UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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LEONEL RUIZ, on behalf of his daughter, E.R., a Minor,

Plaintiff,

- against -

UNITED STATES OF AMERICA,

Defendant.

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Civil No. CV 13-1241 (KAM) (SMG)

PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS THE COMPLAINT FOR LACK OF JURISDICTION, MOTION FOR JUDGMENT ON THE PLEADINGS, AND MOTION FOR CHANGE OF VENUE

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Plaintiff Leonel Ruiz ("Mr. Ruiz"), on behalf of his minor daughter, E.R., respectfully submits this memorandum of law in opposition to the defendant's motion to dismiss the complaint for lack of jurisdiction pursuant to Rule 12(b)(1), for judgment on the pleadings pursuant to Rule 12(c), and for a change of venue pursuant to 28 U.S.C. § 1404(a).

PRELIMINARY STATEMENT

The defendant's motion to dismiss E.R.'s claims for lack of subject matter jurisdiction is based upon an attempted invocation of the "discretionary function exception" ("DFE") to the waiver of sovereign immunity contained in the Federal Tort Claims Act. However, neither of the required prongs of the DFE is satisfied here and the defendant's brief re-characterizes the events at issue in a way that is unsupported by the allegations in the Complaint or the extrinsic evidence submitted by the defendant. The Complaint alleges that E.R. was detained by officers of United States Customs and Border Protection ("CBP") for more than 20 hours under conditions that are unacceptable under the agency's own rules. Given that the CBP officers involved knew from the start that E.R. was a U.S. citizen, were aware of her parents' contact information from the initial moments of her detention, and failed to contact her parents for nearly 14 hours, her prolonged seizure was unreasonable under the Fourth Amendment. Equally unreasonable was E.R.'s expulsion from the United States, procured by the officers' belated insistence to E.R.'s father that his only options were to consent to her removal or send her to an "adoption center," a false choice that was the product of their own delay. Because federal agents do not have "discretion" to violate the Constitution, federal statutes, or agency rules, and because the DFE also does not shield conduct that is the product of laziness or inattentiveness, this Court has jurisdiction to hear E.R.'s claims for damages.

The Complaint also states claims for false imprisonment, intentional infliction of emotional distress ("IIED"), and negligence on behalf of E.R., upon which this Court may grant

relief. First, the defendant's contention that E.R. fails to allege that she was "confined" during the 20 hours when she was detained at Dulles under CBP control and then removed from the United States misconstrues Virginia law and overlooks the allegations in the Complaint. Second, notwithstanding the defendant's narrow construction of E.R.'s IIED claim, the Complaint adequately pleads that the CBP officers' conduct was outrageous and that E.R. suffered severe emotional distress. Third, the defendant admits that the CBP officers owed E.R. a duty, and the Complaint plainly alleges that the CBP officers' treatment of E.R. breached that duty.

Finally, venue is proper in this Court. The defendant erroneously focuses on the residence of Mr. Ruiz, a purely nominal plaintiff, rather than that of E.R., on whose behalf this action was brought and who resides in this district. Moreover, the defendant has not met the high burden of showing that the discretionary factors weigh strongly in favor of transferring venue, especially given that E.R.'s contact with Virginia was entirely inadvertent and she had no reasonable expectation of having to litigate there to vindicate her rights.

BACKGROUND

On March 10, 2011, E.R., who was then four years old, boarded a flight in Guatemala destined for John F. Kennedy International Airport ("JFK"), accompanied by her grandfather, Luis Dubon ("Mr. Dubon"). Complaint ("Compl."), April 3, 2013, ECF No. 7-1 ¶ 13. Due to bad weather, the flight was diverted to Dulles International Airport ("Dulles"), arriving between 2:00 and 3:00 A.M. on March 11, 2011. Id. ¶¶ 13-14. E.R. was traveling on a validly-issued U.S. passport and, upon arrival, her passport was stamped for entry into the United States. Id. ¶ 15. Although Mr. Dubon had previously travelled to and from the United States without incident, id. ¶ 12, a CBP officer denied Mr. Dubon entry into the United States and subsequently detained both Mr. Dubon and E.R. in a secondary inspection area, under guard by CBP officers, which E.R. was not free to leave, for approximately 20 hours. Id. ¶¶ 16-18.

During this time, CBP unreasonably failed to contact E.R.'s parents for nearly 14 hours—despite being presented with her contact information by Mr. Dubon, who carried with him a notarized letter from E.R.'s parents containing their contact information, and even though CBP policy requires CBP officers to afford noncitizens detained for more than three hours an opportunity to contact those waiting for them at their destination. Id. ¶¶ 14, 17, 19-20. As a result, E.R.'s parents were denied a meaningful opportunity to retrieve her.

The conditions of E.R.'s detention were entirely unsuitable for a four-year-old and were contrary to CBP internal rules and the Flores v. Reno Settlement Agreement (the "Flores Agreement") to which CBP is bound regarding the standards required when even noncitizen children are detained. Id. ¶¶ 52-54. E.R. was held in a cold room, was not provided with a blanket or pillow, and was provided nothing to eat for most of the 20-hour period during which she was detained. Id. ¶¶ 49-50. E.R. repeatedly asked Mr. Dubon about her parents and cried often. Id. ¶¶ 35-36, 51.

Nearly 14 hours after E.R. arrived at Dulles, a CBP officer finally contacted Mr. Ruiz and explained that E.R. was being held by CBP, promised to send E.R. home on a flight to New York, and agreed to call Mr. Ruiz with the flight information. Id. ¶¶ 27-31. When a CBP officer called back hours later, the officer instead informed Mr. Ruiz that he could not find Mr. Ruiz or his wife "in the system," and stated that CBP would not turn E.R. over to "illegals." Id. ¶¶ 40-41. Rather than facilitating E.R.'s reunion with her parents, or giving Mr. Ruiz the option to designate a custodian to pick up E.R. at Dulles (which he would have done), the CBP officer offered only that E.R. could be sent to an "adoption center" or that she could be sent back to Guatemala with Mr. Dubon. Id. ¶¶ 42-43. Mr. Ruiz was given less than an hour to decide

between these untenable options. Id. ¶ 45. Terrified that he was at risk of losing custody of his daughter, Mr. Ruiz acquiesced to sending E.R. back to Guatemala. Id. ¶¶ 44, 46.

E.R. was then taken by CBP officers to the TACA flight on which she was effectively deported to Guatemala. Id. ¶ 55. While in Guatemala she had bouts of hysterical and prolonged crying and called her father a liar for failing to pick her up at the airport as he had promised. Id. ¶¶ 60-61. It was not until 18 days after E.R. was wrongfully removed from the United States, her country of citizenship, that she was able to return. Id. ¶¶ 57-58. After returning to the United States, E.R. developed symptoms related to the stress of her ordeal: she began to overeat, throw tantrums, and soil her pants during the day; she hid whenever people knocked on the front door; she refused to let go of her father's hand; and she became frightened whenever the lights were left off at night. Id. ¶ 62. A child psychologist who evaluated E.R. shortly after she returned to the United States determined she had been traumatized by her treatment by CBP. Id. ¶ 63. The psychologist diagnosed E.R. with Posttraumatic Stress Disorder ("PTSD"). Id. ¶ 63.

On March 8, 2013, Mr. Ruiz, on behalf of E.R., commenced this action. For the reasons alleged in the Complaint and set forth below, E.R. is entitled to relief from this Court.

ARGUMENT

I. THE DISCRETIONARY FUNCTION EXCEPTION DOES NOT SHIELD CONDUCT THAT VIOLATES THE CONSTITUTION, FEDERAL STATUTES, OR AGENCY RULES, OR THAT IS THE RESULT OF INATTENTIVENESS OR LACK OF DILIGENCE

The Federal Tort Claims Act ("FTCA") waives the sovereign immunity of the United States for monetary claims arising from "personal injury . . . caused by the negligent or wrongful act or omission of any employee of the Government." 28 U.S.C. § 1346(b); see also 28 U.S.C. § 2674. The "discretionary function exception" ("DFE") to this waiver, 28 U.S.C. § 2680,

applies only if two criteria are met: (1) "the acts alleged to be negligent must be discretionary, in that they involve an 'element of judgment or choice' and are not compelled by statute or regulation," and (2) "the judgment or choice in question must be grounded in 'considerations of public policy' or susceptible to policy analysis." Coulthurst v. U.S., 214 F.3d 106, 109 (2d Cir. 2000) (quoting U.S. v. Gaubert, 499 U.S. 315, 322-23 (1991)).

