

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MARYLAND**

**ROXANA ORELLANA SANTOS**

:

*Plaintiff,*

:

**Civil No. BEL-09-2978**

**v.**

:

**FREDERICK COUNTY**

:

**BOARD OF COMMISSIONERS, *et al.***

:

*Defendants.*

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**FEDERAL DEFENDANTS' MEMORANDUM IN SUPPORT  
OF MOTION TO DISMISS OR FOR SUMMARY JUDGMENT**

Defendants **Julie L. Myers**, *former Assistant Secretary, U.S. Department of Homeland Security*, **Calvin McCormick**, *ICE Baltimore Field Office Director*, and **James A. Dinkins**, *ICE Special Agent in Charge of the ICE*, by and through counsel, Rod J. Rosenstein, United States Attorney for the District of Maryland, and Ariana Wright Arnold, Assistant United States Attorney for said District, hereby submit this Memorandum in support of their Motion to Dismiss the claims as to these Defendants under Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure or for Summary Judgment under Rule 56.

**INTRODUCTION**

Plaintiff Santos alleges in her Complaint that she was unlawfully interrogated and detained by Frederick County law enforcement officers, in part, pursuant to their authority under a Memorandum of Agreement between local law enforcement and the U.S. Department of Homeland Security (DHS). Santos claims that on October 7, 2008, while she was eating her lunch, she was confronted, questioned and detained by officers from the Frederick County Sheriff's Office. She claims she was then transferred into the custody of U.S. Immigration and Customs Enforcement

where she remained until her supervised release on November 13, 2008.

She alleges numerous claims against Frederick County, the Frederick County Sheriff's Office, and the two Sheriff's deputies involved in the incident. However, only Count 8, relates to the Federal Defendants. In Count 8, Plaintiff claims that the federal defendants are liable in both their official and individual capacities, for violations of Plaintiff's Constitutional rights, via their supervisory capacity, and their purported role in ensuring that local law enforcement complied with the MOA, and was provided appropriate training and/or guidance. Complaint, ¶ 127-129.

However, to the extent that Plaintiff's claims allege claims for damages against the federal defendants in their *official* capacity, they are barred, as Plaintiff has not exhausted her required administrative remedies. Her claims against the federal defendants in their *individual* capacities must also fail, as she cannot establish sufficient personal involvement to overcome the presumption against individual capacity claims based solely on their supervisory duties.

### **LEGAL STANDARDS**

#### **I. Motion To Dismiss For Lack Of Jurisdiction**

A motion to dismiss based on lack of subject matter jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(1) raises the question of whether the court has the authority to hear and decide the case. *See Davis v. Thompson*, 367 F. Supp. 2d 792, 799 (D. Md. 2005). The plaintiff bears the burden of proving that subject matter jurisdiction exists. *See Evans v. B.F. Perkins Co.*, 166 F.3d 642, 647 (4th Cir. 1999). When a defendant challenges subject matter jurisdiction, the court "may consider evidence outside the pleadings without converting the proceeding to one for summary judgment." *Id.* The court may properly grant a motion to dismiss for lack of subject matter jurisdiction "where a claim fails to allege facts upon which the court may base jurisdiction." *Davis*,

367 F. Supp. 2d at 799.

A plaintiff may recover against the United States only to the extent it has expressly waived its sovereign immunity. Welch v. United States, 409 F.3d 646, 650 (4th Cir. 2005). Where the United States has not waived its sovereign immunity, a case ordinarily should be dismissed for lack of subject matter jurisdiction pursuant to Rule 12(b)(1). Williams v. United States, 50 F.3d 299, 304 (4th Cir. 1995); *cf. Kerns v. United States*, 585 F.3d 187, 195-96 (4th Cir. 2009). The “scope of a waiver of the Government’s sovereign immunity will be strictly construed...in favor of the sovereign.” Frahm v. United States, 492 F.3d 258, 262 (4th Cir. 2007) (internal quotation marks and citation omitted). It is the plaintiff’s burden to “show that an unequivocal waiver of sovereign immunity exists.” Welch, 09 F.3d at 651. “If the plaintiff fails to meet this burden, then the claim must be dismissed.”

