

Support of their Motion to Dismiss Counts I, II, III and IV of Plaintiffs' First Amended Complaint pursuant to Federal Rules of Civil Procedure (Fed. R. Civ. P.) 9(b), 12(b)(1), 12(b)(5), and 12(b)(6).

EXECUTIVE SUMMARY OF ARGUMENT

This case involves claims by individuals whose homes were damaged by Hurricane Isabel in September 2003. The plaintiffs allege that the federal defendants violated their Fifth Amendment due process rights and state tort law by colluding with private insurers to defraud them of payments under flood insurance policies that were rightfully theirs. Plaintiffs plead causes of action under Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971), claiming that they have been deprived of property without due process of law (Count I) and state law tort violations, including fraud and/or interference with contract (Counts II, III, and IV). Specifically, the plaintiffs allege that the federal defendants committed fraud by misrepresenting the scope of the coverage afforded by the Standard Flood Insurance Policy and by fraudulently underestimating the amount of money it would take to repair or replace flood damaged dwellings.

The plaintiffs' tort and Bivens claims against the federal defendants can be disposed of with two words: sovereign immunity. It is axiomatic that the United States cannot be sued unless it has specifically waived its immunity from suit. Counts II, III and IV must be dismissed for the simple reason that the Federal Tort Claims Act specifically exempts the very torts that are the subject of those counts from the limited waiver of sovereign immunity that statute provides. Likewise, the Bivens count is subject to dismissal on the same grounds. The Supreme Court has declined to permit Bivens suits for monetary damages against federal officials in cases, such as this, where the "design of a Government program suggests that Congress has provided what it considers adequate remedial mechanisms for constitutional violations that may occur in the course of its administration." Schweiker v. Chilicky, 487 U.S. 412 (1988). Since Congress has provided a

variety of opportunities for review of flood insurance claims, including institution of lawsuits against FEMA in federal district court, the National Flood Insurance Program (NFIP) provides adequate non-monetary remedies. Finally, the plaintiffs cannot make out a Bivens case against any of the federal defendants as they have failed entirely to allege any specific, individual actions by those defendants that affected the plaintiffs at all, much less violated their constitutional rights.

The only claims against the federal defendants that will survive this Motion to Dismiss are the plaintiffs' breach of contract claims against FEMA and eleven flood insurance policies that FEMA issued directly.⁴ Although Congress waived the Federal government's sovereign immunity to allow suit on a flood insurance policy under the NFIA, it did so only to the extent that a claim has been disallowed and only to allow suit by a policyholder. See 42 U.S.C. § 4072. Since FEMA has paid the full amount on the plaintiffs' Proofs of Loss as to many of those policies, those claims will be subject to summary judgment in subsequent motions practice.

BACKGROUND OF THE NATIONAL FLOOD INSURANCE PROGRAM

The National Flood Insurance Program ("NFIP") is a federally-subsidized program designed to make affordable flood insurance available to the general public at or below actuarial rates. [H. Rep. No. 786, 90th Congress, 2nd Sess. (1967); S. Rep. No. 11233, 90th Congress, 1st Sess. (1967)]; see also Peal v. N.C. Farm Bureau Mut. Ins. Co., 212 F. Supp. 2d 508, 512-13 (E.D.N.C. 2002).

In January 1978, because of concerns about the fact that private insurers might cease to provide flood insurance because of economic factors, the Federal government "took control of the program and assumed all operational responsibilities," and the NFIP has operated under

⁴ As is explained in more detail below, the National Flood Insurance Act ("NFIA") provides for the issuance of Standard Flood Insurance Policies ("SFIP") by either private insurers called Write Your Own ("WYO") companies or by FEMA itself. 42 U.S.C. § 4071. In either case, the issuance and adjustment of claims under those policies are subject to stringent federal regulations, which are set forth at 44 C.F.R. Part 61.