On a motion to dismiss based on the DFE, the Court must "accept all of the factual allegations in [the C]omplaint as true." Berkovitz by Berkovitz v. U.S., 486 U.S. 531, 540 (1988). Although it is always the plaintiff's burden to prove the existence of subject matter jurisdiction, the Court should "constru[e] all ambiguities and draw[] all inferences in [the] plaintiff's favor." Aurecchione v. Schoolman Transp. Sys., Inc., 426 F.3d 635, 638 (2d Cir. 2005) (brackets omitted) (citation and internal quotation marks omitted); see, e.g., Coulthurst, 214 F.3d at 109, 111 (vacating district court's dismissal of FTCA action on DFE grounds, reasoning that the complaint was "susceptible to various readings" and that dismissal was inappropriate "given the ambiguous allegations" in the complaint).

Neither prong of the DFE is satisfied here. The well-pleaded allegations of the Complaint show that the CBP officers' actions violated E.R.'s constitutional rights and were therefore outside the scope of their discretionary authority under the first prong of the DFE. Further, the Complaint plausibly supports the inference that the complained-of actions were the product of the officers' lack of diligence or inattentiveness—or worse—and are therefore not susceptible to policy analysis under the second prong of the DFE. Either point, standing alone, renders the DFE inapplicable and confirms that this Court has jurisdiction to consider E.R.'s claims. Further, the defendant offers no evidentiary support for its attempt to re-cast the actions

of its officers as reasoned responses to difficult choices, which is contrary to the Complaint's well-pleaded allegations.

A. The CBP Officers Violated E.R.'s Constitutional Rights and Exceeded the Scope of their Authority

The law places a clear limitation on the discretion of federal officers: they may not violate the Constitution or exceed their statutory authority. See Myers & Myers, Inc. v. U.S. Postal Serv., 527 F.2d 1252, 1261 (2d Cir. 1975) ("It is, of course, a tautology that a federal official cannot have discretion to behave unconstitutionally or outside the scope of his delegated authority."). Although the Complaint does not advance constitutional claims on behalf of E.R. (e.g., Bivens claims against individual CBP officers), it is entirely proper to assert E.R.'s constitutional rights in response to an attempted invocation of the DFE. See, e.g., id.; Rhoden v. U.S., 55 F.3d 428, 432 n.5 (9th Cir. 1995); El Badrawi v. Dep't of Homeland Sec., 579 F. Supp. 2d 249, 275 (D. Conn. 2008); Garcia v. U.S., 896 F. Supp. 467, 475 (E.D. Pa. 1995). Here, the defendant's attempted reliance on the DFE fails because the Complaint plausibly alleges that the CBP officers violated E.R.'s constitutional rights and exceeded their statutory authority.

First, the CBP officers' unnecessarily prolonged seizure of E.R. violated her Fourth Amendment rights.[1] Although CBP officers have the power to detain travelers at the border for a "routine customs search and inspection," U.S. v. Montoya de Hernandez, 473 U.S. 531, 541 (1985), E.R. was admitted to the United States, and the only basis for her continued detention was that Mr. Dubon was also being detained. "Where a minor plaintiff is detained not

[1] Here, E.R. was seized for purposes of the Fourth Amendment because a reasonable child would not have felt free to leave Dulles or the TACA flight on which E.R. was effectively deported to Guatemala. See Phillips v. Cnty. of Orange, 894 F. Supp. 2d 345, 361 (S.D.N.Y. 2012) (plaintiff adequately alleged unreasonable seizure of his child when school authorities questioned child at school, reasoning that "a reasonable five-year-old child would not have thought she was free to leave or decline the adults' questioning"); Armatas v. Maroulleti, No. 08-CV-310 (SJF)(RER), 2010 WL 4340437, at *11 (E.D.N.Y. Oct. 19, 2010) (minor children were "technically seized within the meaning of the Fourth Amendment" when they were confined by police at the time their father was arrested), adopted in part, 2010 WL 4340334 (E.D.N.Y. Oct. 22, 2010).

on suspicion of criminal activity but, rather, as incident to their parent or guardian's arrest," the appropriate Fourth Amendment inquiry is whether the seizure was reasonable. Graham v. City of N.Y., No. 08-CV-3518 (KAM)(RML), 2011 WL 3625074, at *5 (E.D.N.Y. Aug. 17, 2011) (Matsumoto, J.). In Graham, this Court held the alleged seizure of a minor to be reasonable because, among other factors, the minor's confinement was of a short duration, the minor was entrusted to the care of a third-party with the arrested parent's consent, and the police did not remove the child to any other location. See id. at *6-7; see also Armatas, 2010 WL 4340437, at *11 (noting the lack of available childcare alternatives).

Here, by contrast, the CBP officers detained E.R. for more than 14 hours before even contacting her parents, despite Mr. Dubon's specific requests soon after being detained and several times thereafter. Compl. ¶¶ 17, 19-20. When they finally contacted Mr. Ruiz, the CBP officers initially promised to facilitate E.R.'s travel to New York, id. ¶¶ 27-31, but later reneged on that promise after another delay of several hours, id. ¶¶ 40-43. At this point, the CBP officers delivered an ultimatum: Mr. Ruiz had to decide whether to place E.R. in an "adoption center" or send her to Guatemala. Id. ¶ 43. Worse yet, for reasons that can only be attributed to the CBP officers' own delay and revoked promises, E.R.'s parents were given just one hour to make their decision. Id. ¶ 45. Ultimately, the CBP officers effectively deported E.R. from the United States.[2]

In addition to constituting an unreasonable seizure, E.R.'s removal from the United States violated her procedural and substantive Due Process rights and exceeded the CBP

[2] Although Mr. Ruiz acquiesced to E.R.'s removal to Guatemala, his permission was coerced and thus not effective consent that could make E.R.'s seizure reasonable. Threats made toward a person's child are especially likely to render involuntary any subsequent statements by that person. See, e.g., Lynumn v. Illinois, 372 U.S. 528, 534 (1963) (statement was involuntary because it was "made only after the police had told [the suspect] that state financial aid for her infant child would be cut off, and her children taken from her, if she did not 'cooperate'"); U.S. v. Tingle, 658 F.2d 1332, 1335-36 (9th Cir. 1981) (statement held to be coerced where suspect was made "to fear that, if she failed to cooperate, she would not see her young child for a long time," reasoning that "[t]he relationship between parent and child embodies a primordial and fundamental value of our society").

officers' statutory authority. The Immigration and Nationality Act ("INA")—which the defendant suggests left the CBP officers with an incomplete framework for their decisions and thus allowed for discretion, see Defendant's Memorandum of Law in Support of its Motion to Dismiss ("Def.'s Br."), Sept. 9, 2013, 6-7—could never vest the CBP officers with authority to detain (other than for the purpose of and limited time required for inspection) or deport a U.S. citizen. See Lyttle v. U.S., 867 F. Supp. 2d 1256, 1281 (M.D. Ga. 2012). Indeed, "the right of a United States citizen to enter the country is a right 'which the fundamental law has conferred upon him.'" Hernandez v. Cremer, 913 F.2d 230, 237 (5th Cir. 1990) ("The Supreme Court has long acknowledged that the 'right to travel is a part of the "liberty" of which the citizen cannot be deprived without due process of law under the Fifth Amendment.'") (quoting Kent v. Dulles, 357 U.S. 116, 126-27 (1958)). E.R. was not meaningfully permitted to enter the United States because her ability to travel beyond the secondary inspection area was constrained by the actions of the CBP officers, based on their perception of the alienage of her parents. Compl. ¶ 41. Moreover, "[d]eporting one who claims to be a citizen is a deprivation of liberty implicating Fifth Amendment constitutional concerns." Lyttle, 867 F. Supp. 2d at 1283 (citing Ng Fung Ho v. White, 259 U.S. 276, 284-85 (1922)). Since Mr. Ruiz did not give effective consent to E.R.'s removal from the United States, and she was not otherwise afforded process, E.R.'s fundamental liberty interests were violated by the CBP officers.

Finally, the Complaint alleges that E.R.'s treatment violated CBP's own rules regarding the standard for treatment of those in immigration-related detention, which removes the CBP officers' conduct from the ambit of permissible discretion. Compl. ¶¶ 20, 52-54 (detention and isolation of E.R. violated Directive No. 3340-030B, the Flores Agreement, the Office of Border Protection's "Hold Room and Short Term Custody" policy, and the Office of

Field Operations' "Secure Detention, Transport and Escort Procedures at Ports of Entry"). Because these rules constitute the minimum required standard of treatment for those in CBP custody, the CBP officers' treatment of E.R. during her detention is outside the scope of the DFE. See Berkovitz, 486 U.S. at 536 (the DFE does not apply if a "federal statute, regulation, or policy specifically prescribes a course of action for an employee to follow," because "the employee has no rightful option but to adhere to the directive").

