

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
CENTRAL DIVISION**

ORDEAN R. CLAUDE and
MARCELLA M. CLAUDE,

Plaintiffs,

vs.

UNITED STATES OF AMERICA, and
CHRISTOPHER SMOLA,

Defendants.

No. C00-3010MWB

**MEMORANDUM OPINION AND
ORDER REGARDING UNITED
STATES' MOTION TO DISMISS OR,
IN THE ALTERNATIVE, MOTION
FOR SUMMARY JUDGMENT**

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I. INTRODUCTION

This matter is before the court pursuant to defendant's, United States of America ("United States"), February 23, 2001, Motion to Dismiss or, in the Alternative, Motion for Summary Judgment in Favor of the United States (#57). In support of these motions, defendant United States asserts the following: If plaintiffs' complaint is construed as involving an express or implied contract with the United States, exclusive jurisdiction for this claim lies with the Court of Federal Claims; if plaintiffs' complaint is construed as an action brought under the Federal Tort Claims Act ("FTCA"), recovery is barred because plaintiffs have failed to satisfy the jurisdictional prerequisite of filing an administrative claim with the agency, and the actions that form the basis of plaintiffs' complaint meet the discretionary function exception to the limited waiver of sovereign immunity provided by the FTCA; and if plaintiffs' complaint is construed as alleging interference with contract rights, recovery is barred under 28 U.S.C. § 2680(h). On February 28, 2001, plaintiffs filed a resistance to defendant's motion, asking that the case not be dismissed. Additionally, plaintiffs ask that this court reconsider United States Magistrate Judge Zoss's prior Order denying plaintiffs' request for a settlement conference.¹

II. BACKGROUND

In February of 1999, the plaintiffs, Ordean and Marcella Claude (hereinafter referred to as the "Claudes"), owned a single family dwelling located at 1300 Seneca Street in Webster City, Iowa. At that time, the Claudes inquired about the possibility of obtaining

¹By Order dated February 13, 2001, Judge Zoss stated that "the court is unwilling to referee a meaningless argument that has no chance of leading to a voluntary resolution of the case." *See* Docket #52. Judge Zoss explained to the plaintiffs that a settlement conference given the circumstances in this case would be pointless, because defendant United States is not willing to settle the case for anything approaching what the plaintiffs would require to settle the case, thereby rendering a settlement conference fruitless.

federal grant funds from the United States Department of Agriculture (“USDA”) office of Rural Development to make repairs to the roof of their dwelling. An initial inspection of the home revealed that the roof was leaking and had already caused damage to the interior of the Claudes’ home. By letter dated February 17, 1999, the Claudes were notified that they were found to be qualified recipients of the grant money and were told to solicit bids for the needed repairs. The Claudes, therefore, obtained four bids and on March 18, 1999, signed a contract with contractor Christopher Smola, because he made the lowest bid.

It was later discovered, however, that Mr. Smola was not insured in connection with the roofing work. Moreover, at one point, while Mr. Smola was working on the roof, he apparently tore off part of the shingles and placed some type of protective covering on the roof. The protective covering that Mr. Smola placed on the Claudes’ roof was not sufficiently secured, because after heavy rains, water leaked into the house, and allegedly caused additional damage. Mr. Smola failed to complete the roofing work on the Claudes’ home in a timely fashion, and when the deadline under the contract for Mr. Smola to complete the work had passed, the Claudes hired a new and different contractor, namely, Jack Pelz, to complete the work. After obtaining the Claudes’ signature indicating that the repair work was completed to their satisfaction, Rural Development employees released the grant funds to Mr. Pelz. Mr. Smola was not paid by Rural Development.

On November 20, 1999, and December 10, 1999, the Claudes sent letters to USDA Rural Development alleging that their civil rights were violated and that they were going to go to court, asking for \$15,000.00 in damages, and \$25,000.00 in punitive damages. In response to those letters, Ellen King Huntoon, State Director for Rural Development, by letter dated December 16, 1999, stated, among other things, that “[a]fter reviewing this file with my staff, I find no apparent violation of your civil rights. You may specify in writing how your civil rights have been violated.” See Defendant’s Exhibit N. Thereafter, on January 11, 2000, the Claudes filed suit in Hamilton County District Court against three

USDA Rural Development employees and the original contractor, Mr. Smola. Because the three Rural Development employees were acting within the scope of their employment, defendant United States was substituted for those three employees and, on January 31, 2000, removed the case from state court to this court. Presently, the United States asserts several reasons for dismissal of the Claudes' complaint; its reasons, however, are contingent upon how the Claudes' complaint is construed by this court. In other words, defendant United States sets forth different reasons supporting dismissal in this case based on whether the Claudes' complaint is construed as a contract action or as a tort action. Therefore, the court must examine the Claudes' complaint.

In their complaint, the Claudes² allege the following:

- (1) We file this complaint on these defendants in District court for negligence in accepting the Contractor that they approved to do the job of roofing on the Claude's home located at 1300-Seneca Street in Webster City, Iowa, causing considerable damage inside their home.
- (2) Also for interfering with the work, causing trouble between the contractor and the Claude's, so he could go to the other defendants to get his way, to try and not have to do the job, and still get paid for it. This all started just after the first of April and lasted clear up too the 1st of June, at which time his contract ran out and he still hadn't finished the roof.
- (3) Mary Beth Juergens, Karen K. Reuter, did harass the Claude and humiliated them, causing Mental Distress, and making a nuisance of themselves, adding more fuel to the fire, as they say. As for Randy Hildreth, he said he's speak to them about it, but if he did, it didn't do any good, because they kept it up.
- (4) Contractor didn't care if he did the work or not after getting the job. But the Claude's was told by Mary Beth and Karen K. that, they couldn't do nothing about it till his time was up. The contractor took off one side of the upper part of the house and never covered it right and it rained in and ruined the upstairs and came clear down threw to the lower floor, ruining the carpet and the floor under it. It ruined every room except the bedroom. He didn't care. He left it like that for a week or longer, and these workers just sat and

²The Claudes appear *pro se* in this matter.

laughed at it. So the Claude's had to sit and do nothing about it. Because the Contractor wouldn't listen to the Claude's, he told them that he was taking his orders from Mary Beth Juergens and Karen K. Reuter and they told him, he could get on the Claude's roof anytime, even with no Insurance.