## **II. Motion To Dismiss For Failure To State A Claim**

A motion to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure tests the sufficiency of the plaintiff’s complaint. *See* Edwards v. City of Goldsboro, 178 F.3d 231, 243 (4th Cir.1999). Although the complaint need only satisfy the "simplified pleading standard" of Rule 8(a), Swierkiewicz v. Sorema N.A., 534 U.S. 506, 513 (2002), which requires a "short and plain statement of the claim showing that the pleader is entitled to relief," Fed. R. Civ. P. 8(a)(2), this Rule "still requires a ‘showing,’ rather than a blanket assertion, of entitlement to relief." Bell Atl. Corp. v. Twombly, 127 S. Ct. 1955, 1965 n.3 (2007). That is, "[f]actual allegations must be enough to raise a right to relief above the speculative level . . . on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." Id. at 1965 (internal citations omitted). In considering a motion to dismiss, the court need not accept unsupported legal allegations, Revene v.

Charles County Comm'rs, 882 F.2d 870, 873 (4th Cir. 1989), legal conclusions couched as factual allegations, Papasan v. Allain, 478 U.S. 265, 286 (1986), or conclusory factual allegations devoid of any reference to actual events, United Black Firefighters v. Hirst, 604 F.2d 844, 847 (4th Cir. 1979).

A court may dismiss a complaint "as a matter of law if it lacks a cognizable legal theory or if it alleges insufficient facts under a cognizable legal theory." Turner v. Kight, 192 F. Supp. 2d 391, 398 (D. Md. 2002) (internal citations omitted). A court should also dismiss a complaint if it appears beyond doubt that the plaintiff can prove no set of facts in support of his claims that would entitle him to relief. Franks v. Ross, 313 F.3d 184, 192 (4th Cir. 2002).

### **III. Summary Judgment**

A party is entitled to summary judgment if the evidence in the record "show[s] that there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The Supreme Court has emphasized that the "summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed 'to secure the just, speedy and inexpensive determination of every action.'" Celotex Corp. v. Catrett, 477 U.S. 317, 327 (1986).

Trial courts should enter summary judgment "against any party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Id. at 322. Where the plaintiff fails to meet this burden, "a defendant should not be required to undergo the considerable expense of preparing for and participating in a trial." Hayes v. Hambruch, 841 F. Supp. 706, 708 (D. Md. 1994) (Harvey, J.) *aff'd* 64 F.3d 657 (4th Cir. 1995). The Fourth Circuit has emphasized that trial judges have an

“affirmative obligation. . .to prevent factually unsupported claims and defenses from proceeding to trial.” Felty v. Graves-Humphreys Co., 818 F. 2d. 1126, 1128 (4th Cir. 1987).

### **ARGUMENT**

#### **I. Plaintiff’s Official Capacity Claims Must be Dismissed for Lack of Subject Matter Jurisdiction.**

Plaintiff appears to seek damages for emotional pain and suffering and alleged harm she claims to have suffered during her arrest and detention. The Federal Tort Claims Act grants jurisdiction to the federal courts via a *limited* waiver of sovereign immunity for the negligent acts performed by its employees within the scope of their employment. *See United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 807-08 (1984); *Williams v. United States*, 50 F.3d 299, 304 (4th Cir.1995).

However, the FTCA only waives sovereign immunity for suits brought against *the United States* – suits brought against a federal officer or agency must be dismissed for lack of jurisdiction. *See* 28 U.S.C. §2679, §1346(b); *see also Holmes v. Eddy*, 341 F.2d 477, 480 (4th Cir. 1965).<sup>1</sup>

In addition, the FTCA requires that before an may be brought in Court, a claimant must present his or her claim to the appropriate administrative agency for determination. *See* 28 U.S.C. 2401(b); *United States v. Kubrick*, 444 U.S. 111, 113 (1979).