B. The CBP Officers' Negligence Was Unrelated to Any Plausible Policy Objectives

In Coulthurst, the Second Circuit explained that merely because the government officers' actions are "not directly controlled by statute or regulation" does not render them protected by the DFE. 214 F.3d at 110. The DFE does not shield negligent conduct arising out of carelessness, lack of diligence, haste, laziness, or inattentiveness. See id. at 109-10 ("Such negligent acts neither involve an element of judgment or choice within the meaning of Gaubert nor are grounded in considerations of government policy.") (reversing dismissal of FTCA claim based on the DFE).

The Complaint contains numerous allegations plausibly supporting the inference that the CBP officers' conduct resulted from a lack of diligence or worse. The CBP officers inexplicably failed to contact Mr. Ruiz for nearly 14 hours after first detaining E.R. Compl. ¶ 20. The CBP officers also failed to provide adequate food, drink, or warmth to E.R. Id. ¶¶ 49-50. Even to the extent that CBP policies did not give the CBP officers on-point guidance regarding E.R., see Def.'s Br. 7, that does not mean that any actions by CBP officers were transformed into protected discretionary conduct. See Coulthurst, 214 F.3d at 110 (cautioning against any rule that "would effectively shield almost all government negligence from suit, because almost every act involves some modicum of discretion regarding the manner in which one carries it out").

C. The Defendant's Re-characterizations of the CBP Officers' Actions Are Unsupported By the Allegations in the Complaint or the Defendant's Extrinsic Evidence

Aware that the well-pleaded allegations of the Complaint preclude application of the DFE, the defendant endeavors to recast the Complaint in its brief, resorting to sheer conjecture concerning the CBP officers' motivations and objectives that finds support nowhere in the Complaint or in the extrinsic evidence attached to the Declaration of Margaret M. Kolbe ("Kolbe Decl."), September 9, 2013.[3]

Attempting to escape the unreasonable seizure of E.R. that was clearly outside the officers' discretion, the defendant re-characterizes the CBP officers' detention of E.R. as merely "permitting ER to remain with her grandfather in the secondary area, and to remain with him while he was removed to Guatemala," Def.'s Br. 7, a rewriting that misleadingly collapses the entire 20-hour sequence detailed in the Complaint into two isolated events. Even assuming the CBP officers had discretion to detain E.R. initially, it does not follow that it was reasonable for them to extend her detention by failing to contact her parents in violation of CBP's own rules, Compl. ¶ 20-22, or actively frustrate her parents' efforts to retrieve her, see id. ¶ 42-43.[4] The defendant does not even attempt to explain how such actions could be within the CBP officers' discretion.

Furthermore, it does not follow from the Complaint that the CBP officers were "placed in the untenable position of deciding whether to separate ER from her grandfather or

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[3] While it is true that "the court may resolve the disputed jurisdictional fact issues by referring to evidence outside of the pleadings," Zappia Middle E. Const. Co. Ltd. v. Emirate of Abu Dhabi, 215 F.3d 247, 253 (2d Cir. 2000) (emphasis added), the facts alleged in the Complaint must be "assume[d] to be true unless contradicted by more specific allegations or documentary evidence." Amidax Trading Grp. v. S.W.I.F.T. SCRL, 671 F.3d 140, 145 (2d Cir. 2011).

[4] The defendant's reliance on Bradley v. U.S., 164 F. Supp. 2d 437 (D.N.J. 2001), see Def.'s Br. 7, which involved a border search for drugs, is misplaced. The events alleged in the Complaint happened over 20 hours; they did not involve split second decision-making about whether to conduct a search.

permit her to remain in the care of her grandfather," Def.'s Br. 8 (emphasis added), the implication being that the officers made the best of a difficult situation that arose through no fault of their own.[5] As the Complaint alleges, the CBP officers themselves had recognized an alternative option hours earlier: a CBP officer "assured Mr. Ruiz that he would send E.R. to JFK as soon as he located a suitable flight." Compl. ¶ 31.[6] Furthermore, Mr. Ruiz would have designated a custodian who was willing and able to pick up E.R. if he had been given the opportunity. Id. ¶ 42. If the CBP officers found themselves confronted with the need to act quickly, it was only because they had first delayed contacting E.R.'s parents for 14 hours, id. ¶ 20, reassured E.R.'s parents that no further action was required by promising to put E.R. on a plane to New York, id. ¶ 31, and then abruptly changed their minds, after yet another delay of several hours, id. ¶¶ 40-41, 43. That the CBP officers' purportedly "untenable position" was the result of their unreasonably prolonged seizure of E.R. does not immunize their decision to deport her; it makes that decision all the more unreasonable.[7]

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[5] The defendant places considerable weight on the purely invented factual complication that there was some uncertainty about Mr. Ruiz's identity. See Def.'s Br. 8 (referring to "the voice on the other end of a telephone"). Rather, the Complaint alleges that the CBP officers refused to return E.R. to her parents because they were deemed to be "illegals," not because they could not be identified as E.R.'s parents. Compl. ¶ 41. In fact, the CBP officers were presented with a notarized letter from E.R.'s parents containing their contact information. Id. ¶ 14; see also Kolbe Decl., Ex. E. Moreover, the CBP administrative records attached to the Kolbe Declaration contain no statement that the CBP officers ever doubted Mr. Ruiz's identity; in fact, in the documentation, the CBP officers confirm speaking with "the minor[']s father, Ruiz Gutierrez, Leonel." Kolbe Decl., Ex. C, at 23. The defendant cannot maintain, on the one hand, that Mr. Ruiz provided valid consent to remove his U.S. citizen child from the country, and on the other, that Mr. Ruiz was just an unverified "voice on the other end of a telephone." See id. ("The minor[']s father was contacted and agreed to allow the child to accompany [the] subject to Guatemala.").

[6] The defendant asserts—without any basis in the record, let alone a declaration from an expert in psychology—that sending E.R. back to her parents would "have led to a traumatizing result," see Def.'s Br. 8. However, the defendant's current speculation about the viability of putting E.R. on a return flight to New York is not credible given that, at the time, the CBP officers agreed to do so, Compl. ¶ 31, and only reversed course after concluding that Mr. Ruiz and his wife were purportedly "illegals," see id. ¶ 41.

[7] For these reasons, the actions of the CBP officers as alleged in the Complaint are readily distinguishable from those of the government officers in Castro v. U.S. See Def.'s Br. 7. There, the court concluded that the government officers' actions constituted discretionary functions because the officers faced a forced choice not of their own making. See Castro v. U.S., No. C-06-61, 2007 WL 471095, at *7 (S.D. Tex. Feb. 9, 2007) (reasoning it was the plaintiff's persistent failure to secure custody of her daughter, despite being advised to do so by the Border Patrol officers, which left the Border Patrol officers "without a 'good' option with a wholly positive outcome.").

Elsewhere, the defendant's brief attempts to reframe the actions of the CBP officers as discretionary decisions concerning "how best to ensure the well-being of ER, while also processing [Mr. Dubon] for removal." Def.'s Br. 5. To the contrary, the allegations in the Complaint support the plausible inference that—rather than having decided how to ensure E.R.'s welfare—the CBP officers were at best indifferent to the length or conditions of E.R.'s detention. As already noted, the Complaint alleges that the CBP officers disregarded CBP's own rules concerning the treatment of minors held in immigration-related detention in their treatment of E.R., Compl. ¶¶ 48-54, and by failing to contact E.R.'s parents for more than 14 hours after her detention, id. ¶¶ 27-28.

II. THE COMPLAINT SETS FORTH SUFFICIENT FACTS TO ESTABLISH PLAUSIBLE CLAIMS FOR RELIEF

Judgment on the pleadings is appropriate only where all material facts are undisputed and "a judgment on the merits is possible merely by considering the contents of the pleadings." Sellers v. M.C. Floor Crafters, Inc., 842 F.2d 639, 642 (2d Cir. 1988). In all other respects, a motion pursuant to Rule 12(c) of the Federal Rules of Civil Procedure is evaluated under the same standard as that used for a motion to dismiss pursuant to Rule 12(b)(6). See Cleveland v. Caplaw Enter., 448 F.3d 518, 521 (2d Cir. 2006). Under this standard, a complaint need only allege "factual content" that, when assumed to be true, "allows the court to draw the reasonable inference" that the plaintiff is entitled to relief. Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (citing Bell Atl. Corp. v. Twombly, 550 U.S. 544, 556 (2007)). The Court's review is "limited to facts stated on the face of the complaint, in documents appended to the complaint or incorporated in the complaint by reference, and to matters of which judicial notice may be taken."