(5) So, because of all that was said and done. The Claudes is seeking \$25,000.00 in damages, plus the cost for them to pack and storing all their belongings, and for cost to relocate to live for whatever time it takes to repair their home and for moving back in, for all court cost and legal fees, Plus \$250,000.00 PUNITIVE DAMAGES, for past, present, and future damages, and for the Health hazard they're making us live in. We are unable to move or fix our home, because we only have our Social Security to live on.

(6) We only wanted to get our roof reshingled and ended up with our home ruined.

Plaintiffs' Complaint. The court concludes that the acts complained of by the Claudes are properly construed as torts brought under the Federal Tort Claims Act. Specifically, the court extracts from the Claudes' complaint the following claims: negligence, tortious interference with contract, and tortious infliction of severe emotional distress.³

³The court does not find that the acts complained of by the Claudes against defendant United States can be construed as contractual in nature. This is so primarily because the Claudes never contracted with defendant United States; rather, the Claudes entered into two contracts with two different contractors, namely, Christopher Smola and Jack Pelz. Even if the acts complained of by the Claudes could be construed as contractual in nature, exclusive jurisdiction of this case rests with the Court of Federal Claims, because the Claudes request \$25,000.00 in damages and \$250,000.00 in punitive damages. *See* 28 U.S.C. § 1346(a)(2) and 28 U.S.C. § 1491(a)(1). In *VS Ltd. P'ship v. Dep't of Housing and Urban Dev.*, 235 F.3d 1109 (8th Cir. 2000), the Eighth Circuit Court of Appeals explained that:

This being a contract action brought against the United States, our analysis must begin with the Tucker Act. The Tucker Act waives the United States' sovereign immunity as to contract actions but also vests exclusive subject matter jurisdiction over all such suits in excess of \$10,000.00 in the Court of Federal Claims. 28 U.S.C. § § 1346, 1491; *Mullally v. United States*, 95 F.3d 12, 14 (8th Cir. 1996) (actions against the United States founded upon a contract and exceeding \$10,000.00 fall within the exclusive jurisdiction of the Court of Federal Claims).

(continued...)

Accordingly, the court will address only the reasons asserted by defendant United States for dismissal of the Claudes' complaint as construed as a tort action, which include the following: the Claudes' failure to satisfy the jurisdictional pre-requisite of filing an administrative claim with the agency; the actions that form the basis of the Claudes' complaint meet the discretionary function exception to the limited waiver of sovereign immunity provided by the FTCA; and, the Claudes' recovery is barred under 28 U.S.C. § 2680(h).

III. LEGAL ANALYSIS

Initially, the court must determine which standard of review it will apply in this case. The United States has moved pursuant to Federal Rules of Civil Procedure 12(b)(1) (dismissal for lack of subject matter jurisdiction) and 12(b)(6) (failure to state a claim upon which relief can be granted), and, in the alternative, Federal Rule of Civil Procedure 56. While dismissal pursuant to Rule 12(b)(1) is appropriate at any time, technically a motion to dismiss pursuant to Rule 12(b)(6) must be filed prior to any responsive pleading, such as an answer. *See Westcott v. City of Omaha*, 901 F.2d 1486, 1488 (8th Cir. 1990). Here, on April 10, 2000, the United States filed an answer and, thus, the United States' Rule 12(b)(6) motion should have been brought pursuant to Federal Rule of Civil Procedure 12(c).⁴ Aware

³(...continued)

Id. at 1112. Immediately thereafter in a footnote, however, the Eighth Circuit Court of Appeals stated that “[i]n a few instances, a suit relating to a contract yet involving extra-contractual issues may be heard in a district court.” *Id.* at 1112 n.2. Here, even if this was one of those “few instances” where a “suit relating to a contract yet involving extra-contractual issues” can be heard in district court, as will be demonstrated later in this opinion, this court is without subject matter jurisdiction to entertain this action.

⁴Federal Rule of Civil Procedure 12(c), captioned “Motion for Judgment on the Pleadings,” provides:

(continued...)

of this technicality, the court decided to treat the United States' motion to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure as one for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure. Therefore, on March 14, 2001, this court notified the parties that the United States' motion to dismiss would be treated as a motion for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure.⁵ While the court admittedly did not specifically indicate in the Order that it was only treating the United States' motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) as a motion for summary judgment pursuant to Federal Rule of Civil Procedure 56, that was its intent. The court is fully aware of the differences that inure when matters outside the pleadings are considered by the court on a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(1) versus Federal Rule of Civil Procedure 12(b)(6), having examined this very issue in several published decisions. *See, e.g., Med-Tec, Inc. v. Kostich*, 980 F. Supp. 1315, 1321-22 (N.D. Iowa 1997); *Lockhart v. Cedar Rapids Community School Dist.*, 963 F. Supp. 805, 810-12 (N.D. Iowa 1997); *Thompson v. Thalacker*, 950 F. Supp. 1440, 1447-49 (N.D. Iowa 1996); *Slycord v. Chater*, 921 F. Supp. 631, 634-37 (N.D. Iowa 1996); *Quality Refrigerated Services, Inc. v. City of Spencer*, 908 F. Supp. 1471, 1481-83 (N.D. Iowa 1995). In this case, because the United States has

