# APPENDIX
# A

# UNITED STATES COURT OF APPEALS
# FOR THE EIGHTH CIRCUIT

No: 17-2255

Ellen E. Packenham Stanley

Plaintiff - Appellant

Ellen E. Packenham Stanley, as Representative Payee for M.J.S.

Plaintiff

v.

Commissioner, Social Security Administration

Defendant - Appellee

Appeal from U.S. District Court for the District of Minnesota - Minneapolis
(0:16-cv-00275-JRT)

## JUDGMENT

Before WOLLMAN, LOKEN and COLLOTON, Circuit Judges.

This appeal from the United States District Court was submitted on the record of the district court and briefs of the parties.

After consideration, it is hereby ordered and adjudged that the appeal is dismissed for lack of jurisdiction in accordance with the opinion of this Court.

May 02, 2018

Order Entered in Accordance with Opinion:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

**United States Court of Appeals**
***For The Eighth Circuit***
Thomas F. Eagleton U.S. Courthouse
111 South 10th Street, Room 24.329
**St. Louis, Missouri 63102**

**Michael E. Gans**
***Clerk of Court***

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May 02, 2018

Received
May 7, 2018

Ms. Ellen E. Packenham Stanley
P.O. Box 21688
Eagan, MN 55122

RE: 17-2255 Ellen E. Packenham Stanley v. Commissioner, Social Security

Dear Ms. Packenham Stanley:

The court today issued an opinion in this case. Judgment in accordance with the opinion was also entered today. The opinion will be released to the public at 10:00 a.m. today. Please hold the opinion in confidence until that time.

Please review Federal Rules of Appellate Procedure and the Eighth Circuit Rules on post-submission procedure to ensure that any contemplated filing is timely and in compliance with the rules. Note particularly that petitions for rehearing and petitions for rehearing en banc must be received in the clerk's office within 45 days of the date of the entry of judgment. Counsel-filed petitions must be filed electronically in CM/ECF. Paper copies are not required. No grace period for mailing is allowed, and the date of the postmark is irrelevant, for pro-se-filed petitions. Any petition for rehearing or petition for rehearing en banc which is not received within the 45 day period for filing permitted by FRAP 40 may be denied as untimely.

Michael E. Gans
Clerk of Court

MER

Enclosure(s)

cc: Mr. Craig Raymond Baune
Mr. Thomas W. Crawley
Ms. Kate M. Fogarty

District Court/Agency Case Number(s): 0:16-cv-00275-JRT

# United States Court of Appeals
For the Eighth Circuit

No. 17-2255

Ellen Elizabeth Packenham Stanley,

*Plaintiff - Appellant,*

Ellen Elizabeth Packenham Stanley, as Representative Payee for M.J.S.,

*Plaintiff,*

v.

Commissioner, Social Security Administration,

*Defendant - Appellee.*

Appeal from United States District Court
for the District of Minnesota - Minneapolis

Submitted: April 26, 2018
Filed: May 2, 2018
[Unpublished]

Before WOLLMAN, LOKEN, and COLLOTON, Circuit Judges.

PER CURIAM.

Ellen Elizabeth Packenham Stanley seeks to appeal the district court's[1] dismissal of her case without prejudice. We dismiss the appeal for lack of appellate jurisdiction, because Stanley's notice of appeal was not filed within sixty days of the entry of judgment on March 29, 2017. *See* Fed. R. App. P. 4(a)(1)(B)(iii); *FTC v. Minneapolis-Honeywell Regulator Co.*, 344 U.S. 206, 211-12 (1952); *see also Dieser v. Cont'l Cas. Co.*, 440 F.3d 920, 923 (8th Cir. 2006).

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[1]The Honorable John R. Tunheim, Chief Judge, United States District Court for the District of Minnesota, adopting in part the report and recommendations of the Honorable Katherine M. Menendez, United States Magistrate Judge for the District of Minnesota.

# APPENDIX B

**UNITED STATES DISTRICT COURT**

**DISTRICT OF MINNESOTA**

| | |
|---|---|
| ELLEN ELIZABETH PACKENHAM STANLEY and ELLEN ELIZABETH PACKENHAM STANLEY, *as Representative Payee for M.J.S.*, | Civil No. 16-275 (JRT/KMM) |
| Plaintiffs, | **MEMORANDUM OPINION AND ORDER ON REPORT AND RECOMMENDATION OF THE MAGISTRATE JUDGE** |
| v. | |
| NANCY A. BERRYHILL, *Acting Commissioner of Social Security*,[1] | |
| Defendant. | |

Ellen Elizabeth Packenham Stanley, 1530 Thomas Lake Pointe Road #217, Eagan, MN 55122, *pro se*.

Craig R. Baune, Assistant United States Attorney, **UNITED STATES ATTORNEY'S OFFICE**, 600 United States Courthouse, 300 South Fourth Street, Minneapolis, MN 55415, for defendant.

