234 (11th Cir. 2003) (no allegation that OC spray used by police officer was prohibited chemical agent); *Clemmons v. Greggs*, 509 F.2d 1338 (5th Cir. 1975) (no allegation that CS gas used by prison guard was prohibited chemical agent); *Andrade v. United States*, 116 F. Supp. 2d 778 (W.D. Tex. 2000), *aff'd*, 338 F.3d 448 (5th Cir. 2003), *cert. denied*, 124 S. Ct. 1655 (2004) (no allegation that CS gas used by federal agents was prohibited chemical agent);

Ellsworth v. City of Lansing, 34 F. Supp. 2d 571 (W.D. Mich. 1998), *aff'd without opinion*, 205 F.3d 1340 (6th Cir. 2000) (no allegation that CS gas used by police was prohibited chemical agent); and *Vineyard v. Wilson*, 311 F.3d 1340 (11th Cir. 2002) (no allegation that OC spray used by police officer was prohibited chemical agent).

Here, unlike the cases relied on by the District Court, the INS's own policies and procedures in effect at the time of the raid, as well as the INS's Operational Plan for the raid, did not authorize the use of CS gas during the raid for any reason. See *supra* at 5-6, 29-30. It is undisputed that the use of CS gas during the raid violated the INS's own express policies and procedures and the INS Operational Plan for the raid. If INS officials believed it might be reasonable to add a weapon containing CS gas to the INS's arsenal for use during the raid, it should have sought and obtained authorization to use CS gas before arming one of its agents with an Israeli gas gun filled with CS gas. As it was, the Operational Plan for the raid contained no such authorization. Thus, it was patently unreasonable for the INS to violate its own express polices and procedures, as well as its own express Operational Plan, by arming one of its agents with a gas gun that contained prohibited CS gas. Moreover, the INS made no showing that, during the course of the raid itself, some emergency or exigent circumstances arose requiring the use of

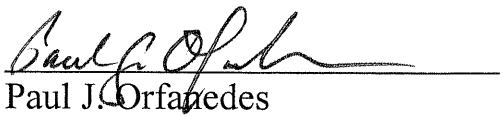
CS gas in addition to OC spray. There was never any dispute that other agents who participated in the raid were armed with OC spray, and there was no demonstration that OC spray was insufficient to control the crowd during the raid. As a result, the use of CS gas during the raid was not reasonable as a matter of law, and this Court should reverse the aforementioned erroneous findings of fact and conclusions of law and remand these 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 reverse the dismissal of their claims for failure to include a "sum certain" on their SF-95s. In addition, all Plaintiffs respectfully request that the Court reverse the aforementioned erroneous findings of fact and conclusion of law regarding the reasonableness of the use of OC spray and remand this matter for further proceedings.

Respectfully submitted,

JUDICIAL WATCH, INC.



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Counsel for Appellants

ADDENDUM

Department of Homeland Security
Office of the Regional Counsel

EORCOU 90/16.29

Bureau of Immigration and Customs Enforcement
Bureau of Citizenship and Immigration Services

70 Kimball Avenue
South Burlington, Vermont 05403-6813

June 9, 2003

Paul Orfanedes, Esq.
Judicial Watch, Inc.
501 School St., S.W.
Washington, D.C. 20024

Re: Administrative tort claims on behalf of Hector S. Abelairas, et al.

Dear Mr. Orfanedes:

On March 13, 2003, Judicial Watch, Inc. filed a lawsuit in the United States District Court for the Southern District of Florida following presentation of administrative tort claims on behalf of the persons listed on the attachment to this letter. Since Judicial Watch has exercised its option under 28 U.S.C. § 2675(a) to file a lawsuit, the administrative claims must be, and hereby are, denied.

I am required to notify you that if Judicial Watch is dissatisfied with this determination, it may file suit in an appropriate United States District Court no later than six months from the date of mailing of this notification of denial. *See* 28 U.S.C. § 2401(b) and 28 C.F.R. § 14.9(a).

