UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION

MICAH ROEMEN; TOM TEN EYCK, Guardian of Morgan Ten Eyck; and MICHELLE TEN EYCK, Guardian of Morgan Ten Eyck, Plaintiffs, v. UNITED STATES OF AMERICA, ROBERT NEUENFELDT, individually and UNKNOWN SUPERVISORY PERSONNEL OF THE UNITED STATES, individually, Defendants.	Civ. 19-4006-LLP Civ. 19-4007-LLP **UNITED STATES' BRIEF IN SUPPORT OF MOTION TO DISMISS**

The United States of America, by and through its counsel of record, moves pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(h) to dismiss all counts against the United States under the Federal Tort Claims Act ("FTCA") because the United States has not waived its sovereign immunity, and the Court lacks subject matter jurisdiction over these claims.

INTRODUCTION

On June 18, 2017, Tahlen Bourassa made repeated, harmful choices that led to a high-speed pursuit that ultimately resulted in the injuries sustained by his passengers, Morgan Ten Eyck and Micah Roemen. Plaintiffs would lead the Court to believe that the law enforcement officers forced Bourassa's bad choices; specifically claiming the then-Chief of Police for the Flandreau Santee Sioux Tribe, Robert Neuenfeldt, engaged in conduct that was intentional, malicious, and reckless when he continued a lawful police pursuit initiated by the South Dakota Highway Patrol. At this lawsuit's core, Plaintiffs allege that Neuenfeldt used excessive force and assaulted or

battered Plaintiffs when, as the lead pursuer, he allegedly forced Bourassa down a dead-end road knowing it "would result in an accident." These allegations cannot lie in negligence, and Plaintiffs' negligence claim based on the same conduct is simply a recasting of an assault or battery claim. However, because the only source of jurisdiction is under the FTCA, there is a jurisdictional bar to suit. The FTCA contains an intentional tort exclusion that prohibits any claim arising out of an assault or battery when the actor is not a federal law enforcement officer. As Neuenfeldt was a tribal police officer without a Special Law Enforcement Commission card issued by the Bureau of Indian Affairs, he cannot be a federal officer for purposes of the FTCA's law enforcement proviso. The Court must dismiss Count III for assault and battery. Because the Supreme Court and Eighth Circuit have read the "arising out of" language of the law enforcement proviso expansively, the intentional tort exception equally bars Plaintiffs' negligence (Count I) and employment-related claims (Count V).

Even if the intentional tort exception to the FTCA did not bar this action, the Court also lacks jurisdiction over Neuenfeldt's pursuit conduct because the discretionary function exception to the FTCA applies. Specifically, Neuenfeldt's decision to continue the Highway Patrol's pursuit involved an element of judgment or choice that must be left to his common sense or good judgment. Courts in this District have specifically found the pursuit provisions of the BIA Law Enforcement Handbook specifically give officers discretion when initiating, continuing, or terminating a pursuit. In those instances, the Courts dismissed the FTCA actions against the United States, and the same result should occur here.

The Court also should dismiss Count V because South Dakota law requires that for a tort to exist over the employer, the relevant employee must first commit an underlying tort. However, because the Court does not have jurisdiction over Neuenfeldt's alleged torts or they are not

actionable torts due to the intentional tort exception or the discretionary function exception, it equally does not have jurisdiction over his employer's alleged tort for failing to supervise or train him. Accordingly, all of Plaintiffs' claims against the United States must be dismissed.

FACTUAL BACKGROUND

I. Flandreau Santee Sioux Tribe's 638 Contract for Law Enforcement Services

The Flandreau Santee Sioux Tribe (hereafter "FSST" or "the Tribe") and the United States, acting through the Bureau of Indian Affairs, Office of Justice Services (hereafter "BIA" or OJS") entered into a contract wherein the Flandreau Santee Sioux Tribal Police Department was operated by the Tribe pursuant to an Indian Self-Determination and Education Assistance Act ("ISDEAA") Contract (hereafter referred to as the "638 Contract" or "ISDEAA Contract"). Declaration of Yvonne LaRocque, Ex. 1. In this ISDEAA Contract, the provision of law enforcement services for the Flandreau Santee Sioux Indian Reservation was transferred from OJS to the Tribe from October 1, 2015 through September 30, 2018. *Id.* at USA001397.[1] The only supervisory obligation that the BIA retained with respect to the Contract was noted in the Annual Funding Agreement, which provided that "[t]he Government, through the Bureau of Indian Affairs, shall . . . [p]rovide technical assistance and guidance, as needed, to the Contractor[,]" and "monitor Contractor performance under this contract[,]" which included "[p]eriodic on-site technical assistance visits, as needed and/or requested by the Contractor[.]" *Id.*

II. Mutual Aid Agreements and Dispatch Agreement

During this same time, the Moody County Sheriff's Office ("Moody County") and the

[1] Furthermore, the 638 Contract provided that "[w]hen operating within the scope of this contract, the contractor may be required to leave or operate outside of Indian country." LaRocque Decl., Ex. 1 at USA001393. The 638 Contract provides for five specific instances of acceptable work outside of Indian country, but the Contract provides that this "may include, but are not limited to" those five instances. *Id.*

Tribe entered into a Law Enforcement Assist Agreement in September of 2015. Declaration of Meghan K. Roche., Ex. 1 (Excerpts of Moody County Sheriff Troy Wellman's Deposition Transcript) at 31-32; *see also* LaRocque Decl., Ex. 1 at USA001450-52. The City of Flandreau and Moody County had a similar agreement because "there's usually one [police officer] out for each department" and "[s]ometimes one person can't control the situation." Roche Decl., Ex. 1 at 35. Pursuant to their Mutual Aid Agreement, Moody County or the Tribe could request assistance from the other entity "[i]n the event of or the threat of an emergency, disaster, or widespread conflagration which cannot be met with the facilities of one of the parties to this agreement, the other party agrees, upon proper request, to furnish law enforcement assistance to the party requesting the assistance upon either an actual or standby basis." LaRocque Decl., Ex. 1 at USA001450. A "proper request" from Moody County to the Tribe "shall only be communicated directly, either formally or informally, by the Sheriff's Office or the Sheriff's designee(s), to the Tribal Chief of Police or the Chief's designee." *Id.* at USA001451 ¶ (1)(a). While the furnishing party is rendering aid to the other, the responding officer "shall temporarily have the same powers and authority conferred by law on the members of the law enforcement of the party to which the assistance is rendered." *Id.* USA001451 ¶ (2).

As of June 17, 2017, Moody County provided dispatch services to the Tribe and the City of Flandreau. LaRocque Decl., Ex. 1 at USA001454-1458. Thus, Moody County's dispatch received and accepted "all calls for service within, or near, the jurisdiction of the Tribe, including emergency calls for fire, medical, and emergency situations." *Id.* at (3)(a). It also provided radio and support communications with the Tribe from the initial call until the conclusion of the emergency. *Id.* at (3)(c). During this timeframe, Moody County, the City of Flandreau, and the Tribe all utilized the same radio channel. Roche Decl., Ex. 1 at 63. In addition, other nearby

agencies or jurisdictions also had access to this radio channel; like Lake County and certain South Dakota Highway Patrol officers who worked in that geographical area. *Id.*

III. Events Leading Up to Tahlen Bourassa Fleeing Law Enforcement on June 18, 2017

During the 638 Contract period, in about January of 2016, Robert Neuenfeldt was hired as a police officer by the Tribe's then-Police Chief, Nicholas Cottier. Roche Decl., Ex. 2 at 27 (Excerpts of Robert Neuenfeldt's Deposition Transcript). Neuenfeldt had been certified as a law enforcement officer by the State of South Dakota after attending the State Academy in 2013. *Id.* at 8. Neuenfeldt previously worked as a deputy sheriff for Moody County from 2013 through late-2015. *Id.* at 13-14. Neuenfeldt eventually became Acting Chief of Police for the Tribe and occupied that role on June 17, 2017. *Id.* at 60.

On the evening of June 17, 2017, Moody County Sheriff's Deputies Carl Brakke and Logan Baldini[2] were on duty together in Brakke's police cruiser. Roche Decl., Ex. 3 (Excerpts of Carl Brakke's Deposition Transcript) at 21. They were doing a drive-by security check of a residence located in rural Moody County at 24364 484th Avenue, Dell Rapids, South Dakota. *Id.* at 21; *see also* Roche Decl., Ex. 4 at 1 (FSST Command Log). The owners of this unoccupied property requested extra drive-bys from the Moody County Sheriff's Office to help the owners with security because there had been a party there the evening before. Roche Decl., Ex. 3 at 29-30. The owners had ongoing concerns with trespassing. *Id.*

[2] At the time of this incident, Deputy Baldini was new to his position and was riding along with Deputy Brakke for experience. Roche Decl., Ex. 3 at 21. Deputy Baldini had been sworn in as a law enforcement officer by a state court judge, but had not yet been to the South Dakota State Police Academy to become a certified law enforcement officer. Roche Decl., Ex. 5 at 8-11 (Excerpts of Logan Baldini's Deposition Transcript). Deputy Brakke was Deputy Baldini's field training officer, which is why the two deputies were riding together. *Id.* at 8-11; 31.

At 11:50 p.m. on June 17, 2017, Deputy Brakke radioed[3] to Moody County dispatch that he could see six to eight vehicles at the location and "looks like another house party going on." Roche Decl., Ex. 3 at 32; *see also* Roche Decl., Ex. 4 at 4. Deputy Brakke relayed to dispatch that as they pulled up to the residence, 15 individuals ran from the house toward the trees. Roche Decl., Ex. 3 at 32. Deputy Brakke said he believed there were more people in the house, and there were a number of people who did not run, but instead stayed in the driveway near Deputy Brakke's cruiser. *Id.* at 32-33. Deputy Brakke estimated there were 25 people in the house having a party. *Id.* at 33.

Deputy Brakke testified that he was involved with radio traffic from at least two different dispatchers and two different radio channels that night. Roche Decl., Ex. 3 at 47-48. He testified that after he contacted Moody County's dispatch, he went to the "Brookings inter-agency" channel,[4] which is a channel that Troopers from the South Dakota Highway Patrol monitor and where deputies go to ask for their help, and asked for assistance at a house party and "gave the address the same type of way" that he gave it to his own dispatcher. *Id.* On his inter-agency request for assistance, he asked for "any available units" or "can you start all units to my location" and "went on to explain about the kids running and the number of vehicles." *Id.* at 47, 57. Deputy Brakke testified that he asked for "additional units" because it could have been deemed "an emergency." *Id.* at 46. Deputy Baldini also testified Deputy Brakke made a call for "a general assist" on the radio. Roche Decl., Ex. 5 at 18.

[3] For the Court's benefit if it listens to the radio transmissions, the following is an identification of each individual responder's call sign: 1F: Carl Brakke; 1W: Logan Baldini; HP 28: Isaac Kurtz; HP 198: Chris Spielmann; 7C: Robert Neuenfeldt; 5-2-1: Moody County Dispatch; 2-3: Brent Goehring. *See* Roche Decl., Ex. 4 at 4 (USA000777).