Allen v. WestPoint-Pepperell, Inc., 945 F.2d 40, 44 (2d Cir. 1991).[8] "Unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his or her claim which could entitle the plaintiff to relief, the court cannot grant a defendant's motion for a judgment on the pleadings." Mennella v. Office of Court Admin., 938 F. Supp. 128, 131 (E.D.N.Y. 1996) (citing Sheppard v. Beerman, 18 F.3d 147, 150 (2d Cir. 1994)), aff'd, 164 F.3d 618 (2d Cir. 1998). The defendant's motion fails to meet this standard; Mr. Ruiz has pleaded "allegations respecting all the material elements necessary to sustain recovery" on the three tort claims he brings on behalf of E.R. See Twombly, 550 U.S. at 562.

A. The Complaint States a Claim for False Imprisonment

Virginia law defines false imprisonment as the "restraint of one's liberty without any sufficient legal excuse therefor by word or acts which he fears to disregard." Montgomery Ward & Co. v. Wickline, 188 Va. 485, 489 (1948). The Complaint adequately pleads both elements.

First, with regard to the restraint of E.R.'s liberty, the Complaint plainly alleges that E.R.'s liberty was restrained by the CBP officers who improperly confined her for 20 hours in the secondary inspection area of Dulles from which she was not free to leave, refused to permit Mr. Dubon to contact her parents, refused to contact her parents themselves for an extended period, refused to permit E.R. to return to New York, failed to provide Mr. Ruiz an opportunity to make other arrangements or designate a custodian to pick up E.R., and effectively

[8] The defendant has introduced a preliminary report from the psychologist who examined E.R. as an exhibit to the motion. See Kolbe Decl., Ex. B. Mr. Ruiz submitted this report in support of his administrative FTCA claim but did not attach it to, or reference its contents in, the Complaint. The contents of the preliminary psychological report cannot be properly considered on a motion for judgment on the pleadings challenging the legal sufficiency of the allegations in the Complaint. See Sira v. Morton, 380 F.3d 57, 67 (2d Cir. 2004) ("Limited quotation from or reference to documents that may constitute relevant evidence in a case is not enough to incorporate those documents, wholesale, into the complaint."); DeLuca v. AccessIT Grp., Inc., 695 F. Supp. 2d 54, 60 (S.D.N.Y. 2010) (incorporating a document by reference requires a "clear, definite, and substantial reference" to the document).

deported E.R. from the United States. Compl. ¶¶ 18-20, 27, 41-42, 55. Second, E.R.'s confinement was without legal excuse. The Complaint alleges that the CBP officers: at all times knew E.R. to be a U.S. citizen (and thus entitled to enter and travel within the United States), had no reason to believe she had committed a crime, had actual knowledge of her parents' contact information from the start of her detention, had either actual or constructive knowledge that her parents were willing and able to take custody of her in New York, and deported her without obtaining effective consent from her parents. Id. ¶¶ 14-15, 17, 30, 45, 55.

The defendant's argument that E.R. was not "confined," see Def.'s Br. 11-12, misstates well-established Virginia tort law as well as the allegations in the Complaint. As an initial matter, false imprisonment under Virginia law does not require confinement. Rather, the tort is defined as the "restraint of one's liberty . . . by words or acts." Montgomery Ward & Co., 188 Va. at 489; see, e.g., S.H. Kress & Co. v. Musgrove, 153 Va. 348, 356 (1929). To state a claim for false imprisonment it is "not [even] essential that a citizen be confined in jail or placed in the custody of an officer." Zayre of Va., Inc. v. Gowdy, 207 Va. 47, 50-51 (1966); see also S.H. Kress & Co., 153 Va. at 356; Samuel v. Rose's Stores, Inc., 907 F. Supp. 159, 164 (E.D. Va. 1995).[9]

Moreover, contrary to the defendant's argument, E.R. was "placed . . . in a location where her physical movement was, in fact, restricted," see Def.'s Br. 12—the

[9] The defendant relies on Goldstein v. Costco Wholesale Corp., No. Civ. 02-1520, 2003 WL 21954039 (E.D. Va. Jul 21, 2003), for the proposition that "confinement to some defined area is implicit in the tort of false imprisonment." Def.'s Br. 11. But that case involved the unusual claim of false imprisonment through the forced removal of the plaintiff from a defined space. Goldstein, 2003 WL 21954039, at *1, *6. That obvious distinction aside, the court in Goldstein also recognized that "Virginia courts have never explicitly stated that restriction of the individual to a confined or bounded area is a necessary element of the tort of false imprisonment," but then went on to apply the Restatement (Second) of Torts instead of Virginia's substantive law to the claims before it. Id. at *6. The Supreme Court of Virginia, which is the ultimate arbiter of Virginia law, has been clear on this issue. See, e.g., Zayre of Va., Inc., 207 Va. at 51 (allowing false imprisonment claim to go to the jury because plaintiffs "were deprived of their right of freedom of movement and the right to come and go as they chose."); see also Duprey v. J.C. Penny Co., Inc., No. 6052-L, 1995 WL 1704491, at *2 (Va. Cir. Ct. Feb. 27, 1995) (denying a motion to dismiss on facts similar to those in Zayre).

allegations of the Complaint are unambiguous on this point. Irrespective of how "open" the area may have been or how much E.R. was able to "move about" within the confines of the facility, see Def.'s Br. 12, 12 n.3, E.R. was unquestionably confined to the secondary inspection area, an area guarded by CBP officers, for more than 20 hours, during which time she was not permitted to communicate with her parents, and was later forced to board a TACA flight to Guatemala instead of returning to New York. Compl. ¶¶ 18, 20, 48, 55.[10] Similarly, the defendant's argument that the CBP officers did not "confine" E.R. because she was in the custody of Mr. Dubon in the secondary inspection area, see Def.'s Br. 11, 13, is a red herring. As a practical matter, Mr. Dubon was himself detained by the CBP officers and plainly not free to leave or to act in a manner consistent with having "custody" of a child. See, e.g., Compl. ¶¶ 17, 19, 49-50.

The defendant's argument that judgment on the pleadings is somehow warranted because the Complaint does not allege that E.R. was aware of her confinement is also unavailing. See Def.'s Br. 13 (citing Estiverne v. Esernio-Jenssen, 833 F. Supp. 2d 356, 381 (E.D.N.Y. 2011)). The court in Estiverne applied the substantive law of New York (not Virginia), which specifically requires pleading and demonstrating that the plaintiff was conscious of the confinement. See Parvi v. Kingston, 41 N.Y.2d 553, 556 (1977). Further, E.R. was four years old at the time of her confinement, not nine months old like the child in Estiverne. A more apt comparison is to the three-year-old in C.T.L. ex rel. Cassidy v. People Inc. of S.W. Va., who after having been confined on a bus for an hour the previous school day, cried at the prospect of having to again ride the bus, and whose claims of negligence and IIED survived a motion to dismiss. No. Civ. A. 105CV00004, 2005 WL 2811785, at *4-8 (W.D. Va. Oct. 27, 2005).

[10] The defendant seems to suggest that because E.R. was detained at the border, the "special circumstances" doctrine negates her confinement. See Def.'s Br. 11-12 (citing U.S. v. Butler, 249 F.3d 1094 (9th Cir. 2001) and U.S. v. Doe, 219 F.3d 1009 (9th Cir. 2000)). Both cases on which the defendant relies concern "custody" as it applies in the specific context of Miranda and its progeny, rather than tort notions of restraint and confinement—or even a seizure for Fourth Amendment purposes—and are thus entirely inapplicable here.

Moreover, the Complaint sets forth ample allegations to permit the court to draw the reasonable inference that E.R. was aware of her confinement. Compl. ¶¶ 35-36, 51, 56, 61-62. Accordingly, the Complaint adequately states a claim for false imprisonment.

B. The Complaint States a Claim for Intentional Infliction of Emotional Distress

Similarly, the Complaint alleges the facts required to establish the tort of intentional infliction of emotional distress ("IIED"). To state a claim for IIED, the Complaint must allege that "1) the wrongdoer's conduct was intentional or reckless; 2) the conduct was outrageous or intolerable; 3) there was a causal connection between the wrongdoer's conduct and the resulting emotional distress; and 4) the resulting emotional distress was severe." Almy v. Grisham, 273 Va. 68, 77 (2007).