This case arises from a series of adjustments made by the Social Security Administration ("SSA") to social security benefits allegedly owed to Plaintiff Ellen Elizabeth Packenham Stanley. Stanley filed an Amended Complaint pursuant to the Federal Tort Claims Act ("FTCA"), 28 U.S.C. § 2671 *et seq.*, alleging the SSA negligently reduced Stanley's social security benefits. United States Magistrate Judge Katherine Menendez issued a Report and Recommendation ("R&R") on January 17,

[1] Nancy A. Berryhill became Acting Commissioner of Social Security on January 23, 2017 and is automatically substituted for Carolyn W. Colvin as Defendant in this action pursuant to Rule 25(d) of the Federal Rules of Civil Procedure.

2017, recommending dismissal of Stanley's Complaint for lack of subject matter jurisdiction. Stanley filed timely objections, arguing the government waived sovereign immunity in the FTCA and, therefore, the FTCA supplies the Court with jurisdiction. Because the Court lacks subject matter jurisdiction over this action, the Court will overrule Stanley's objections, adopt the R&R, in part, and dismiss Stanley's Amended Complaint without prejudice.

## BACKGROUND

From approximately May through July 2014, Stanley allegedly suffered a decrease in social security benefits because SSA employees improperly input an equity settlement into the "earnings" category in the SSA computer system. (Am. Compl. ¶¶ 7, 9, May 12, 2016, Docket No. 8.) According to Stanley, the SSA improperly reduced her social security benefits from $411 to $1 a month. (*Id.* ¶ 7.) Stanley asserts she contacted the SSA numerous times regarding the reduction in benefits, but "was ignored and was not given the proper paperwork and/or interview." (*Id.* ¶ 8.) Stanley alleges the SSA's negligence caused: her "household to become financially unstable"; eviction from Stanley's home; the death of Stanley's dog; and both "physical[] and psychological[]" pain to Stanley and her son M.J.S.[2] (*Id.* ¶¶ 7, 10.)

[2] The Court recognizes Ellen Elizabeth Packenham Stanley is not an attorney and, as such, could not bring this action on behalf of her child M.J.S., who was a minor at the time Stanley filed this case. *See Buckley v. Dowdle*, No. 08-1005, 2009 WL 750122, at *1 (8th Cir. 2009) (citing *Myers v. Loudoun Cty. Pub. Sch.*, 418 F.3d 395, 401 (4th Cir. 2005)). Nevertheless, because the Court will dismiss Stanley's Amended Complaint for lack of subject matter jurisdiction, the Court does not separately analyze this issue.

In July 2015, Stanley filed a claim for damages with the SSA alleging SSA employees negligently decreased her social security benefits in violation of the FTCA.[3] (Decl. of Lucinda E. Davis ("Davis Decl.") ¶ 3 & Ex. 1, Aug. 9, 2016, Docket No. 21.) On August 13, 2015, the SSA denied Stanley's claim. (*Id.*, Ex. 2 at 1.) The SSA found Stanley failed to submit evidence showing "a negligent act or omission of a federal employee acting within the scope of his or her employment caused [Stanley's] injury." (*Id.*) The SSA further advised Stanley of its position that the FTCA did not permit claims related to benefits calculations against the SSA. (*Id.* (citing 42 U.S.C. § 405(h)).) The SSA informed Stanley that the proper procedure for appealing this determination was to "fil[e] suit in the appropriate United States District Court within six (6) months."[4] (*Id.*)

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[3] The government's submissions also indicate Stanley filed an initial request for reconsideration and request for waiver regarding the benefits calculation in April 2014. (Decl. of Cristina Prelle ("Prelle Decl."), Ex. 1 at 4, Aug. 9, 2016, Docket No. 20.) In September 2014, the SSA denied the request for reconsideration on the calculation of "her mother's benefits" and Stanley filed a request for a hearing before an Administrative Law Judge ("ALJ"). (*Id.*) The ALJ issued two decisions regarding this issue, in October 2015 and December 2015 respectively, both finding Stanley's mother's benefits were properly calculated and dismissing the request for reconsideration on the basis of res judicata. (*Id.* at 7; Prelle Decl., Ex. 2 at 8.) The record indicates Stanley requested review of the ALJ's decisions with the Appeals Council, (Prelle Decl. ¶ 3(c)), and that this administrative matter is still pending (R&R at 3 (noting the administrative matter was pending as of November 18, 2016)).

[4] Stanley correctly points out that, contrary to the findings in the R&R, the SSA did not advise Stanley of her right to appeal the FTCA claim to the Appeals Council. (*See* Pl.'s Obj. to R&R at 2-3, Jan. 27, 2017, Docket No. 41 (citing Davis Decl., Ex. 2).) In fact, the SSA directly informed Stanley any appeal should be filed "in the appropriate United States District Court." (Davis Decl., Ex. 2; *see also* Davis Decl. ¶ 4 ("I . . . advised [] Stanley of her right to appeal SSA's decision in the appropriate United States District Court").) Therefore, on the record before the Court, Stanley appears to have exhausted her administrative remedies on this claim. *See* 28 U.S.C. § 2675(a) (requiring the claimant to first "present[] the claim to the appropriate Federal agency" and the claim be "finally denied by the agency in writing"). But the Court need not decide the issue because the Court adopts the recommendation of the Magistrate Judge that

(Footnote continued on next page.)

