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United States Court of Appeals  
Tenth Circuit

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

June 3, 2021

Christopher M. Wolpert  
Clerk of Court

BARBARA SILVA,

Plaintiff - Appellant,

v.

UNITED STATES OF AMERICA,

Defendant - Appellee.

No. 21-2005  
(D.C. No. 1:17-CV-01224-MV-JHR)  
(D.N.M.)

ORDER AND JUDGMENT\*

Before MORITZ, BALDOCK, and EID, Circuit Judges.

Barbara Silva, proceeding pro se,<sup>1</sup> appeals the district court's order dismissing her lawsuit against the United States as barred by sovereign immunity. For the reasons explained below, we affirm.

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\* After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist in the determination of this appeal. See Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. But it may be cited for its persuasive value. See Fed. R. App. P. 32.1(a); 10th Cir. R. 32.1(A).

<sup>1</sup> We liberally construe pro se filings. See *Garrett v. Selby Connor Maddux & Janer*, 425 F.3d 836, 840 (10th Cir. 2005). But we do not act as a pro se litigant's advocate by, for example, "constructing arguments" or "searching the record" for support. *Id.*

Silva's complaint alleges that when first assigning her a Social Security number in 1976, the Social Security Administration negligently assigned her a number that had already been assigned to another individual. The Administration issued her a new and unique Social Security number in 1993. But it did not admit to its initial mistake until 2015, after a senator intervened—and after Silva had allegedly endured decades of negative consequences, including impacts on her credit report and the loss of her military career when the individual who shared her Social Security number declared bankruptcy.

As a result, Silva filed this action, seeking damages from the federal government under the Federal Tort Claims Act (FTCA), 28 U.S.C. § 1346. A magistrate judge reviewed her complaint and reasoned, “based on the injuries to reputational and economic interests for which . . . Silva is claiming damages,” that her claims “sound[ed] in defamation, negligent misrepresentation, interference with contractual rights, and negligent or intentional infliction of emotional distress.” R. 196. The magistrate judge concluded that most of these claims were accordingly barred by 28 U.S.C. § 2680(h), which provides that the government may not be sued in tort for “[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.” And the claims that withstood § 2680(h)—negligent or intentional infliction of emotional distress—failed to state a claim for which relief could be granted because Silva’s allegations did not satisfy the elements

of these claims under New Mexico law.<sup>2</sup> The magistrate judge therefore recommended dismissing the action for lack of subject-matter jurisdiction. *See JGE ex rel. Tasso v. United States*, 772 F. App'x 608, 611 (10th Cir. 2019) (holding that applicability of FTCA exceptions and “plaintiffs[’] fail[ure] to demonstrate analogous tort liability under New Mexico state law, as required by 28 U.S.C. § 1346(b)(1),” are “[b]oth issues [that] implicate the district court’s subject-matter jurisdiction because both are conditions on the government’s waiver of its sovereign immunity”). The district court agreed with the magistrate judge’s analysis and dismissed the action without prejudice.

Silva now appeals. We review de novo the district court’s dismissal of the action for lack of subject-matter jurisdiction under the FTCA. *See Estate of Trentadue ex rel. Aguilar v. United States*, 397 F.3d 840, 852, 854 (10th Cir. 2005).

Silva first argues that the district court “[e]rroneously congregat[ed] the entire case to [d]efamation and/or discretionary[-]function exceptions.” Aplt. Br. 3. But the

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<sup>2</sup> The New Mexico Supreme Court has explained that negligent infliction of emotional distress “is an extremely narrow tort that compensates a bystander who has suffered severe emotional shock as a result of witnessing a sudden, traumatic event that causes serious injury or death to a family member.” *Fernandez v. Walgreen Hastings Co.*, 968 P.2d 774, 777 (N.M. 1998). And a claim of intentional infliction of emotional distress requires the plaintiff to show “extreme and outrageous conduct,” meaning conduct “which is ‘so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.’” *Trujillo v. N. Rio Arriba Elec. Coop., Inc.*, 41 P.3d 333, 342–43 (N.M. 2001) (quoting Restatement (Second) of Torts § 46 cmt. d (Am. L. Inst. 1965)). As the district court put it, although “the conduct . . . Silva alleges is highly unfortunate and has no doubt caused her emotional distress over many years, she has not made out an actionable case of negligent or intentional infliction of emotional distress under th[is] prevailing law.” R. 215.

district court did not rely on § 2680(a)'s discretionary-function exception to dismiss the case; indeed, because the government did not invoke this exception, neither the magistrate judge nor the district court even considered it. Nor did the district court “[d]ecide[] that the facts on the case were based only on defamation,” as Silva argues. *Id.* at 4. The district court simply agreed with the magistrate judge that, “*to the extent that . . .* Silva claims damages to her reputation as a result of the Administration’s false statements, the United States retains immunity” based on § 2680(h)'s exceptions for libel and slander. R. 197 (emphasis added). The magistrate judge and district court also found her complaint to sound in misrepresentation, interference with contractual rights, and negligent or intentional infliction of emotional distress, and the district court explained why these other types of claims also failed to establish subject-matter jurisdiction under the FTCA. And Silva does not address these other aspects of the district court's decision; she only disclaims any intention of raising a defamation claim. This argument is thus based on a misreading of the district court's decision, and it fails to establish reversible error.

Second, Silva argues that the United States should be subject to suit under the FTCA because a private person in the government's position would be liable for the alleged wrongful conduct. However, although the FTCA generally waives sovereign immunity for government torts for which a private person would be held liable, this general waiver is subject to the specific exceptions listed in § 2680(h). *See Ecco Plains, LLC v. United States*, 728 F.3d 1190, 1195 (10th Cir. 2013). And Silva has not shown that the district court erred in concluding that most of her claims were

barred by these exceptions. Further, although her emotional-distress claims are not subject to § 2680(h)'s exceptions, she does not cite to any case in which a private person was found liable for the infliction of emotional distress in similar circumstances, nor does she challenge the district court's conclusion that the allegations in her complaint failed to state a valid emotional-distress claim.