Subchapter II, Part B -- Government Program with Industry Assistance. See 42 U.S.C. § 4071; see also Bleecker v. Standard Fire Ins. Co., 130 F. Supp. 2d 726, 730 (E.D.N.C. 2000). As such, Federal flood insurance is now marketed to the public in one of two ways: directly by FEMA, or through the Write Your Own (“WYO”) program. The Act allows the Director of FEMA to utilize “insurance companies and other insurers, insurance agents and brokers, and insurance adjustment organizations, as fiscal agents of the United States” to assist it in providing flood insurance coverage to the public. 42 U.S.C. § 4071.⁵

Participating WYO insurance companies must, inter alia, enter into a standard arrangement entitled the “Financial Assistance/Subsidy Arrangement” (Arrangement), codified in 44 C.F.R. Part 62, App. A. Under the Arrangement, a WYO Company “shall arrange for the adjustment, settlement, payment and defense of all claims arising from policies of flood insurance it issues under the Program, based upon the terms and conditions of the [SFIP].” Id. § 62.23(d). FEMA reimburses the WYO company for all loss-payments made under the policy, reasonable litigation costs and settlements for claims arising under the SFIP, administrative and adjusting expenses, and premium refunds. Id. Part 62, App. A, Art. III (C)-(D).⁶

Congress authorized FEMA to promulgate by regulation the terms and conditions of flood insurance coverage. 42 U.S.C. § 4013. The terms and conditions of all Federal flood insurance policies have been fixed by FEMA regulation in the form of the Standard Flood Insurance Policy (SFIP). 44 C.F.R. §§ 61.4(b); 61.13(d), (e); 62.23(c); 62.23(d). The SFIP is

⁵ Consistent with that authority FEMA “enter[ed] into arrangements with individual private sector property insurance companies [WYO companies] or other insurers, such as public entity risk sharing organizations. Under these arrangements, such companies or other insurers may offer flood insurance coverage under the program to eligible applicants.” 44 C.F.R. § 62.23(a); see also 42 U.S.C. § 4081. The WYO program is designed “to provide coverage to the maximum number of structures at risk and because the insurance industry has marketing access through its existing facilities not directly available to the FIA, it has been concluded that coverage will be extended to those who would not otherwise be insured under the Program.” 44 C.F.R. Part 62, App. A, Art. I.

⁶ Additionally, the WYO companies are entitled to “withhold, as operating and administrative expenses . . . an amount from the Company’s written premium on the policies covered by this Arrangement in reimbursement of all the Company’s marketing, operating and administrative expenses.” Id. Part 62 App. A, Art. III (B).

codified in the Code of Federal Regulations, and provides coverage for: Dwelling, 44 C.F.R. Pt. 61, App. A(1); General Property, 44 C.F.R. Pt. 61, App. A(2), and Residential Condominium Building Association, 44 C.F.R. Pt. 61, App. A(3). The FIA promulgates the SFIP as authorized and directed by the NFIA, 42 U.S.C. § 4013. By regulation, all flood insurance issued under the NFIP is subject to Federal statute and regulations and the terms and conditions of the SFIP. 44 C.F.R. § 61.4. As stated in that regulation, the scope of coverage in the SFIP is subject to interpretation by the FIA Administrator in accordance with the applicable statutes and regulations. Id. The SFIP is a single-risk insurance policy that provides coverage against all “direct physical loss by or from flood,” which means any “[l]oss or damage to insured property, directly caused by a flood. There must be evidence of physical changes to the property [building and personal contents].” 44 C.F.R. Pt. 61 App. A(1), Art. II, B, 12.

The SFIP is promulgated as a regulation in the Federal Register and is annually published at 44 C.F.R. Pt. 61, App. A(1).⁷ Part 61 of Title 44 of the Code of Federal Regulations describes the limits of coverage available under the NFIP. See 44 C.F.R. § 61.4. Insurance is available for structures and their contents. Id. § 61.3. The policy covers the insured structure only, as defined by the policy, and does not cover land or land values. See 44 C.F.R. Pt. 61 App. A(1), Art. IV, 6.

