UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF SOUTH DAKOTA

SOUTHERN DIVISION

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| TOM TEN EYCK and MICHELLE TEN EYCK, GUARDIANS of MORGAN TEN EYCK,<br><br>Plaintiffs,<br><br>vs.<br><br>UNITED STATES OF AMERICA, ROBERT NEUENFELDT, individually and UNKNOWN SUPERVISORY PERSONNEL OF THE UNITED STATES, individually,<br><br>Defendants. | 4:19-CV-4007<br><br>**REPLY MEMORANDUM IN SUPPORT OF ROBERT NEUENFELDT'S MOTION TO DISMISS** |

COMES NOW, the Defendant, Robert Neuenfeldt ("Neuenfeldt"), specially appearing, and hereby respectfully submits this Reply Memorandum in Support of Robert Neuenfeldt's Motion to Dismiss, asking this Court to enter an Order dismissing those claims and causes of action against Neuenfeldt.

The Plaintiffs, Tom Ten Eyck and Michelle Ten Eyck, as Guardians Morgan Ten Eyck, filed this action against two named defendants, the United States of America and Robert Neuenfeldt. (Doc. 1). The Plaintiffs alleged four causes of action:

1. Negligence;

2. 42 U.S.C.A. § 1983 (*Bivens* Action);

3. Common Law Assault and Battery Against Defendant Neuenfeldt;

4. Second Claim For Relief for Supervisorial Responsibility for Violations of the Civil Right Under Color of Law (*Bivens* Action)

(Doc. 1, pp. 5-15).

Defendant Neuenfeldt filed a Motion to Dismiss the Plaintiff's Complaint under Fed.R.Civ.P. 12(b)(1) and Fed.R.Civ.P. 12(b)(6). (Doc. 8). With respect to the Plaintiff's claims under the Federal Tort Claims Act, Defendant Neuenfeldt asserts that if any such claim exists, that the United States of America is the only proper defendant to such a claim. (Doc. 9, pp. 5-6). With respect to any other claims, Defendant Neuenfeldt asserts that the Flandreau Santee Sioux Tribe and Defendant Neuenfeldt, as its Chief of Police, enjoy sovereign immunity. (Doc. 9, pp. 3-5). Interestingly enough, the Plaintiff's Memorandum in Opposition to Robert Neuenfeldt's Motion to Dismiss acknowledges the accuracy of Defendant Neuenfeldt's argument with respect to the Federal Tort Claims Act (Doc. 17, p. 5) and entirely fails to address Defendant Neuenfeldt's argument with respect to *tribal* sovereign immunity and the lack of subject matter jurisdiction that comes therewith. The Plaintiff argues that "[d]espite the United States being the proper defendant for Plaintiff's FTCA claim, which Plaintiff is in agreement with, Neuenfeldt fails to address the actual cause of action alleged against him and how it is improper—i.e., Plaintiff's cause of action under *Bivens*." (Doc. 17, pp. 5-6). It is the Plaintiff, however, that seemingly ignores Defendant Neuenfeldt's argument that takes up the largest

portion of his Memorandum, to wit: tribal sovereign immunity. (Doc. 9, pp. 3-5).

The Plaintiff spends a significant portion of its brief detailing the factual allegations of the Complaint. (Doc. 17, pp. 2-4). While Defendant Neuenfeldt believes the factual allegations relied upon by the Plaintiff to be wildly inaccurate, they are entirely irrelevant to this Motion to Dismiss. The Plaintiff fails entirely to discuss the very simple factual allegations relied upon by Defendant Neuenfeldt. The relevant Factual Background contained in the Memorandum in Support of Defendant Neuenfeldt's Motion to Dismiss was simple:

> Plaintiffs filed their complaint in this matter seeking damages related to a vehicle chase that occurred on June 18, 2017. (Doc. 1, ¶¶ 11-26). At the time of the chase, Neuenfeldt was the Chief of Police for the Flandreau Santee Sioux Tribe. (Doc. 1, ¶¶ 6, 13, 14). The Plaintiffs allege that Neuenfeldt, in combination with the actions of others, "caus[ed] Bourassa's vehicle to lose control and roll several times throwing all three occupants from the vehicle." (Doc. 1, ¶ 26). It is not disputed that Neuenfeldt "was acting as Flandreau [Santee Sioux Tribe] Chief of Police" "[a]t all relevant times" related to this chase. The Plaintiffs further allege that "the Flandreau Santee Sioux Tribe and its Police Department operated a police department on the Flandreau Santee Sioux Indian Reservation and employed numerous employees, who were performing functions under the contract entered into pursuant to 25 U.S.C. 450f, et seq, which renders said employees, United States Government employees." (Doc. 1, ¶ 5). As an employee of the Flandreau Santee Sioux Tribe or the United States Government, Neuenfeldt is entitled to sovereign immunity and the claims against him should be dismissed.