[4] The parties have been unable to locate recordings from the Brookings Inter-agency channel.

At 11:52 p.m., Deputy Brakke contacted Flandreau City Police Officer Brent Goehring via radio and told him about the party at the residence. Roche Decl., Ex. 3 at 52-53. Officer Goehring responded and said: "10-4. We can start heading that way." *Id.* at 53.

At about 12:02 a.m. on June 18, 2017, one of the partygoers standing in the driveway with Deputies Brakke and Baldini started to have a seizure. Roche Decl., Ex. 4 at 4; Ex. 3 at 38-39. Deputy Brakke requested an ambulance to assist with the seizure. *Id.* By the time the ambulance arrived, the seizure had passed, and the individual did not need to be transported to the hospital for medical care. *Id.* at 39. At about 12:05 a.m., South Dakota Highway Patrol Trooper Isaac Kurtz[5] was working in the area and asked Moody County dispatch if Deputy Brakke needed assistance with the house party. Roche Decl., Ex. 13 (Radio Transmissions; Number 12 at 42 seconds in). Dispatch responded and said, "Yes, please." *Id.*; *see also* Roche Decl., Ex. 6 at 1 (HP Command Log).

Deputy Brakke did not call Chief Neuenfeldt to ask him to assist. Roche Decl., Ex. 3 at 71. However, Sheriff Wellman testified that his Moody County employees "obviously were outnumbered and tried to call in other resources to try to contain the situation." Roche Decl., Ex. 1 at 33. Sheriff Wellman testified that under the Mutual Assist Agreement, his deputies could call the tribal police officers and ask for help. *Id.* at 63. Sheriff Wellman concluded that Deputy Brakke made "a request for assistan[ce]," but it was not to Neuenfeldt specifically. *Id.* at 39. But he also said that there was, in general, a radio call for backup to all available units, and "the tribe falls into

[5] Isaac Kurtz was a Sergeant with the South Dakota Highway Patrol at the time of this incident. Roche Decl., Ex. 7 at 4-6 (Excerpts from Isaac Kurtz's Deposition Transcript). However, to better clarify the jurisdictions involved, the United States refers to him as Trooper in this brief to orient him with the Highway Patrol rather than Moody County, the City of Flandreau, or the Flandreau Santee Sioux Tribe, among other responding jurisdictions, departments, or offices involved in the pursuit.

that." *Id.* at 40-41. Finally, Sheriff Wellman admitted that if Chief Neuenfeldt heard a request for assistance from Deputy Brakke that Chief Neuenfeldt would have authority under the Mutual Assist Agreement to assist in Moody County. *Id.* at 69.

Chief Neuenfeldt also was on duty on June 18, 2021, and testified that he responded to the house party scene because he heard Deputy Brakke call out over the radio and request assistance "when one of the people he was with started having a seizure." Roche Decl., Ex. 2 at 132, 260-62. Chief Neuenfeldt testified he believed he arrived before the ambulance. *Id.* at 133. The FSST Command Log confirms this. Chief Neuenfeldt arrived at 12:13 a.m. Roche Decl., Ex. 4 at 4 (USA000778). Officer Goehring arrived at 12:17 a.m. *Id.* Trooper Kurtz arrived at 12:35 a.m. *Id.*; *see also* Roche Decl., Ex. 6 (HP Command Log; USA000796).

IV. Bourassa Strikes Chief Neuenfeldt and Flees from Trooper Kurtz

After the party had been broken up around 1:20 a.m., Deputy Brakke was in or near his police cruiser in the driveway to the residence giving tickets or processing some of the partygoers who had not fled. Roche Decl., Ex. 3 at 73-75. Chief Neuenfeldt, Deputy Baldini, and Trooper Kurtz had helped search the area for the partygoers who had fled and cleared other structures on the rural property,[6] and were having a discussion at the end of the driveway. Roche Decl., Ex. 5 at 52-53. At that time, Deputy Brakke had already seen at least three cars drive north past the driveway to the residence that would stop about a half of a mile past the driveway and then speed off, as though they were picking up those partygoers who had fled. Roche Decl., Ex. 14 at 2

[6] Trooper Kurtz's police cruiser was equipped with a dash camera that recorded his cruiser's vantage point from the time he arrived at the house party until the accident scene. Roche Decl., Ex. 7 at 14-15, 31-32. Thus, his camera would have captured the start of the pursuit, the portion of the pursuit where Kurtz was the primary pursuer, and after Kurtz arrived at the accident site. *Id.* Chief Neuenfeldt's cruiser was not equipped with a dash cam. Roche Decl., Ex. 2 at 194-95 (Neuenfeldt Depo.). Chief Neuenfeldt had a body-worn camera, but forgot to turn it. *Id.*

(Brakke Report). Deputy Brakke relayed via radio to the other police units that these cars may be picking up people that ran from the house. *Id.* While talking with Deputy Baldini and Chief Neuenfeldt, Trooper Kurtz noticed a vehicle traveling eastbound on 244th Street that appeared to be traveling slow and stopped to the west of 484th Avenue. Roche Decl., Ex. 5 at 54. Trooper Kurtz was in his cruiser and drove south toward the vehicle that he saw. *Id.* at 58; *see also* Roche Decl., Ex. 7 at 118-119. Based on the vehicle's actions, Trooper Kurtz believed he had reasonable suspicion that the person driving the vehicle was involved at the house party. Roche Decl., Ex. 7 at 111.

The vehicle that was approaching the residence turned out to be a gray Dodge pickup that was driven by Tahlen Bourassa. Docket 76 ¶¶ 13-14. Micah Roemen and Morgan Ten Eyck were passengers in Bourassa's pickup. *Id.*

Bourassa turned north onto 484th Avenue and started heading towards the residence. Roche Decl., Ex. 5 at 58. Trooper Kurtz met Bourassa's vehicle, and after Bourassa's vehicle passed Trooper Kurtz, officers heard Bourassa's vehicle accelerate, and Trooper Kurtz saw the truck fishtail in his rearview mirror. Roche Decl., Ex. 7 at 119; *see also* Roche Decl., Ex. 5 at 59-60; 211-12 (discussing noise of pickup as "easy to tell that it was gaining speed" because it "had two stacks on it"). Trooper Kurtz turned around to go north on 484th Avenue and activated his emergency lights to stop Bourassa's truck. Roche Decl., Ex. 7 at 123-26.

Bourassa approached the driveway to the residence in his vehicle. Roche Decl., Ex. 5 at 60. As he approached, Chief Neuenfeldt and Deputy Baldini stepped from the driveway into the road and began giving Bourassa hand signals and verbal commands to stop. *Id.* at 60; Ex. 2 at 256-57. Chief Neuenfeldt testified he "was yelling stop because Kurtz was trying to pull [Bourassa] over." Roche Decl., Ex. 2 at 257. As Bourassa's vehicle slowed and approached the driveway to

the residence, Chief Neuenfeldt crossed to the driver's side of the truck and Deputy Baldini stayed near the passenger side where Roemen sat. Roche Decl., Ex. 2 at 256; Ex. 8 at 67-68 (Excerpts from Micah Roemen's Deposition Transcript). Bourassa briefly stopped at the driveway for Sergeant Kurtz's emergency lights. Roche Decl., Ex. 5 at 60; Ex. 8 at 68.

During this brief stop, Bourassa locked his doors as Chief Neuenfeldt approached his side of the truck. Roche Decl., Ex. 8 at 75. Passenger Roemen claims Chief Neuenfeldt told Bourassa he would arrest him if Bourassa did not unlock his doors. *Id.* Thereafter, Bourassa ignored the officers' commands to get out or unlock his doors, and Bourassa accelerated toward Chief Neuenfeldt. Roche Decl., Ex. 2 at 152; Ex. 8 at 80. Chief Neuenfeldt drew his gun as the Bourassa vehicle accelerated toward him. Roche Decl., Ex. 2 at 152. Chief Neuenfeldt was struck in the left thigh and shoulder and knocked to his knees by Bourassa's truck, specifically stating Bourassa "sideswiped me when he went past." *Id.* at 254.

There is no known witness to the strike. Roemen did not see the strike and admitted he could not see Chief Neuenfeldt's lower body at all through the driver-side window. Roche Decl., Ex. 8 at 128, 134, 194-195. Deputies Baldini and Brakke did not witness the truck striking Chief Neuenfeldt, but they testified they saw Chief Neuenfeldt getting up from his knees as the Bourassa truck sped away. Roche Decl., Ex. 3 at 80-81; Ex. 5 at 104. Later that evening after this incident concluded, Chief Neuenfeldt sought medical care at the emergency room, where the provider noted objective findings of "a little bit of bruising" on his left lower thigh that looked like it would turn into a "more significant bruise as time goes." Roche Decl., Ex. 9 (Avera Medical Record); Roche Decl., Ex. 2 at 298. The provider also observed that his left shoulder did not appear bruised, but it was "a little bit red." Roche Decl., Ex. 9.

After striking Chief Neuenfeldt, Bourassa fled from the scene. Trooper Kurtz was behind

Bourassa's truck as it sped away, and Trooper Kurtz immediately initiated a high-speed pursuit going north on 484th Avenue at 1:21 a.m. Roche Decl., Ex. 7 at 91, 73-74; Ex. 6 at 2. Trooper Kurtz listed the reason for initiating the pursuit as exhibition driving and failure to stop[7] when directed by law enforcement. Roche Decl., Ex. 7 at 73-74. He said Bourassa failed to stop for Chief Neuenfeldt, Deputy Baldini, and himself because he had activated his emergency lights. *Id.* at 75; 80. Once Trooper Kurtz initiated the pursuit, he asked dispatch to contact a supervisor. *Id.* at 192. Trooper Kurtz did not yet know that Chief Neuenfeldt had been struck when initiating the pursuit.

After getting up off of the ground, Chief Neuenfeldt got in the driver's side of his cruiser. Roche Decl., Ex. 5 at 99, 213. Deputy Baldini also ran to Chief Neuenfeldt's cruiser and got in the passenger's side because he had concerns for Chief Neuenfeldt's safety, and "I saw Rob getting up off the ground, and I didn't know if he was injured in any way." Roche Decl., Ex. 5 at 99, 213. Their cruiser was secondary behind Trooper Kurtz in the pursuit. *Id.* Chief Neuenfeldt testified that he joined the pursuit as secondary because he was concerned about officer safety. Roche Decl., Ex. 2 at 281-82. At approximately 1:22 a.m., Chief Neuenfeldt relayed over the radio: "HP28: He hit me with his truck. That's assault on law enforcement." Roche Decl., Ex. 13 (Radio Transmissions at 1:22 a.m.)