Under Subchapter II, Part B, Congress mandated that an insured who has satisfied all the preconditions necessary may bring suit against the Director. 42 U.S.C. § 4072. Section 4072 states that

the claimant, within one year after the date of mailing of notice of

⁷ The SFIP is published annually in October at 44 C.F.R. Pt. 61. As stated earlier, there are three separate SFIPs found at 44 C.F.R. Pt. 61: App. A(1) Dwelling; App. A(2) General Property; and App. A(3) Residential Condominium Building Association. Because plaintiffs seek coverage under a SFIP providing coverage for loss occurring on or about September 18, 2003, the applicable SFIP is found at 44 C.F.R. Pt. 61, App. A(1) (October 1, 2002) (the last prior revision to the SFIP was in 1994). All citations to the SFIP herein refer to the October 2002 policy.

disallowance or partial disallowance by the Director, may institute an action against the Director on such claim in the **United States district court** for the district in which the insured property or the major part thereof shall have been situated, and original exclusive jurisdiction is hereby conferred upon such court to hear and determine such action without regard to the amount in controversy.

42 U.S.C. § 4072 (emphasis added).

STATEMENT OF FACTS

On September 18, 2003, Hurricane Isabel struck the Middle Atlantic States, including Maryland, causing severe flooding to many homes and communities. The 182 plaintiffs in plaintiffs' First Amended Complaint include NFIP policyholders (with SFIPs purchased directly through FEMA or from a participating WYO insurance carrier) and their family members whose homes were damaged as a result of the hurricane and who filed flood insurance claims.⁸

The process of settling claims with those damaged by the storm was protracted. The process was marked by basic misunderstandings on the part of many insureds as to the scope of coverage provided by their homeowners and flood insurance policies. And, as in any situation involving insurance claims, the insured and the insurers occasionally had different views of the degree of damage and the cost of repairs as well as of the pre-flood value of damaged homes. To deal with the inevitable complaints regarding the claims adjusting process, FEMA, with the assistance of its Bureaus and Statistical Agent (BSA), Computer Sciences Corporation (CSC), assembled a Task Force to conduct a review of the Hurricane Isabel claims for every policyholder who requested it. The Task Force was comprised of various individuals with in-depth knowledge of the flood insurance industry, including independent claims adjusters, general

⁸ FEMA has determined that plaintiffs Jean Bowling, Pam Folderaurer, John and Lydia Helmer, Arley Horne, Joel Kelley, Monica McCall, William and Janice Norris, John and Frances Schmidt, Edward and Tammy Schwartz, Garneta and Clarence Staigerwald, and Dale and Robert Ward have NFIP Direct flood insurance policies (i.e., SFIPs purchased directly from FEMA).

adjusters, and FEMA personnel. To ensure that policyholders were aware of this review option, in April 2004, FEMA implemented an outreach program that consisted of a targeted series of community meetings, newspaper ads, press releases, and a toll-free number to field policyholder questions as well as initiate a request for review. See First Amended Complaint (“Amnd. Compl.”) at ¶ 58.

ARGUMENT

I. THE UNITED STATES HAS NOT WAIVED ITS IMMUNITY TO SUIT FOR THE STATE LAW TORT CLAIMS ASSERTED BY THE PLAINTIFFS.

A. The Federal Tort Claims Act Exempts Fraud and Interference With Contract From The Limited Waiver of Sovereign Immunity It Provides.