*Here, no administrative tort claim has been filed.* (Exh. 1). Therefore, any alleged official capacity tort claims cannot be brought to this Court. *Ahmed v. U.S.*, 30 F.3d 514, 516 (4th Cir.

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<sup>1</sup> To the extent that Plaintiff’s claim on page 2 of the Complaint regarding “discrimination” is read as due process challenge, such claims are not actionable under the FTCA. The FTCA, does not provide a cause of action for constitutional tort claims. *See F.D.I.C. v. Meyer*, 510 U.S. 471, 477 (1994). Thus, to the extent that Plaintiff is alleging a violation of due process by the federal defendants in their official capacity under the FTCA, such claims must be dismissed for lack of jurisdiction pursuant to FED. R. CIV. P. 12(b)(6).

1994) (upholding dismissal pursuant to Federal Rule of Civil Procedure 12(b)(1)).

## **II. Plaintiff Cannot Establish Individual Liability Under *Bivens***

The Supreme Court has held that money damages are available when suit is brought against a federal official, in his or her *individual* capacity, acting under color of federal law, for violation of a plaintiff's constitutional rights. Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. 388 (1971).

It is well settled that liability in a *Bivens* suit may not be imposed upon a defendant unless he or she was personally responsible for the constitutional violation forming the basis of the complaint. *See, e.g., Tallman v. Reagan*, 846 F.2d 494, 495 (8th Cir. 1988). *Bivens* liability must be premised on direct personal responsibility for the alleged wrongdoing. *See Pellegrino v. United States*, 73 F.3d 934, 936 (9th Cir. 1996).

Similarly, a federal official cannot be held vicariously liable under *Bivens* for acts of a subordinate under the doctrine of “respondeat superior;” individuals without personal involvement or participation should be dismissed as defendants. *See Rizzo v. Goode*, 423 U.S. 362 (1976); Ward v. Johnson, 667 F.2d 1126, 1131 (4th Cir. 1981); Ashcroft v. Iqbal, 129 S.Ct. 1937, 1948 (2009) (Because vicarious liability is inapplicable to *Bivens* suits, a plaintiff must plead that each Government-official, through the official's own individual actions, has violated the Constitution; each official, regardless of position or title, is only liable for his or her own misconduct).

In this case, Plaintiff alleges only supervisory liability against the Federal Defendants based on their status as “supervisors of the 287(g) agreement between FCSO and ICE” and supervising

compliance with and implementation of the agreement. Complaint ¶ 127, 128, 133.<sup>2</sup> However she has not alleged and cannot prove that any of the named federal defendants were *personally involved* in the incident on October 7, 2008.

Therefore, the individual capacity *Bivens* claims against them must be dismissed.

### **CONCLUSION**

The Federal Defendants respectfully request that the Court dismiss Count 8 of Plaintiff's Complaint pursuant to Fed. R. Civ. P. 12(b)(1) and/or Fed. R. Civ. P. 12(b)(6) for lack of subject matter jurisdiction and failure to state a claim. Alternatively, Defendants respectfully request that the Court grant summary judgment in favor of Federal Defendants on Count 8.

Respectfully submitted,

Rod J. Rosenstein  
United States Attorney

April 27, 2010

By: \_\_\_\_\_/s/\_\_\_\_\_  
Ariana Wright Arnold  
Md Federal Bar No: 23000  
Assistant United States Attorney  
36 S. Charles Street, 4<sup>th</sup> Floor  
Baltimore, Maryland 21201  
Ph (410) 209-4883  
Ariana.Arnold@usdoj.gov

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<sup>2</sup> Moreover, this supervisory and/or vicarious liability is premised on the individual Federal Defendants having some obligation to supervise, monitor or train Sheriff's Deputies Openshaw and Lynch under the 287(g) agreement. However, both Plaintiff and the Sheriff's Deputies have conceded that the officers involved in Ms. Santos' arrest and detention were not certified under the 287(g) agreement. Complaint, ¶ 5, 60, 61; Paper No. 33, p. 3. Rather, they arrested and detained her pursuant to an NCIC warrant and their authority under various State and Federal Statutes. Paper No. 33, pp. 8-16.