From 484th Avenue, Bourassa turned west onto 242nd Street, and Trooper Kurtz followed Bourassa. Roche Decl., Ex. 6 at 2; Ex 7 at 91. At this time, Highway Patrol Trooper Chris Spielmann entered the area after hearing the pursuit radio traffic. Trooper Spielmann set up across 481st Avenue just north of 241st Street,[8] ahead of Bourassa to prepare spike strips. Roche Decl.,

[7] After Trooper Kurtz initiated the pursuit, Bourassa also violated the law by eluding or engaging in aggravated eluding. Roche Decl., Ex. 7 at 191-92.

[8] Plaintiff Roemen disputes that Trooper Spielmann set up the spike strips at the intersection of 241st Street and 481st Avenue (also called Highway 13) even though he does not dispute that the

Ex. 10 at 20-21 (Excerpts from Chris Spielmann's Deposition Transcript). Trooper Kurtz gave Trooper Spielmann permission to deploy spikes. *Id.* Bourassa then turned northbound on 481st Avenue and approached the position of Trooper Spielmann. Roche Decl., Ex. 7 at 91; Ex. 10 at 21-22. Bourassa avoided the spikes by turning east on 241st Street. Roche Decl., Ex. 10 at 21-22. Trooper Kurtz also turned east on 241st Street. *Id.*

After traveling east on 241st Street for approximately 3 miles, Bourassa turned south onto 484th Avenue and then quickly turned east on 242nd Street. Roche Decl., Ex. 8 at 98. Passenger Roemen testified that after turning east on 242nd Street, Bourassa stopped in the middle of the road and turned off his headlights. *Id.* at 95-96; 101-102. The Bourassa truck was stopped for about a minute. *Id.* at 96-98. While the Bourassa truck was stopped, neither of the passengers asked to get out of the truck or attempted to get out. *Id.* at 96-97, 89.

Meanwhile, Trooper Kurtz shadowed Bourassa by turning southbound on 484th Avenue. Roche Decl., Ex. 7 at 92. However, because Bourassa abruptly turned onto 242nd Street and turned off his headlights, Trooper Kurtz temporarily lost sight of the Bourassa vehicle near the intersection of 484th Avenue and 242nd Street. *Id.* at 92. Shortly after he lost sight of the Bourassa vehicle, Trooper Kurtz saw Bourassa taillights headed eastbound, and he relayed that location to the other pursuing police units. Roche Decl., Ex. 7 at 92, 193; Ex. 6 at 2.

For his part, Roemen testified that while the Bourassa truck was hiding, he watched other cop cars "fly by" continuing south on 484th Avenue, but one police car turned east on 242nd Street

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Highway Patrol's video of the pursuit shows a police officer at that intersection. Roche Decl., Ex. 8 at 207. Roemen claims that the Highway Patrol video has been altered. *Id.* at 204-205. Roemen testified that Trooper Spielmann was set up farther south on 481st Avenue between 242nd and 241st Streets, but not at the intersection. *Id.* at 94. Roemen also testified Bourassa went in the ditch to get around Spielmann's spike strip and told others that the truck "almost killed" or "almost ran over Chris Spielmann[.]" *Id.* at 94, 202, 224. The Court need not resolve this factual dispute to rule upon the United States' Motion to Dismiss.

and started driving toward Bourassa's truck. Roche Decl., Ex. 8 at 101-02. Chief Neuenfeldt and Deputy Baldini were the closest law enforcement vehicle to Bourassa's last known whereabouts, as they were traveling southbound on 484th Avenue between 241st Street and 242nd Street when they heard Trooper Kurtz relay that he believed he saw Bourassa's taillights eastbound on 242nd Street, so they turned east on 242nd Street, saw Bourassa's taillights, and Bourassa took off again. Roche Decl., Ex. 8 at 98-99, 102-103; Ex. 5 at 155.

Chief Neuenfeldt and Deputy Baldini saw Bourassa's vehicle within minutes after Trooper Kurtz lost sight, and they continued the pursuit as the primary pursuer. Roche Decl., Ex. 6 at 2 (noting approximately 2-3 minutes between loss of sight and NB on 485th Ave.). After Trooper Kurtz lost sight[9] of the Bourassa vehicle, he continued to search for the truck and tried to get ahead of the Bourassa truck so he could find a place to lay spike strips. Roche Decl., Ex. 7 at 193. In fact, although Trooper Kurtz lost sight of Bourassa around 1:28 a.m., he had already stated over the radio by 1:30 a.m. that was going to try and "get ahead of him[.]" Roche Decl., Ex. 4 at 8.

From eastbound on 242nd Street, Bourassa turned north on 485th Avenue, with Chief Neuenfeldt and Deputy Baldini following directly behind. Roche Decl., Ex. 8 at 102-103; Ex. 5 at 156. When Chief Neuenfeldt's vehicle became the primary pursuer, he focused on driving and Deputy Baldini covered the radio to relay the turns and route of the pursuit to dispatch and the other responding officers and agencies. Roche Decl., Ex. 5 at 222-223. Eventually, Bourassa turned west on 237th Street and traveled that road for about a mile before turning north onto 484th

[9] Trooper Kurtz testified that he did not terminate the pursuit, but he "stopped being the primary pursuer" or "primary unit in pursuit of that vehicle." Roche Decl., Ex. 7 at 193. Trooper Kurtz never requested a "10-22," terminated, or stopped the pursuit. *Id.* at 192-193. Trooper Kurtz testified that a "10-22" means "to stop, disregard . . . go about your normal, job, normal work." *Id.* at 192.

Avenue. *Id.* at 161. Chief Neuenfeldt and Deputy Baldini followed. *Id.* Next, after traveling north on 484th Avenue for about a mile, Bourassa turned west onto 236th Street and sped on that road for two miles. *Id.* Bourassa then turned north on 482nd Avenue and drove north on that road for approximately 5 miles[10] until 482nd Avenue turned into 231st Street, going west until reaching Highway 13. *Id.* at 167-68.

As the pursuit reached just southeast of the town of Flandreau, FSST Tribal Police Officer Brian Arnold was driving toward Bourassa's vehicle. Roche Decl., Ex. 15 at 2 (Neuenfeldt's Report). Right before Bourassa turned north onto Highway 13, Bourassa met Officer Arnold and forced Officer Arnold off the road and into the ditch. *Id.*

Bourassa sped north on Highway 13 through the town of Flandreau. Roche Decl., Ex. 2 at 304. Chief Neuenfeldt and Deputy Baldini continued to pursue. *Id.* Once Bourassa crossed the bridge on Highway 13 just north of Flandreau, Bourassa went by a car[11] and then came to a very rapid stop on Highway 13 just north of 229-A. *Id.* Chief Neuenfeldt stopped his cruiser in the southbound lane behind Bourassa, and Deputy Baldini got out of the cruiser and told Bourassa to stop or get out of the vehicle. Roche Decl., Ex. 2 at 304-306; Ex. 5 at 218.

After nearly a 20-minute pursuit, the chase nearly concluded without injury, but instead of getting out of his truck, Bourassa ignored Deputy Baldini's commands and suddenly reversed and turned east down 229-A. Roche Decl., Ex. 5 at 186-187, 218-219. Chief Neuenfeldt and Deputy Baldini were some distance behind Bourassa when they finally turned east down 229-A because

[10] During about a mile of this portion of the pursuit, 482nd Avenue turned into a minimum maintenance road called a two track, but Chief Neuenfeldt knew this road turned back into gravel after that section, so he continued to pursue. Roche Decl., Ex. 15 at 2.

[11] The pursuit only crossed paths with this one non-law enforcement vehicle during the pursuit. Roche Decl., Ex. 2 at 275.

Chief Neuenfeldt had to wait for Deputy Baldini to get back inside the cruiser. Roche Decl., Ex. 2 at 308. Chief Neuenfeldt did not force Bourassa to take 229-A when, in fact, Bourassa could have continued north or south on Highway 13 or turned east or west. Roche Decl. Ex. 5 at 182; Ex. 2 at 309.

As he slowly followed Bourassa east down 229-A, Chief Neuenfeldt was not speeding because the road was dusty, and he knew it was a dead-end. Roche Decl., Ex. 2. at 308. Chief Neuenfeldt estimated he was a quarter of a mile behind Bourassa on 229-A because he recalls being near a specific grove of trees when Deputy Baldini got on the radio and said he thought Bourassa wrecked. *Id.* at 313. Deputy Baldini also estimated their cruiser was at least a quarter of a mile behind the truck on 229-A. Roche Decl., Ex. 5 at 190. As Chief Neuenfeldt and Deputy Baldini drove toward the end of 229-A, they believed that Bourassa had wrecked up ahead because they could see what appeared to be lights flashing. Roche Decl., Ex. 15 at 2. As they approached the dead-end, they noticed that Bourassa had crashed his truck into a field to the north of the road. *Id*. Neither Chief Neuenfeldt nor Deputy Baldini witnessed the crash because there is a large hill in the middle of 229-A. *Id.* Chief Neuenfeldt's cruiser struggled to stop, likely because his brakes were hot from the pursuit, and slid over a fence post at the entrance to the field where Bourassa crashed farther into the field. Roche Decl., Ex. 5 at 193-94, 224.

Roemen testified that once Bourassa turned onto 229-A, he told Bourassa that it was a dead-end road. Roche Decl., Ex. 8 at 88. Bourassa ignored his passenger's advice, driving fast down 229-A. *Id.* at 112. Roemen remembers there was a corn field to their right, a pasture to their left and a tree straight-ahead at the dead-end. *Id.* The very last thing he remembers is seeing a tree and a dead-end sign and crashing. *Id.* at 112. All three occupants of the pick-up were ejected in the crash and sustained serious injuries. Docket 76 ¶ 29. While Chief Neuenfeldt and Deputy

Baldini were the first responders on the accident scene, Highway Patrolman Denver Kvistad, City Officer Brent Goehring, and FSST Officer Arnold all arrived within one to two minutes of the crash. Roche Decl., Ex. 6 at 2; Ex 4 at 8-9.

While Deputy Brakke was processing party goers from the residence, he testified that someone in his cruiser told him that the truck driver was "possibly" a "Tay-len Bros-na from Dell Rapids who was involved in a possible stand off . . . a year ago." Roche Decl., Ex. 13 (Radio Transmissions; Video 42 at 1:58 minutes); Ex. 15 at 1 (Neuenfeldt's Report). Trooper Kurtz asked dispatch to run a name search or find an address for the name Deputy Brakke relayed, but no information was available during the pursuit. Roche Decl., Ex. 7 at 189-91. Troopers Spielmann and Kurtz, Deputy Baldini, and Chief Neuenfeldt all testified that they did not know Bourassa and were not aware of Bourassa's identity during the pursuit. *Id.*; *see also* Roche Decl., Ex. 2 at 277-79; Ex. 5 at 113; Ex. 10 at 18, 24-35.