Stanley filed the Amended Complaint on May 12, 2016, alleging the SSA negligently reduced Stanley's social security benefits in violation of the FTCA.[5] (*See* Am. Compl. at 11.) Stanley's Amended Complaint set forth allegations substantially similar to the claim Stanley asserted before the SSA in July 2015. (*See* Davis Decl., Ex. 1 at 3-5.) The government moved to dismiss the Amended Complaint, arguing the Court lacks subject matter jurisdiction. (Def.'s Mot. to Dismiss, Aug. 9, 2016, Docket No. 17.) The Magistrate Judge issued an R&R recommending the Court grant the government's motion to dismiss for lack of subject matter jurisdiction. (R&R at 7, Jan. 17, 2017, Docket No. 40.) Stanley filed timely objections to the R&R, arguing the Magistrate Judge erred in finding the Court lacks subject matter jurisdiction over this matter.

(Footnote continued.)

the Court lacks subject matter jurisdiction. The Court does, nonetheless, reject the R&R's findings of fact to the extent they assert "the SSA informed . . . Stanley of her right to appeal [the August 13, 2015] decision to the SSA's Appeals Council" (R&R at 2-3 (citing Davis Decl., Ex. 2)), and the conclusion that dismissal would be proper for failure to exhaust, (*see* R&R at 7 n.5).

[5] The Court adopts the Magistrate Judge's recommendation to construe Stanley's allegations under the Federal Tort Claims Act as if properly filed against the United States. (*See* R&R at 4 n.3, Jan. 17, 2017, Docket No. 40); *see also Stone v. Harry*, 364 F.3d 912, 915 (8th Cir. 2004) ("When we say that a pro se complaint should be given liberal construction, we mean that if the essence of an allegation is discernible . . . then the district court should construe the complaint in a way that permits the layperson's claim to be considered within the proper legal framework.").

## DISCUSSION

### I. STANDARD OF REVIEW

After a magistrate judge files an R&R, a party may file "specific written objections to the proposed findings and recommendations." Fed. R. Civ. P. 72(b)(2); *accord* D. Minn. LR 72.2(b)(1). "The objections should specify the portions of the magistrate judge's report and recommendation to which objections are made and provide a basis for those objections." *Montgomery v. Compass Airlines, LLC*, 98 F. Supp. 3d 1012, 1017 (D. Minn. 2015) (quoting *Mayer v. Walvatne*, No. 07-1958, 2008 WL 4527774, at *2 (D. Minn. Sept. 28, 2008)). On a dispositive motion, the Court reviews "properly objected to" portions of an R&R de novo. Fed. R. Civ. P. 72(b)(3); *accord* D. Minn. LR 72.2(b)(3).

Here, the government moves to dismiss Stanley's Amended Complaint pursuant to Fed. R. Civ. P. 12(b)(1). A Rule 12(b)(1) motion challenges the Court's subject matter jurisdiction and requires the Court to examine whether it has authority to decide the claims. *Uland v. City of Winsted*, 570 F. Supp. 2d 1114, 1117 (D. Minn. 2008). In resolving a motion to dismiss under Rule 12(b)(1) based on a "facial" attack,[6] "all of the factual allegations concerning jurisdiction are presumed to be true and the motion is successful if the plaintiff fails to allege an element necessary for subject matter jurisdiction." *Titus v. Sullivan*, 4 F.3d 590, 593 (8th Cir. 1993). "In other words, in a

[6] Neither Stanley nor the government object to the Magistrate Judge's recommendation that the government's motion is a "facial" attack – "the government argues that regardless of the truth of the fact in . . . Stanley's complaint, the Court lacks . . . subject matter jurisdiction." (R&R at 3.)

facial challenge, the court 'determine[s] whether the asserted jurisdictional basis is patently meritless by looking to the face of the complaint, and drawing all reasonable inferences in favor of the plaintiff.'" *Montgomery*, 98 F. Supp. 3d at 1017 (quoting *Biscanin v. Merrill Lynch & Co.*, 407 F.3d 905, 907 (8th Cir. 2005)).

## II. SUBJECT MATTER JURISDICTION

Stanley primarily challenges the R&R's recommendation that the Court lacks subject matter jurisdiction over this action. Specifically, Stanley challenges the R&R's conclusion that the Court lacks subject matter jurisdiction because the exclusive remedy provision in the Social Security Act – 42 U.S.C. § 405(h) – "precludes pursuing tort claims via the FTCA." (R&R at 5; *see also* Pl.'s Obj. to R&R at 4, Jan. 27, 2017, Docket No. 41 (arguing section 405(h) does not bar an "action for tortfeasance").)

