IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
WACO DIVISION

ISABEL G. ANDRADE, *et al*.	§	CIVIL ACTION NO. W-96-CA-139
	§	JUDGE WALTER S. SMITH
Plaintiffs,	§	
	§	and consolidated actions:
V.	§	*Holub v. Reno* W-96-CA-140
	§	*Ferguson v. Reno* W-96-CA-141
PHILLIP J. CHOJNACKI, *et al.*	§	*Brown v. U.S.* W-96-CA-142
	§	*Riddle v. Reno* W-96-CA-143
Defendants.	§	*Gyarfas v. U.S.* W-96-CA-144
	§	*Martin v. U.S.* W-96-CA-145
	§	*Holub v. U.S.* W-96-CA-146
	§	*Brown v. U.S.* W-96-CA-147
	§	*Sylvia v. U.S.* W-96-CA-373

ANDRADE PLAINTIFFS' SUPPLEMENTAL RESPONSE TO DEFENDANT'S MOTION FOR PARTIAL DISMISSAL AND MOTION FOR PARTIAL SUMMARY JUDGMENT

Following submission of the *Andrade* Plaintiffs' Response to Defendant's Motion for Partial Dismissal and Motion for Partial Summary Judgment, depositions were taken in Washington of an HRT member present at Mt. Carmel on April 19 and Richard Rogers, former Commander of the HRT. The *Andrade* Plaintiffs file this supplemental response to apprise the Court of testimony from those depositions relevant to the issues raised by Defendant's motions.

I. ARMORED FIREFIGHTING EQUIPMENT

The testimony of Rogers makes it clear that any summary disposition of this issue should be in favor of Plaintiffs, rather than for Defendant. The failure to have armored firefighting equipment present at Mt. Carmel on April 19, 1993, was not an exercise of the "discretionary function" of government, involving the allocation of "finite resources," but rather simple, unadulterated government negligence.

First, Rogers confirmed that he and Jeff Jamar, Special Agent in Charge at Waco, decided "there would be **no plan to fight a fire** should one develop in the Davidian compound." Rogers testified that he has no recollection of ever apprising Attorney General Reno, Director Sessions, Deputy Director Floyd Clark, Assistant Director Potts, or Assistant Deputy Director Coulson of that decision.[1]

Second, Rogers testified—contrary to the testimony of Deputy Assistant Director Coulson previously submitted with Plaintiffs' response—that he understood the Attorney General's orders concerning "sufficient emergency vehicles" to include only "*medical* equipment" in order to handle "any casualties."[2] In fact, Rogers testified that he would have **acted** "**differently**" if he had understood that the Attorney General's orders encompassed firefighting equipment.[3]

Furthermore, Rogers agreed that cost was no consideration in the decisions concerning "proper equipment" at Mt. Carmel for April 19. Specifically, Rogers rejected the notion advanced by the DOJ lawyers that "finite resources" limited his options in any way at Mt. Carmel.[4]

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[1] Deposition of Richard Rogers, March 3, 2000, at 34-36. All testimony of Richard Rogers referenced herein is attached at Tab 1. [Filed under seal.]

[2] *Id*. at 39.

[3] *Id.* at 39.

[4] *Id.* at 39-40.

Finally, in what can only be an acknowledgment of government negligence, Rogers testified that inquiries were made concerning the availability of armored firefighting equipment and that he had been advised that "**there was no such thing**." **Rogers agreed that he "probably would have had [armored firefighting equipment] brought out", if he had known it existed!**[5]

The availability of armored firefighting equipment in April 1993 was amply demonstrated by the declaration of Patrick M. Kennedy, Plaintiffs' fire expert, together with specific examples of armored firefighting equipment in use and available in April 1993, including some just blocks from FBI headquarters in Washington.[6] The availability of this firefighting equipment was confirmed when Plaintiffs received the report of Defendant's firefighting expert, Michael O. McNamee, a District Fire Chief from Worcester, Massachusetts, who does not challenge the availability of "armored fire apparatus."[7] Rather, McNamee's opinions go only to the effectiveness of such equipment, which relates only to the issue of *damages* flowing from the FBI's failure to have such equipment in place on April 19.[8]

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5 *Id.* at 41-42.