At the time of this pursuit, Bourassa was on parole and wearing an ankle monitor because he had recently been released from prison. Roche Decl., Ex. 8 at 45. As of June 17, 2017, Roemen was aware that Bourassa was wearing an ankle monitor, had previously been involved in a stand-off with law enforcement, had previous trouble with drugs and a prior burglary charge, and was recently in jail. Roche Decl., Ex. 8 at 44-45, 58-59. Bourassa's girlfriend, Morgan Ten Eyck, was equally aware of Bourassa's previous law enforcement encounters[12] on June 17, 2017. Roche Decl., Ex. 16 (excerpts from the extraction from Tahlen Bourassa's cell phone; text messages from Bourassa to Ten Eyck admitting he was on parole once he got out from prison), Ex. 17 (excerpts

[12] Trooper Kurtz testified that there were two cell phones recovered from the accident scene. Roche Decl., Ex. 7 at 19-20. Law enforcement downloaded data from those two cell phones, which turned out to belong to Bourassa and Morgan Ten Eyck. *Id.*; *see also* Roche Decl., Ex. 18 (Kurtz Supplemental Report).

from the extraction for Morgan Ten Eyck's cell phone; showing she googled Bourassa's name in May of 2017 and found various news stories about his previous legal trouble). Bourassa did not have any alcohol in his system that evening, but tested positive for a prescription drug for which he did not have a prescription. Roche Decl., Ex. 7 at 117-18. The Highway Patrol sent criminal charges forward against Bourassa, but nothing has happened with that referral. *Id.*

PROCEDURAL BACKGROUND

Plaintiffs filed their separate complaints in this Court on January 14, 2019. Docket 1. In their complaints, Plaintiffs brought a claim of negligence against the United States and Robert Neuenfeldt individually (Count I), a *Bivens* claim against Neuenfeldt individually (Count II), a common law assault and battery claim against both defendants[13] (Count III), and a supervisory *Bivens* claim against unknown and unnamed federal officials (Count IV). Neuenfeldt moved to dismiss all counts against him. Docket 8. The Court dismissed the negligence and assault and battery claims against Neuenfeldt because those claims were properly brought against the United States under the Federal Tort Claims Act. Docket 31 at 17. The Court denied the motion as to the *Bivens* claim against Neuenfeldt. *Id.* at 23. Soon thereafter, the Court consolidated the two matters on August 10, 2020. Docket 35.

On March 31, 2021, Plaintiffs moved to amend their complaint to add a claim against the United States for Negligent Training, Supervision and Retention (Count V). Docket 56. The United States objected. Docket 65. The Court granted the motion to amend. Docket 74. After the Second Amended Complaint was filed and Defendants answered, Plaintiffs did not take any depositions or send any interrogatories or requests for production related to Count V. Roche Decl. ¶ 2.

[13] The subheader claims Count III is against Defendant Neuenfeldt, but the text of the specific allegations alleges tortious conduct against "the Defendants." Docket 76 at 12.

Plaintiffs sent two sets of requests for admission prior to October 1, 2021. *Id.* ¶ 3. On September 30, 2021, the Court entered an order staying discovery pursuant to the parties' stipulation requesting such a stay until the Court could resolve Plaintiffs' to-be-filed motion for partial summary judgment on Count V to be filed by October 1. Docket 81, 82. On October 11, Plaintiffs sent a third set of Requests for Admission containing fifty-one requests. Roche Decl. ¶ 4. Again, Plaintiffs sent no formal discovery. *Id.*

On October 25, 2021, Plaintiffs filed their Motion for Partial Summary Judgment on Count V against the United States for negligent training, supervision, and retention. Docket 83. Now, the United States moves to dismiss all counts alleged against it (I, III, and V) because the United States has not waived its sovereign immunity under the Federal Tort Claims Act when various exceptions apply to bar liability and preclude the Court's jurisdiction over the matter.

STANDARD OF REVIEW

A court may grant a motion to dismiss[14] a complaint under Federal Rule Civil Procedure 12(b) for lack of subject matter jurisdiction and for a failure to state a claim. *Carney v. Houston*, 33 F.3d 893, 894 (8th Cir. 1994) (citing *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)). Pursuant to Federal Rule of Civil Procedure 12(b)(1), a plaintiff bears the burden of establishing by a preponderance of the evidence at the onset of a case that the court possesses subject matter jurisdiction. Federal courts have limited jurisdiction, and the law presumes that a cause of action lies outside its jurisdiction. *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994).

Under a 12(b)(1) motion "the trial court may proceed as it never could under 12(b)(6) or Fed. R. Civ. P. 56 . . . Because at issue in a factual 12(b)(1) motion is the trial court's jurisdiction—

[14] This motion is properly brought post-answer under Federal Rule of Civil Procedure 12(h)(3), which provides that a court must dismiss the action if it determines that it lacks subject-matter jurisdiction "at any time[.]"

its very power to hear the case—there is substantial authority that the trial court is free to weigh the evidence and satisfy itself as to the existence of its power to hear the case." *Osborn v. United States,* 918 F.2d 724, 730 (8th Cir. 1990). A motion to dismiss for lack of subject matter jurisdiction under Rule 12(b)(1) may challenge either the factual truthfulness or the facial sufficiency of a plaintiff's jurisdictional allegations. *Stalley v. Catholic Health Initiatives*, 509 F.3d 517, 520-21 (8th Cir. 2007) (citing *Osborn*, 918 F.2d at 729 n.6). In a facial attack, the standard of review is the same standard that applies to motions brought pursuant to Federal Rule of Civil Procedure 12(b)(6). That is, a court must "accept as true all factual allegations in the complaint, giving no effect to conclusory allegations of law," and must determine whether the plaintiff has asserted "facts that affirmatively and plausibly suggest that the pleader has the right he claims (here, the right to jurisdiction), rather than facts that are merely consistent with such a right." *Id.* at 521 (citations omitted). In contrast, "[w]hen a district court engages in a factual review, it inquires into and resolves factual disputes." *Faibisch v. Univ. of Minnesota*, 304 F.3d 797, 801 (8th Cir. 2002). The United States makes a factual challenge here.

Sovereign immunity shields the Federal Government and its agencies from suit in the absence of a waiver. *FDIC v. Meyer*, 510 U.S. 471, 475 (1994). To sue the United States, a plaintiff must show both a waiver of sovereign immunity and a grant of subject matter jurisdiction. *V.S. Ltd. P'ship v. HUD*, 235 F.3d 1109, 1112 (8th Cir. 2000) (citation omitted). "It is axiomatic that the United States may not be sued without its consent and that the existence of consent is a prerequisite to jurisdiction." *United States v. Navajo Nation*, 537 U.S. 488, 502 (2003) (citation and quotation omitted).

ARGUMENT

I. The United States Has Not Waived Its Sovereign Immunity under the FTCA Because Neuenfeldt Was Not a Federal Officer as Is Necessary to Waive Immunity for Intentional Torts under 28 U.S.C. § 2680(h).

Plaintiff alleges numerous theories of relief for the conduct of Robert Neuenfeldt on June 18, 2017. Some are directed at the United States and others are directed at Neuenfeldt individually. At bottom, Plaintiffs allege that from the start of Neuenfeldt's pursuit of the Bourassa vehicle, Neuenfeldt engaged in an intentional, malicious, or reckless use of force that caused harm to the Plaintiffs. *See, e.g.*, Docket 76 ¶ 38. Plaintiffs style the same conduct in multiple ways: an alleged common law assault or battery, negligent conduct pursuant to state law, and excessive force pursuant to *Bivens*. Plaintiffs themselves acknowledge that for their assault and battery claim alleged against the United States that "the actions, set forth above," which allegations also detailed their negligence and excessive force claims, "constitute common law assault and battery." Docket 76 ¶¶ 67. Plaintiffs exclusively argue Neuenfeldt's conduct was intentional, malicious, and reckless, as recently as in support of their Motion for Partial Summary Judgment. Docket 86 ¶¶ 42 ("Neuenfeldt, outside of his jurisdiction, pushed the Bourassa vehicle down a gravel road that was a known dead-end and the vehicle crashed, with all three kids sustaining catastrophic injuries.").

The FTCA's intentional tort bar precludes Plaintiffs' assault and battery claim, and any claim that arises out of such intentional torts. 28 U.S.C. § 2680(h). Robert Neuenfeldt is not a federal "investigative or law enforcement officer" pursuant to the law enforcement proviso (exception to the exception) of the FTCA. Accordingly, the United States has not waived its sovereign immunity for any intentional tort he is alleged to have committed, including assault and battery. It further has not waived its sovereign immunity for claims of negligence arising out of an intentional tort, such as Count I or Count V, because Plaintiffs' negligence and employment claims

are inextricably linked to their intentional assault and battery claim. As such, all claims against the United States must be dismissed.

The FTCA waives the Federal Government's sovereign immunity for "civil actions on claims against the United States, for money damages . . . for injury or loss of property . . . caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U.S.C. § 1346(b)(1). Thus, the FTCA allows suit only for certain torts committed by federal employees acting within the scope of their employment. *Audio Odyssey, Ltd. v. United States,* 255 F.3d 512, 516 (8th Cir. 2001).

The FTCA contains numerous exceptions to this waiver of sovereign immunity, however. *See, e.g.,* 28 U.S.C. § 2680. If an exception applies, "the bar of sovereign immunity remains." *Dolan v. U.S. Postal Serv.*, 546 U.S. 481, 485 (2006). "Sovereign immunity is a jurisdictional doctrine, and the terms of the United States' 'consent to be sued in any court define that court's jurisdiction to entertain the suit.' " *Brown v. United States,* 151 F.3d 800, 803-04 (8th Cir. 1998) (quoting *Meyer*, 510 U.S. at 475). Thus, "[w]here the United States has not waived sovereign immunity under the FTCA, the district court lacks subject matter jurisdiction to hear the case." *Hart v. United States*, 630 F.3d 1085, 1088 (8th Cir. 2011) (citations omitted).

The FTCA's waiver of sovereign immunity and conferral of jurisdiction to district courts extends to those certain "claims arising from the performance of functions . . . under a contract, grant agreement, or cooperative agreement authorized by the [ISDEAA]" by a "tribal employee." Pub. L. No. 101-512, Title III § 314, 104 Stat. 1915, 1959-60 (1990). A tribal employee is only deemed a federal employee "while acting within the scope of their employment in carrying out the

contract or agreement." *Id.* Generally, the court must first determine whether the alleged activity is encompassed by "the relevant federal contract or agreement" and then "decide whether the allegedly tortious action falls within the scope of the tortfeasor's employment under state law. *Temple v. United States*, Civ. 20-5065-JLV, 2021 WL 42 67858, at *3 (D.S.D. Sept. 20, 2021) (citing *Shirk v. United States*, 773 F.3d 999, 1006 (9th Cir. 2014); *Colbert v. United States*, 785 1384 (11th Cir. 2015)).

The FTCA provides a limited waiver of the government's sovereign immunity under certain circumstances as enumerated in 28 U.S.C. § 2680. Sovereign immunity has not been waived, however, for intentional torts, including "[a]ny claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights." 28 U.S.C. § 2680(h). There is an exception to this exception, which is known as the law enforcement proviso. The law enforcement proviso provides,"[t]hat with regard to acts or omissions of investigative or law enforcement officers of the United States Government, the provisions of this chapter and section 1346(b) of this title shall apply to any claim arising, or after the date of the enactment of this proviso, out of" assault and battery. *Id.* § 2680(h) (emphasis added).