⁴(...continued)

After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings. If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

⁵The parties were given fourteen (14) days within which to supplement the motion and resistance thereto, if appropriate, in light of the court's Order. In response, both parties submitted supplemental briefs.

challenged whether this court has subject matter jurisdiction, the court must resolve this issue first. *Marine Equipment Management Co. v. United States*, 4 F.3d 643, 646 (8th Cir. 1993) (“Federal courts are not courts of general jurisdiction and have only the power that is authorized by Article III of the Constitution and the statutes enacted by Congress pursuant thereto.”), citing *Bender v. Williamsport Area School Dist.*, 475 U.S. 534, 541 (1986), citing in turn, *Marbury v. Madison*, 5 U.S. [1 Cranch] 137 (1803). This is so because if this court lacks subject matter jurisdiction to entertain this action, then the court does not even reach the question of summary judgment. Therefore, the court must determine whether the prerequisite of subject matter jurisdiction has been satisfied here. See, *Magee v. Exxon Corp.*, 135 F.3d 599, 601 (8th Cir. 1998); *Bradley v. American Postal Workers Union, AFL--CIO*, 962 F.2d 800, 802 n.3 (8th Cir. 1992).

A. Rule 12(b)(1) Challenges to Jurisdiction

For the court to dismiss for lack of subject matter jurisdiction under FED.R.CIV.P. 12(b)(1), the complaint must be successfully challenged on its face or on the factual truthfulness of its averments. *Titus v. Sullivan*, 4 F.3d 590, 593 (8th Cir. 1993). The court in *Titus* distinguished between the two kinds of challenges:

In a facial challenge to jurisdiction, 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. *Eaton v. Dorchester Dev., Inc.*, 692 F.2d 727, 731-32 (11th Cir. 1982). . . .

If the [defendant] wants to make a factual attack on the jurisdictional allegations of the complaint, the court may receive competent evidence such as affidavits, deposition testimony, and the like in order to determine the factual dispute. *Land v. Dollar*, 330 U.S. 731, 735 n.4 (1947) [footnote omitted]. The proper course is for the defendant to request an evidentiary hearing on the issue. *Osborn [v. United*

States], 918 F.2d [724,] 730 (citing *Crawford v. United States*, 796 F.2d 924, 928 (7th Cir. 1986)).

Id.

In *Osborn v. United States*, 918 F.2d 724 (8th Cir. 1990), the Eighth Circuit Court of Appeals presented its most exhaustive discussion of the procedures and requirements for determination of a 12(b)(1) motion to dismiss.

The district court was correct in recognizing the critical differences between Rule 12(b)(1), which governs challenges to subject matter jurisdiction, and Rule 56, which governs summary judgment. Rule 12 requires that Rule 56 standards be applied to motions to dismiss for failure to state a claim under Rule 12(b)(6) when the court considers matters outside the pleadings. [Citations omitted.] Rule 12 does not prescribe, however, summary judgment treatment for challenges under 12(b)(1) to subject matter jurisdiction where a factual record is developed. Nonetheless, some courts have held that Rule 56 governs a 12(b)(1) motion when the court looks beyond the complaint. We agree, however, with the majority of circuits that have held to the contrary. . . . [Citations omitted.]

The reason for treating a 12(b)(1) motion differently than a 12(b)(6) motion, which is governed by Rule 56 when matters outside the pleadings are considered, “is rooted in the unique nature of the jurisdictional question.” *Williamson [v. Tucker]*, 645 F.2d [404,] 413 [(5th Cir.), *cert. denied*, 454 U.S. 897 (1981)]. It is “elementary,” the Fourth [sic] Circuit stated, that a district court has “broader power to decide its own right to hear the case than it has when the merits of the case are reached.” *Id.* Jurisdictional issues, whether they involve questions of law or of fact, are for the court to decide. *Id.* Moreover, because jurisdiction is a threshold question, judicial economy demands that the issue be decided at the outset rather than deferring it until trial, as would occur with denial of a summary judgment motion.

Osborn, 918 F.2d at 729.

The court in *Osborn* found the distinction between facial and factual attacks on the complaint under 12(b)(1) to be critical. *Id.* (citing *Menchaca v. Chrysler Credit Corp.*, 613 F.2d 507, 511 (5th Cir.), *cert. denied*, 449 U.S. 953 (1980), and *Mortensen v. First Fed. Sav. & Loan Ass'n*, 549 F.2d 884, 891 (3d Cir. 1977)). The court stated that

[i]n the first instance, the court restricts itself to the face of the pleadings, and the non-moving party receives the same protections as it would defending against a motion brought under Rule 12(b)(6). The general rule is that a complaint should not be dismissed “‘unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.’” In a factual attack, the court considers matters outside the pleadings, and the non-moving party does not have the benefit of 12(b)(6) safeguards.

Id. at 729 n.6 (citations omitted). A factual challenge to jurisdiction under 12(b)(1) is unique:

[H]ere the trial court may proceed as it never could under 12(b)(6) or FED. R. CIV. P. 56. Because at issue in a factual motion is the trial court’s jurisdiction—its very power to hear the case—there is substantial authority that the trial court is free to weigh the evidence and satisfy itself as to the existence of its power to hear the case. In short, no presumptive truthfulness attaches to the plaintiff’s allegations, and the existence of disputed material facts will not preclude the trial court from evaluating for itself the merits of jurisdictional claims. Moreover, the plaintiff will have the burden of proof that jurisdiction does in fact exist.

Id. at 730 (quoting *Mortensen*, 549 F.2d at 891). The *Osborn* court stated that the proper course is for the defendant to request an evidentiary hearing on the issue, and, since no statute or rule prescribes the format of such a hearing, “‘any rational mode of inquiry will do.’” *Id.* (quoting *Crawford*, 796 F.2d at 929).