The defendant misconstrues E.R.'s IIED claim as limited to the CBP officers' decision to present Mr. Ruiz with the false choice between E.R.'s removal from the United States and her being sent to an adoption center in Virginia. See Def.'s Br. 13.[11] This was indeed "outrageous," but the Complaint also alleges that the CBP officers acted in an outrageous and intolerable manner by "detaining E.R. for more than twenty (20) hours, depriving her of contact with her parents, attempting to separate her from her grandfather, threatening to put her up for

[11] The defendant's argument that it was reasonable for the CBP officers to "make reference to a State social services agency" is yet another erroneous re-characterization of the Complaint. See Def.'s Br. 14 (emphasis added). The Complaint alleges, very specifically, that the CBP officers threatened to send E.R. to an "'adoption center' (using those words, in English)." Compl. ¶ 43 (emphasis added). Threatening a father that his child will be sent to an "adoption center"—which implies permanent severance of custody—is a strong factor indicating outrageousness. Apparently recognizing the adequacy of the pleadings, the defendant improperly introduces the Preliminary Psychological Report of Dr. Roy Aranda, and suggests that there is an inconsistency between what Mr. Ruiz told Dr. Aranda and what is alleged in the Complaint. See Kolbe Decl., Ex. B; Def.'s Br. 13 n.4. To be clear, Dr. Aranda's report was prepared as a "summary" document on July 13, 2012 (i.e., more than one year after E.R.'s detention—not contemporaneously with the events at issue). Kolbe Decl., Ex. B at 19. The report does not purport to be a verbatim accounting of what Mr. Ruiz told Dr. Aranda—unlike the Complaint, which identifies the vocabulary used by the CBP officers. Moreover, the report is entirely consistent with the Complaint: while Dr. Aranda's non-verbatim attribution refers to "a children's center" (not a "State social services agency"), the very next sentence says that Mr. and Ms. Ruiz "cried and worried that they were going to lose [E.R.] and opted to have her go to Guatemala." Id. at 20 (emphasis added). Moreover, the defendant does not contest that the CBP officers told Mr. Dubon that E.R. was being put up for adoption. See Def.'s Br. 13 n.4; Compl. ¶ 32; Kolbe Decl., Ex. B at 20. It is equally outrageous to raise the specter of E.R.'s adoption to Mr. Dubon, E.R.'s grandfather and the family member traveling with her.

adoption, refusing to reunite her with her parents, depriving her of adequate food and water, holding her under conditions otherwise unsuitable for a four-year-old child, and effectively deporting her from her country of citizenship." Compl. ¶ 73(i); see also id. ¶¶ 19-20, 35, 43, 48-49.[12] The Fourth Circuit, applying Virginia law, has held that deliberate and unwarranted interference with the child and parent relationship can satisfy the threshold of outrageousness required to establish an IIED claim. See Raftery v. Scott, 756 F.2d 335, 339-40, 339 n.4 (4th Cir. 1985); see also Heslep v. Ams. for African Adoption, Inc., 890 F. Supp. 2d 671, 686 (N.D.W.V. 2012); Almy, 273 Va. at 78 ("'outrageous' does not objectively describe particular acts but instead represents an evaluation of behavior," such that when "reasonable persons could view the conduct alleged" as outrageous, resolution on a motion to dismiss is improper).

The defendant also contends that the Complaint has not adequately alleged distress that is "severe" under Virginia law. Virginia courts ask whether "the distress inflicted is so severe that no reasonable person could be expected to endure it." Hatfill v. N.Y. Times Co., 416 F.3d 320, 337 (4th Cir. 2005) (quoting Russo v. White, 241 Va. 23, 27 (1991)) (internal quotation marks omitted). Where "reasonable men may differ" as to the severity of the distress, the issue cannot be resolved by the court as a matter of law. Womack v. Eldridge, 215 Va. 338, 342 (1974). In federal court, a plaintiff need not plead severity with particularity. See Hatfill, 416 F.3d at 337; see also Guerrero v. Deane, No. 1:09cv1313 (JCC/TRJ), 2010 WL 670089, at *15 (E.D. Va. Feb. 19, 2010) ("[A] plaintiff merely needs to give a defendant fair notice of the claim and the grounds upon which the claim rests under Rule 8."). Rather, "relatively simple

[12] Given the defendant's exceedingly narrow construction of the IIED claim, the cases cited by the defendant concerning the inadequacy of allegations of merely "insensitive" comments are also inapt. See Def.'s Br. 14 (citing Harris v. Kreutzer, 271 Va. 188 (2006) and Gaiters v. Lynn, 831 F.2d 51 (4th Cir. 1987)). Here, there are allegations of more than insensitive words—the CBP officers took numerous actions that directly restrained E.R.'s liberty. Moreover, the threat made to Mr. Ruiz is quite different from a poorly phrased declarative statement.

allegations of severe emotional distress [are] sufficient to state a claim" for IIED. Perk v. Worden, 475 F. Supp. 2d 565, 571 (E.D. Va. 2007).

Here, the Complaint alleges both severe emotional trauma and physical manifestations of that distress sufficient to state a claim. The Complaint alleged that E.R. suffered "bouts of hysterical and prolonged crying" after being sent back to Guatemala. Compl. ¶ 61. It also alleges the concrete symptoms that E.R. exhibited after her return to the United States—all symptoms which she had not previously experienced. Id. ¶ 62.[13] Moreover, a child psychologist diagnosed E.R. with PTSD resulting from the incident, further indicating the severity of the distress she endured. Id. ¶ 63. These allegations are sufficient for a reasonable person to conclude that E.R. endured severe distress, such that this claim is ill-suited for resolution on the pleadings. See Womack, 215 Va. at 342; see also Guerrero, 2010 WL 670089, at *15 (denying motion to dismiss IIED claim "in light of the relaxed pleading requirements under Rule 8," where the complaint alleged that one plaintiff child was "afraid" and another was "fearful every time he [saw] a police officer," and that the family had "suffered great shame and humiliation") (internal quotation marks omitted).[14]

C. The Complaint States a Claim for Negligence

The tort of negligence is recognized where: (1) a duty is owed to the plaintiff, (2) that duty is breached by the defendant, (3) the breach of duty was the cause of plaintiff's

[13] The defendant speculates that E.R.'s emotional distress might have been caused by her separation from her parents during her winter vacation in Guatemala. However, the Complaint alleges that E.R.'s symptoms only emerged after her detention. In fact, the child psychologist who diagnosed E.R. concluded that her PTSD "was a result of her detention, her perception of the reasons for her deportation, and her forced separation from her parents." Compl. ¶ 63 (emphasis added). There is no allegation that these stressors were present during E.R.'s vacation with her grandparents in Guatemala. The Complaint sufficiently alleges causation.

[14] Because the Complaint alleges the specific symptoms of E.R.'s distress, the reasoning of the court in McPhearson v. Anderson, 873 F. Supp. 2d 753 (E.D. Va. 2012), upon which the defendant relies, is inapplicable. See Def.'s Br. 15 (asserting that the Compliant has "not alleged concrete symptoms . . . in any detail").

damages, and (4) plaintiff has suffered actual damages. See Atrium Unit Owners Ass'n v. King, 266 Va. 288, 293 (2003).

The defendant concedes that the CBP officers owed a duty to E.R., at least to the extent of "granting her admission to the United States and permitting [Mr. Dubon] . . . to care for her." Def.'s Br. 16 (emphasis added). The Complaint's allegations clearly show that the CBP officers did not permit Mr. Dubon to care for E.R.: because Mr. Dubon was confined, he was unable to procure food or water for E.R., and he had no ability to change the climate in the secondary inspection area or provide for E.R.'s basic physical comfort. The CBP officers therefore had a duty to provide this care—which is recognized in CBP's own rules. Compl. ¶¶ 52-53; see also Burns v. Gagnon, 283 Va. 657, 671 (2012) (school principal had a duty to students in part because they are required by law to attend); Kellermann v. McDonough, 278 Va. 478, 487 (2009) (assumption of responsibility for supervision of a child creates a duty of reasonable care).[15]

The defendant asserts that only emotional damages are alleged in the Complaint, so a claim for negligence cannot be maintained. See Def.'s Br. 17-18. The Complaint in fact alleges physical harm to E.R. as a result of her negligent treatment. Compl. ¶¶ 49-50 (inadequate food, water, warmth, and conditions).[16] The Complaint also alleges that E.R. suffered physical injuries, which were the natural result of the stresses of her confinement caused by the CBP

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[15] The defendant's argument that the Complaint's negligence claim "amounts to a claim for 'negligent false imprisonment'" misapplies the cited authorities. See Def.'s Br. 16 (citing Markel Am. Ins. Co. v. Staples, Civ. Action No. 3:09-CV-435-HEH, 2010 WL 370304 (E.D. Va. Jan. 28, 2010) and Baggett v. Nat'l Bank & Trust Co., 174 Ga. App. 346 (Ga. Ct. App. 1985)). Both cases simply held that the plaintiff could not recover on a tort expressly labeled "negligent false imprisonment"—they hardly stand for the proposition that negligent conduct injuring a confined individual is immunized from liability. See Markel, 2010 WL 370304, at *5; Baggett, 174 Ga. App. at 349.