Third, Silva appears to argue that the district court erred in dismissing the case for lack of subject-matter jurisdiction because Silva alleged a sufficient injury to establish Article III standing. However, the questions of standing and sovereign immunity are separate inquiries; both must be satisfied in order for a plaintiff to proceed in a suit against the government. *See Branson Sch. Dist. RE-82 v. Romer*, 161 F.3d 619, 631 (10th Cir. 1998) (addressing question of sovereign immunity after separately holding that plaintiffs "alleged a sufficient 'injury-in-fact' for purposes of Article III standing"). Regardless of whether Silva established Article III standing, the district court could not exercise subject-matter jurisdiction over claims for which the government had not waived its sovereign immunity. *See JGE*, 772 F. App'x at 611.

Lastly, Silva's reply brief includes several new arguments. For instance, she seems to raise a new theory of government liability, suggesting that the district court should have treated her complaint as an action under the Administrative Procedures Act or some other statute, rather than as an FTCA action. But "issues raised by an appellant for the first time on appeal in a reply brief are generally deemed waived," even when the appellant is pro se. *Wheeler v. Comm'r*, 521 F.3d 1289, 1291 (10th

Cir. 2008). We accordingly will not address the issues that Silva raises for the first time in her reply brief. *See id.*

In conclusion, we agree with the district court that “the conduct . . . Silva alleges is highly unfortunate,” but these unfortunate circumstances do not negate her responsibility to establish a valid claim for relief against the government. R. 215. Because Silva has not shown that the district court erred in dismissing this action without prejudice based on the government’s sovereign immunity under the FTCA, we affirm.

Entered for the Court

Nancy L. Moritz  
Circuit Judge

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW MEXICO**

BARBARA SILVA,

Plaintiff,

v.

No. 17-CV-1224 MV/JHR

UNITED STATES OF AMERICA,

Defendant.

**MEMORANDUM OPINION AND ORDER OVERRULING PLAINTIFF'S  
OBJECTIONS AND ADOPTING MAGISTRATE JUDGE RITTER'S SUPPLEMENTAL  
PROPOSED FINDINGS AND RECOMMENDED DISPOSITION**

**THIS MATTER** is before the Court on the Defendant United States' Motion to Dismiss or, in the Alternative, Motion for Summary Judgment and Memorandum in Support. Doc. 31. In it, the United States asks the Court to dismiss *pro se* Plaintiff Barbara Silva's claim under the Federal Tort Claims Act (FTCA) that the United States caused her various financial and professional injuries when the Social Security Administration (SSA) assigned her the same Social Security Number (SSN) as another individual. *See id.* at 3. Ms. Silva seeks the "maximum relief" under the FTCA for the failures of SSA employees in: (1) issuing her the incorrect SSN; (2) ensuring the accuracy of the issuing employee's actions; and (3) recognizing the discrepancy in her retirement income as wages were earned. Doc. 23 at 1, 3, 4. Ms. Silva filed a response in opposition to the Motion to Dismiss [Doc. 34] and the United States did not file a reply. United States Magistrate Judge Jerry H. Ritter submitted his first Proposed Findings and Recommended Disposition (PFRD) recommending that this Court grant the United States' motion and dismiss Ms. Silva's lawsuit without prejudice for failure to timely bring suit within the FTCA's statute of limitations. Doc. 42. Ms. Silva timely objected to the PFRD and this Court sustained her Written

Objections [Doc. 43] and remanded the case to Magistrate Judge Ritter for further analysis of the remaining issues in the United States' Motion to Dismiss. Doc. 44.

Concluding that the Court lacks subject matter jurisdiction over Ms. Silva's claims because the FTCA's exceptions apply, Magistrate Judge Ritter issued his Supplemental Proposed Findings and Recommended Disposition on November 12, 2020 [Doc. 46] and Ms. Silva filed timely written objections on November 25, 2020. Doc. 47. For the reasons stated below, the Court will **OVERRULE** Ms. Silva's objections, **ADOPT** the disposition recommended in the PFRD, **GRANT** the United States' motion [Doc. 31] and **DISMISS** this case **WITHOUT PREJUDICE**.<sup>1</sup>

## BACKGROUND

In his Supplemental PFRD, Magistrate Judge Ritter recommends that the Court dismiss Ms. Silva's lawsuit without prejudice because the statutory exceptions in the FTCA, as construed by various courts across the country, bar her claims. *See* Doc. 46 at 7–11 (citing 28 U.S.C. § 2680(h)). According to the Magistrate Judge, Ms. Silva's claims, properly construed in light of the reputational and economic interests at stake, sound in: defamation, misrepresentation, interference with contractual rights, and infliction of emotional distress, all which are precluded by Section 2680(h) of the FTCA<sup>2</sup> or New Mexico common law as applied to the facts of this case. Doc. 46 at 7. The Magistrate Judge reasons that if Ms. Silva seeks to recover for harm to her reputation due to defamatory statements made (implicitly or explicitly) by the SSA, her claims sound in defamation. Doc. 46 at 8–9 (citing *Jimenez-Nieves v. U.S.*, 682 F.2d 1, 3–4 (1st Cir.

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<sup>1</sup> As Magistrate Judge Ritter noted, "a dismissal for lack of jurisdiction is not an adjudication of the merits and therefore dismissal must be without prejudice." Doc. 46 at 1 n.1 (quoting *Brown v. Buhman*, 822 F.3d 1151, 1179 (10th Cir. 2016) (quoted authority and internal alterations omitted)).

<sup>2</sup> Section 2680(h) lists exceptions to the FTCA over which the United States continues to enjoy sovereign immunity from suit. These exceptions include "[a]ny claim arising out of ... libel, slander, misrepresentation, deceit, or interference with contract rights." *See* 28 U.S.C. § 2680(h).