Sincerely,

Scott A. Whitted
Assistant Regional Counsel

Enc.

ADMINISTRATIVE TORT CLAIMANTS

Hector S. Abelairas
Miguel Alejandro
Gregory Paul Allen
Abel Ramon Alonso
Nicole Alonso, minor
Natalie Alonso, minor
Tanay Alonso
Leslie Alvarez
Elsa G. Anderson
Guilllermo Arce
Joel Beltran
Teresa Benitez
Cencepcion Maria Cabral
Francia de la Concepcion Cabral
Nancy Canizares
Arturo Castellanos
Blanca Nieves Chils
Juan Francisco Chils
Sandra Cobas
Ms. Milagros Cruz
Donato Dalrymple
Cosme D. Diago
Darianne Diago, monor
Idail Diago
Ramon Diago
Norma Dominguez
Eva Espinosa
Triburcio Estupinan
Mirtha Maria Falcon
Antonio Ortega, minor
Juliet Colon, minor
Lenia Fernandez
Osmany Fernandez
Pastor Ferrer
Jose Antonio Freijo
Gilberto E. Gallarraga
Leida Garcia
Rosa Garcia
Rubin Garcia
Nixy Gomez
Carlos Alberto Gonzalez
Jose A. Gonzalez
Josefa R. Gonzalez
Vanessa G. Gonzalez

Yusleivy Gonzalez
Estelva G. Guevara
Pablo Hernandez
Ms. Yanet Huet
Martha Teresita Lara
Maria Eugnia Cabrera Lazo
Thomas A. Comacho, minor
Marta Lorenzo
Reina Machado
Anaisa Machin
Morgan Marcos
Alfredo Martell
Nelva Martin
Ileana Martinez
Jose L. Martinez
Pedro S. Martinez
Felix Rafael Meana
Troadio Mesa
Mario Miranda
Julio Mondelo
Martha Mondelo
Jorge A. Morales
Aray Noda
Zaide Nunez
Roberto Orama
Martha Lina Oropesa
Anna Teresa Ortega
Antonio F. Ortega
Antonio Ortega (son)
Mrs. Yosledis Ortiz
Lazaro Martell, minor
Francisco Ondarza
Miriam Palacio
Misael R. Pandiello
Mr. Cristobal Peraza
Madeleine Peraza
Sergio Perez-Barroto
Angel Pina
Jennifer Pina
Myra Pina
Mellissa Pumarega
Nestor Ramos
Otoniel Ramos
Leonor Rivero
Maria A. Riveron
Pedro Riveron

Eduardo Rodriguez
Manuel Rodriguez
Maria E. Rodriguez
Marta Rodriguez
Patricia Rodriguez
Tomas A. Rodriguez
Gloria Sanchez
Ireana Santana
Armanda Santos
Orlando Santos
Michael Stafford
Diego Tintoereo
Angela Tains Toro
Alexei Torres
Carlos Treto
Carmen Valdes
Divaldo Valdes
Miriam A. Zaldivar
Carlos R. Zayas

CERTIFICATE OF COMPLIANCE

Pursuant to Fed.R.App.P. 32(a)(7)(C), I hereby certify that the foregoing Appellants' Brief complies with the type-volume limitations in Fed.R.App.P. 32(a)(7)(B). The brief contains 8,727 words, as counted by Corel WordPerfect 11.

Paul J. Orfanedes

CERTIFICATE OF SERVICE

I hereby certify that on September 20, 2005 two true and correct copies of the foregoing Appellants' Brief were served, via first class U.S. mail, postage prepaid, on the following:

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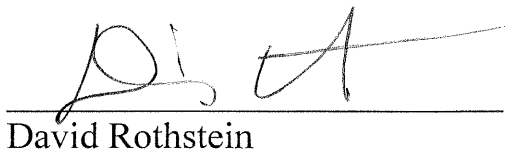

David Rothstein