(Doc. 9, p. 2).

As it concerns all four of the Plaintiffs' causes of action, the Plaintiffs refer to the plural "Defendants" in each claim and do little, if anything, to distinguish between the United States of America or Defendant Neuenfeldt in

those allegations. With respect to Plaintiffs' claims, Defendant Neuenfeldt assumed that Plaintiffs were referring to Defendant Neuenfeldt as an employee or similar to an employee of the United States of America under their analysis related to the 638 Contract with the Flandreau Santee Sioux Tribe and the Federal Tort Claims Act cause of action, not the remaining claims. In fact, the Plaintiffs' own factual allegations make it clear that Defendant Neuenfeldt is an employee of the Flandreau Santee Sioux Tribe, as the Chief of Police, and that the Flandreau Santee Sioux Tribe has entered into a 638 Contract with the United States of America (Defendant Neuenfeldt does not himself have the authority or capacity to enter into a 638 Contract). As such, the facts are undisputed that Defendant Neuenfeldt is an employee of the Flandreau Santee Sioux Tribe (not the United States of America) and the Flandreau Santee Sioux Tribe entered into a contract with the United States of America. This is important because while the Federal Tort Claims Act may apply, the Plaintiffs' entire argument with respect to the remaining claims is based on a knowingly false assertion that Defendant Neuenfeldt is a federal employee.

The Plaintiffs' statement that "Neuenfeldt fails to address the actual cause of action alleged against him and how it is improper—i.e., Plaintiff's cause of action under *Bivens,*" (Doc. 17, pp. 5-6), in-and-of itself requires the dismissal of Plaintiffs' claims against Defendant Neuenfeldt under counts 1, 3, and 4. The only *Bivens* claim asserted against Defendant Neuenfeldt is found in Count 2. The Plaintiffs have restricted their argument to the Plaintiffs' *Bivens* claim and have not made any attempt to establish how Defendant Neuenfeldt's

sovereign immunity does not prevent claims against Defendant Neuenfeldt under Count 1, 3, and 4.

With respect to the Plaintiffs' *Bivens* claim, the Plaintiffs argue that "[a] *Bivens* claim is closely analogous to those suits against state officials under 42 U.S.C. § 1983, and they both are often treated the same." (Doc. 17, p. 6). While this may be true for a federal employee, it couldn't be further from the truth for a tribal employee. As recently stated by United States District Judge Roberto A. Lange:

> "Aside from the Indian Civil Rights Act [ ("ICRA") ], no federal statute specifically addresses the civil rights of persons under tribal jurisdiction." Cohen § 14.04[3], at 989. This is because *many federal civil rights statutes limit their application, by their very terms, to states or state action, or impose duties on the executive and federal government; those limitations do not apply to Indian tribes*. *Id.; see also Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56-57 (1978) (noting that absent a congressional delegation of power, tribes are not states of the Union as described in the federal Constitution). But even under ICRA, federal judicial review of tribal actions is authorized only through the habeas corpus provision of 25 U.S.C. § 1303, *Santa Clara*, 436 U.S. at 58, 69-70.

*Whiting v. Martinez*, No. 3:15-CV-03017-RAL, 2016 WL 297434, at *4 (D.S.D. Jan. 22, 2016) (emphasis added). Even the Plaintiffs argue that "[u]nder *Bivens* and its progeny, 'a plaintiff may pursue a lawsuit for damages against *federal officials* in their personal capacities for constitutional violations.'" (Doc. 17, p. 6) (emphasis added) (citing *Jiggetts v. Cipullo,* 285 F.Supp.3d 156, 163 (D.D.C. 2018)). *Bivens* provides the Plaintiff with a potential cause of action against employees of the United States of America. There is nothing within *Bivens,* or any other authority relied upon by the Plaintiff, to suggest that *Bivens* provides the Plaintiff with a potential cause of action against employees

of a tribal government. As the United States Supreme Court has held with respect to *Bivens*:

> Given the notable change in the Court's approach to recognizing implied causes of action, however, *the Court has made clear that expanding the Bivens remedy is now a "disfavored" judicial activity*. *Iqbal,* 556 U.S., at 675, 129 S.Ct. 1937. This is in accord with the Court's observation that *it has "consistently refused to extend Bivens to any new context or new category of defendants."* *Correctional Services Corp. v. Malesko,* 534 U.S. 61, 68, 122 S.Ct. 515, 151 L.Ed.2d 456 (2001). Indeed, the Court has refused to do so for the past 30 years.
>
> For example, the Court declined to create an implied damages remedy in the following cases: a First Amendment suit against a federal employer, *Bush v. Lucas,* 462 U.S. 367, 390, 103 S.Ct. 2404, 76 L.Ed.2d 648 (1983); a race-discrimination suit against military officers, *Chappell v. Wallace,* 462 U.S. 296, 297, 304–305, 103 S.Ct. 2362, 76 L.Ed.2d 586 (1983); a substantive due process suit against military officers, *United States v. Stanley,* 483 U.S. 669, 671–672, 683–684, 107 S.Ct. 3054, 97 L.Ed.2d 550 (1987); a procedural due process suit against Social Security officials, *Schweiker v. Chilicky,* 487 U.S. 412, 414, 108 S.Ct. 2460, 101 L.Ed.2d 370 (1988); a procedural due process suit against a federal agency for wrongful termination, *FDIC v. Meyer,* 510 U.S. 471, 473–474, 114 S.Ct. 996, 127 L.Ed.2d 308 (1994); an Eighth Amendment suit against a private prison operator, *Malesko, supra,* at 63, 122 S.Ct. 515; a due process suit against officials from the Bureau of Land Management, *Wilkie v. Robbins,* 551 U.S. 537, 547–548, 562, 127 S.Ct. 2588, 168 L.Ed.2d 389 (2007); and an Eighth Amendment suit against prison guards at a private prison, *Minneci v. Pollard,* 565 U.S. 118, 120, 132 S.Ct. 617, 181 L.Ed.2d 606 (2012).

*Ziglar v. Abbasi*, 137 S. Ct. 1843, 1857, 198 L. Ed. 2d 290 (2017) (emphasis added). Where the Court refuses to expand *Bivens* to other federal employees, it certainly cannot expand *Bivens* to an employee of the Flandreau Santee Sioux Tribe.

Defendant Neuenfeldt argued, and the Plaintiffs did not contest, that the Flandreau Santee Sioux Tribe and Neuenfeldt, its Chief of Police, enjoy sovereign immunity. "Indian tribes have long been recognized as possessing

the common-law immunity from suit traditionally enjoyed by sovereign powers." *Id.* at 58 (citing *Turner v. United States*, 248 U.S. 354, 358, 39 S.Ct. 109, 110, 63 L.Ed. 291 (1919); *United States v. United States Fidelity & Guaranty Co.*, 309 U.S. 506, 512–513, 60 S.Ct. 653, 656, 84 L.Ed. 894 (1940); *Puyallup Tribe, Inc. v. Washington Dept. of Game*, 433 U.S. 165, 172–173, 97 S.Ct. 2616, 2620–2621, 53 L.Ed.2d 667 (1977)). "This aspect of tribal sovereignty, like all others, is subject to the superior and plenary control of Congress. But 'without congressional authorization,' the 'Indian Nations are exempt from suit.' *Id.* (citing *United States v. United States Fidelity & Guaranty Co., supra*, 309 U.S., at 512, 60 S.Ct. at 656). As Judge Lange recognized, where Congress has provided that "congressional authorization" for suit with respect to State or federal actors, it has not done the same for Indian tribes. Judge Lange ultimately concluded:

> "Aside from the Indian Civil Rights Act [ ("ICRA") ], no federal statute specifically addresses the civil rights of persons under tribal jurisdiction."… Additionally, the Eighth Circuit has stated that *ICRA only provides rights "against the tribe and governmental subdivisions thereof, and not against tribe members acting in their individual capacities*." *Means v. Wilson,* 522 F.2d 833, 841 (8th Cir. 1975) (citing 25 U.S.C. § 1302); *see also id.* (concluding that "it is plain that only actions of the tribe and tribal bodies are constrained"). *Defendants thus may not be sued for money damages in either their official or their individual capacities under ICRA.*

*Whiting v. Martinez*, No. 3:15-CV-03017-RAL, 2016 WL 297434, at *4 (D.S.D. Jan. 22, 2016).

Thus, as Defendant Neuenfeldt originally argued, with respect to the Plaintiffs' claims under the Federal Tort Claims Act, the United States of

America is the proper defendant and Defendant Neuenfeldt should be dismissed from those claims. With respect to any remaining claims against Defendant Neuenfeldt, any such claims are barred by sovereign immunity and the fact that this Court lacks subject matter jurisdiction. The Plaintiffs do not dispute Defendant Neuenfeldt's argument with respect to the Federal Tort Claims Act, but state only that the Plaintiffs believe their *Bivens* claim should survive. As set forth above, no such claim exists against Defendant Neuenfeldt, the Chief of Police for the Flandreau Santee Sioux Tribe.

**CONCLUSION**

For the foregoing arguments and authority set forth herein, the Defendant, Robert Neuenfeldt, respectfully requests that this Court enter an Order dismissing those claims and causes of action set forth in the Complaint against the Defendant, Robert Neuenfeldt, with prejudice.

Dated this 19th day of May, 2019.

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