Once the evidence is submitted, the district court must decide the jurisdictional issue, not simply rule that there is or is not enough evidence to have a trial on the issue. [*Crawford*, 796

F.2d at 929.] The only exception is in instances when the jurisdictional issue is “so bound up with the merits that a full trial on the merits may be necessary to resolve the issue.” *Id.*

Id. In the present case, the court concludes that defendant United States has made a factual challenge to subject matter pursuant to Federal Rule of Civil Procedure 12(b)(1). Neither party has asked for an evidentiary hearing on the issue. Moreover, the court concludes that no adjudication of facts is necessary to address this challenge here because the parties do not dispute the factual averments made by the other, but instead assert that it is the operative effect of these facts which is controlling in this case on the question of whether this court is vested with subject matter jurisdiction in light of the Federal Tort Claims Act. Therefore, because the jurisdictional issue here is not bound up with the merits, a full trial on the merits is unnecessary to resolve the issue.

B. Federal Tort Claims Act

The Federal Tort Claims Act (“FTCA”) was passed by Congress in 1946, *see United States v. Muniz*, 374 U.S. 150, 154 & n.5 (1963), and it purports to waive the government’s sovereign immunity for tort claims brought by individuals injured by governmental conduct. Specifically, the FTCA provides a cause of action for “injury or loss of property . . . caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.” *Selland v. United States*, 966 F.2d 346, 347 (8th Cir. 1992), *cert. denied*, 507 U.S. 923 (1993) (citing 28 U.S.C. § 1346(b)); *see St. John v. United States*, 240 F.3d 671, 676 (8th Cir. 2001) (citing 28 U.S.C.

§ § 1346(b) and 2674⁶). The United States, however, may not be a defendant in a civil action unless it has waived its sovereign immunity, and without such a waiver, a district court has no jurisdiction over the case. *United States Dep't of Energy v. Ohio*, 503 U.S. 607, 615 (1992); *United States v. Mitchell*, 445 U.S. 535, 538 (1980). In granting its consent to be sued, the United States may attach such conditions and limitations, and strict compliance with those conditions is an absolute requirement. *Bellecourt v. United States*, 994 F.2d 427, 430 (8th Cir. 1993) (holding that waiver of FTCA sovereign immunity is conditioned upon strict compliance with exhaustion requirement), *cert. denied*, 510 U.S. 1109 (1994). A waiver of sovereign immunity must be strictly construed in favor of the sovereign. *Dep't of the Army v. Blue Fox, Inc.*, 525 U.S. 255, 261 (1999). Therefore, when the sovereign consents to be sued, the terms of the waiver of sovereign immunity establish the boundaries of the court's jurisdiction. *Hercules, Inc. v. United States*, 516 U.S. 417, 422 (1996) (“[T]he United States, as sovereign, ‘is immune from suit save as it consents to be sued . . . and the terms of its consent to be sued in any court define that court’s jurisdiction to entertain the suit.’”) (citing *United States v. Testan*, 424 U.S. 392, 399 (1976), quoting in turn *United States v. Sherwood*, 312 U.S. 584, 586 (1941)); *United States v. Mottaz*, 476 U.S. 834, 841 (1986) (“When the United States consents to be sued, the terms of its waiver of sovereign immunity define the extent of the court’s jurisdiction.”) (citing *Sherwood*). In this case, the United States asserts that the Claudes have failed to file an administrative claim with the agency, which is a jurisdictional prerequisite to claims brought under the FTCA. Additionally, the United States argues that even if the Claudes had filed an administrative claim with the agency, recovery under the FTCA is still barred,

⁶28 U.S.C. § 2674 provides, *inter alia*: The 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, but shall not be liable for interest prior to judgment or for punitive damages.

because it argues that no right to recovery under the FTCA is available for alleged actions that fall within the purview of the discretionary function exception to the FTCA. The court will address each of these arguments in turn.

1. Jurisdictional Prerequisite

The United States asserts that the FTCA contains a jurisdictional prerequisite that requires the plaintiff to present his/her claim to the federal agency that employs the person whose act or omission caused the alleged injury, and that the claim must state a sum certain. In support of its argument, the United States cites to controlling Eighth Circuit precedent as well as sections in the United States Code and Code of Federal Regulations. See *e.g.*, *Sanchez v. United States*, 49 F.3d 1329, 1329-30 (8th Cir. 1995) (citing *Bellecourt v. United States*, 994 F.2d 427, 430 (8th Cir. 1993), *cert. denied*, 510 U.S. 1109)); *Bruce v. United States*, 621 F.2d 914, 918 (8th Cir. 1980) (citing *West v. United States*, 592 F.2d 487, 492 (8th Cir. 1979)); *Peterson v. United States*, 428 F.2d 368 (8th Cir. 1970); 28 U.S.C. § 2675; 28 C.F.R. § 14.2(a). The United States argues that, although the Claudes sent letters to Ellen Huntoon on November 20, 1999, and December 10, 1999, claiming that their civil rights were violated and requesting \$15,000.00 in damages, and \$250,000.00 in “punity,” those letters do not satisfy the requirements outlined in 28 U.S.C. § 2675(a). In response, the Claudes argue that those letters provided the agency with sufficient information of their claims.