6 Tabs 9, 12-14 of *Andrade* Plaintiffs' Response.

7 Attached at Tab 2.

8 Actually, McNamee's principal opinion concerning the use of armored firefighting equipment

seems to be that such equipment "usually means that the involved building is being written off as a loss." Of course, there is no claim for the loss of the building being brought by the *Andrade* Plaintiffs. It was the **loss of life** that is at issue here.

Therefore, there can no longer be any doubt that Plaintiffs' claims concerning the failure to have armored firefighting equipment available on April 19, 1993, are not subject to the "discretionary function" exception to the Federal Tort Claims Act. This failure was not the result of a considered judgment, focusing upon "social, economic, and political" considerations, and allocation of the "finite resources" of the government. Rather, this was a classic government screwup—gross negligence—which unfortunately resulted in the needless deaths of dozens of innocent women and children.

II. THE GOVERNMENT MAY HAVE STARTED THE FIRE

In addition to the testimony already submitted by Plaintiffs in their response, Plaintiffs obtained additional testimony concerning the possibility that the government actually sparked the fatal fire on April 19, 1993. In further support of the materials attached to Plaintiff's response concerning the likelihood that pyrotechnic military tear gas rounds fired by HRT members into the kitchen on April 19, 1993, were potential cause of the fire,[9] Plaintiffs have now obtained testimony of the commander of one of the Bradleys in question concerning the use of pyrotechnic rounds on April 19.

The tank commander for the Charlie Team Bradley, located on the green side of Mt. Carmel, confirmed that his Bradley and "Echo's Bradley", which was the Bradley on the black side of Mt. Carmel, had approximately the same number of tear gas rounds on April 19, including **"approximately ten" M651 pyrotechnic military tear gas rounds**.[10]

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[9] *Andrade* Plaintiffs' response at Tabs 28-31.

[10] Deposition testimony taken March 2, 2000, of Charlie Team Bradley Commander, at 85. Attached at Tab 3. [Filed under seal.]

Additionally, the Charlie Team Bradley Commander confirmed the notes previously identified and submitted to the Court with Plaintiff's response[11] that the operator of the M79 grenade launcher for the Charlie Team Bradley first saw smoke shortly after firing gas rounds into the Mt. Carmel kitchen:

> Q. Do you recall Mr. _____ in this meeting or in any other meeting, or conversation, saying something like, "you know, I fired three rounds into the kitchen, and less than 30 seconds later I saw smoke"?
> A. I did.
>
> Q. And when did he say that?
>
> A. He said that in an interview with Congressional Affairs.
>
> Q. And that was the House Government Reform Committee, you mean? How recent was that?
>
> A. Um, a month and a half ago.
>
> Q. Alright, sir. And did you participate in that interview? I mean were you interviewed at the same time?
>
> A. We were interviewed simultaneously, yes. Yes.
>
> ****
>
> Q. Ok. So the only time that—that is the only time—the only time, that you've had any discussion with him about this issue about firing rounds into the kitchen, and 30 seconds later seeing smoke, was that meeting, right?

[11] Tabs 30 and 31.

A. Yeah. I didn't discuss it. He told them. I was sitting there listening.[12]

Given this evidence from an HRT tank commander, it is clear that the fire of April 19 may have been sparked by the government's use of pyrotechnic military tear gas rounds. Taken with the other evidence submitted previously with the *Andrade* Plaintiffs' response, the government's motion for partial summary judgment on this issue must be denied.

CONCLUSION

The evidence previously submitted by Plaintiffs was more than enough to compel denial of the government's motions for partial dismissal and partial summary judgment. The additional evidence submitted with this supplemental response makes it abundantly clear that the government's motions must be denied.

Respectfully submitted,

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[12] *Ibid*., at 94-96.

CERTIFICATE OF SERVICE

I certify that on March 8, 2000, I have served a true copy of the foregoing to the following by fax and first class mail.

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