Absent an express waiver by the government, sovereign immunity protects the United States and its agents from suit. *United States v. Shaw*, 309 U.S. 495, 500-01 (1940); *United States v. Kearns*, 177 F.3d 706, 709 (8th Cir. 1999). A district court lacks jurisdiction to hear a case against the United States or its agents unless sovereign immunity has been expressly waived. *F.D.I.C. v. Meyer*, 510 U.S. 471, 475 (1994) ("Absent a waiver, sovereign immunity shields the Federal Government and its agencies from suit."). In some circumstances, the FTCA acts as such a waiver. *Hart v. United States*, 630 F.3d 1085, 1088 (8th Cir. 2011) (quoting *Riley v. United States*, 486 F.3d 1030, 1032 (8th Cir. 2007)). In those circumstances, the FTCA permits the United States and its agents to be sued "in the same matter and to the same extent as a private

individual under like circumstances" for torts committed by government employees during the scope of their employment. 28 U.S.C. §§ 2672, 2674.

But the FTCA does not provide for an unlimited waiver of sovereign immunity in all tort-related claims. As relevant to this case, the FTCA cannot generally be used as a back door to circumvent an exclusive remedy provision in another statute that narrows the relief an individual can obtain for actions by the United States or its agents. *Am. Postal Workers Union, AFL-CIO v. U.S. Postal Serv.*, 940 F.2d 704, 708 (D.C. Cir. 1991) (holding a plaintiff cannot use the FTCA to circumvent an "elaborate remedial system that has been constructed step by step, with careful attention to conflicting policy considerations"); *Paul v. United States*, 929 F.2d 1202, 1204 (7th Cir. 1991) ("The FTCA is not a back door to review . . . the administrative decision"); *cf. Stencel Aero Eng'g Corp. v. United States*, 431 U.S. 666, 673 (1977) (quoting *Laird v. Nelms*, 406 U.S. 797, 802 (1972)) (discussing FTCA and Veterans' Benefits Act).

Here, the Social Security Act provides an exclusive remedy for claims related to SSA employees' alleged mistakes in calculating an individual's benefits. *See* 42 U.S.C. § 405(g); *see also Laird v. Ramirez*, 884 F. Supp. 1265, 1279 (N.D. Iowa 1995) (noting section 405(h) "makes [section] 405(g) the exclusive remedy"). Section 405(h) provides that "[n]o action against the United States, the Commissioner of Social Security, or any officer or employee thereof shall be brought . . . to recover on any claim **arising under**" the Social Security Act's provisions related to the determination and administration of old-age, survivors, and disability insurance benefits. (Emphasis added.)

The Eighth Circuit has held the "aris[es] under" language in section 405(h) applies to claims for negligent determination and administration of social security benefits, thus precluding liability under the FTCA. *See Goings v. United States*, 287 F. App'x 543, 543 (8th Cir. 2008) (per curiam) (holding section 405(h) precluded an FTCA claim when the claims required the district court to review an administrative decision to determine whether Goings was entitled to disability benefits); *Tallman v. Reagan*, 846 F.2d 494, 495 (8th Cir. 1988) (noting section 405(h) precludes "FTCA action for damages caused by negligently tardy processing of cost reports" (citing *Marin v. HEW, Health Care Fin. Agency*, 769 F.2d 590, 592 (9th Cir. 1985))); (*see also* R&R at 5-6 (listing cases)).

Here, Stanley's claim plainly arises under the Social Security Act. All of Stanley's alleged injuries stem from conduct related to the calculation and administration of her social security benefits. Thus, Stanley's claim under the FTCA would improperly be used as "a back door" to circumvent the remedial scheme set forth in section 405(g), in direct contradiction of section 405(h). *See Paul*, 929 F.2d at 1204. Further, Stanley's claim would require the Court to relitigate the SSA's benefits award, which is further evidence the claim "aris[es] under" the Social Security Act. *See Goings*, 287 F. App'x at 543; *see also Jarrett v. United States*, 874 F.2d 201, 204 (4th Cir. 1989) (holding a claim arises under the Social Security Act when it requires "relitigation of the denial of social security benefits").

For these reasons, the Court finds Stanley's claim "aris[es] under" the Social Security Act and is subject to the exclusive remedies set forth in section 405(g). Thus, the Court lacks subject matter jurisdiction over Stanley's Amended Complaint under the

FTCA and will dismiss the Amended Complaint without prejudice, which means that the Complaint may be refiled if done in a proper manner according to law.