To the extent that the United States argues that there is a jurisdictional prerequisite under the FTCA, specifically outlined in 28 U.S.C. § 2675(a), it is correct. The FTCA does, indeed, require a plaintiff to first present his/her claim to the appropriate federal agency before filing suit. *Sanchez*, 49 F.3d at 1329-30 (citing 28 U.S.C. § 2675(a) (action for personal injury against United States must first be presented to appropriate federal agency) and *Bellecourt v. United States*, 994 F.2d 427, 430 (8th Cir. 1993) (“[p]resentment of an administrative claim is jurisdictional and must be pleaded and proven by the FTCA

claimant”), *cert. denied*, 510 U.S. 1109 (1994)); *see also Brady v. United States*, 211 F.3d 499, 502 (9th Cir.), *cert. denied*, ___ U.S. ___, 121 S. Ct. 627 (2000) (stating that the requirement of an administrative claim is jurisdictional and that it must be strictly adhered to) (internal quotations and citations omitted); *Hart v. Dep’t of Labor*, 116 F.3d 1338, 1339 (10th Cir. 1997) (“Proper presentation of the administrative claim is a jurisdictional prerequisite to suit, one which the courts have no authority to waive.”) (citation omitted). This requirement that a party file an administrative claim before filing an action under the FTCA derives from 28 U.S.C. § 2675(a), which provides in part:

An action shall not be instituted upon a claim against the United States for money damages for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, unless the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency in writing and sent by certified or registered mail. The failure of an agency to make final disposition of a claim within six months after it is filed shall, at the option of the claimant any time thereafter, be deemed a final denial of the claim for purposes of this section.

Id. Moreover, in considering the notice requirement of 28 U.S.C. § 2675(a), the Eighth Circuit Court of Appeals has stated that a “claimant satisfies the notice requirement of section 2675 if he provides in writing (1) sufficient information for the agency to investigate the claims, and (2) the amount of damages sought.” *Farmers State Sav. Bank v. Farmers Home Admin.*, 866 F.2d 276, 277 (8th Cir. 1989) (citations omitted). Neither the language in the statute nor the Eighth Circuit Court of Appeals, however, define exactly what constitutes “sufficient information,” thereby complying with 28 U.S.C. § 2675(a).

In *Burchfield v. United States*, 168 F.3d 1252 (11th Cir. 1999), the Eleventh Circuit Court of Appeals did have occasion to examine and explain what constitutes “sufficient information” under 28 U.S.C. § 2675(a). Specifically, the *Burchfield* Court stated the

following:

Congress had a dual purpose in enacting section 2675(a): to encourage prompt settlement of claims and to ensure fairness to FTCA litigants. The Senate reported that the law was intended to “provid[e] for more fair and equitable treatment of private individuals and claimants when they deal with the Government or are involved in litigation with their Government.” S. REP. NO. 89-1327, at 2 (1966), reprinted in 1966 U.S.C.C.A.N. 2515, 2515-16 (quoting House report). It further stated that the administrative claim requirement, by giving agencies an opportunity to settle suits before litigation commenced, would “ease court congestion and avoid unnecessary litigation, while making it possible for the Government to expedite the fair settlement of tort claims asserted against the United States.” *Id.* at 2, reprinted in 1966 U.S.C.C.A.N. at 2516 (quoting House report); *see also McNeil v. United States*, 508 U.S. 106, 111-12 (1993) (stating that purpose of section 2675(a) is to give federal agencies “a fair opportunity to investigate and possibly settle. . . claim[s]”); *Adams* [v. United States,] 615 F.2d [284,] at 288 [(5th Cir.1980)] (noting legislative history evidencing statute’s purpose). Congress, therefore, enacted section 2675(a) not to place procedural hurdles before potential litigants, but to facilitate early disposition of claims. *See, e.g., Lopez v. United States*, 758 F.2d 806, 809 (1st Cir. 1985) (“[I]ndividuals wishing to sue the government must comply with the details of [section 2675], but . . . the law was not intended to put up a barrier of technicalities to defeat their claims.”).

. . . .

We have held that a claimant must give an administrative agency only enough information to allow the agency to “begin its own investigation” of the alleged events and explore the possibility of settlement. *Adams*, 615 F.2d at 292. We do not require the claimant to provide the agency with a preview of his or her lawsuit by reciting every possible theory of recovery, *see Brown v. United States*, 838 F.2d 1157, 1160-61 (11th Cir. 1988), or every factual detail that might be

relevant, *see Adams*, 615 F.2d at 291-92. In short, the amount of information required is “minimal.” *Id.* at 289.

Id. at 1255.

This court, therefore, is mindful of § 2675(a)’s purpose when considering the amount of information it requires from the Claudes here. The Claudes sent two letters to the State Director of Rural Development, Ellen Huntoon. In their first letter, dated November 20, 1999, the Claudes indicate that “they violated our civil rights,” that “they were the ones not us that approved the contractors bid,” that “they’re the ones that caused all the trouble, and interference” and that it was the Claudes’ intention to go to court. *See United States’ Exhibit K.* In response to that letter, Ms. Huntoon stated that she was in receipt of their letter and that “a complaint of this type is taken very seriously,” and that a review of the Claudes’ entire case was in order, including a “visit with appropriate Rural Development employees next week.” *See United States’ Exhibit L.* In their second letter, dated December 10, 1999, the Claudes indicate that they are “glad that someone is looking into this,” and that there has been damage for which they request \$15,000.00 and \$200,000.00 for “punity” [sic] damages. *See United States’ Exhibit M.* In her response letter dated December 16, 1999, Mr. Huntoon indicated that after reviewing the Claudes’ file, she found no “apparent violation” of their civil rights, and directed the Claudes “to specify in writing how your civil rights have been violated.” *See United States’ Exhibit N.* Whether the letters sent by the Claudes to Ms. Huntoon comply with the requirements of 28 U.S.C. § 2675(a) is undoubtedly a close call, however, the court concludes that, when viewed together, the two letters did provide Rural Development with sufficient information and with sums certain about their potential claims. Although the United States submitted an affidavit by Ms. Huntoon in which she states “I did not treat their letter, alleging a violation of their civil rights, as an administrative claim filed with the agency pursuant to the Federal Tort Claims Act. If I had thought their letter was an administrative claim I would have