It is well established that the United States may not be sued without its consent and that its consent must be unequivocally manifested in the text of a statute. Lane v. Pena, 518 U.S. 187, 192 (1996). “Moreover, a waiver of the Government's sovereign immunity will be strictly construed, in terms of scope, in favor of the sovereign.” Id. Because the United States’ consent to be sued is a prerequisite to jurisdiction,⁹ plaintiffs must identify a statute specifically providing that the United States may be sued. United States v. Idaho, 508 U.S. 1, 6-7 (1993) (citations omitted) (waivers of sovereign immunity, to be effective, must be “unequivocally

⁹ It is well established that federal courts are courts of limited jurisdiction as they possess only the power authorized by the Constitution and by statute. See Cooper v. Productive Trans. Servs., 147 F.3d 347, 352 (4th Cir. 1998) (citation omitted). Accordingly, a court may properly dismiss an action for lack of subject matter jurisdiction pursuant to Fed. R. Civ. P. 12(b)(1) when the court lacks the statutory authority or constitutional power to adjudicate the case. See e.g., Home Builders Ass’n of Miss., Inc. v. City of Madison, 143 F.3d 1006, 1010 (5th Cir. 1998), Makarova v. United States, 201 F.3d 110, 113 (2d Cir. 2000). The Fourth Circuit has made clear that the plaintiff has the burden of proving subject matter jurisdiction. Richmond, Fredericksburg & Potomac R. Co. v. United States, 945 F.2d 765, 768 (4th Cir. 1991). Further, a court may dismiss a complaint for failure to state a claim under Fed. R. Civ. P. 12(b)(6) “if after accepting all well-pleaded allegations in the plaintiff's complaint as true and drawing all reasonable factual inferences from those facts in the plaintiff's favor, it appears certain that the plaintiff cannot prove any set of facts in support of his claim entitling him to relief.” Edwards v. City of Goldsboro, 178 F.3d 231, 244 (4th Cir. 1999). A Court may dismiss a complaint for failure to state a claim if “it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.” Lambeth v. Board of Comm’rs, 407 F.3d 266, 268 (4th Cir. 2005) (citing Conley v. Gibson, 355 U.S. 41, 45-46 (1957))

expressed in the statutory text,” “strictly construed in favor of the United States,” and “not enlarged beyond what the statute requires.”).

Plaintiffs’ Second, Third, and Fourth Causes of Action – alleging state tort claims -- should also be dismissed because there is no waiver of sovereign immunity for such claims under the Federal Tort Claims Act (FTCA) and this Court lacks subject matter jurisdiction over those claims as to the federal defendants.¹⁰ See 28 U.S.C. § 2680(h). Plaintiffs’ Second and Third Causes of Action allege deceit (i.e., Procurement Fraud and Adjustment Fraud, respectively) while plaintiffs’ Fourth Cause of Action alleges interference with contract. Section 2680(h) of the FTCA clearly excludes from the FTCA “any 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) (emphasis added); see also McKeel v. United States, 178 F. Supp. 2d 493, 504 (D. Md. 2001); Whedbee v. United States, 352 F. Supp. 2d 618, 628 (M.D.N.C. 2001). Plaintiffs’ Second, Third, and Fourth Causes of Action clearly fall within the categories excluded by the FTCA. Indeed, plaintiffs’ Second and Third Causes of Action contain the term “deceit” in the subheading and their Fourth Cause of Action is entitled “Interference With Contract.” Moreover, plaintiffs’ Second and Third Causes of Action allege that the defendants made false representations of coverage under the SFIP to purchasing plaintiffs to induce them to purchase SFIPs and that the defendants made false representation to induce plaintiffs into accepting settlement amounts for their flood claims in amounts less than that to which they were entitled. Amnd. Compl. at ¶¶ 73, 80. Because plaintiffs’ claims of deceit, misrepresentation, and interference with contract are clearly excluded

¹⁰ Federal defendants were not specifically named in Count III of plaintiffs’ First Amended Complaint. However, to the extent that plaintiffs’ Third Cause of Action for adjustment fraud incorporates all preceding paragraphs, Federal defendants will construe Count III as allegations against the Federal defendants for purposes of this Motion to Dismiss.

by the FTCA pursuant to 28 U.S.C. § 2680(h), plaintiffs' Second, Third, and Fourth Causes of Action are barred against the Federal defendants.¹¹

B. Even if the FTCA Waived Sovereign Immunity for the State Torts Alleged, this Action is Still Be Barred by Failure To Exhaust Administrative Remedies.