[16] See Restatement (Third) of Torts: Physical & Emotional Harm § 4 cmt. c (2010) ("[A]ny level of physical impairment is sufficient for liability; no minimum amount of physical harm is required. Thus, any detrimental change in the physical condition of a person's body or property counts as a harmful impairment; there is no requirement that the detriment be major.").

officers' tortious conduct: she began soiling her pants and overeating. Id. ¶ 62; see also Hughes v. Moore, 214 Va. 27, 35 (1973) (holding that the plaintiff could maintain negligence action in which she "suffered physical injuries which were the natural result of the fright and shock proximately caused by defendant's tortious conduct.").

E.R.'s most significant injuries are indeed in the form of mental anguish such as emotional distress, psychological injury, and damage to her relationship with her parents resulting from the CBP officers' conduct. Compl. ¶ 75(ii). Virginia law provides that a plaintiff may recover for past and future mental anguish arising out of a defendant's negligence. See Musick v. U.S., 781 F. Supp. 445, 452 (W.D. Va. 1991) (mental anguish includes "anguish at the loss of pleasures" and the "loss of enjoyment of life"); see, e.g., Burgess v. Basdikis, No. ML-5681, 44 Va. Cir. 252, 1997 WL 33573695, at *1 (Va. Cir. Ct. Dec. 31, 1997) ("fear and anxiety" and "anguish[] from the memories" of the incident are cognizable as "mental anguish"). Accordingly, the Complaint states a claim for negligence under Virginia law.

III. VENUE IS APPROPRIATE IN THIS COURT AND THE CASE SHOULD NOT BE TRANSFERRED TO THE EASTERN DISTRICT OF VIRGINIA

A. Venue Is Proper in the Eastern District of New York Where E.R. Resides

The defendant's argument that venue cannot be established based on the judicial district in which Mr. Ruiz resides is a non-sequitur because E.R.'s residence is controlling for venue purposes. E.R. is a resident of Long Island, New York, in the Eastern District of New York ("EDNY"), meaning venue is proper here. See 28 U.S.C. § 1402(b); Compl. ¶¶ 9-10.

In describing the parties, the Complaint explicitly states that Mr. Ruiz brings the action "[p]ursuant to Rule 17(c) of the Federal Rules of Civil Procedure, . . . on behalf of his minor daughter, E.R." Compl. ¶ 10; see Fed. R. Civ. P. 17(c) (allowing a guardian to serve as a "representative" to "sue or defend on behalf of a minor"). Mr. Ruiz is "referred to as 'the

plaintiff' throughout the [C]omplaint," Def.'s Br. 18, because he is the plaintiff—but solely in a representative capacity. None of the cases cited by the defendant involved a suit brought by a representative of a United States citizen in the venue where that citizen resided.[17]

Mr. Ruiz is a purely nominal party because the Complaint seeks to vindicate only E.R.'s rights. All of the causes of action asserted in the Complaint arise out of injury to E.R., Compl. ¶¶ 65-75; Mr. Ruiz does not bring a single claim on his own behalf. As a matter of Virginia substantive law (unlike that of many other states), Mr. Ruiz has no right to bring an action in his capacity as E.R.'s guardian for damages to E.R. See Herndon v. St. Mary's Hosp., Inc., 266 Va. 472, 476-77 (2003) ("[A]n infant's suit must be brought in his name and not in that of the next friend" because "the minor child, not the next friend, is the real party in interest"; Virginia law does not "authorize parents to bring a child's action in the parents' own name, but merely specifies that either or both parents may act as next friend on behalf of their minor child"). Mr. Ruiz's presence in this lawsuit is merely a matter of procedural efficiency.[18]

The defendant even concedes that "[u]nder the Federal Rules, . . . E.R. is considered the 'Real Party in Interest'" in this action. Def.'s Br. 18. This is a critical admission because the real party in interest is the one "who, according to the governing substantive law, is entitled to enforce the right." 6A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure § 1543 (3d ed. 2010). Because Mr. Ruiz is acting solely in a

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[17] See Galveston H. & S.A. Ry. Co. v. Gonzales, 151 U.S. 496 (1894); Arevalo-Franco v. U.S. I.N.S., 889 F.2d 589 (5th Cir. 1989); Williams v. U.S., 704 F.2d 1222 (11th Cir. 1983); Zhang v. Chertoff, No. C 08-02589 (JW), 2008 WL 5271995 (N.D. Cal. Dec. 15, 2008); Li v. Chertoff, No. C-08-3540 (MMC), 2008 WL 4962992 (N.D. Cal. Nov. 19, 2008); Ou v. Chertoff, No. C-07-3676 (MMC), 2008 WL 686869 (N.D. Cal. Mar. 12, 2008).

[18] Notably, E.R. could have prosecuted this action through a guardian ad litem. See Fed. R. Civ. P. 17(c)(2); N.Y. CPLR § 1201. The defendant's position suggests that if Mr. Ruiz had incurred the expense of seeking appointment of a guardian ad litem who resided in the Eastern District of New York, venue would be proper here. Focusing the venue analysis on the representative rather than the represented party leads to gamesmanship and forum shopping, and would run counter to "the policy of the State of New York, to avoid unnecessary appointments of guardians." See Hilpert v. City of New York, No. 94 CIV. 1662 (AGS), 1997 WL 139531, at *3 (S.D.N.Y. Mar. 27, 1997) (ellipses omitted) (quoting U.S. v. Noble, 269 F. Supp. 814, 816 (E.D.N.Y. 1967)).

representative capacity pursuant to Rule 17(c), and is not considered the real party in interest, he is regarded as a nominal party. See Caban ex rel. Crespo v. 600 E. 21st St. Co., 200 F.R.D. 176, 179-80 (E.D.N.Y. 2001) ("Pursuant to Rule 17(c), a natural guardian has the right to sue on behalf of his or her child. Whe[n] suing as a natural guardian . . . the representative is a nominal party only; the action must be brought in the name of the real party in interest—the infant.") (footnotes, internal quotation marks, and citation omitted); Ramsey v. NYP Holdings, Inc., No. 00 Civ. 3478 (VM)(MHD), 2002 WL 1402055 (S.D.N.Y. June 27, 2002) (holding that because parents appeared pursuant to Rule 17(c) "as representatives of their minor son" and "assert[ed] claims only for injuries to him and [sought] relief only on his behalf," they were "not parties in their own capacity").

Because Mr. Ruiz is a nominal party, his residence is not considered. See 6A Wright & Miller, supra, § 1570 (in suits brought by a representative as nominal party only, "the represented party's citizenship generally is considered determinative for diversity of citizenship and venue purposes"); see Glynn v. Gonda, No. 06 CIV. 5447 (NRB), 2006 WL 2109457 (S.D.N.Y. July 26, 2006) (residence of nominal parties does not determine venue). It is E.R.'s residence that is relevant, and because she resides in this district, venue is proper here.[19]

[19] Even if Mr. Ruiz's residence were considered, he should be deemed to have the same residence as E.R. Under the rules for citizenship in a diversity case, "the legal representative of an infant . . . shall be deemed to be a citizen only of the same State as the infant." 28 U.S.C. § 1332(c)(2). Courts often determine a party's residence for venue purposes by applying the rules used to determine that party's citizenship for diversity purposes. See 14D Wright & Miller, supra, § 3805 ("the great bulk of authority" treats residence and citizenship as "synonymous and applies the same test of domicile in determining a party's 'residence' for venue purposes as is applied in determining a party's 'citizenship' for jurisdictional purposes"); see, e.g., Royal Ins. Co. of Am. v. U.S., 998 F. Supp. 351, 353 (S.D.N.Y. 1998) ("[I]f subject matter jurisdiction turns on the citizenship of the subrogee as the real party in interest, then issues such as venue should as well."). This approach is especially warranted in the circumstances of this case because otherwise, the defendant's position would render the FTCA's special venue provision allowing venue to lie where the plaintiff resides, unavailable to an entire class of U.S. citizens—namely, any minors who purportedly lack a "lawfully present" guardian, see Def.'s Br. 19, and do not have the financial means to seek the appointment of a guardian ad litem. Cf. Alegria v. U.S., 945 F.2d 1523, 1527 (11th Cir. 1991) (per curiam) (venue limitations on jeopardy assessment actions commenced by nonresident alien violated equal protection and due process). Further, even if the court were to consider Mr. Ruiz's citizenship, the defendant itself acknowledges the case of Gu v. Napolitano, No. Civ. A. No. 09-2179 PVT, 2009 WL 2969460 (N.D. Cal. Sept. 11, 2009), see Def.'s Br. 19, in