1982); *Bergman v. U.S.*, 751 F.2d 314, 317 (10th Cir. 1984); *Moessmer v. U.S.*, 760 F.2d 236, 237–38 (8th Cir. 1985); *Talbert v. U.S.*, 932, F.2d 1064 (4th Cir. 1991); *Smith v. Surden*, 2012-NMSC-010, ¶ 34, 276 P.3d 943). To the extent that Ms. Silva seeks to recover for pecuniary loss resulting from the SSA’s failure to use care in communicating her economic information or in interfering with her prospective economic advantage, the Magistrate Judge found that her claims sound in misrepresentation or interference with contract rights. Doc. 46 at 9–10 (citing *Estate of Trentadue ex rel. Aguilar v. U.S.*, 397 F.3d 840, 854–55 (10th Cir. 2005); *Bergman*, 751 F.2d at 317; *Moessmer*, 760 F.2d at 237–38). Finally, the Magistrate Judge found that, to the extent that Ms. Silva retains common law claims for negligent or intentional infliction of emotional distress by the SSA outside of these exceptions, she fails to state a claim under New Mexico law because the facts of this case do not satisfy the elements of those torts. See Doc. 46 at 10 (citing *Castillo v. City of Las Vegas*, 2008-NMCA-141, 145 N.M. 205, 195 P.3d 870).

In her written objections to the Supplemental PFRD, Ms. Silva argues that “this case is a personal injury tort negligence case and does not sound in defamation nor does it fall under any of the exceptions under 2680(h).” Doc. 47 at 5 (citing *Quinones v. United States*, 492 F.2d 1269 (3rd Cir. 1974)). She then submits that the interference with contractual relations exception does not apply because Social Security is not a contract and the SSA’s actions were intentional, though she later admits that “[n]ot following basic techniques to ensure accuracy … is a failure to exercise duty of care” sounding in negligence. *Id.* Ms. Silva also recognizes that New Mexico allows recovery for stand-alone emotional distress only in limited circumstances, but she argues that the specialized nature of her contractual relationship with the administration “naturally contemplated that reasonable care would be taken to avoid the infliction of severe emotional distress.” Doc. 47 at 3. Ms. Silva concludes by asserting she is entitled to compensation for the SSA’s abuse of its

governmental authority, drawing the analogy that private insurance companies are held accountable for errors that they make. *Id.* at 8. She asks the Court to reject the Supplemental PFRD and deny the United States' Motion to Dismiss. *Id.*

The United States also filed a Request for Supplementation and Recommendation to Report in which it agrees with the Magistrate Judge's dismissal of the case but disagrees with the Magistrate Judge's rejection of its argument that Ms. Silva's claims should be barred by Section 405(h) of the Social Security Act because they "arise" under the Act. Doc. 46 at 1. The United States submits that the "SSA typically takes a more expansive read of [the bar on lawsuits in] § 405(h)" but it does not cite any legal authority to explain why the SSA's broader interpretation of that section is correct. *See id.* The Court finds that it need not resolve this issue because it agrees with the United States' other bases for dismissal which the Magistrate Judge adopted in his PFRD.

## DISCUSSION

District Judges may refer dispositive motions to Magistrate Judges for proposed findings and a recommended disposition pursuant to 28 U.S.C. § 636 and Rule 72 of the Federal Rules of Civil Procedure. *See* 28 U.S.C. § 636(b)(1)(B); Fed. R. Civ. P. 72(b)(1). "Within 14 days after being served with a copy of the [magistrate judge's] recommended disposition, a party may serve and file specific written objections to the proposed findings and recommendations." 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b)(2). To preserve an issue for review, a party's objections must be "both timely and specific." *United States v. One Parcel of Real Prop.*, 73 F.3d 1057, 1060 (10th Cir. 1996). In reviewing such objections, the district judge must "make a *de novo* determination of those portions of the [PFRD] ... to which objection is made." 28 U.S.C. § 636(C); *see also* Fed. R. Civ. P. 72(b)(3). While the district judge must conduct a *de novo* review

of the record, no specific findings are required, and the Court may place whatever reliance it chooses on the magistrate judge's recommendation. *See Garcia v. City of Albuquerque*, 232 F.3d 760 (10th Cir. 2000); *United States v. Raddatz*, 447 U.S. 667, 676 (1980).

Ms. Silva does not disagree with the applicable legal standards set out by the Magistrate Judge. As noted, her disagreement is that her claims sound in intentional conduct and are thereby excluded from the FTCA's waiver of liability by Section 2680(h). Although at points she argues that the SSA's actions were intentional, Ms. Silva primarily argues that the SSA's failures were in exercising a duty of reasonable care—textbook negligence. Having considered Ms. Silva's objections and conducted a *de novo* review of the record, the Court overrules her objections. The one case supporting Ms. Silva's position that her claim does not sound in an exception to the FTCA, *Quinones*, 492 F.2d 1269, reasoned that defamation is distinct from and cannot be caused by simple negligence—permitting suit for reputational injuries arising from the negligent failure to maintain personnel records. This proposition has been rejected by several other federal courts of appeals, including the Tenth Circuit. *See Jimenez-Nieves*, 682 F.2d 1 at 3; *Bergman*, 751 F.2d at 317; *Moessmer*, 760 F.2d at 237–38; *Talbert*, 932, F.2d at 1067. Ms. Silva has presented no compelling or binding authority sufficient to permit the Court to depart from this majority reasoning. To the extent that Ms. Silva argues that her contractual relationship with the administration gave rise to a special duty of care under New Mexico law, the Court notes that Social Security is not a contract (which Ms. Silva admits). Moreover, any economic loss resulting from interference with future contracts Ms. Silva attempted to enter because of the SSA's failures are barred by Section 2680(h)'s exception for “claim[s] arising out of … interference with contract rights.” § 2680(h).

Finally, Ms. Silva has alleged no conduct and provided no authority that permits the Court to allow a common-law claim of negligent or intentional infliction of emotional distress to proceed here, as the Magistrate Judge explains. *See* Doc. 46 at 10. As the New Mexico Supreme Court explained in *Fernandez v. Walgreen Hastings Co.*, 1998-NMSC-039, 126 N.M. 263, 968 P.2d 774, negligent infliction of emotional distress is an “extremely narrow tort that compensates a bystander who has suffered severe emotional shock as a result of witnessing a sudden, traumatic event that causes serious injury or death to a family member.” *Id.* at 777. And to make out a case of *intentional* infliction of emotional distress, Ms. Silva must plead conduct on the part of the United States that is “extreme and outrageous,” a standard which has been described as requiring conduct that is “so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.” *Castillo*, 195 P.3d at 876 (citations and internal quotations omitted). The Court agrees with the Magistrate Judge’s conclusion that while the conduct Ms. Silva alleges is highly unfortunate and has no doubt caused her emotional distress over many years, she has not made out an actionable case of negligent or intentional infliction of emotional distress under the prevailing law.