Even assuming, arguendo, that plaintiffs' Second, Third and Fourth Causes of Action are not barred by the FTCA, plaintiffs claims should still be dismissed for lack of subject matter jurisdiction because plaintiffs failed to comply with and exhaust the administrative requirements under the FTCA. See Ahmed v. United States, 30 F.3d 514, 516 (4th Cir. 1994); see also Shaia v. Klein, 2001 U.S. Dist. LEXIS 5600, *6 (D. Md. 2001) (motions to dismiss for failure to exhaust administrative remedies governed by Fed. R. Civ. P. 12(b)(1)). Plaintiffs seek damages for pain, suffering and personal injury for alleged adjustment fraud, procurement fraud, and interference with contract as a result of the Federal defendants' actions. The law is clear that an action under the FTCA "shall not be instituted upon a claim against the United States for money damages . . . unless the claimant shall have first presented the claim to the appropriate Federal agency." 28 U.S.C. § 2675(a). The FTCA, 28 U.S.C. § 1346(b), vests the district courts with exclusive jurisdiction over tort claims against the United States for money damages, and 28 U.S.C. § 2671 et seq. contains the exclusive waiver of sovereign immunity in such cases. Under 28 U.S.C. § 2675(a), however, no tort action may be maintained against the United States unless the plaintiffs first pursues the claim before the appropriate administrative agency. Reynolds Assoc. v. Kemp, 1992 U.S. App. LEXIS 20727, *10 (4th Cir. 1992). In this case, plaintiffs do not aver in the First Amended Complaint that they filed the requisite administrative tort claims before filing this action. Because there is no indication in Plaintiffs' First Amended Complaint that any of the

¹¹ Nor can a waiver of sovereign immunity be found in the NFIA, which only provides for suit on the insurance contract. See 42 U.S.C. § 4072.

named plaintiffs exhausted their administrative remedies as required by the FTCA, there can be no waiver of sovereign immunity over their tort claims. See Reynolds Assoc. 1992 U.S. App. LEXIS at *10. Accordingly, plaintiffs' tort claims (Second, Third, and Fourth Causes of Action) should be dismissed for lack of subject matter jurisdiction for failure to exhaust their administrative remedies.

II. THE UNITED STATES HAS NOT WAIVED ITS SOVEREIGN IMMUNITY FOR A BIVENS ACTION AGAINST FEDERAL OFFICIALS

A. The Courts Have Declined To Infer The Right To Money Damages Against Federal Officials Where, As Here, There Are Adequate Administrative Safeguards For Violations Of Constitutional Rights.

First, to the extent that plaintiffs are suing federal officials in their official capacity and are seeking monetary damages from them, the suit is tantamount to a suit against the United States. Dugan v. Rank, 372 U.S. 609 (1963). The United States cannot, however, be sued absent a Congressional waiver of the government's sovereign immunity. United States v. Testan, 424 U.S. 392, 399 (1976); United States v. Sherwood, 312 U.S. 584, 586 (1941).

While 28 U.S.C. § 1331 provides for federal subject matter jurisdiction allowing suit against individual federal officials for violation of the constitutional rights of an individual under the rationale of Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971), 28 U.S.C. § 1331 is not a general waiver of sovereign immunity for money damages against the government. Thus, any claim against an officer of the United States in his *official capacity* for money damages under Section 1331 or the Constitution is barred by the doctrine of sovereign immunity. Federal Deposit Insurance Corporation v. Meyer, 510 U.S. 471 (1994). Therefore, the District Court lacks subject matter jurisdiction over any claim by plaintiffs for money damages against