**ORDER**

Based on the foregoing, and all the files, records, and proceedings herein, the Court **OVERRULES** Stanley's objections [Docket No. 41] and **ADOPTS in part** and **REJECTS in part** the Report and Recommendation of the Magistrate Judge dated January 17, 2017 [Docket No. 40] as set forth above. Accordingly, **IT IS HEREBY ORDERED** that:

1. The government's Motion to Dismiss [Docket No. 17] is **GRANTED.**

2. This case is **DISMISSED without prejudice.**

**LET JUDGMENT BE ENTERED ACCORDINGLY.**

DATED: March 29, 2017
at Minneapolis, Minnesota.

s/ John R. Tunheim
JOHN R. TUNHEIM
Chief Judge
United States District Court

# UNITED STATES DISTRICT COURT

## District of Minnesota

ELLEN ELIZABETH PACKENHAM STANLEY and ELLEN ELIZABETH PACKENHAM STANLEY, *as Representative Payee for M.J.S.*

Plaintiff(s),

v.

NANCY A. BERRYHILL,
*Acting Commissioner of Social Security*

Defendant(s).

**JUDGMENT IN A CIVIL CASE**

Case Number: 16-cv-275 (JRT/KMM)

☐ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☒ **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED THAT:

This case is **DISMISSED without prejudice.**

Date: March 29, 2017

RICHARD D. SLETTEN, CLERK

s/L. Brennan
(By) L. Brennan , Deputy Clerk

# UNITED STATES DISTRICT COURT
## District of Minnesota

Warren E. Burger Federal Building and U.S. Courthouse
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Fergus Falls, MN 56537
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## CIVIL NOTICE

**The appeal filing fee is $505.00. If you are indigent, you can apply for leave to proceed in forma pauperis, ("IFP").**

The purpose of this notice is to summarize the time limits for filing with the District Court Clerk's Office a Notice of Appeal to the Eighth Circuit Court of Appeals or the Federal Circuit Court of Appeals (when applicable) from a final decision of the District Court in a civil case.

***This is a summary only. For specific information on the time limits for filing a Notice of Appeal, review the applicable federal civil and appellate procedure rules and statutes.***

Rule 4(a) of the Federal Rules of Appellate Procedure (Fed. R. App. P.) requires that a Notice of Appeal be filed within:

1. Thirty days (60 days if the United States is a party) after the date of "entry of the judgment or order appealed from;" or

2. Thirty days (60 days if the United States is a party) after the date of entry of an order denying a timely motion for a new trial under Fed. R. Civ. P. 59; or

3. Thirty days (60 days if the United States is a party) after the date of entry of an order granting or denying a timely motion for judgment under Fed. R. Civ. P. 50(b), to amend or make additional findings of fact under Fed. R. Civ. P. 52(b), and/or to alter or amend the judgment under Fed. R. Civ. P. 59; or

4. Fourteen days after the date on which a previously timely Notice of Appeal was filed.

If a Notice of Appeal is not timely filed, a party in a civil case can move the District Court pursuant to Fed. R. App. P. 4(a)(5) to extend the time for filing a Notice of Appeal. This motion must be filed no later than 30 days after the period for filing a Notice of Appeal expires. If the motion is filed after the period for filing a Notice of Appeal expires, the party bringing the motion must give the opposing parties notice of it. The District Court may grant the motion, but only if excusable neglect or good cause is shown for failing to file a timely Notice of Appeal.

# APPENDIX C

**UNITED STATES DISTRICT COURT**
**DISTRICT OF MINNESOTA**

Ellen Elizabeth Packenham Stanley and Ellen Elizabeth Packenham Stanley, *as Representative for M.J.S., a minor,*

Plaintiffs,

v.

Carolyn W. Colvin, *Commissioner of Social Security,*

Defendant.

Case No. 0:16-cv-00275-JRT-KMM

**REPORT AND RECOMMENDATION**

Ellen Elizabeth Packenham Stanley, 1530 Thomas Lake Point Road #217, Eagan, MN 55122, plaintiff pro se

Craig R. Baune, United States Attorney's Office, counsel for defendant

This matter is before the Court on the government's motion to dismiss. ECF No. 17. For the reasons set forth below, the Court recommends that the motion be granted and the case be dismissed without prejudice.

## I. Background

This case involves a complicated history of adjustments made by the Social Security Administration ("SSA") to social security benefits allegedly owed to Ellen Elizabeth Packenham Stanley and M.J.S, her son.[1] Ms. Stanley filed her complaint on

[1] Because M.J.S. is under the age of eighteen, the Court will use his initials in this Report and Recommendation, as required by the Federal Rules of Civil Procedure. Fed. R. Civ. P. 5.2(a)(3).

Additionally, Ms. Stanley is not an attorney. As a result, she was not permitted to bring this action on behalf of her child, M.J.S. *Vargason v. Dep't of Human Servs.,*

*(footnote continued on next page)*

February 4, 2016. Compl., ECF No. 1. On May 12, 2016, she amended the complaint, restating the same claims but expanding her prayer for relief to include $3 million for pain and suffering. Am. Compl., ECF No. 8.