## CONCLUSION

Ms. Silva suffered a wrong at the hands of the federal government and has experienced resulting financial and emotional harm. Unfortunately, as the Magistrate Judge found, the FTCA expressly bars her financial claims and New Mexico common law does not recognize her emotional distress claim. The Court accordingly concludes that the United States’ Motion [Doc. 31] must be **GRANTED**, and that this case must be **DISMISSED WITHOUT PREJUDICE**.

Dated this 4th day of January, 2021.



MARTHA YAZQUEZ  
United States District Judge

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW MEXICO

BARBARA SILVA,

Plaintiff,

v.

CV 17-1224 MV/JHR

UNITED STATES OF AMERICA,

Defendant.

**PROPOSED FINDINGS AND RECOMMENDED DISPOSITION**

This matter comes before the Court pursuant to the Order of Reference entered by presiding District Judge Martha Vazquez on August 28, 2019, which directed the undersigned Magistrate Judge to “perform any legal analysis required to recommend to the Court an ultimate disposition of [this] case.” [Doc. 39]. The Court has carefully reviewed the docket, including Defendant’s Motion to Dismiss or, in the Alternative, Motion for Summary Judgment and Memorandum in Support [Doc. 31] and Ms. Silva’s Response in Opposition to the government’s Motion [Doc. 34]. Having done so, the Court finds that it lacks subject matter jurisdiction to consider Ms. Silva’s claims under the Federal Tort Claims Act (“FTCA”), and therefore recommends that this case be dismissed without prejudice.<sup>1</sup>

**I. INTRODUCTION**

There is no question that Ms. Silva has been harmed. There is also no question that the United States government all but admitted fault for at least some of the harm Ms. Silva has endured because of its negligence in a letter it sent to her in November 2015. [Doc. 31-1, p. 7].

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<sup>1</sup> “It is fundamental, of course, that a dismissal for lack of jurisdiction is not an adjudication of the merits and therefore dismissal must be without prejudice.” *Brown v. Buhman*, 822 F.3d 1151, 1179 (10th Cir. 2016) (quoted authority and internal alterations omitted).

Unfortunately, the government's admission of fault in 2015 does not mean it must now pay Ms. Silva damages for what no one disputes happened in 1976 – when it issued her a social security number that belonged to another individual. The reason for this is straightforward. While the government is ordinarily immune from suit, Congress partially waived this immunity by enacting the FTCA. However, Congress also put a time limit on a victim's ability to pursue a claim: two years from the date the claim accrues. Ms. Silva argues that her claims in this case did not accrue until the government admitted fault in 2015, but the Court cannot agree. While the Court is not holding that Ms. Silva's claims necessarily accrued in 1993, it also finds that a reasonable person in Ms. Silva's position knew or should have known enough to seek professional representation or otherwise diligently search for the cause of her harm so as to enable her to pursue a claim sometime before 2015 (22 years after she was first made aware of the problem). To conclude otherwise would relieve Ms. Silva of her independent duty to protect her own legal and financial interests and undermine Congress' intent to place a reasonable temporal limitation on redress for the government's wrongful acts. Because the Court finds that a reasonable person in Ms. Silva's position should have discovered the cause of her damages before 2015, it must conclude that her suit against the government is barred by the FTCA's limitations provision – meaning that the Court lacks subject matter jurisdiction over this case, and that the case should be dismissed without prejudice.

## II. BACKGROUND<sup>2</sup>

Ms. Silva was issued a social security number that belonged to someone else when she was 10 years old, in June of 1976. [Doc. 23, p. 1]. In late 1992, while she was enlisted in the Navy, Ms.

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<sup>2</sup> The Court views the government's invocation of Rule 12(b)(1) and recitation of pertinent facts as alleged by Ms. Silva as a facial attack on the operative Complaint's invocation of the subject matter jurisdiction of the Court. Accordingly, the Court assumes the truth of the facts asserted in Ms. Silva's Complaint for the purposes of this decision. *See Holt v. U.S.*, 46 F.3d 1000, 1002-1003 (10th Cir. 1995).

Silva learned that a garnishment action was entered against her. [*Id.*]. In January 1993 she went to a Social Security Administration office and explained that someone else was using her social security number (“SSN”), that she had to keep clearing her credit report, and that she believed identity theft was involved. [*Id.*, p. 2]. While it issued Ms. Silva a new social security number and transferred wages paid from the old number to the new number for retirement purposes, the Administration did not correct Ms. Silva’s impression that her identity had been stolen, and refused to provide sufficient documentation to allow Ms. Silva to clear her name and continue serving in the Navy, resulting in her decision to accept an honorable discharge after 15 years of service.

Plagued by creditors and governmental entities for years, Ms. Silva began reaching out to politicians for assistance in compelling the Administration to respond. Relevant here, she wrote to Senator Martin Heinrich in September 2015 seeking assistance, explaining that the Administration issued the same social security number to her and another person and that she had tried and failed to change her military records so she could re-enlist. [Doc. 31-1, p. 12]. In response to this inquiry Ms. Silva received a letter from the office of the Regional Commissioner of Social Security in November 2015, admitting “fault in assigning you the Social Security number – xxx-xx-xxxx – previously assigned to another individual....” [Doc. 31-1, p. 7]. In closing, the Administration stated its sincere regret for “the error and the problems and inconvenience [Ms. Silva] experienced” as a result of its error. [*Id.*].

In April 2017 Ms. Silva submitted an administrative claim to the Administration, which it denied on June 13, 2017. [Doc. 31-1, pp.1-2]. Ms. Silva then filed suit against the Administration on December 13, 2017. [Doc. 1]. After the Court determined that her claims arise under the Federal Tort Claims Act (rather than the Social Security Act) the Court substituted the United States as the proper Defendant. [See Doc. 26]. The government answered the operative Complaint on May 21,

2019. [See Docs. 23, 25]. The government filed its Motion to Dismiss on July 25, 2019. [Doc. 31]. Ms. Silva responded on August 5, 2019, [Doc. 34], and supplemented her claim with additional evidence (a letter certifying that she is receiving service-connected disability compensation from the Department of Veterans Affairs) on December 2, 2019. [Doc. 40].