B. The Discretionary Factors Weigh in Favor of Maintaining Venue in the Eastern District of New York

The defendant's motion to transfer venue is subject to 28 U.S.C. § 1404(a), which requires a court to engage in an "individualized, case-by-case consideration of convenience and fairness." Stewart Org., Inc. v. Ricoh Corp., 487 U.S. 22, 29 (1988). "The moving party has the 'burden to clearly establish that a transfer is appropriate and that the motion should be granted.'" Pall Corp. v. PTI Techs., Inc., 992 F. Supp. 196, 198 (E.D.N.Y. 1998) (emphasis in original); see also Pecorino v. Vutec Corp., No. 11-CV-6312 (ADS)(ARL), 2012 WL 5989918, at *2 (E.D.N.Y. Nov. 30, 2012) ("In any motion to change venue, the movant bears the burden of establishing the propriety of transfer by clear and convincing evidence.") (quoting Payless Shoesource, Inc. v. Avalon Funding Corp., 666 F. Supp. 2d 356, 362 (E.D.N.Y. 2009)). Courts consider the following discretionary factors:

> (1) convenience of the parties; (2) convenience of witnesses; (3) relative means of the parties; (4) locus of operative facts and relative ease of access to sources of proof; (5) attendance of witnesses; (6) the weight accorded the plaintiff's choice of forum; (7) calendar congestion; (8) the desirability of having the case tried by the forum familiar with the substantive law to be applied; (9) practical difficulties; and finally, (10) the [c]ourt should also consider how best to serve the interest of justice, based on an assessment of the totality of material circumstances.

Modern Computer Corp. v. Ma, 862 F. Supp. 938, 948 (E.D.N.Y. 1994). Where venue is proper, the plaintiff's choice of forum "will not be disturbed" unless the movant can demonstrate that the factors informing the court's discretion fall "strongly" in the movant's favor. EasyWeb

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which the court found that the plain language of 28 U.S.C. § 1391(e)(1)(C), which is similar to that of §1402(b), is not limited to citizens and plainly allows any plaintiff to sue an officer of the United States in the district where the plaintiff resides. See Gu, 2009 WL 2969460, at *1. Applying the same reasoning, 28 U.S.C. §1402(b) would allow a plaintiff—whether or not a citizen—to bring a tort claim against the United States in the judicial district where that plaintiff resides.

Innovations, LLC v. Facebook, Inc., 888 F. Supp. 2d 342, 348 (E.D.N.Y. 2012) (citation and internal quotation marks omitted). They do not.

1. Convenience of the Parties and Relative Means of the Parties

These factors weigh strongly against transfer to the Eastern District of Virginia because the EDNY is a convenient forum for E.R. and the defendant, and the defendant has greater means to travel to New York. E.R. resides in this district and has no connection to the Eastern District of Virginia or future plans to travel there. See Declaration of Sheryl B. Shapiro, October 16, 2013 ("Shapiro Decl.") ¶¶ 4-5.[20]

Transferring this action to Virginia would impose a financial burden on E.R.'s family. See Fisher v. Hopkins, No. 02 Civ. 7077 (CSH), 2003 WL 102845, at *4 n.2 (S.D.N.Y. Jan. 9, 2003) (denying motion to transfer venue, in part because the "plaintiff has submitted that cost concerns motivate his choice of forum"); see also Michelli v. City of Hope, No. 93 Civ. 7582 (KMW)(THK), 1994 WL 410964, at *3 (S.D.N.Y. Aug. 4, 1994) ("The relative financial hardship on the litigants and their respective abilities to prosecute or defend an action in a particular forum are legitimate factors to consider.") (quoting Vaughn v. Am. Basketball Ass'n, 419 F. Supp. 1274, 1277 (S.D.N.Y. 1976)) (internal quotation marks omitted). This action was commenced in the EDNY because it is the district in which E.R. lives, and where it will be the least costly and least difficult for Mr. Ruiz and E.R. to maintain this action. See Shapiro Decl. ¶ 6. Moreover, the cost of travel to Virginia to participate in this lawsuit would be financially burdensome for E.R.'s family. Id. ¶ 7. Accordingly, this district is a more convenient forum than is Virginia.

[20] Although the defendant makes the unfounded assertion that "neither [Mr. Ruiz nor E.R.] actually witnessed the events that occurred on March 11, 2011," see Def.'s Br. 21, Mr. Ruiz is a critical witness to the telephone communications between him and the CBP officers, which are likely to be of central significance, and E.R. experienced firsthand the events alleged in the Complaint. See Compl. ¶¶ 27-31, 40-47.

At the same time, contrary to the defendant's argument, see Def.'s Br. 21-22, the EDNY may be a convenient forum for the United States. See Farez-Espinoza v. Chertoff, 600 F. Supp. 2d 488, 496-97 (S.D.N.Y. 2009) (observing that New York City is a convenient forum for the United States). The majority of the defendant's potential witnesses are its CBP officers and supervisors, whose location is of reduced significance. See infra Point III.B.2. And any inconvenience to the defendant is outweighed by the inconvenience to E.R. of having the case transferred out of her district of residence. See Cohen v. U.S., No. CV 98-2604 (RJD), 1999 WL 294777, at *1 (E.D.N.Y. Mar. 17, 1999) (denying motion to transfer venue out of district of plaintiffs' residence in FTCA action, reasoning that "[d]espite the government's assertion to the contrary, the 'inconvenience' to the United States of America in having to defend in New York is not comparable to the inconvenience and expense to individual litigants").

Finally, to the extent that the EDNY may be considered an inconvenient venue for the defendant, "transfer of a venue should not merely shift the burden of inconvenience from one party to the other." Pecorino, 2012 WL 5989918, at *9 (brackets omitted) (quoting Invivo Research, Inc. v. Magnetic Resonance Equip. Corp., 119 F. Supp. 2d 433, 438 (S.D.N.Y. 2000)). As a result, this factor heavily weighs against transfer.[21]

2. Convenience of the Witnesses

In determining how to weigh this factor, the "court must qualitatively evaluate the materiality of the testimony that the witnesses may provide." ESPN, Inc. v. Quicksilver, Inc., 581 F. Supp. 2d 542, 547 (S.D.N.Y. 2008).

As to the eight employee witnesses identified by the defendant, the declarations proffered are underwhelming and leave the Court with no particularized understanding of the

[21] The circumstances of this case are easily distinguished from those in Tabbaa v. Chertoff, No. 05-CV-1918 (ARR) (E.D.N.Y. Aug. 11, 2005), ECF No. 25, cited by the defendant. See Def.'s Br. 21. In that case, four of five plaintiffs resided in the district to which venue was transferred and not one non-party witness resided in the EDNY.

employees' likely testimony or its probative value. See Kolbe Decl., Ex. F(1)–(8). Only two of the declarants specifically mention having personal contact with E.R. or Mr. Ruiz. See id., Exs. F(4), (5). Two of the declarants' only apparent involvement in the events alleged in the Complaint was to assist in transporting Mr. Dubon to the hospital, an event that is irrelevant to E.R.'s FTCA claims. See id. Exs. F(1), (2). The remaining declarants generically assert that they have witnessed some portion of the events in question or had some undefined supervisory responsibility. See id. Exs. F(3), (6)-(8). These general assertions fail to satisfy the required showing from the defendant. See Pall Corp., 992 F. Supp. at 198 ("The movant must support the motion with an affidavit containing 'detailed factual statements' explaining . . . 'the potential principal witnesses expected to be called and a general statement of the substance of their testimony.'") (emphasis in original) (quoting Laumann Mfg. Corp. v. Castings USA, Inc., 913 F. Supp. 712, 720 (E.D.N.Y. 1996)).