forwarded it to Office of General Counsel, USDA, for processing,” see United States’ Exhibit P at ¶ 6, the court is convinced that upon receipt of the second letter containing two sums certain for damages, coupled with the first letter, that Rural Development was provided with sufficient information to allow it to begin its own investigation of the alleged events and explore the possibility of settlement with the Claudes. This court will not allow a barrier of technicalities to defeat the Claudes’ claims, especially where the court finds that the two letters sent to Ms. Huntoon provided her, and Rural Development, with sufficient information, thereby complying with 28 U.S.C. § 2675(a). Having determined that the Claudes complied with 28 U.S.C. § 2675(a), the court next addresses whether the discretionary function exception to the FTCA immunizes the United States from liability for its own alleged misconduct.

2. Discretionary Function Exception

As stated previously, the FTCA provides a limited waiver of sovereign immunity for suits against the United States. Under 28 U.S.C. § 2680(a), known as the discretionary function exception, the FTCA’s waiver of the United States’ sovereign immunity does not extend to “[a]ny claim . . . based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.” *Dykstra v. United States Bureau of Prisons*, 140 F.3d 791, 795 (8th Cir. 1998) (quoting 28 U.S.C. § 2680(a)). This discretionary function exception “marks the boundary between Congress’ willingness to impose tort liability upon the United States and its desire to protect certain governmental activities from exposure to suit by private individuals.” *Id.* (quoting *United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 808 (1984)). The rationale for the discretionary function exception is that it serves the public by “ensuring that certain governmental activities not be disrupted by the threat of damage suits; avoiding exposure of the United States to liability for excessive or fraudulent claims;

and not extending coverage of the Act to suits for which adequate remedies were already available.” *Kosak v. United States*, 465 U.S. 848, 858 (1984) (citation and internal quotations omitted); see also *United States v. Gaubert*, 499 U.S. 315, 323 (1991) (“the purpose of the exception is to prevent judicial ‘second-guessing’ of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort. . . .”) (citation and internal quotations omitted). Additionally, Congress was convinced that imposing liability for discretionary acts “would seriously handicap efficient government operations.” *Varig Airlines*, 467 U.S. at 814 (citing *United States v. Muniz*, 374 U.S. 150, 163 (1963)). Moreover, “[t]o the extent an alleged act falls within the discretionary function exception, a court lacks subject matter jurisdiction.” *Id.* (citing *Jurzec v. American Motors Corp.*, 856 F.2d 1116, 1118 (8th Cir. 1988)).

Whether the discretionary function exception applies in any given case is a two-step inquiry. The Supreme Court, in *Berkovitz v. United States*, 486 U.S. 531 (1988) and *United States v. Gaubert*, 499 U.S. 315 (1991), delineated this two step inquiry for determining whether government activity is protected by the discretionary function exception. First, the government conduct must be “discretionary in nature,” meaning it involves “an element of judgment or choice.” *Gaubert*, 499 U.S. at 322 (citations omitted). Second, the actions must be “based on considerations of public policy” or at least “susceptible to policy analysis.” *Id.* at 323, 325 (citations omitted). The Eighth Circuit Court of Appeals in *Dykstra* provided further guidance for determining whether a government activity is shielded by the discretionary function exception, explaining:

The Supreme Court has developed a two-step test to determine whether the discretionary function exception applies, thereby barring the claim. See *Berkovitz v. United States*, 486 U.S. 531, 536-37 (1988). For the exception to apply, the first step requires that the challenged governmental action be the product of “judgment or choice.” *United States v. Gaubert*, 499 U.S. 315, 322 (1991) (quoting *Berkovitz*, 486 U.S. at 536). Under

this step, we must determine whether a statute, regulation, or policy mandates a specific course of action. If such a mandate exists, the discretionary function exception does not apply and the claim may move forward. When no mandate exists, however, the governmental action is considered the product of judgment or choice (i.e., discretionary), and the first step is satisfied. The second step requires that the judgment or choice be based on “considerations of public policy.” *Id.* at 323 (quoting *Berkovitz*, 486 U.S. at 537). Under this step, we determine whether the judgment is grounded in social, economic, or political policy. If the judgment of the governmental official is based on any of these policy considerations, then the discretionary function exception applies and the claim is barred.

Dykstra, 140 F.3d at 795. An analysis of the government conduct challenged by the Claudes in this case establishes the applicability of the discretionary function exception. The Claudes essentially allege that the Rural Development employees: (1) acted negligently in selecting the contractor, Christopher Smola; (2) acted negligently in failing to supervise Christopher Smola; (3) interfered with their contract rights; and (4) intentionally inflicted severe emotional distress.

a. *the first step—whether the conduct involved an element of judgment or choice?*

As just noted, the first step requires that the challenged governmental conduct be the product of judgment or choice, which in turn requires the court to determine whether the challenged actions were controlled by mandatory policy mandates, statutes or regulations. *Kirchmann v. United States*, 8 F.3d 1273, 1276 (8th Cir. 1993) (citations omitted). If there are mandatory statutes or regulations, and if the government employee violated a statute or regulations, there will be no shelter from liability because there is no room for choice and the action will be contrary to [established government] policy. *Id.* (quotation and citations omitted).