In its Motion to dismiss, the government argues that, among other things, Ms. Silva's failure to file her administrative claim for damages within two years of the incident bars her suit under the FTCA's statute of limitations. [Doc. 31, p. 8]. The government contends that once Ms. Silva was aware of the problem with her social security number in late 1992 and the Administration refused to provide her with adequate documentation to satisfy the Navy in early 1993 she was both aware of her injury and its cause, meaning she was required to file suit before January, 1995. [*Id.*, p. 9]. In response, Ms. Silva argues that her claims against the government did not accrue until it admitted fault in November 2015, meaning she had until November 2017 to file suit because the cause of her injury was "inherently unknowable" and incapable of detection despite her reasonable diligence until the government admitted fault. [See Doc. 34, pp. 4, 8, 13, 15].

The government's Motion asserts that this case must be dismissed for lack of subject matter jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(1). [Doc. 31, p. 4]. Thus, the determinative question here, and the linchpin of whether this Court has subject matter jurisdiction to hear Ms. Silva's claims, is whether her administrative claim accrued before April 2015 so that her claim was extinguished before it was filed in April 2017.

### **III. LEGAL STANDARDS**

Federal courts are courts of limited jurisdiction, and they must presume that they lack jurisdiction unless the party invoking federal jurisdiction proves otherwise. *See Kucera v. Central Intelligence Agency*, 754 F. App'x 735, 738 (10th Cir. 2018) (unpublished). While pro se litigants

are afforded liberal construction of their pleadings, they are required to establish jurisdiction just as any represented party. *Id.*

As summarized by the Tenth Circuit in *Bayless v. U.S.*, 767 F.3d 958 (10th Cir. 2014), the Federal Government and its agencies are generally immune from suit except where immunity is waived through positive law, such as the enactment of the FTCA. *See id.* at 964-965 (citations omitted). Federal courts lack jurisdiction over tort claims against the government unless they are brought within the confines of the FTCA, which decrees that a tort claim against the government is “forever barred unless it is presented to the appropriate Federal agency within two years after such claim accrues.” 28 U.S.C. § 2401(b). Section 2401(b) thus requires reasonably diligent presentation of tort claims against the Government. *Bayless*, 767 F.3d at 964-965.

Ordinarily, the general accrual rule for FTCA claims is the “injury-occurrence rule,” but in “exceptional” cases courts apply the “discovery rule”: “the date of accrual is when that reasonably diligent plaintiff knows or should have known of both the existence and cause of the injury.” *Id.* (citation omitted). The parties’ arguments assume that the discovery rule applies here, and the Court agrees. The disagreement lies in when Ms. Silva discovered, or should have discovered, her injury and its cause.

#### **IV. ANALYSIS**

The Court rejects the government’s position that Ms. Silva’s claim accrued as soon as she was denied an acceptable letter for the purposes for re-enlisting with the Navy in early 1993. However, the Court also rejects the notion that Ms. Silva could wait for over 20 years, all the while enduring creditors and independently seeking to clear her name, to investigate and to bring a claim against the government to recover damages resulting from its negligent act (which itself occurred in 1976). The Social Security Administration’s failure to provide Ms. Silva with appropriate

documentation to permit her to re-enlist with the Navy was one of many events that should have put Ms. Silva on notice that suit against the government was a possibility, if not necessary. As the Supreme Court recognized in 1979 and the Tenth Circuit reiterated in 1991, “[a]ccrual need not await ‘awareness by the plaintiff that [her] injury was negligently inflicted.’” *Bradley v. Veterans Admin.*, 951 F.2d 268, 270 (10th Cir. 1991) (quoting *U.S. v. Kubrick*, 444 U.S. 111, 123 (1979)). As stated in *Kubrick*, the Supreme Court was

unconvinced that for statute of limitations purposes a plaintiff’s ignorance of [her] legal rights and [her] ignorance of the fact of [her] injury or its cause should receive identical treatment. That [s]he has been injured in fact may be unknown or unknowable until the injury manifests itself; and the facts about causation may be in the control of the putative defendant, unavailable to the plaintiff or at least very difficult to obtain. The prospect is not so bleak for a plaintiff in possession of the critical facts that [s]he has been hurt and who has inflicted the injury. [Sh]e is no longer at the mercy of the latter. There are others who can tell [her] if [s]he has been wronged, and [s]he need only ask.

444 U.S. at 122. What this means for Ms. Silva is that she was required to at least seek help, like hiring an attorney to investigate her claims, in order to toll the discovery period. Waiting over 20 years for the government to affirmatively admit fault before submitting a claim for damages for malfeasance committed decades earlier simply cannot be considered “reasonably diligent” for the purposes of the discovery rule.

The exact date Ms. Silva’s claims accrued is not clear on the present record but, contrary to her position, it is clear that Ms. Silva was aware of the extent and cause of her injuries before the government admitted fault in November 2015. [Doc. 31-1, p. 12]. Moreover, even if the Court were to assume that Ms. Silva was not subjectively aware of the cause of her injuries, a reasonably diligent person in her position should have known or would have inquired further into the cause of her troubles before 2015. Without such a record here, Ms. Silva’s administrative claim, and by extension this lawsuit, are untimely.

**V. RECOMMENDATION**

Because Ms. Silva was aware or should have been aware of both the existence and cause of her claimed injuries more than two years before she finally decided to pursue a claim against the government, the Court finds and concludes that she failed to bring suit within the limitations period provided by the FTCA and that it lacks subject matter jurisdiction over this case. Therefore, the undersigned recommends that the Court dismiss this case without prejudice.

Wherefore,

**IT IS HEREBY RECOMMENDED** that the United States' Motion to Dismiss pursuant to Federal Rule of Civil Procedure 12(b)(1) [Doc. 31] be **granted**, and that this case be **dismissed without prejudice**.



Jerry H. Ritter  
U.S. Magistrate Judge

**THE PARTIES ARE FURTHER NOTIFIED THAT WITHIN 14 DAYS OF SERVICE of a copy of these Proposed Findings and Recommended Disposition, they may file written objections with the Clerk of the District Court pursuant to 28 U.S.C. § 636(b)(1). A party must file any objections with the Clerk of the District Court within the fourteen-day period if that party wants to have appellate review of the proposed findings and recommended disposition. If no objections are filed, no appellate review will be allowed.**

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW MEXICO

BARBARA SILVA,

Plaintiff,

v.