Assuming Neuenfeldt was a tribal law enforcement officer acting pursuant to a valid 638 contract on June 17-18, 2017, and assuming he would be considered a federal employee for purposes of the FTCA, Neuenfeldt still was not a federal investigative or law enforcement officer pursuant to the law enforcement proviso; thus, the United States has specifically *not* waived subject matter jurisdiction for "any claim arising out of" the alleged assault and battery, which includes every claim Plaintiffs allege against the United States. There is no dispute that Neuenfeldt was an FSST employee at the time of the pursuit on June 18, 2017. Docket 76 ¶ 7 (Amended Complaint);

Docket 77 ¶ 7 (United States' Answer). The parties agree that FSST had a 638 Contract with the BIA through which law enforcement services were transferred from the BIA to the FSST. *Id.* Under the ISDEAA, tribal police officers may be considered federal employees for purposes of coverage under the FTCA. The ISDEAA does not, however, automatically convert Tribal law enforcement officers to federal investigative or law enforcement officers for the law enforcement proviso in § 2680(h).

A tribal police officer is only considered a "federal law enforcement officer" for purposes of the law enforcement proviso to the FTCA if the BIA has issued a Special Law Enforcement Commission ("SLEC") to that individual officer. *See* 25 C.F.R. § 12.21(b) ("Tribal law enforcement officers operating under a BIA contract or compact are not automatically commissioned as Federal officers, however, they may be commissioned on a case-by-case basis."); *Gatling v. United States*, Civ. 15-08070, 2016 WL 147920, at *3 (D. Ariz. Jan. 12, 2016) ("[A] tribal officer requires a special law enforcement commission ("SLEC") issued by the BIA before qualifying as a federal law enforcement officer under § 2680(h) . . . the FTCA federal law enforcement officer exception to the intentional tort exception does not apply to tribal officers not in possession of an SLEC, meaning sovereign immunity is not waived and subject matter jurisdiction does not exist.") (citations omitted); *Buxton v. United States*, Civ. 09-5057-JLV, 2011 WL 4528337, at *3 (D.S.D. Sept. 28, 2011), *adopting report and recommendation*, 2011 WL 4528337 (D.S.D. April 1, 2011) (noting that 638 contracts deem tribal employees to be employees of the BIA, but "says nothing about transforming BIA employees into federal law enforcement officers[,]" under § 2680(h) where 25 C.F.R. § 12.21 specifically provides for that process).

A. Plaintiffs' Assault and Battery Count Against the United States Is Barred by the FTCA.

The former Assistant Special Agent in Charge ("ASAC") for BIA's Office of Justice Services District I, Joel Chino Kaydahzinne, which District covers the Flandreau Santee Sioux Indian Reservation, confirms that at the time of the pursuit on June 17-18, 2017, the FSST did not have an SLEC or deputization agreement with the BIA, such that any of its tribal officers could have been individually commissioned. Declaration of Joel Chino Kaydahzinne ¶¶ 8-10. Accordingly, Neuenfeldt could not have had an SLEC card on the date of the pursuit. *Id.* ¶ 10. Neuenfeldt could not have been cross-deputized pursuant to a cross-deputization agreement as of June 18, 2017. *Id.* ¶¶ 8-10. And, Joel Chino Kaydahzinne confirmed that upon review of the applicable records, there was no record of Neuenfeldt having been issued an SLEC card. Furthermore, the 638 Contract expressly provides that "Tribal officers are authorized to enforce Title 18, Chapter 53 of the United States Code and investigate violations thereunder, only if tribal officers have obtained the BIA Special Law Enforcement Commission." LaRocque Decl., Ex. 1 at USA001393-1394.

Thus, at the time of this pursuit, for purposes of any claim for an intentional tort under the FTCA, Neuenfeldt was not a federal law enforcement officer, and the United States has not waived its sovereign immunity to be sued for a common law claim for assault or battery. *See Gatling*, 2016 WL 147920, at *4 (dismissing plaintiff's claims for assault and battery because the named defendants did not have SLEC cards thus they "did not qualify as federal law enforcement officers under section 2680(h) and the United States does not waive its sovereign immunity."); *Locke v. United States*, 215 F. Supp. 2d 1033, 1039-40 (D.S.D. 2002) (Kornmann, J.) (finding tribal police officer serving pursuant to a 638 contract was "not an officer of the United States" simply because

there was a 638 contract and tribal police officers and federal and state officers assisted each other on occasion).

Cases from this District demonstrate this principle. South Dakota federal courts have dismissed allegations for assault and battery because Tribal officers serving pursuant to a 638 Contract are not "federal law enforcement officers" based solely on the existence of the ISDEAA contract without more. *See Buxton v. United States*, Civ. 09-5057-JLV, 2011 WL 4528329, at *3 (D.S.D. Sept. 28, 2011) (overruling plaintiffs' objection to the Magistrate Judge's Report and Recommendation finding that the tribal officers were not certified officers of the United States within the meaning of 28 U.S.C. § 2680(h)); *Bob v. United States*, Civ. 07-5068-RHB, 2008 WL 818499, at *2 (D.S.D. March 26, 2008) (finding that although police officer may have been considered a federal employee for purposes of the FTCA, because he did not have SLEC card and was not cross-deputized, he was not a federal law enforcement officer to waive sovereign immunity for assault or battery claims pursuant to 28 U.S.C. § 2680(h)); *Locke*, 215 F. Supp. 2d at 1039-40.

As in *Locke*, *Buxton*, and *Bob*, the Court must dismiss Count III because the United States has not waived its sovereign immunity pursuant to the FTCA when the intentional tort exception bars liability.

B. Plaintiffs' Negligence and Employment Claims (Count I and Count V), which Arise Out of the Same Facts or Conduct as the Assault and Battery Claim, Are Also Barred by the FTCA.

The intentional tort exception to the FTCA does not simply bar Plaintiffs' Count III for assault and battery, but also equally precludes Plaintiffs' negligence claim and Plaintiff's failure to train, failure to supervise, and negligent retention claim because those claims constitute "any claim arising out of assault [or] battery[.]" 28 U.S.C. § 2680(h).

In *United States v. Shearer*, the Supreme Court emphasized that "§ 2680(h) does not merely bar claims for assault or battery; in sweeping language it excludes any claim arising out of assault and battery." *United States v. Shearer*, 473 U.S. 52, 55 (1985) (emphasis in original). Accordingly, § 2680(h) covers claims that "sound in negligence but stem from a battery committed by a Government employee." *Id.* In a later decision, the Supreme Court clarified that § 2680(h) bars a plaintiff's claim of negligence that stems from an assault or battery, unless the alleged act is "entirely independent of [the employee's] employment status" and the employment status "has nothing to do with the basis for imposing liability on the Government." *Sheridan v. United States*, 487 U.S. 392, 401-02 (1988).

1. Plaintiffs' Negligence Claim Arises Out of Neuenfeldt's "Use of Force" During the Pursuit, Which They Allege Was an Assault and Battery.

At bottom, Plaintiffs allege that Neuenfeldt intentionally and maliciously used force during an attempted stop or arrest. For instance, in support of Plaintiffs' recently-filed partial motion for summary judgment, Plaintiffs state: "Neuenfeldt, outside of his jurisdiction, pushed the Bourassa vehicle down a gravel road that was a known dead-end and the vehicle crashed, with all three kids sustaining catastrophic injuries." Docket 86 ¶¶ 42. Plaintiffs also argue that Neuenfeldt ignored an order to terminate the pursuit and should have "understood that his vehicle in a high-speed pursuit constitutes a dangerous weapon that he is responsible for." Docket 84 at 65.

Under the FTCA's intentional tort exception, the FTCA does not waive sovereign immunity for those claims "arising out of" assault or battery. 28 U.S.C. § 2680(h). "Courts have interpreted 'arising out of' broadly." *Wilburn v. United States*, 616 F. App'x 848, 857 (6th Cir. 2015); *see also Shearer*, 473 U.S. at 55 ("Section 2680(h) does not merely bar claims for assault or battery; in sweeping language it excludes any claim *arising out of* assault or battery . . . to cover claims . . . that sound in negligence but stem from a battery committed by a Government

employee.") (emphasis in original). A reviewing court must "look beyond the literal meaning of the language [of the stated claim] to ascertain the real cause of [the] complaint," to ensure a litigant does not attempt to circumvent § 2680(h). *United States v. Neustadt*, 366 U.S. 696, 703 (1961); *see also Larson v. United States*, Civ. 20-3019-RAL, 2021 WL 3634149, at *4 (D.S.D. Aug. 17, 2021) (citations omitted) (stating "courts should examine the conduct underlying the claim, not merely how the claim is labeled in the complaint."). The mere allegation of negligence cannot transform an intentional tort into negligence. *Id.* (quoting *Benavidez v. United States*, 177 F.3d 927, 931 (10th Cir. 1999)).

The Eighth Circuit considered a similar factual scenario to these facts in *Westcott v. City of Omaha*, 901 F.2d 1486 (8th Cir. 1990). There, a police officer responded to a burglary alarm at a pharmacy; when he arrived the suspect began to flee, and the police officer shot the suspect upon viewing two flashes of light coming from his hand. *Id.* at 1487. The suspect's estate brought a negligence action against the City of Omaha for the police officer's conduct. *Id.* The City moved to dismiss based on sovereign immunity because it relied on a state statute similar to the FTCA, which authorized tort claims against municipalities absent exception, including one that applies to "any claim arising out of . . . [a] battery." *Id.* at 1487-88. Although the Eighth Circuit was considering Nebraska's state version of the FTCA, the Eighth Circuit cited the Supreme Court's view of § 2680(h) in *Shearer* and *Sheridan* to hold that the plaintiff's negligence claim pertaining to an officer's use of force was barred because it could not "conclude that the district court erred in determining the allegations 'actually constitute a description of the intentional tort of battery rather than negligence.'" *Id.* at 1489.

Under South Dakota's definition of assault and battery, plaintiffs must establish a defendant "(a) [intended] to cause a harmful or offensive contact with the person of the other or a

third person, or an imminent apprehension of such a contact; and, (b) an offensive contact with the person of the other directly or indirectly results." *Stratmeyer v. Engberg*, 649 N.W.2d 921, 925–26 (S.D. 2002) (citations and internal quotations omitted). "[T]he victim need not show a specific intent or design to cause the contact or to cause any singular and intended harm. What is forbidden is the intent to bring about the result which invades another's interests in a manner that the law forbids." *Id.* (citing *Frey v. Kouf*, 484 N.W.2d 864, 867 (S.D. 1992)). "A battery is traditionally defined as any harmful or offensive contact resulting from an act intended to cause such contact." *Kottman v. United States*, 2017 WL 4185481, at *6 (W.D. Mo. Sept. 21, 2017) (citations omitted).