The Amended Complaint alleges that the SSA negligently reduced Ms. Stanly's and M.J.S.'s spousal and survivor benefits in violation of the Federal Tort Claims Act ("FTCA"). *See* Am. Compl. ¶ 7. Between April and August 2014, Ms. Stanley claims that the SSA repeatedly negligently adjusted their benefits, leading to periods of time where their total benefits were significantly lower than the amount to which Ms. Stanley believes they were entitled, and to efforts by the SSA to recover funds already dispersed, further harming her family.[2] Faced with the financial hardship of lower benefits awards, Ms. Stanley asserts that the SSA's actions caused her and M.J.S. to be evicted from their home, led to the death of their dog, and caused physical and psychological damage to both of them. Am. Compl. ¶ 10.

Ms. Stanley has also challenged the SSA's handling of her and M.J.S.'s benefits administratively. In July 2015, prior to filing this case, Ms. Stanley brought a claim directly to the SSA with allegations that match those currently before the Court. *See* Davis Decl., Ex. 1, ECF No. 21-1. On August 13, 2015, Ms. Stanley's claim was denied by the SSA. Davis Decl., Ex. 2, ECF No. 21-2. In the letter denying her claim, the SSA noted that it found no evidence of negligence on the part of its

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No. 13-cv-518-DWF-LIB, 2013 WL 1315090, at *1 n.1 (D. Minn. Mar. 7, 2013) ("However, a parent cannot bring an action in federal court for the benefit of a minor child, unless the parent is represented by an attorney.") (citing *Myers v. Loudon County Pub. Schools*, 418 F.3d 395, 401 (4th Cir. 2005), and *Buckley v. Dowdle*, No. 08-1005, 2009 WL 750122, at *1 (8th Cir. Mar. 24, 2009) (per curiam)). M.J.S. cannot be a party in this litigation unless he is represented by counsel. Because this Report and Recommendation recommends dismissal of all claims on other grounds, the Court does not separately analyze what effect this would have on the future of this case.

[2] The timing of the alleged errors that gave rise to Ms. Stanley's claims is not totally clear from the record. In the briefing related to the government's motion to dismiss, Ms. Stanley alleges that these changes occurred between March and November 2014. Pl.'s Reply Mem. Opposing Def.'s Mot. to Dimiss ("Pls.' Resp."), at 4, ECF No. 31. In any case, it is clear that the allegedly negligent changes to Ms. Stanley's and M.J.S.'s benefits spanned several months during 2014.

employees and that it believed the Social Security Act barred FTCA claims related to benefits determinations from being brought against the SSA. *Id.* Finally, the SSA informed Ms. Stanley of her right to appeal that decision to the SSA's Appeals Council, *id.*, which Ms. Stanley has done, Johnson Decl. ¶ 29, ECF No. 22. At the motion hearing on November 18, 2016, defense counsel indicated that Ms. Stanley's administrative appeal was still pending.

The government filed its motion to dismiss this case on August 9, 2016, arguing that the Court lacks subject matter jurisdiction pursuant to the doctrine of sovereign immunity. ECF No. 17. Ms. Stanley responsed on October 25, 2016, and the government filed its reply on November 8, 2016. ECF Nos. 31, 34. The Court heard argument on November 18, 2016. ECF No. 37. Ms. Stanley recently moved and did not receive a copy of the government's reply until after the hearing. As a result, she requested and was granted an opportunity to file a surreply. ECF No. 38. She filed her surreply on December 7, 2016. ECF No. 39.

## II. "Facial Attack" Under Rule 12(b)(1)

"[S]overeign immunity is a jurisdictional threshold matter . . . ." *Lors v. Dean*, 746 F.3d 857, 861 (8th Cir. 2014) (citing *Harmon Indus., Inc. v. Browner*, 191 F.3d 894, 903 (8th Cir. 1999) (alterations in original omitted). Because the government's motion implicates the Court's subject matter jurisdiction, it is analyzed under Rule 12(b)(1) of the Federal Rules of Civil Procedure.

Challenges to the Court's subject matter jurisdiction come in two forms, and the appropriate standard is based on which form the challenge takes. *See, e.g., Najbar v. United States*, 723 F. Supp. 2d 1132, 1133 (D. Minn. 2010), *aff'd on other grounds*, 649 F.3d 868 (8th Cir. 2011). The first type involves a challenge to the factual basis of the Court's subject matter jurisdiction where the defendant argues that "under the facts as they actually exist" (rather than as they are pleaded), the Court lacks subject matter jurisdiction over the case. *Id.* The second type involves a "facial attack" where the defendant contends that the Court lacks the subject matter jurisdiction to hear the case even if all of the facts in the complaint are accepted as true. *See, e.g., Titus v. Sullivan*, 4 F.3d 590, 593 (8th Cir. 1993).

The 12(b)(1) motion in this case is of the second type. The government argues that regardless of the truth of the facts in Ms. Stanley's complaint, the Court lacks the subject matter jurisdiction to decide her case. In deciding a facial attack, the Court

"must afford the non-moving party the same protections it would be entitled to under Rule 12(b)(6)." *Gilmore v. Nw. Airlines, Inc.*, 504 F. Supp. 2d 649, 653 (D. Minn. 2007) (citing *Osborn v. United States*, 918 F.2d 724, 729 n.6 (8th Cir. 1990)). The Court must therefore assume the facts in the complaint to be true and construe all reasonable inferences in the light most favorable to the plaintiff. *Morton v. Becker*, 793 F.2d 185, 187 (8th Cir. 1986).