CV 17-1224 MV/JHR

UNITED STATES OF AMERICA,

Defendant.

**SUPPLEMENTAL PROPOSED FINDINGS  
AND RECOMMENDED DISPOSITION**

This matter comes before the Court pursuant to the Order Sustaining Plaintiff's Objection and Rejecting Magistrate Judge's Proposed Findings and Recommended Disposition, [Doc. 44], filed July 20, 2020, and the Order of Reference entered by presiding District Judge Martha Vazquez on August 28, 2019, which directed Magistrate Judge Jerry Ritter to "perform any legal analysis required to recommend to the Court an ultimate disposition of [this] case." [Doc. 39]. Judge Vazquez rejected my recommendation that this case be dismissed without prejudice for lack of subject matter jurisdiction under the Federal Tort Claims Act ("FTCA") (untimeliness) and remanded the case for further consideration of the grounds for dismissal stated in the United States' Motion to Dismiss. [See Docs. 31, 34, 42 and 43]; *see generally* 28 U.S.C. § 2401. Having carefully reviewed the briefing a second time and after consulting the applicable law, I conclude that the Court still lacks subject matter jurisdiction to consider Ms. Silva's claims under the FTCA, this time because the Act's exceptions apply, and therefore I again recommend that the government's motion be **granted** and that this case be **dismissed without prejudice**.<sup>1</sup>

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<sup>1</sup> "It is fundamental, of course, that a dismissal for lack of jurisdiction is not an adjudication of the merits and therefore dismissal must be without prejudice." *Brown v. Buhman*, 822 F.3d 1151, 1179 (10th Cir. 2016) (quoted authority and internal alterations omitted).

## **I. INTRODUCTION**

The government mistakenly issued the same social security number to Ms. Silva that it had already issued to another person. [Doc. 23, p. 1]. There is no question that Ms. Silva was harmed by the resulting confusion of identities over many years, and the government all but admitted fault for at least some of the harm its negligence caused in a letter it sent to her in November 2015. [Doc. 31-1, p. 7]. Unfortunately, the government’s admission of fault does not mean that Ms. Silva can state a claim to recover monetary damages for its failures.

As a general matter, the United States government enjoys sovereign immunity, which has only been waived in narrow circumstances by the Federal Tort Claims Act (“FTCA”). Even where, as here, the government has clearly erred and admitted fault, recovery for certain torts, and by extension, certain categories of damages, is prohibited by the language of the Act and case law construing it. The wisdom of these prohibitions is for Congress to determine, and several federal appellate courts, including the Tenth Circuit, have reasoned that claims analogous to Ms. Silva’s cannot be brought even where a non-discretionary duty is identified. Finally, to the extent that Ms. Silva’s non-contractual claims are not barred by the FTCA’s exceptions, she does not state a valid claim for infliction of emotional distress under New Mexico law as required to recover under the FTCA. Therefore, I again recommend that this case be dismissed without prejudice.

## **II. BACKGROUND**

Ms. Silva was issued a social security number that belonged to someone else when she was 10 years old, in June of 1976. [Doc. 23, p. 1]. In late 1992, while she was enlisted in the Navy, Ms. Silva became aware that a garnishment action was entered against her. [*Id.*]. In January 1993 she went to a Social Security Administration office and explained that someone else was using her social security number (“SSN”). [*Id.*, p. 2]. At that time, Ms. Silva told the Administration that she

had to keep clearing her credit report and that she believed identity theft was involved. [*Id.*]. While the Administration issued Ms. Silva a new social security number and transferred wages paid from the old number to the new number for retirement purposes, it did not correct Ms. Silva’s impression that her identity had been stolen and refused to provide sufficient documentation to allow Ms. Silva to clear her name and continue serving in the Navy, resulting in her decision to accept an honorable discharge after 15 years of service.

Plagued by creditors for years, Ms. Silva reached out to politicians to compel the Administration to take meaningful action. She wrote to Senator Martin Heinrich in September 2015, explaining that the Administration issued the same social security number to her and another person and that she had tried and failed to change her military records so she could re-enlist. [Doc. 31-1, p. 12]. Upon the Senator’s inquiry, Ms. Silva received a letter from the office of the Regional Commissioner of Social Security in November 2015, admitting “fault in assigning you the Social Security number … previously assigned to another individual....” [Doc. 31-1, p. 7 (ellipsis supplied)]. The Administration stated its sincere regret for “the error and the problems and inconvenience [Ms. Silva] experienced.” [*Id.*].

After notifying the Administration that she intended to sue and receiving an administrative denial, Ms. Silva filed her initial Complaint in this Court on December 13, 2017. [Doc. 1]. Her operative Complaint states three claims. [*See* Docs. 23, 26]. First, Ms. Silva alleges that the Social Security Administration employee who issued her (the already-issued) social security number had a duty to ensure its accuracy. [Doc. 23, p. 3] Second, she claims that a second Administration employee had a duty to verify the first employee’s actions to ensure accuracy. [*Id.*]. Third, Ms. Silva states that the Administration had a duty to notice the discrepancies in her retirement earnings as wages were earned and correct its mistake(s). [*Id.*; *see also* Doc. 23, p. 4]. As relief, she asks

that the Court hold the government accountable for its “deliberate indifference and negligent errors” affecting her privacy rights through an award of damages pursuant to the Federal Tort Claims Act and an order requiring the Administration to contact all private credit reporting and governmental agencies to replace the incorrect number with the correct one. [Doc. 23, p. 8].

The government filed a Motion to Dismiss pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6) on July 25, 2019, claiming that Ms. Silva’s claims are barred because the United States did not waive sovereign immunity under the FTCA. [Doc. 31, p. 5]. First, the government argued that Ms. Silva’s claims arise under the Social Security Act, not the Tort Claims Act, leaving the Court without subject matter jurisdiction. [*Id.*, pp. 5-7]. Second, the government argued that Ms. Silva’s claims sound in defamation, which is excepted from the Tort Claims Act’s waiver of immunity. [*Id.*, pp. 7-8]. Third, it argued that Ms. Silva’s claims were untimely. [*Id.*, pp. 8-10]. Finally, the government argued that Ms. Silva’s claims are not cognizable under New Mexico law, precluding its liability under the Federal Tort Claims Act’s waiver. [Doc. 31, pp. 10-15]. Ms. Silva responded to the motion on August 5, 2019 and submitted additional evidence on December 2, 2019. [Docs. 34, 40].