Plaintiffs' allegations, and the substance of the conduct underlying these allegations, make clear that the negligence allegations arise out of the alleged assault or battery.

a. General Allegations in the Amended Complaint

Plaintiffs allege that when Chief Neuenfeldt and other law enforcement officers "stopped a vehicle driven by Tahlen Bourassa" that Neuenfeldt "threatened[15] to take Bourassa to jail" and "Bourassa then fled." Docket 76 ¶¶ 15, 16. Plaintiffs allege that Neuenfeldt knew Bourassa's identity, knew that the vehicle had not committed any crimes to justify the pursuit, knew Bourassa had a GPS ankle monitor, but still continued the pursuit and "forced Tahlen Bourassa to take a dead-end gravel road" and "Defendants knew the dead-end road would result in an accident." (Docket 76 ¶¶ 19-22; 24, 25). "Neuenfeldt disregarded orders to terminate the pursuit." (Docket 76 ¶ 26).

b. Assault and Battery Specific Allegations

Plaintiffs specifically allege that Neuenfeldt's conduct during the high-speed pursuit on

[15] Plaintiffs also implied Chief Neuenfeldt pursued this truck intentionally for retribution during his deposition, asking: "Your ego was assaulted because [Bourassa] didn't do exactly what you told him to do, right?" Neuenfeldt responded: "False." Roche Decl., Ex. 2 at 270.

June 17-18, 2017 was "malicious, reckless, intentional and caused damages to Plaintiffs." Docket 76 ¶ 68. Plaintiffs argue that all of its allegations in its Second Amended Complaint "set forth above" paragraph 67, which include the allegations alleged under the negligence claim, "constitute common law assault and battery." Docket 76 ¶ 68.

c. Negligence Specific Allegations

Even in their negligence section, Plaintiffs allege intentional conduct. For example: "Defendants' numerous violations of the pursuit policies constitute reckless disregard for the safety of others." Docket 76 ¶ 37 (emphasis added). Plaintiffs also describe the pursuit as "a use of force" under the negligence claim. Docket 76 ¶ 38. Finally, Plaintiffs allege that "[a]s a direct legal result of Defendants' negligent, reckless, and willful and wanton disregard for the safety of Plaintiff, Micah Roemen sustained serious injuries and damages." Docket 76 ¶ ¶ 45, 46.

Finally, Plaintiffs' negligence claim arises out of Plaintiffs' "use of force claim" and is based on the same conduct. *Id.* Plaintiffs specifically argue that "Defendant Neuenfeldt used excessive, unreasonable, and unwarranted force during the pursuit." Docket 76 ¶ 47; *see also* Docket 76 ¶ ¶ 55, 56, 57, 58, 61, 62, 63, 72, 73, 74, 75, 76 (discussing excessive or unreasonable use of force). Plaintiffs' dual pleading cannot save a claim that is grounded in an intentional tort. *See Deal v. City of Fort Worth, Tex.*, Civ. 15-095, 2016 WL 6806237, at *3 (N.D. Texas Nov. 16, 2016) ("Use of excessive force is an intentional tort and an alternative negligence pleading cannot save the claim where the claim is based on the same conduct as the intentional tort claim.") (citations omitted).

Plaintiffs do not allege that Neuenfeldt failed to exercise reasonable or ordinary care (as that of a reasonable police officer). They argue instead that his conduct was malicious and intentional. Alleging that Neuenfeldt intentionally sent Plaintiffs down a dead-end road knowing

it would result in an accident cannot sound in negligence. Plaintiffs cannot circumvent the intentional tort bar by recasting their assault and battery claim as negligence. *Locke*, 215 F. Supp. 2d at 1046; *see also Total Auctions & Real Estate, LLC v. S.D. Dep't of Rev & Reg.*, 888 N.W.2d 577, 581 (S.D. 2016) (barring plaintiff's negligence claim when the facts were grounded in a separately pleaded claim of negligent misrepresentation, which was not actionable under the law, and plaintiff could not "avoid that fact by relabeling the name of its claim."); Docket 76 ¶¶ 19-22, 24-25. Thus, the Court lacks jurisdiction over this negligence claim, particularly because waivers of sovereign immunity, like those expressed in the FTCA, are construed narrowly in favor of the sovereign. *Rutten v. United States*, 299 F.3d 993, 995 (8th Cir. 2002) ("We must narrowly construe waivers of sovereign immunity in favor of the sovereign and resolve any ambiguities in its favor.").

2. Plaintiffs' Negligent Training, Supervision, and Retention Claim Also Arises Out of Conduct Pertaining to an Alleged Intentional Tort Because It Is Based Solely on Neuenfeldt's Employment.

Finally, the intentional tort exception to the FTCA bars Plaintiffs' amended claim against the United States for its alleged negligent training, supervision, and retention because the United States owes no duty that is distinct from its employment relationship with Neuenfeldt. Accordingly, these employment claims also arise out of Neuenfeldt's alleged assault and battery and are barred by the Supreme Court and the Eighth Circuit's sweeping interpretation of 28 U.S.C. § 2680(h).

In *Billingsley v. United States*, the Eighth Circuit held that when a federal employee is alleged to have committed an assault or battery "[t]he government would not be liable . . . for its negligent hiring and supervision of [the employee], as such a claim pertains to the government's employment relationship with [the employee]." *Billingsley*, 251 F.3d 696, 698 (8th Cir. 2001). Where an employee who allegedly commits an assault or battery is found to be acting within the

scope of his or her employment, the government could only be liable if the plaintiff can show the government's negligence "arose out of an independent, antecedent duty unrelated to the employment relationship between the employee and the United States." *Id.* (quoting *Leleux v. United States*, 178 F.3d 750, 757 (5th Cir. 1999)). "To find the government liable for negligent hiring and supervision of an employee who commits a tort would frustrate the purpose of § 2680(h)[.]" *Id.* (citation omitted).

Plaintiffs' only allegations against the United States for negligent training, negligent supervision, and negligent retention solely pertain to Neuenfeldt's employment relationship with the Tribe. The claim therefore is barred by 28 U.S.C. § 2680(h). *Billingsley*, 251 F.3d at 698. Furthermore, Plaintiffs brought Count V because they realized that the discretionary function exception precludes liability against the United States for direct liability pertaining to Neuenfeldt's conduct during the pursuit. *See infra* section II; *see* Docket 71 at 13 (admitting in their reply to their motion to amend that "[t]he court in *Uses Many* found that the officers' decision to continue or abandon the pursuit was a discretionary decision[,]" and that "specific portions of the BIA Handbook may in fact be advisory and contain elements allowing officer discretion[.]"). It is for these very reasons that Count V must fail here and below. Courts have made clear that the focus of negligence claims under the FTCA "is on the employee who directly caused the harm to the plaintiff, not on the supervisor who failed to prevent it." *Bohenkamp v. Whisterbarth*, Civ. 19-00115, 2021 WL 1600477, at *4 (W.D. Pa. 2021).

In this case, any allegation against the United States for failure to train, or for negligent supervision or retention, would arise "solely from the employment relationship" with Neuenfeldt. It would also arise out of an alleged intentional tort. Accordingly, the intentional tort exception to the FTCA bars all of Plaintiffs' actions from proceeding.

II. The Discretionary Function Exception to the FTCA Applies, and the United States Has Not Waived Its Sovereign Immunity for Plaintiffs' Negligence[16] Claim (Count I).

Even if the intentional tort exception did not bar jurisdiction, the negligence claim asserted against the United States in Count I is also barred under the discretionary function exception to the FTCA. Rather than asking whether Neuenfeldt violated a duty or was negligent in his pursuit conduct, the relevant question at this juncture is, instead, whether controlling statutes, regulations, and administrative policies (federal directives) mandated that he initiate, continue, or terminate a pursuit in a specific manner. Here, the plain language of the Bureau of Indian Affairs, Office of Justice Services Law Enforcement Handbook, Third Edition (hereafter "BIA Handbook"), along with district court opinions in South Dakota analyzing the same issue and similar handbook provisions, establish that the Handbook contains guidelines rather than mandates. Mandates are impractical in this context because the Handbook cannot possibly contemplate every pursuit scenario. Instead, officers are provided guidelines, and they are directed to use their best judgment based on their experience, knowledge, and training.

When the discretionary function exception applies, there is no waiver of sovereign immunity, and the Court must dismiss the claim for lack of subject matter jurisdiction. *See Hart*, 630 F.3d at 1088. "Moreover, because jurisdiction is a threshold question, judicial economy demands that the issue be decided at the outset rather than deferring it until trial, as would occur with [the] denial of a summary judgment motion." *Osborn*, 918 F.2d at 729.

The FTCA "explicitly excepts from its coverage certain categories of claims," which includes the discretionary function exception. *Simmons v. Himmelreich*, 136 S. Ct. 1843, 1847 (2016). Pursuant to the discretionary function exception outlined in 28 U.S.C. § 2680(a), the

[16] The United States preserves its right to later raise the discretionary function exception as to Count V, but does not do so at this time.

United States cannot be sued for "the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused." The purpose of the exception is to "prevent judicial 'second-guessing' of legislative and administrative decisions grounded in social, economic, and political policy." *United States v. Gaubert*, 499 U.S. 315, 323 (1991). Thus, if an alleged act falls within the discretionary function exception to the government's limited waiver of sovereign immunity, this Court lacks subject matter jurisdiction. *Hart*, 630 F.3d at 1088; *Dykstra v. United States*, 140 F.3d 791, 795 (8th Cir. 1998). To determine whether the discretionary function exception applies, the Court applies the following two-part test:

> First, the conduct at issue must be discretionary, involving an element of judgment or choice. The second requirement is that the judgment at issue be of the kind that the discretionary function exception was designed to shield.

Hart, 630 F.3d at 1088. Under the first prong, a court should consider whether a "federal statute, regulation, or policy *specifically prescribes a course of action* for an employee to follow." *Gaubert*, 499 U.S. at 322 (emphasis added).

Governmental action is discretionary when a policy "uses predominately permissive rather than mandatory language, a clear signal the [policies are] merely guidelines rather than mandatory requirements." *Herden v. United States*, 726 F.3d 1042, 1047 (8th Cir. 2013). "Even when some provisions of a policy are mandatory, governmental action remains discretionary if all of the challenged decisions involved 'an element of judgment or choice.'" *Compart's Boar Store, Inc. v. United States*, 829 F.3d 600, 605 (8th Cir. 2016), *cert. denied*. When governmental policy permits the exercise of discretion, it is presumed that the acts are grounded in policy when exercising discretion. *Gaubert*, 499 U.S. at 324. It is the plaintiff's burden to rebut that presumption under the second prong. *Dykstra*, 140 F.3d at 796.

A. Prong One: Neuenfeldt's Decision to Continue a Pursuit Was Discretionary under the BIA Handbook's Pursuit Policy, which Affords Police Officers with Discretion.