The United States contends that it is clear that the actions of the federal employees

in the administering of grant funds on behalf of Rural Development, USDA, meet the discretionary function exception, thereby barring liability under the FTCA. This is so because the United States argues that the actions of the employees involve an element of judgment or choice based on their actions in their oversight of this grant project. Moreover, the United States asserts that no mandatory directive of the agency was violated in connection with administering the grant funds, and significantly, that the Claudes, who bear the burden of establishing subject matter jurisdiction, *see Osborne v. United States*, 918 F.2d 724, 730 (8th Cir. 1990) (citation omitted), cannot show that any mandatory regulation or directive was violated by any of the federal employees. In response, the Claudes do not point to any mandatory directive of the agency that the Rural Development employees violated. Mindful that the Claudes appear *pro se* in this matter, the court finds that reference to the applicable regulations and agency handbooks related to this rural housing grant program is appropriate.

The office of the Rural Development is a mission area within the USDA, which includes Rural Housing Service (RHS), Rural Utilities Service (RUS), and Rural Business-Cooperative Service (RBS). The purpose of the Rural Housing Service of the USDA is outlined in 7 C.F.R. § 3550.2, which provides: “The purpose of the direct RHS single family housing loan programs is to provide low-and very low-income people who will live in rural areas with an opportunity to own adequate but modest, decent, safe, and sanitary dwellings and related facilities. . . .The section 504 program offers loans to very low-income homeowners who cannot obtain other credit to repair or rehabilitate their properties. The section 504 program also offers grants to homeowners age 62 or older who cannot obtain a loan to correct health and safety hazards or to make the unit accessible to household members with disabilities” *Id.* The Claudes qualified under the section 504 program to receive a grant for the repair of their roof. As pointed out by Ms. Huntoon in her affidavit, and relevant to the inquiry here, guidelines are in place for Rural Development employees

in connection with their administration of grant and loan funds, including 7 C.F.R. § 1924, *et seq.*, and the Rural Development Handbook HB1-3550. A review of these guidelines, however, does not reveal that any of the Rural Development employees who were involved in the grant transaction with the Claudes violated a mandatory regulation or directive. Additionally, the Claudes do not cite to any mandatory regulation or directive that was violated.

7 C.F.R. § 1924.6(11), captioned “Awarding the Contract,” provides: The borrower, with the assistance of the County Supervisor or District Director, will consider the amount of the bids or proposals, and all conditions which were listed in the “Invitation for the Bid.” On the basis of these considerations, the borrower will select and notify the lowest responsible bidder.” *Id.* Rural Development’s handbook, HB-1-3550, contains the following guidance with respect to the selecting of the contractors:

If the applicant selects a contractor with whom the Field Office is not familiar, the Loan Originator *should*:

- Interview the contractor and inspect homes they have recently built;
- Obtain a certified financial statement;
- Obtain, at the contractor’s expense, a commercial credit report on the firm and consumer credit reports on each of the principals;
- Check with the local consumer protection agency or Better Business Bureau for any complaints about the builder; and
- Talk to other homeowners about their experiences with the builder.

See United States’ Appendix Exhibit O at 26. These guidelines are, on their face, not mandatory as they address things that “should” be done when selecting contractors. See *Weissich v. United States*, 4 F.3d 810, 814 (9th Cir. 1993) (analyzing the discretionary function exception to the FTCA and explaining that the language “should” is suggestive, not mandatory). These above-mentioned guidelines that the Rural Development employees were suggested to adhere to when selecting contractors clearly left room for judgment and choice.

Cf. Appley Brothers v. United States, 164 F.3d 1164, 1172 (8th Cir. 1999) (explaining that although the governmental inspector had discretion in selecting how he would investigate the status of previously reported out-of-condition grain, he had no discretion not to undertake some investigation, and, therefore the discretionary function exception did not bar the plaintiffs' claim); *McMichael v. United States*, 751 F.2d 303, 307 (8th Cir. 1985) (concluding that discretionary function exception did not apply when the government failed to follow a 51-step procedure review checklist, which mandated that "they had a number of precise inspections to perform which involved no judgment concerning agency policy"). Indeed, this is not the case where contractors were placed on a list of eligibles in a routine manner, and when a specific contract was to be awarded, it automatically went to the lowest bidder on the pre-existing list, thereby virtually eliminating any element of judgment or choice. *See, e.g. Orlikow v. United States*, 682 F. Supp. 77, 82 (D.D.C. 1988) (selecting incompetent contractors or employees and supervising them in a careless manner are acts of negligence pure and simple and do not fall within the FTCA's discretionary function exception); *Melton v. United States*, 488 F. Supp. 1066, 1072-73 (D.D.C. 1980) (finding that the government acts of selecting incompetent contractors and supervising them in a careless manner are not beyond the jurisdictional reach of the FTCA). Rather, both the Rural Development employees, not to mention the Claudes themselves, exercised judgment or choice when selecting Christopher Smola.

Moreover, the caselaw demonstrates that selection and/or replacement of contractors requires choice and/or judgment, and falls within the ambit of the discretionary function exception to the FTCA. For example, in a case involving the negligent hiring of a postal employee, the Eighth Circuit Court of Appeals explained:

[A]llegations of negligent hiring cannot survive the discretionary function inquiry. The . . . choice between several potential employees involves the weighing of individual backgrounds, office diversity, experience and employer

intuition. These multi-factored choices require the balancing of competing objectives and are of the “nature and quality that Congress intended to shield from tort liability”

Tonelli v. United States, 60 F.3d 492, 496 (8th Cir. 1995) (quoting *Varig Airlines*, 467 U.S. at 813). In this case, the court concludes that the selection of Christopher Smola as the contractor to repair the Claudes’ roof by the Rural Development employees involved an “element of judgment or choice.” *Berkovitz*, 486 U.S. at 536.