Finding the government’s timeliness argument persuasive, I recommended that Ms. Silva’s claims be dismissed without prejudice for lack of federal subject matter jurisdiction on May 16, 2020. [Doc. 42]. Ms. Silva objected, and presiding District Judge Vazquez sustained her objections on July 20, 2020. [Docs. 43, 44]. Judge Vazquez accordingly rejected my proposed disposition of this case and remanded the matter to me for further analysis of the issues raised by the government’s motion to dismiss. [Doc. 44, p. 1].

### III. LEGAL STANDARDS

The government's Motion asserts that this case must be dismissed for lack of subject matter jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(1). [Doc. 31, p. 4]. Federal courts are courts of limited jurisdiction, and they must presume that they lack jurisdiction unless the party invoking federal jurisdiction proves otherwise. *See Kucera v. Central Intelligence Agency*, 754 F. App'x 735, 738 (10th Cir. 2018) (unpublished). While filings of pro se litigants are afforded liberal construction, all pleadings are held to this standard. *Id.* "Rule 12(b)(1) motions generally take one of two forms: (1) a facial attack on the sufficiency of the complaint's allegations as to subject matter jurisdiction; or (2) a challenge to the actual facts upon which subject matter jurisdiction is based." *Ruiz v. McDonnell*, 299 F.3d 1173, 1180 (10th Cir. 2002) (citation omitted). "On a facial attack, a plaintiff is afforded safeguards similar to those provided in opposing a Rule 12(b)(6) motion: the court must consider the complaint's allegations to be true." *De Baca v. United States*, 403 F. Supp. 3d 1098, 1113 (D.N.M. 2019) (Browning, J.) (citation omitted). The Court finds that the government's jurisdictional arguments invoking sovereign immunity do not require analysis of the facts underlying Ms. Silva's claims; therefore, resolution of this case turns on the allegations stated in the complaint. *Garling v. United States Envtl. Prot. Agency*, 849 F.3d 1289, 1293 n.3 (10th Cir. 2017) ("[W]hen a defendant asserts that [a] FTCA complaint fails to allege sufficient facts to support subject matter jurisdiction, the trial court must apply a standard patterned on Rule 12(b)(6) and assume the truthfulness of the facts alleged.") (quoted authority omitted).

The government's motion also relies on Federal Rule of Civil Procedure 12(b)(6), which permits dismissal of a plaintiff's case for failure to state a claim only on review of the facts as alleged. [See generally Doc. 31]. That is, when resolving motions brought under Rule 12(b)(6), the Court accepts as true all well-pleaded factual allegations in the Complaint and views them in

the light most favorable to Ms. Silva, drawing all reasonable inferences in her favor. *See Garling v.* 849 F.3d at 1292-1293. In other words, the Court may only dismiss a case for failure to state a claim under Rule 12(b)(6) where a reasonable person could not plausibly conclude that the facts alleged could result in a finding of liability. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (“A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.”).

#### **IV. ANALYSIS**

While I recommend that the Court find that the government has a dispositive jurisdictional argument, it has another argument which is not dispositive. I address that argument first.

**A) The government’s argument, that Ms. Silva’s claims arise under the Social Security Act (because it issues social security numbers and maintains social security records) thereby precluding her suit under the Federal Tort Claims Act, should be rejected.**

The United States’ position that Ms. Silva’s claims are barred under the FTCA because they arise under the Social Security Act should be rejected. [Doc. 31, pp. 5-7]. The First Circuit found the government’s position as argued here “unacceptable” in *Jimenez-Nieves v. U.S.*, 682 F.2d 1, 3-4 (1st Cir. 1982). There, the government raised the same type of argument it does here – that the FTCA claim was excepted by Section 405(h) of the Social Security Act. *Id.* The appellate court held that some of *Jimenez-Nieves’* claims did indeed fall within the 405(h) exception, but not the allegation that an agency employees’ negligent typographical error caused the government to dishonor benefit checks. *Id.* at 2-3. The court determined that “[t]he language of § 405(h) [of the Social Security Act] applies only to a ‘claim arising under th[at] subchapter[]’ [and] [a]n action for damages based on a tort committed in the course of administering the Social Security Act does not arise” under the Act. *Id.* at 3-4. The allegation of negligence, therefore, merited further examination by the district court for possible recovery under the tort law of Puerto Rico. *Id.* at 6.

While *Jimenez-Nieves* is not binding on this Court, its reasoning is highly persuasive. As the First Circuit noted, the government's rationale would effectively abolish a victim's ability to sue the United States' under the FTCA anytime another statutory or regulatory scheme applies because of the procedural requirements and unique discretion implicated by administrative review. *See* 682 F.2d 1 at 3. The better rule is that a tort, otherwise actionable under the FTCA but committed in the course of administering a different federal law, does not arise under the latter act for the purposes of excepting the claim from review as a matter of federal jurisdiction. The ultimate jurisdictional analysis for a tort committed while administering a federal program is whether it is within the waiver of sovereign immunity in the FTCA.

**B) Ms. Silva's claims are barred by an exception to the FTCA's waiver of liability, requiring dismissal for want of federal subject matter jurisdiction.**

The FTCA states that “[t]he United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances[.]” 28 U.S.C. § 2674. “If a claim against the government falls within an exception to the FTCA, the cause of action must be dismissed for want of federal subject matter jurisdiction.” *Estate of Trentadue ex rel. Aguilar v. U.S.*, 397 F.3d 840, 853 (10th Cir. 2005)). There are many exceptions to the government's tort liability due to the discretionary nature of many government actions, but the United States does not invoke those here. Instead, it cites the exception of Section 2680(h) disallowing “[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).