Because Ms. Stanley is representing herself in this litigation, the Court reads her complaint liberally. *Solomon v. Petray*, 795 F.3d 777, 787 (8th Cir. 2015). "When we say that a pro se complaint should be given liberal construction, we mean that if the essence of an allegation is discernible . . . then the district court should construe the complaint in a way that permits the layperson's claim to be considered within the proper legal framework." *Id.* (citing *Stone v. Harry*, 364 F.3d 912, 914 (8th Cir. 2004)). Courts should also consider statements in the *pro se* litigant's memoranda or other filings in analyzing the sufficiency of the allegations in the complaint. *See Pratt v. Corrections Corp. of Am.*, 124 Fed. App'x 465, 466 (8th Cir. 2005).

## III. Sovereign Immunity Precludes Jurisdiction[3]

The government argues that the Social Security Act, specifically 42 U.S.C. §§ 405(g) and (h), bar the Court from adjudicating this case under the doctrine of sovereign immunity. Ms. Stanley argues that the Court hsa jurisdiction, that the SSA negligently made adjustments to her and M.J.S.'s benefits, and that the Court should exercise its equitable powers to find in her favor. However, for the reasons explained below, it is not within the Court's power to offer Ms. Stanley the relief she seeks.

Under the doctrine of sovereign immunity, the federal government and its agencies cannot be sued, absent an express waiver of their immunity. *F.D.I.C. v. Meyer*, 510 U.S. 471, 475 (1994) ("Absent a waiver, sovereign immunity shields the Federal Government and its agencies from suit."). The FTCA is such a waiver in

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[3] In its brief, the government argues that the named defendant, the Acting Commissioner of the Social Security Administration, is not the proper defendant in a case brought pursuant to the FTCA. Def.'s Mem. in Supp. Mot. to Dismiss, at 8-9, ECF No. 19. The Court agrees with this analysis, as does Ms. Stanley. Pl.'s Sur-Reply, at 10. Given Ms. Stanley's pro se status and her agreement, the Court analyzes the motion as if the case had been brought against the United States.

some circumstances. *See Riley v. United States*, 486 F.3d 1030, 1032 (8th Cir. 2007). It allows the federal government to be sued "in the same manner and to the same extent as a private individual under like circumstances" for torts committed by its employees who were acting within the scope of their employment. 28 U.S.C. §§ 2672, 2674.

However, the FTCA is not a blanket waiver of sovereign immunity. *See, e.g., Hart v. United States*, 630 F.3d 1085, 1088 (8th Cir. 2011) ("Where the United States has not waived sovereign immunity under the FTCA, the district court lacks subject matter jurisdiction to hear the case."). Its own terms narrow the field of potential damages for which the federal government can be found liable. *See* 28 U.S.C. §§ 2674 (indicating the FTCA does not allow liability for interest prior to judgment or punitive damages). And other statutory schemes affect whether and how FTCA claims can be brought against a particular agency. For example, exclusive remedy provisions in certain statutes narrow the FTCA's waiver of sovereign immunity or change the process by which relief may be obtained. *See, e.g., Stencel Aero Eng'g Corp. v. United States*, 431 U.S. 666, 671-73 (1977) (discussing the Veterans' Benefits Act's exclusivity provision as limiting the FTCA's waiver of sovereign immunity in situations covered by the Act's provisions).

In the Social Security context, § 405(h) is an exclusive remedy provision that precludes pursuing tort claims via the FTCA. 42 U.S.C. § 405(h) (indicating that "[n]o action against the United States, the Commissioner of Social Security, or any officer or employee thereof shall be brought under" the statutes providing federal courts with jurisdiction over cases involving federal questions or the United States as a defendant). It applies to claims "arising under" the Social Security Act's provisions related to the determination and administration of old-age, survivors, or disability insurance benefits. *Id.* The question here is whether Ms. Stanley's claims "arise under" those statutory provisions.

The overwhelming majority of appellate courts that have considered this question, including the Eighth Circuit, have found that the "arising under" language in § 405(h) should be broadly understood to preclude FTCA liability for allegedly negligent conduct on the part of the SSA in determining, denying, or administering benefits awards. *Goings v. United States*, 287 F. App'x 543, 543 (8th Cir. 2008) (per curiam) (tort claim related to the Veterans Administration's negligent handling of plaintiff's personnel file that caused his SSA claim to be denied was barred because it arose under Social Security Act); *Tallman v. Reagan*, 846 F.2d 494, 495 (8th Cir. 1988)