First, there is no federal statute or regulation that dictates the conduct of a federal or Tribal law enforcement officer who engages in a high-speed pursuit. Thus, the only source to consult on whether such a "mandatory" directive exists is the BIA Handbook. The BIA Handbook itself is not "mandatory" for purposes of a discretionary function analysis under the facts of this case. In fact, the Handbook proclaims at its outset that:

> The Law Enforcement Handbook is designed to guide all law enforcement officers and employees engaged in law enforcement. It provides general policies, rules, and procedures and serves as an outline for law enforcement officers and employees of the Bureau of Indian Affairs, Office of Justice Services. It is important to understand that policies, rules, and procedures cannot be arbitrarily established to cover all situations that arise in law enforcement. Some decisions must be left to the intelligence, experience, initiative, training, and judgment of the individual officers and employees.

Roche Decl., Ex. 11 at 14 (Excerpts of BIA Handbook); *see also* Docket 58-2 (entire BIA Handbook) at 31 (emphasis added). The BIA Handbook provisions are general guidelines pursuant to the Handbook's own terms, for a discretionary function analysis. *Compare OSI, Inc. v. United* States, 285 F.3d 947, 952 (11th Cir. 2002) ("[A]n agency manual which provides only objectives and principles for a government agent to follow does not create a mandatory directive which overcomes the discretionary function exception to the FTCA."); *see also Rosebush v. United States*, 119 F.3d 438, 442 (6th Cir. 1997) (the applicable policy must set forth "the precise manner" in which the function is to be performed); *compare Layton v. United States*, 984 F.2d 1496, 1502-03 (8th Cir. 1993) (distinguishing situations "in which [a] government inspector is controlled by precise regulations establishing specific steps he is required to perform in his inspections").

Even were this not so, the specific pursuit provisions of the BIA Handbook are clearly discretionary for FTCA purposes. First, the introductory section regarding pursuits under "Policy"

states:

> OJS officers should make every reasonable effort to stop violators. The protection of life, both civilian and law enforcement, is the foremost concern that governs this policy. Officers must balance the need to stop a suspect against the potential threat to themselves and the public created by a pursuit or apprehension.

Roche Decl., Ex. 11 at 15 (Handbook page 275). The policy authorizes officers to pursue violators who fail to stop or yield. *Id.* at 15-16 (Handbook pages 275-276; 2-24-02). When an officer elects to begin a pursuit, the policy requires the officer to use the "same objective reasonableness standard he/she uses when any force is used in the course of accomplishing police duties." *Id*. at 16 (2-24-03A). When an officer is in his jurisdiction, he may initiate a pursuit based on his own perception that: there has been a potentially hazardous traffic offense; a felony has occurred or is about to occur; the driver is a violent suspect; the suspects exhibits an intention to avoid apprehension by refusing to stop; or "the officer [has a] reasonable belief that the suspect, if allowed to flee, presents a potential danger to human life, or may cause serious injury." *Id.* (2-24-03).

The policy further provides a non-exhaustive list of 10 factors to consider before engaging in and while continuing a pursuit, as follows:

1. Seriousness of the crime,
2. Potential for apprehending the suspect in the pursuit or by other means,
3. Pedestrian and vehicle traffic in the area of the pursuit,
4. Potential risk to the citizens using the highway,
5. Current street and traffic conditions, including the presence or absence of traffic control devices,
6. Current weather conditions,
7. Current road conditions, including lighting (visibility),
8. Risk to the public if the suspect escapes,
9. Known identity of the suspect or means to ascertain the suspect's identity and immediately apprehend the suspect,
10. The manner in which the driver of the fleeing vehicle is driving, including:
    a. Speeds being driven,
    b. Regard for other traffic,
    c. Regard and observance of traffic control signs and devices,
    d. Driver's control of the fleeing vehicle,
    e. Type and condition of fleeing vehicle, and

f. Age of the suspect, if known.

Id. at 2-24-04.

The policy specifically emphasizes that "[n]o set of guidelines can address all possible circumstances. As a result, officers are expected to evaluate their actions based on whether the potential benefits of their actions outweigh the risks that are involved." *Id.* at 2-24-06. Thus, the policy clearly permits law enforcement decisions, including the decision to continue a pursuit, as being within the discretion and judgment of the pursuing officer.

Again, cases in this District demonstrate the principle. Twice sister courts have analyzed this Handbook pursuit policy as specifically affording officers with discretion; twice those FTCA actions were dismissed. First, as Judge Duffy noted in *Colombe v. United States*, Civ. 16-05094-JLV, 2019 WL 7629237, at *14 (D.S.D. July 30, 2019) (report and recommendation), *adopted in full,* 2019 WL 7628982 (Viken, J., Oct. 21, 2019), the ultimate inquiry pertaining to a high-speed pursuit and the discretionary function exception "is whether the officers' decision to continue or abandon the pursuit was a discretionary decision." More specifically, "[t]he court considers the language of the pursuit policy as a whole – not in piecemeal fashion – to determine whether the conduct at issue was discretionary." *Id.* That the pursuing police officer did not comply with certain policy provisions "is not determinative even if those portions of the policy contain the words 'will' or 'must' – so long as the policy as a whole evinces an intent that the decision whether a pursuit should be undertaken (or continued) is discretionary." *Id.* (citing *Uses Many v. United States*, Civ. 15-3004-RAL, 2017 WL 2937596, at *4 (D.S.D. July 7, 2017)).

Prior to *Colombe*, Chief Judge Lange also dismissed an FTCA cause of action against a tribal police officer brought by the estate of the fleeing driver because the discretionary function exception applied and the Court therefore lacked subject matter jurisdiction. *Uses Many*, 2017 WL

2937596. In his opinion, Judge Lange specifically noted that portions of the pursuit policy that discussed an officer using his good judgment or common sense "explicitly involves 'an element of judgment or choice'" for purposes of prong one of the discretionary function exception analysis. *Id.* at *4 (citations and quotations omitted). Judge Lange further found it was not a violation of any mandatory policy for the police officer to initiate pursuit after witnessing a driving offense and the driver's subsequent failure to yield. *Id.* Furthermore, the weighing of the necessary factors in the Handbook as to whether to continue or discontinue a pursuit was subject to the officer's discretion. *Id.* The same result should occur here.

On the evening of June 17, 2017, the weather was dry and clear. Roche Decl., Ex. 5 at 224; *see also* Ex. 12 at 1 (Kurtz Pursuit Report). The South Dakota Highway Patrol began the pursuit after Bourassa failed to yield to law enforcement and sped away. Roche Decl., Ex. 7 at 91, 73-74; Ex. 6 at 2. Plaintiffs do not dispute that the Highway Patrol had authority and justification to begin the pursuit.

Chief Neuenfeldt was on scene pursuant to a lawful mutual assist agreement. He joined the pursuit as the secondary pursuer out of concern for Trooper Kurtz's safety. Roche Decl., Ex. 2 at 281. Once on the scene pursuant to the mutual assist agreement, Chief Neuenfeldt had "the same powers and authority conferred by law on the members of the law enforcement of the party to which the assistance is rendered." LaRocque Decl., Ex. 1 at USA001451 ¶ (2). Thus, Chief Neuenfeldt had the same jurisdiction as a Moody County Deputy would have had to begin, continue, join, or terminate a pursuit. Accordingly, the BIA Handbook provision discussing pursuits "Beyond Jurisdiction[17] or Initiated by Another Agency" do not control. Roche Decl., Ex.

[17] The provision reads:

11 at 21 (Handbook page 281). Even if the provision discussing pursuits beyond the Tribe's jurisdiction did apply, that section is still discretionary, and Chief Neuenfeldt met its plain terms.

There is further no dispute that while Trooper Kurtz temporarily lost sight of Bourassa's vehicle, he radioed the last known whereabouts to the other law enforcement vehicles in the area, in the hopes that another vehicle would pick up the pursuit. Roche Decl., Ex. 7 at 92, 192-193 Trooper Kurtz testified at his deposition that he never terminated the pursuit, but temporarily lost sight and then actively tried to get back in front of Bourassa. *Id.* at 192-93. Sheriff Wellman, who was the decisionmaker for County, also never terminated the pursuit. Thus, Chief Neuenfeldt continued the pursuit, as he had the discretion to do.

As the factual section demonstrates, while the pursuit itself lasted nearly 24 minutes (Roche Decl., Exs. 4, 6), it took an incredible amount of attention and focus for Chief Neuenfeldt to follow the fleeing vehicle. Deputy Baldini was charged with working the radio and providing dispatch with detailed instructions about the pursuit path. Roche Decl., Ex. 5 at 222-223. Deputy Baldini testified that he did not feel that the pursuit speeds were becoming unsafe. Roche Decl., Ex. 5 at 156, 211. Chief Neuenfeldt testified that he believed he was exercising sound judgment even when traveling at high speeds. Roche Decl., Ex. 2 at 250. Furthermore, from the beginning of the pursuit until its end, Bourassa only passed one non-law enforcement vehicle. Roche Decl., Ex. 2 at 275.

A. A pursuit may extend beyond the reservation line, but primary control of the pursuit must be relinquished as soon as practical to police personnel of the entered jurisdiction if their policy allows them to enter the pursuit.
B. The following guidelines governing joining a pursuit initiated by another jurisdiction:
    1. Officers must follow LE Handbook Section 2-24-02, Authorization for Pursuit.
    2. An officer may participate in a pursuit initiated by another jurisdiction to assist with officer safety concerns but should request that the pursuit be terminated if conditions pose a safety hazard.
    3. OJS officers will discontinue pursuits initiated by another jurisdiction when the pursuit continues outside their jurisdiction, unless officer safety becomes a consideration.

The pursuit occurred almost exclusively on unoccupied county roads. While the pursuit went through a portion of the city of Flandreau, it was on the far east side of town and it was past 1:30 a.m. There is only one reference in the depositions or documents that the gravel roads were dusty, and that was right before the pursuit concluded after Bourassa turned onto 229-A, and Neuenfeldt was more than a quarter mile back and slowly approaching Bourassa's vehicle due to the dust. Roche Decl., Ex. 2 at 308, 313.

Comparatively, Bourassa showed clear signs that he was a danger to the public and other law enforcement officers. It was dark. It was 1:30 in the morning. Officers presumed Bourassa was involved with the house party and his intoxication levels were unknown. He was traveling more than 100 miles per hour and disregarding stop signs. Bourassa struck one police officer, disregarded orders from many law enforcement officers, drove around spike strips, hid from law enforcement in the middle of the pursuit, drove one law enforcement officer off the road, and generally displayed erratic and aggressive behavior with two passengers inside. All of these factors could be considered by Chief Neuenfeldt in his discretion as to whether to continue the pursuit.

Plaintiffs will make specific critiques of Chief Neuenfeldt's decisions during the pursuit. However, hindsight cannot micromanage each specific decision because they are subsumed by Chief Neuenfeldt's original, discretionary choice to continue the pursuit. *See Colombe*, 2019 WL 7629237, at *14 ("Though some portions of the pursuit policy are phrased in mandatory terms, the ultimate decisions of whether to initiate and whether to continue a pursuit are left to the sound discretion of the officers."). No one disputes that the result in this case is tragic, but the intent of the discretionary function exception is to preclude judicial second-guessing of an inherently discretionary decision. While the policy required good judgment and common sense, all the decisions remained discretionary, involving an element of judgment or choice.