the federal defendants in their *official capacity*.⁵

Second, the Plaintiffs do not state a Bivens claim against the Federal defendants. Generally, a Bivens action allows an individual whose constitutional rights were violated by a federal official to seek money damages against that official in federal court, despite the absence of any statute conferring such a right. See Bivens v. Six Unknown Named Agents, 403 U.S. at 389. Bivens remedies, however, are not automatic and must be inferred by the courts. The United States Supreme Court has extended Bivens to apply to claims for constitutional deprivations under the Fifth Amendment Due Process Clause in limited circumstances. Davis v. Passman, 442 U.S. 228, 248-49 (1979). However, “in order for a Bivens remedy to be available, a court must determine that: 1) Congress has not already provided an exclusive statutory remedy; 2) there are no ‘special factors counseling hesitation in the absence of affirmative action by Congress’; and 3) there is no ‘explicit congressional declaration’ that money damages not be awarded.” Judicial Watch v. Rossotti, 317 F.3d 401, 410 (4th Cir. 2003) (citations omitted). The “special factors” concept “includes an appropriate judicial deference to indications that congressional inaction has not been inadvertent.” Id. (citing Schweiker v. Chilicky, 487 U.S. 412, 423 (1988)).

The Supreme Court’s decision in Schweiker v. Chilicky is dispositive here. In that case, the plaintiffs, persons whose disability benefits had been terminated pursuant to a continuing

⁵ Even if the Court were to read plaintiffs’ First Amended Complaint as one seeking damages under the FTCA, 28 U.S.C. §§ 1346(b), 2671, *et. seq.*, as a basis for subject matter jurisdiction, it would still fail. The FTCA provides a waiver of sovereign immunity and permits recovery of money damages against the United States for torts committed by federal officials acting within the scope of their employment. However, the remedy under the FTCA is against the United States and *not* against the agent thereof; the agent must not be sued in his own name. 28 U.S.C. § 2679(b), 28 U.S.C. § 1346(b). Therefore, the United States is the only proper party Defendant to an FTCA action. As previously stated, the FTCA requires a plaintiff seeking federal subject matter jurisdiction under the FTCA to exhaust all administrative remedies before filing suit in district court. 28 U.S.C. §§ 2401(a) and 2675(a); McNeil v. United States, 508 U.S. 106 (1993). Here, there is no record that plaintiffs have filed administrative tort claims with FEMA. Therefore, a suit brought by plaintiffs against the United States under the FTCA would be barred for lack of subject matter jurisdiction.

disability review that required state agencies to which the responsibility was delegated to review individuals receiving disability benefits every three years to determine whether they were still eligible to receive benefits. Schweiker, 487 U.S. at 415-416. Because this process frequently resulted in benefits being terminated by state agencies only to be reinstated months later by a federal administrative law judge, Congress enacted temporary emergency legislation in 1983 providing for the continuation of benefits pending review by a federal administrative law judge. Id.

The plaintiffs in Schweiker, whose benefits had been terminated before the 1983 legislation was enacted, claimed that the federal official had violated their Fifth Amendment right to due process by adopting illegal policies that led to the wrongful termination of their benefits by state agencies. Id. at 418. They sought money damages against the SSA officials involved in the continuing review program. Id. at 419. The Supreme Court denied their request for money damages, holding that Bivens did not apply where “the design of a Government program suggests that Congress has provided what it considers adequate remedial mechanisms for constitutional violations that may occur in the course of its administration.” Id. at 423.

In Schweiker, the Court was impressed with the administrative safeguards provided by the Social Security Disability Reform Act of 1984 (“the 1984 Act”) to insure that benefit decisions are fair. Included within those safeguards was the right to *de novo* reconsideration by the state agency determining eligibility and further review of that decision by an Administrative Law Judge. At both stages of review, the claimant was permitted to present new evidence or raise new issues. Id. at 424. If the claimant was still dissatisfied, he or she had the right to appeal to the Social Security Appeals Council, and then seek judicial review of that decision, including of any claims of constitutional violations. Id. The 1984 Act, which provided these

procedural safeguards, did not provide for money damages for alleged violations of constitutional rights. Because of these elaborate safeguards, the Court held that money damages were not available for violations of the constitutional rights asserted by the plaintiffs. Id. at 425 – 426.