As noted, Ms. Silva's claim is that an Administration employee negligently issued a Social Security Number that already belonged to another individual; a second employee negligently reviewed the first employee's actions, failing to detect the error; and subsequent employees failed

to recognize and correct the error(s) in subsequent years. [See Doc. 23]. Ms. Silva does not label these claims, but federal and New Mexico case law indicate that they sound in defamation, negligent misrepresentation, interference with contractual rights, and negligent or intentional infliction of emotional distress based on the injuries to reputational and economic interests for which Ms. Silva is claiming damages.

**i. Defamation (Libel & Slander):**

Ms. Silva's claims seek to recover for injuries to her economic and personal reputation due to confusing her financial history with the negative history of another. While the Administration did not affirmatively spread lies about Ms. Silva, its negligent association of two identities was to the detriment of her financial reputation. Defamation is excepted from the FTCA waiver of sovereign immunity by § 2680(h). "The interest served by allowing recovery for defamation ... is the interest of compensating individuals for injury to reputation." *Smith v. Surden*, 2012-NMSC-010, ¶ 34, 276 P.3d 943. As a result, "[a]ll ... claims which involve injury to [Ms. Silva's] reputation and the consequent harm suffered by [her] when the Social Security Administration actions ... implicitly communicated defamatory statements about [her] are ... barred by the Federal Tort Claims Act." *Jimenez-Nieves v. U.S.*, 682 F.2d 1, 3-4 (1st Cir. 1982).

Although not directly on point, the Tenth Circuit held two years after *Jimenez-Nieves* that harm to reputation caused by failure of a federal agency to "correct" its records fits within the FTCA's exception for defamation. *Bergman v. U.S.*, 751 F.2d 314, 317 (10th Cir. 1984). Other circuits have issued similar holdings. For example, the Eighth Circuit reviewed the negligent maintenance of a CIA agent's employment records and found that the resulting communication of false and derogatory information fell within the FTCA defamation exception. *Moessmer v. U.S.*, 760 F.2d 236, 237-238 (8th Cir. 1985). Likewise, the Fourth Circuit held that a breach of the duty

to use reasonable care in maintaining the accuracy of personnel records fell within the defamation exception when harm resulted from untrue communication. *Talbert v. U.S.*, 932 F.2d 1064 (4th Cir. 1991). As that court said: “[a]rtful pleading cannot alter the fact that [a] claim ‘resounds in the heartland of the tort of defamation [when] the injury is to reputation [and] the conduct is the communication of an idea, either implicitly or explicitly.’” *Id.* (quoting *Jimenez-Nieves v. U.S.*, 682 F.2d 1, 6 (1st Cir. 1982) (bracketed language supplied)).

Therefore, to the extent that Ms. Silva claims damages to her reputation as a result of the Administration’s false statements, the United States retains immunity.

**ii. Negligent (and Willful) Misrepresentation:**

The Tenth Circuit has defined misrepresentation under the FTCA as violation of the duty to use care in obtaining and communicating information upon which a party may reasonably be expected to rely in the conduct of economic affairs. *Estate of Trentadue ex rel. Aguilar v. U.S.*, 397 F.3d 840, 854-855 (10th Cir. 2005). Proving such a claim requires reliance and pecuniary loss. *Id.* As with defamation, harm to reputation caused by failure of a federal agency to “correct” its records fits within the FTCA’s exception for misrepresentation and deceit. *See Bergman v. U.S.*, 751 F.2d 314, 317 (10th Cir. 1984). Therefore, to the extent that Ms. Silva claims that she relied on the misrepresentations of the SSA, resulting in her pecuniary loss, the United States retains immunity.

**iii. Interference with Contractual Rights:**

To the extent that Ms. Silva’s claims state a claim for interference with contract rights, they are barred by the § 2680(h) exception to the FTCA. The Eighth Circuit case of *Moessmer v. U.S.*, 760 F.2d 236 (8th Cir. 1985), is analogous. There, the Eighth Circuit reasoned that interference with prospective economic advantage is the equivalent of a claim for interference with contract

rights. *Id.*, at 237-38. Ms. Silva claims harm resulting from the Administration's acts which caused her to lose out on economic opportunities and advantages she might have otherwise obtained had she been issued a unique social security number. To the extent that Ms. Silva claims that the actions of the SSA resulted in interference with her prospective economic advantage, the United States retains immunity.

**iv. Negligent or Intentional Infliction of Emotional Distress:**

Obviously, not all common law claims are barred by the § 2680(h) exception to the FTCA waiver of sovereign immunity. *See Jimenez-Nieves v. U.S.*, 682 F.2d 1, 6 (1st Cir. 1982). Intentional infliction of emotional distress is a common example. *See, e.g., Estate of Trentadue ex rel. Aguilar v. U.S.*, 397 F.3d 840, 854-855 (10th Cir. 2005). However, under New Mexico law, prosecution of the standalone tort of negligent infliction of emotional distress generally<sup>2</sup> requires the plaintiff to be a bystander who suffers severe emotional shock due to witnessing trauma to a family member, and recovery for the tort of intentional infliction of emotional distress requires proof of "socially reprehensible" extreme and outrageous conduct, not mere negligence. *Castillo v. City of Las Vegas*, 2008-NMCA-141, 145 N.M. 205, 195 P.3d 870. Therefore, to the extent that Ms. Silva argues that the SSA's actions caused her emotional distress, the United States retains immunity because she has failed to state a valid claim under New Mexico's formulation of both negligent and intentional infliction of emotional distress.

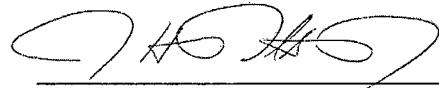
**V. RECOMMENDATION**

Ms. Silva suffered a wrong at the hands of the federal government and has alleged resulting financial and emotional harm. The FTCA, however, expressly bars her financial claims, and New Mexico common law does not recognize her emotional distress claim. Therefore, because I

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<sup>2</sup> With one exception not relevant here. *See Madrid v. Lincoln County Medical Center*, 1996-NMSC-049, 122 N.M. 269, 923 P.2d 1154.

conclude that the Court lacks subject matter jurisdiction over this case, I **RECOMMEND** that the United States' Motion to Dismiss pursuant to Federal Rule of Civil Procedure 12(b)(1) and 12(b)(6) [Doc. 31] be **granted**, and that this case be **dismissed without prejudice**.



Jerry H. Ritter  
U.S. Magistrate Judge

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