Plaintiffs themselves have acknowledged that "[t]he court in *Uses Many* found that the officers' decision to continue or abandon the pursuit was a discretionary decision[,]" and that "specific portions of the BIA Handbook may in fact be advisory and contain elements allowing officer discretion[.]" Docket 71 at 13. For all these reasons, the first prong of the discretionary function test is satisfied.

B. Prong Two: Allowing an Officer to Exercise Discretion in High-Speed Pursuits Is Grounded in Policy.

Judgment calls that involve public policy considerations meet the second prong of the test even if the employee making the particular decision did not consciously consider policy factors. *Tonelli v. United States*, 60 F.3d 492, 496 (8th Cir. 1995). "[W]hen governmental policy permits the exercise of discretion, it is presumed that the acts are grounded in policy." *Whalen v. United States*, 29 F. Supp. 2d 1093, 1098 (D.S.D. 1998) (citing *Chantal v. United States*, 104 F.3d 207, 212 (8th Cir. 1997)). The Eighth Circuit has stated that that "[l]aw enforcement decisions of the kind involved in making or terminating an arrest must be within the discretion and judgment of enforcing officers." *Deuser v. Vecera*, 139 F.3d 1190, 1195 (8th Cir. 1998); *see also Uses Many*, 2017 WL 2937596, at *4.

In *Colombe* and *Uses Many*, both Courts determined that an officer's decision to begin a high-speed pursuit, continue a high-speed pursuit, and/or terminate a high-speed pursuit are the exact type of decisions the discretionary function exception was designed to shield and were grounded in social, economic, and political policy. *See Colombe*, 2019 WL 7629237, at *14-16; *Uses Many*, 2017 WL 2937596, at *4-6. Prong two of the discretionary function exception has been met, and the Court must dismiss Count I because it lacks jurisdiction.

III. Count V Must Be Dismissed Because Plaintiffs Cannot Establish an Actionable Tort by the Employee, So an Action Against the Employer Cannot Proceed.

Next, whether by virtue of the intentional tort exception or the discretionary function exception, the Court cannot conclude that Neuenfeldt committed a tort because it does not have jurisdiction under the FTCA. If the Court lacks jurisdiction over Neuenfeldt's alleged torts, it equally lacks jurisdiction over his employer's alleged tort for failing to supervise or train him.

Plaintiffs cannot avoid dismissal by adding a claim against Neuenfeldt's unknown supervisors because in order "[f]or an employer to be held liable for the negligent hiring, retention, or supervision of an employee, a court must first find that the employee committed a tort." *Gatling v. United States*, Civ. 15-08070, 2016 WL 147920, at *5 (D. Ariz. Jan. 12, 2016). Like in Arizona, the South Dakota Supreme Court also has found that "a negligent supervision claim requires that an employee commit an underlying tort." *Total Auctions & Real Estate, LLC v. S.D. Dep't of Rev & Reg.*, 888 N.W.2d 577, 581 (S.D. 2016) (citing *Schoff v. Combined Ins. Co. of Am.*, 604 N.W.2d 43, 53 (Iowa 1999)). "[A]n employer cannot be held liable for negligent supervision . . . where the conduct that proper supervision and training would have avoided is not actionable against the employee." *Schoff*, 604 N.W.2d at 53; *see also Schieffer v. Catholic Archdiocese of Omaha*, 508 N.W.2d 907, 913 (Neb. 1993) ("[A]n underlying requirement in actions for negligent supervision . . . is that the employee is individually liable for a tort or guilty of a claimed wrong against a third person[.]").

Here, Neuenfeldt's pursuit conduct is not an actionable tort, whether by virtue of the intentional tort exception to the FTCA, the discretionary function exception, or both. Because Plaintiffs cannot state an actionable tort claim against Neuenfeldt, they also fail to state a claim against Neuenfeldt's supervisors for negligent supervision or training under South Dakota law. *Total Auctions*, 888 N.W.2d at 582; *see also Schoff*, 604 N.W.2d at 53. For these reasons,

Plaintiffs' claims against the United States fail. *See Grost v. United States*, Civ. 13-158, 2014 WL 1783947, at *20 (W.D. Texas May 5, 2014) (dismissing negligent supervision claim under the FTCA because alleged torts committed by employee were barred by § 2680(h) and "Plaintiff did not identify any other actionable tort that Defendant's employees may have committed.").

IV. Plaintiffs Failed to Administratively Present Negligent Hiring or Negligent Retention Theories in Their Administrative Complaint.

If despite all of the above, the Court nonetheless concludes it retains jurisdiction over Count V, certain portions of those allegations require dismissal for additional reasons. The Court does not have jurisdiction over any allegations that the Tribe negligently hired Neuenfeldt or negligently retained Neuenfeldt as an employee because Plaintiffs never presented these claims in their administrative claim, which is another jurisdictional requirement under the FTCA. As such, the Court lacks jurisdiction over and cannot consider any alleged negligent conduct pertaining to the Tribe's hiring decision, including the allegation that the Tribe failed to acquire a federal background check for Neuenfeldt. Nor could it consider those facts relevant to a negligent retention claim.

In the SF-95 (administrative claim) for both Morgan Ten Eyck and Micah Roemen, Plaintiffs, stated:

> It was reasonably foreseeable that the officers employed by Flandreau Santee Sioux Tribe would be called upon to make decisions about initiating pursuits and would be called upon to conduct pursuits of claimed law breakers, and as a result, had a **duty to adequately train, instruct, and supervise** its police officers, including the police officers involved in this chase[.]

Docket 66-1 at 4; 66-2 at 4 (emphasis added). Thus, while Plaintiffs made a colorable presentment of the Tribe's purported failure to train, instruct, or supervise Neuenfeldt, they clearly did not present a negligent hiring claim or a negligent retention claim, both of which are considered distinct torts from failure to train or supervise under South Dakota law.

Under South Dakota law, an employer may be held liable for negligent hiring, retention, training, and supervision. *Kirlin v. Halverson*, 758 N.W.2d 436, 448 (S.D. 2008). South Dakota views negligent hiring as a situation in which, "*at the time an employee was hired,* it was negligent for an employer to engage the employee's services based on what the employer knew or should have known about the employee." *Id.* Conversely, a negligent retention claim "alleges that information which the employer came to know, or should have become aware of, *after hiring the employee* made continued employment of the employee negligent." *Id.* (quoting *Yunker v. Honeywell, Inc.,* 496 N.W.2d 419, 422-24 (Minn. App. 1993)). A negligent training claim exists when "the manner or circumstances of the employee's training by the employer inadequately or defectively *coached, educated, or prepared* its employees for the performance of their job duties." *Id.* Finally, a negligent supervision claim occurs when "the employer inadequately or defectively *managed, directed or oversaw* its employees." *Id.*

Because Plaintiffs failed to allege negligent hiring or negligent retention in their administrative claim, they failed to present these allegations, and they are barred from pursuing them in district court. *See Dudley v. United States*, Civ. 09-4024-LLP, 2010 WL 5290024, at *5 (D.S.D. Dec. 17, 2010) (citations omitted) (Piersol, J., dismissing specific theories or issues plaintiff had failed to allege in his SF-95; thus, they were not presented and exhausted under the FTCA); *see also Mader v. United States*, 654 F.3d 794, 797-98 (barring suit under the FTCA unless a claim is first presented to the federal agency).

Any argument that Neuenfeldt did not have a background check conducted prior to his hiring or that the Tribe should have been aware of prior employment misconduct, amounts to a negligent hiring claim, which is not before the Court. *See Kirlin*, 758 N.W2d at 448 ("it was negligent for an employer to engage the employee's services based on what the employer knew or

should have known about the employee."). Any argument that the Tribe negligently retained Neuenfeldt because it failed to obtain a background check or should have become aware of certain information pertaining to Neuenfeldt's background check, is likewise precluded by the jurisdictional presentment bar. *See id.* (discussing definition of negligent retention); *see also* (Docket 85 ¶ 19) (noting background investigations are a "one time requirements and recurring requirements to occur "when hired and every 5 years"). None of these claims were presented to the Department of the Interior, and they cannot be advanced herein.

V. Neuenfeldt's Status as a Federal Employee Pursuant to the FTCA.

In their brief in support of their partial motion for summary judgment, Plaintiffs argue ad nauseum that Robert Neuenfeldt was outside of his jurisdiction and that his conduct did not fit properly within the confines of the mutual assist agreement between the Moody County Sheriff's Office and the Flandreau Santee Sioux Tribe. *See., e.g.*, Docket 84 (Plaintiffs' Brief) at 27-29, 32, 46; Docket 86 ¶¶ 35-36 (Statement of Undisputed Material Facts, alleging there was no proper request for assistance under the Law Enforcement Assist Agreement). To the extent the Court concludes that Neuenfeldt was not operating under the mutual assist agreement such that he was outside of his jurisdiction, the Court must dismiss the United States from this lawsuit.

Such a finding would eliminate jurisdiction over the United States. If the Court concludes Neuenfeldt was performing functions outside of the 638 Contract, he would not be deemed to be a federal employee for purposes of the FTCA. *See Audio Odyssey, Ltd.*, 255 F.3d at 516 ("The Federal Tort Claims Act is a limited waiver of sovereign immunity, making the Federal Government liable to the extent as a private party for certain torts of federal employees acting within the scope of their employment.") (emphasis added); *Shirk*, 773 F.3d at 1006 (concluding that for scope of employment analysis under § 314 the proper consideration is whether the

employee's conduct is encompassed by the federal contract and whether the employee is acting in the scope of his employment pursuant to state law). Absent Neuenfeldt's alleged activity being encompassed by the federal contract, the legal fiction that transforms Neuenfeldt into a federal employee vanishes, and with it, so does jurisdiction.

Plaintiffs lack any other source of jurisdiction over the United States. *See* Amended Complaint, Docket 76 ¶ 3 (alleging only the FTCA and *Bivens* as sources of jurisdiction). Plaintiffs cannot continually argue that Neuenfeldt had no authority to be on the scene of the party and expect the litigation to continue without preclusive consequence. Thus, no matter how the Court rules, the United States should be dismissed from this lawsuit in its entirety.

CONCLUSION

Plaintiffs' assault and battery, negligence, and employment claims against the United States all must be dismissed because the Court lacks subject matter jurisdiction over them when the United States has not waived its sovereign immunity because the intentional tort exception to the FTCA bars these claims. Even if the negligence claim is not barred by the intentional tort exception, the Court lacks jurisdiction because the claim is further barred by the discretionary function exception to the FTCA. Lastly, all claims against the United States must be dismissed because Plaintiffs have no actionable tort against the employee, and therefore, Plaintiffs' claim against the employer must also be dismissed. If Count V survives, the Court must dismiss any negligent hiring or negligent retention arguments because Plaintiffs failed to present those claims in their administrative claim.

Dated this 19th day of November, 2021.

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