In this case, Congress has provided SFIP policyholders with similar procedural safeguards. Plaintiffs' Bivens claim boils down to a complaint that they did not receive what they were entitled to in settlement of their flood insurance claims and the SFIP, which is codified within FEMA's regulations, provides several remedies for persons so aggrieved. See 42 U.S.C. §4072, 44 C.F.R. § 62.22, and 44 C.F.R. Part 61, App. A, Art. VII, R. In addition to the option of filing a breach of contract claim on the disallowance or partial disallowance of a claim, a policyholder may request appraisal if both parties cannot agree on an actual cash value or, if applicable, replacement cost of the damaged property. 44 C.F.R. Pt. 61, App. A(1), Art. VII, P. Under the Appraisal provision, the policyholders and the appropriate insurer would each select an appraiser who, in turn, would select an umpire to resolve any differences. Id. If both parties are unable to agree on an umpire, both sides may request that a judge of a court of record where the property is located select an umpire. Id. The appraisers would then submit separate reports stating the actual cash value, the replacement cost, and the amount of loss for each item and any differences would go to the umpire for a final determination. Id. Further, a policyholder may request a waiver of certain SFIP provisions by making a written request to the Federal Insurance Administrator. 44 C.F.R. Pt. 61, App. A(1), Art. VII, D.

Additionally, in this case, FEMA provided plaintiffs the extraordinary option of having their claims re-reviewed by the Hurricane Isabel Task Force, which was specifically established to address concerns brought by insureds experiencing problems with the adjustment of their

flood claims. As a result of the Task Force review, many policyholders requested and received an additional review of their claim, and many of them received additional payments.

Congress and FEMA have “heavily regulated the process for handling claims under the flood insurance program and have provided for judicial review of claims handling.” Studio Frames, Ltd. v. Vill. Ins. Agency, Inc., 2003 U.S. Dist. LEXIS 5450, *14 (M.D.N.C. 2003) (citing 42 U.S.C. § 4072), rev’d on other grounds, Studio Frames v. Std. Fire Ins. Co., 369 F.3d 376 (4th Cir. 2004). Because the SFIP and the regulations governing the adjustment of flood insurance claims constitutes a comprehensive set of procedural and substantive provisions governing the rights of SFIP policyholders, it would be inappropriate “to supplement that regulatory scheme with a new judicial remedy.” See Judicial Watch, 317 F.3d at 409 (citing Bush v. Lucas, 462 U.S. 367, 368 (1983)). Thus, a Bivens claim cannot be maintained when the dispute is over coverage or claims activities related to a SFIP.

In addition to the specific statutory remedy provided to address a dispute over a flood insurance claim, the NFIP regulations and statute covering the adjustment of flood insurance claims constitute the sort of “special factor” discussed in Schweiker that make a Bivens remedy inappropriate. Indeed, the statute and regulations governing the adjustment of flood insurance claims, as stated above, provide “meaningful safeguards or remedies” for redress. See Judicial Watch, 317 F.3d at 410 (citing Chilicky, 487 U.S. at 425). Although Congress may not have specifically spoken on all of plaintiffs’ particular causes of action, these “special factors” are sufficient for the court to determine that the plaintiffs and policyholders were provided “meaningful safeguards or remedies” for redress.¹² Judicial Watch, 317 F.3d at 410 (citing

¹² Plaintiffs would be mistaken if they were to claim that the NFIP statute and regulations do not provide complete relief for all their claims. Indeed, the SFIP and statute provide for judicial review of claims and insureds would be able to argue all their claims before a U.S. District Court judge. See 42 U.S.C. § 4072, 44 C.F.R. Pt. 61 A(1), Art. VII, R.