Furthermore, with respect to the Claudes’ claim of negligent supervision, once again, the court points out that the Claudes make no showing that the Rural Development employees’ actions violate a specific statute, code, or directive, or are anything other than actions involving an element of judgment or choice. The Eighth Circuit Court of Appeals has explained that “where no statute or regulation controls the government’s monitoring of a contractor’s work, the extent of monitoring required or actually accomplished is necessarily a question of judgment, or discretion, for the government.” *Kirchmann*, 8 F.3d at 1276 (citations omitted); *see also Tonelli*, 60 F.3d at 496 (issues of employee supervision and retention generally fall within the discretionary function exception). Therefore, in the absence of any reference to, or showing of, a policy mandate, statute or regulation requiring specific acts of supervision, the court concludes that oversight of the grant for repairs to the Claudes’ roof was left to the Rural Development employees’ discretion. Having determined that the first step has been satisfied, therefore, the court turns to the second step as to whether that discretion is of the type that Congress intended to protect from liability under the discretionary function exception.

b. the second step—policy considerations

After it has been established that the conduct in question involves an element of judgment or choice, the second step in the discretionary function exception analysis requires that the conduct be the result of policy considerations. *Berkovitz*, 486 U.S. at 537. The Eighth Circuit Court of Appeals has stated that when “governmental policy permits the

exercise of discretion, it is presumed that the acts are grounded in policy.” *Chantal v. United States*, 104 F.3d 207, 212 (8th Cir. 1997) (citing *Gaubert*, 499 U.S. at 324). Therefore, the Claudes are required to rebut the presumption. *Id.* The Claudes have failed to rebut the presumption.

Notwithstanding, the court concludes that decisions made by the Rural Development employees concerning the administration of grant funds to the Claudes were based upon considerations of public policy and are the kinds of discretionary acts that the discretionary function exception is designed to shield. *Berkovitz*, 486 U.S. at 537. The administration of grant funds from the office of Rural Development to individuals is grounded in social, economic, and political policies of Rural Development. *Id.* Indeed, the United States, through the affidavit of Ellen Huntoon, asserts that the “administration of grant and loan funds furthers important public policy objectives by providing a mechanism for low income citizens to make needed repairs to their homes and, in some instances, to provide housing for low income citizens. The proper administration of these funds furthers important social and economic policies for our agency and the United States.” See United States’ Exhibit P at ¶ 2.

Here, because the Claudes have failed to rebut the presumption, and because the governmental conduct at issue here was grounded in considerations of public policy, the court concludes that the Claudes’ claims for negligence and tortious infliction of severe emotional distress, based upon the actions of the Rural Development employees, are barred by the discretionary exception function to the FTCA.

C. Interference with Contract Claim

In their complaint, the court also notes that the Claudes allege that the Rural Development employees “interfered with the work, causing trouble between the contractor and the Claudes.” To the extent that the Claudes’ claim is construed as one claiming interference with contract rights, the court concludes that the FTCA does not provide a

basis for liability with respect to this claim. 28 U.S.C. § 2680(h); *Selland v. United States*, 966 F.2d at 347 (“A claim for interference with contractual relations is not within the scope of the FTCA”); *Moessmer v. United States*, 760 F.2d 236, 237 (8th Cir. 1985).

IV. CONCLUSION

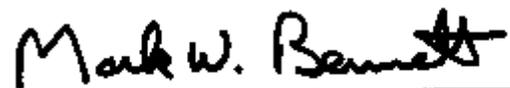
The court concludes, for the reasons stated above, that the Claudes’ claims for negligence, tortious infliction of severe emotional distress, and interference with contract rights are barred by the Federal Tort Claims Act. Therefore, the United States’ Motion to Dismiss pursuant to Federal Rule of Civil Procedure 12(b)(1) is **granted**, and the Claudes’ claims against the United States are hereby **dismissed with prejudice**. Additionally, the court **denies as moot** the Claudes’ requests for a settlement conference (#63, 64 and 66).

Furthermore, because all of the federal claims in this action have been dismissed, and because defendant United States is no longer a party to this action, the court must determine whether it will exercise its supplemental jurisdiction over the Claudes’ claims against Christopher Smola in light of 28 U.S.C. § 1367(c)(3). The decision whether to exercise supplemental jurisdiction over state-law claims when federal claims have been dismissed depends upon “factors such as convenience, fairness, and comity.” See *Pioneer Hi-Bred Int’l v. Holden Found. Seeds, Inc.*, 35 F.3d 1226, 1242 (8th Cir. 1994) (citing *United Mine Workers of America v. Gibbs*, 383 U.S. 715, 726 (1966)); *Murray v. Wal-Mart, Inc.*, 874 F.2d 555 (8th Cir. 1989) (citing *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343 (1988), and *North Dakota v. Merchants Nat’l Bank & Trust Co.*, 634 F.2d 368, 371 (8th Cir. 1980) (en banc)). Furthermore, “[i]t is the law of this circuit that ‘the substantial investment of judicial time and resources in the case . . . justifies the exercise of jurisdiction over the state claim, even after the federal claim has been dismissed.’” *Pioneer Hi-Bred Int’l*, 35 F.3d at 1242 (quoting *North Dakota*, 634 F.2d at 371, and also citing *Gilbert/Robinson, Inc. v. Carrie Beverage-Missouri, Inc.*, 989 F.2d 985, 993 (8th

Cir.), *cert. denied*, 510 U.S. 928 (1993), and *First Nat'l Bank & Trust Co. v. Hollingsworth*, 931 F.2d 1295, 1307-08 (8th Cir. 1991)). *Accord Murray*, 874 F.2d at 558 (also stating that retention of jurisdiction is proper in such circumstances). Guided by these considerations, therefore, the court declines to exercise supplemental jurisdiction over the Claudes' state-law claims against Christopher Smola.

IT IS SO ORDERED.

DATED this 12th day of April, 2001.



MARK W. BENNETT
CHIEF JUDGE, U. S. DISTRICT COURT
NORTHERN DISTRICT OF IOWA