(per curiam) (FTCA claim alleging negligently delayed determination of benefits was barred by § 405(h)); *Giesse v. Sec'y of Dep't of Health & Human Servs.*, 522 F.3d 697, 702 (6th Cir. 2008) (tort claim related to allegedly arbitrary and capricious termination of benefits barred by § 405(h)); *Raczkowski v. United States*, 138 F. App'x 174, 174 (11th Cir. 2005) (per curiam) (FTCA claim related to allegedly negligent calculation of benefits was barred by § 405(h)); *Puente v. Callahan*, 117 F.3d 1428 (10th Cir. 1997) (FTCA claim related to allegedly negligent calculation of benefits was barred by § 405(h)); *Jarrett v. United States*, 874 F.2d 201, 204 (4th Cir. 1989) (FTCA claim for allegedly negligent termination of benefits was barred by § 405(h)); *Hooker v. U.S. Dep't of Health & Human Servs.*, 858 F.2d 525, 529 (9th Cir. 1988) (same); *Marin v. HEW, Health Care Financing*, 769 F.2d 590 (9th Cir. 1985) (FTCA claim for negligently delayed processing of SSA claim was barred as arising under Social Security Act); *accord Livingston Care Ctr., Inc. v. United States*, 934 F.2d 719, 722 (6th Cir. 1991) (consequential damages claim related to allegedly wrongful termination of Medicare benefits barred by § 405(h), as incorporated into the Medicare statute).[4]

In these decisions, courts have found that the FTCA does not permit liability for extended delay prior to a determination of an individual's entitlement to benefits, allegedly erroneous denial of benefits, or errors in the administration of and adjustments to benefits awards. Though none of these decisions precluding FTCA liability involve claims of negligence identical to those raised by Ms. Stanley, there is no legal distinction between her claims and those at issue in those cases that would enable a court to allow an FTCA claim in one but not the others.

The Court finds that § 405(h) bars FTCA claims that are broadly related to Social Security benefits, and that § 405(g) provides the exclusive process by which claims related to benefits can be reviewed by the Court. Ms. Stanley's tort claims arise out of the SSA's allegedly erroneous and negligent administration of her and her son's benefits. All of the injuries she claims are directly related to asserted mistakes made by the SSA in calculating her benefits. Claims of negligent—or even grossly negligent—conduct of the SSA broadly related to the determination of benefits "arise

[4] The lone court to disagree with this assessment is the First Circuit. *See Jimenez-Nieves v. United States*, 682 F.2d 1, 3 (1st Cir. 1982) In *Jimenez-Nieves*, the court decided that § 405(h)'s "arising under" language did not cover a claim of negligent administration of benefits.

under" the Social Security Act and thus cannot be brought as an FTCA claim. *Tallman*, 846 F.2d at 495.

Moreover, Ms. Stanley's claims would require the Court to relitigate whether the SSA's various 2014 adjustments to her and M.J.S.'s benefits were erroneous before the Court could ever reach a question about the SSA's alleged negligence. *See Jarrett v. United States*, 874 F.2d 201, 204 (4th Cir. 1989) (finding that a purported FTCA claim for negligent termination of benefits arose under the Social Security Act, in part because it would require relitigation of the awarding of benefits). As such, Ms. Stanley's claims necessarily "arise under" the Social Security Act and are subject to § 405(h)'s exclusive remedy provision and the procedures for judicial review set forth in § 405(g). Therefore, the Court lacks subject matter jurisdiction to hear this case and it must be dismissed.[5]

**Recommendation**

Based on the foregoing, the Court **HEREBY RECOMMENDS** the government's motion to dismiss (ECF No. 17) be granted and that the case be dismissed without prejudice.

Date: January 17, 2017

s/ *Katherine Menendez*
Katherine Menendez
United States Magistrate Judge

[5] Because the Court finds that it lacks subject matter jurisdiction to hear this case regardless of the accuracy of the facts alleged in the complaint, the Court does not need to reach whether has properly exhausted her claims as required by the FTCA. *See* 28 U.S.C. § 2675(a). However, both Ms. Stanley and the government have indicated that Ms. Stanley's appeal of the determination of benefits is still pending before the SSA's Appeals Council. *See, e.g.*, Pls.' Resp., at 3-4; Def.'s Reply, at 3 n.2. Therefore, even if the Court were not precluded from deciding the case for the reasons set forth above, it would nonetheless recommend dismissal without prejudice on the grounds of failure to exhaust.

## NOTICE

**Filing Objections:** This Report and Recommendation is not an order or judgment of the District Court and is therefore not appealable directly to the Eighth Circuit Court of Appeals.

Under Local Rule 72.2(b)(1), "a party may file and serve specific written objections to a magistrate judge's proposed finding and recommendations within 14 days after being served a copy" of the Report and Recommendation. A party may respond to those objections within 14 days after being served a copy of the objections. LR 72.2(b)(2). All objections and responses must comply with the word or line limits set for in LR 72.2(c).

**Under Advisement Date:** This Report and Recommendation will be considered under advisement 14 days from the date of its filing. If timely objections are filed, this Report and Recommendation will be considered under advisement from the earlier of: (1) 14 days after the objections are filed; or (2) from the date a timely response is filed.