Even to the extent that some of the declarants proffered by the defendant could offer relevant testimony, they are all employee witnesses, and are therefore entitled to minimal consideration. See Pecorino, 2012 WL 5989918, at *11 (The "inconvenience [of employee witnesses] does not weigh as heavily as inconvenience to non-party witnesses."); see Payless Shoesource, Inc., 666 F. Supp. 2d at 364 ("However, these persons are all employees or agents of the parties in this case, so their inconvenience does not weigh as heavily as inconvenience to non-party witnesses.").

In fact, the convenience of witnesses factor weighs against transfer to Virginia because of the location of relevant non-employee witnesses. While the defendant references E.R.'s psychologist, Dr. Roy Aranda, and his report several times in its motion, it ignores Dr. Aranda entirely in the venue discussion. Dr. Aranda, who evaluated E.R. almost immediately

upon her return to New York from Guatemala, is a resident of the EDNY, and maintains his professional practice here. See Declaration of Dr. Roy Aranda, October 13, 2013 ("Aranda Decl.") ¶¶ 2-5; see also id. ¶ 6 (stating his professional opinion); Compl. ¶ 63. It is also of significance that Dr. Aranda saw E.R. on a pro bono basis. See id. ¶ 7. The only non-party witnesses referenced in the defendant's brief who are not employees of the defendant are the hospital employees who treated Mr. Dubon and TACA Airline employees. Their testimony, unlike that of Dr. Aranda, is of doubtful relevance.[22] Further, the identity of these witnesses and nature of their possible testimony, as well as the forums that would be convenient for them, are entirely speculative. See Excelsior Designs Inc. v. Sheres, 291 F. Supp. 2d 181, 185-86 (E.D.N.Y. 2003) ("Because of the importance of this factor, the party seeking transfer must clearly specify the key witnesses to be called and make a general statement of what their testimony will cover.") (citation and internal quotation marks omitted).[23] This factor thus weighs against transfer.

3. Locus of Operative Facts and Relative Ease of Access to Sources of Proof

While many (but not all) of the events alleged in the Complaint occurred at Dulles, that fact is entitled to limited weight. United States border policy and the practices of federal agencies are not issues of limited local concern: many forums, including the EDNY (with its own significant international airport), have an interest in the outcome of this dispute. Moreover, E.R.'s contact with Virginia was serendipitous—her plane was bound for JFK and was diverted to Dulles for weather reasons, and she had no reasonable expectation that she would be forced to

[22] Although the Complaint alleges facts concerning Mr. Dubon's medical emergency for completeness, no relief is sought for injuries to Mr. Dubon. None of the events at the hospital where Mr. Dubon was treated, or that occurred during Mr. Dubon's transportation to and from the hospital, are alleged to be actionable.

[23] The defendant notably omits the TACA employees at JFK who served as intermediaries between Mr. Ruiz and CBP, Compl. ¶ 26, who could offer relevant testimony concerning the CBP officers' contemporaneous representations about the rationale for E.R.'s continued detention, and whether they communicated to the CBP officers that Mr. Ruiz was waiting at JFK to receive E.R.

litigate in Virginia to vindicate her rights. See also infra Points III.B.5, 7. Finally, because the relevant evidence in this matter consists of witnesses' recollections and documentary records, there is no practical requirement that the case be litigated in the forum in which many of the underlying events took place. See Jannus Grp., Inc. v. Indep. Container, Inc., No. 98 CIV. 1075 (LBS), 1998 WL 542294, at *3 (S.D.N.Y. Aug. 24, 1998) (in a manufacturing contract dispute, this factor did not militate in favor of changing venue because a site visit to the manufacturing plant was not necessary). To the extent that any material evidence exists in documentary form, "modern photocopying technology deprives [the location of documents] of practical or legal weight" in determining whether a case should be transferred. Distefano v. Carozzi N. Am. Inc., No. 98 CV 7137 (SJ), 2002 WL 31640476, at *4 (E.D.N.Y. Nov. 16, 2002). Accordingly, this factor should be attributed extremely little weight.

4. Attendance of Witnesses

This factor is neutral. The defendant has not identified its non-party witnesses, and its employee witnesses "would be subject to compulsory process even in New York, by virtue of their employment relationship with" the defendant. See Carruthers v. Amtrak, No. 95 Civ. 0369 (PKL), 1995 WL 378544, at *3 (S.D.N.Y. June 26, 1995).

5. Weight Accorded to Plaintiff's Choice of Forum

"A plaintiff's choice of forum is generally entitled to considerable weight and should not be disturbed unless other factors weigh strongly in favor of transfer." Schwartz v. Marriott Hotel Servs., Inc., 186 F. Supp. 2d 245, 251 (E.D.N.Y. 2002). The deference shown to the plaintiff's choice of forum is especially elevated in an FTCA action in which the plaintiff has invoked the FTCA's special venue statute, 28 U.S.C. § 1402(b), and filed suit in her district of residence. See Dale v. U.S., 846 F. Supp. 2d 1256, 1258 (M.D. Fla. 2012) ("Congress expressly provided that a plaintiff under the FTCA may sue in the judicial district where the plaintiff

resides. The obvious purpose behind such a broad venue statute is to 'protect the plaintiff from abuse by the United States forcing the plaintiff to litigate the controversy in an inconvenient forum.'") (internal citation omitted) (quoting Jones v. U.S., 407 F. Supp. 873, 876 (N.D. Tex. 1976)). Because transferring this action to Virginia would impair the vindication of E.R.'s rights, see supra Point III.B.1, and in light of the FTCA's remedial objectives and congressional intent in enacting the special venue provision, this factor weighs strongly in favor of retaining venue in this Court.

6. Familiarity with Applicable Law

Courts have regularly held that "the 'governing law' factor is to be accorded little weight on a motion to transfer venue" because the federal courts are assumed to be equally capable of applying the substantive law of different states. Prudential Sec., Inc. v. Norcom Dev., Inc., No. 97 Civ. 6308 (DC), 1998 WL 397889, at *6 (S.D.N.Y July 16, 1998); see also Imagine Solutions, LLC v. Med. Software Computer Sys., Inc., No. 06 CV 3793 (ARR)(JMA), 2007 WL 1888309, at *12 (E.D.N.Y. June 28, 2007) (denying motion to transfer venue to the Eastern District of Virginia, noting the case "involve[d] rather routine questions of contract law"). The defendant has not identified any reason why this Court is not competent to apply the routine Virginia tort law concepts that govern this dispute. Therefore, this factor is neutral.[24]

7. Interest of Justice

It is significant too that E.R. did not choose to have any interaction with the government in Virginia. Rather, her plane was diverted there through no fault of her own, and she had no reasonable expectation that she would set foot in Virginia, much less be forced to

[24] The two remaining factors which may be considered—practical difficulties and calendar congestion—are neutral. It is the movant's burden to demonstrate practical difficulties with litigating in the present forum, see Pall Corp., 992 F. Supp. at 201, which the defendant has not done. Similarly, calendar congestion is only relevant where a movant has presented evidence on caseload profiles, see Pecorino, 2012 WL 5989918, at *18, which the defendant has also failed to submit.

litigate there. Under these circumstances, forcing her and her family to incur the burden of going to Virginia—instead of remaining in the district where E.R. resides—to seek redress for her unlawful treatment would be unjust and compound her injury. See Dale, 846 F. Supp. 2d at 1258 (purpose of FTCA's special venue statute is "to protect the plaintiff from abuse by the United States forcing the plaintiff to litigate the controversy in an inconvenient forum").

The totality of the material circumstances leaves little doubt that venue should be maintained in this district. This forum is convenient for both parties, whereas transferring the case to Virginia would be financially burdensome for E.R.'s family and would improperly shift the burden of any inconvenience. The only third-party witness that has been specifically identified is located in the EDNY. The defendant has not established the relevance of its declarants' testimony, but in any event, they are party witnesses who deserve reduced consideration. The defendant has not identified any way in which this Court would encounter obstacles in accessing evidence or any other practical impediments to administering justice. Thus, in light of the strong presumption in favor of the plaintiff's choice of forum—a presumption that is heightened because the Complaint seeks relief pursuant to the FTCA's special venue provision, and given E.R.'s entirely inadvertent contact with the Eastern District of Virginia—the defendant has not demonstrated that the relevant factors weigh in its favor at all, much less strongly in its favor, which is its burden on this motion.

CONCLUSION

For the foregoing reasons, the Court should deny the defendant's motion to dismiss this action for lack of jurisdiction, motion for judgment on the pleadings, and motion to transfer this action to the Eastern District of Virginia.

Dated: New York, New York
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Respectfully submitted,

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