Chilicky, 487 U.S. at 425). Accordingly, these “special factors” counsel against the inference of a Bivens remedy against the individual Federal defendants.¹³

B. Plaintiffs’ Bivens Actions Must Fail Because They Cannot Establish That They Have A Fifth Amendment Right To A Set Amount Of Insurance For The Damages They Sustained In Hurricane Isabel.

Moreover, plaintiffs’ Bivens claim against the individual Federal defendants fails to state a claim upon which relief can be granted pursuant to Fed. R. Civ. P. 12(b)(6) because plaintiffs have not and can not allege facts which show that they were deprived of a Fifth Amendment due process right. In order for a court to determine whether a state actor violated an individual’s due process rights, a court must make a two-part inquiry. See Harrison v. United States Postal Service, 840 F.2d 1149, 1152-54 (4th Cir. 1998). First, a court must determine whether the plaintiff had a liberty or property interest. Id. at 1152 (citing Board of Regents of State Colleges v. Roth, 408 U.S. 564 (1972)). Second, a court must determine what process is due by analyzing the following three separate factors: (a) the private interest that will be affected by an official action; (b) the risk of an erroneous deprivation of such interest through the procedures used; and (c) the government’s interest in the procedures utilized. Id. at 1154 (citing Mathews v. Eldridge, 424 U.S. 319, 335 (1976)).

In this case, plaintiffs cannot demonstrate a liberty or property interest in “naming their own price” with respect to their flood insurance claim settlement and cannot meet the first prong of the Eldridge test. Indeed, while policyholders have limits on their SFIPs capped at \$250,000.00 for residential properties and \$100,000.00 for personal property and contents, they do not have a liberty or property interest in receiving full policy limits on their claims. See 44

¹³ In addition to the specific remedy in the NFIA, Congress specifically declined to create a remedy for certain activities otherwise actionable under state tort laws. The FTCA also specifically addresses the claims for tortious misrepresentation, deceit, etc., as discussed supra at pp. 7-9.

C.F.R. § 61.6. It is well-established that “[t]o have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it.” Board of Regents v. Roth, 408 U.S. at 577. Here, plaintiffs cannot show a “legitimate entitlement” to full policy limits or coverage for items not covered by or excluded from coverage on their flood insurance claims. Plaintiffs at best merely show a unilateral expectation of receiving full policy limits or payment for uncovered property. Accordingly, plaintiffs’ expectation of policy limits on their claims does not constitute “property” within the meaning of the Due Process Clause.

Even assuming, arguendo, that plaintiffs meet the first prong of the Eldridge test, plaintiffs cannot show that the Federal defendants denied them their due process rights and fail to satisfy the second Eldridge prong. Indeed, plaintiffs do not specify how the Federal defendants allegedly denied them their Fifth Amendment due process rights. Rather, plaintiffs only generally aver that the federal defendants engaged in conduct that deprived plaintiffs of their liberty and property in violation of the Fifth Amendment. Amnd. Compl. at ¶¶ 67-71. In any event, taking the Eldridge factors into consideration, federal defendants provided plaintiffs’ with sufficient due process. Although plaintiffs’ “private interest” in obtaining a fair and reasonable insurance settlement is significant, the procedures utilized by the Federal defendants in adjusting plaintiffs’ flood insurance claims provided adequate procedural safeguards that do not constitute a denial of due process of law.¹⁴

¹⁴ As previously stated, under the Appraisal provision of the SFIP, plaintiffs could have requested an appraisal if there was any disagreement on the actual cash value or, if applicable, replacement cost of the damaged property. 44 C.F.R. P. 61 App. A(1), Article VII, P. Second, if plaintiffs were still not satisfied with their flood insurance adjustment, they could have requested a second review by the Hurricane Isabel Task Force (Task Force) that was specifically established to address plaintiffs’ complaints regarding the claims adjusting process arising out of Hurricane Isabel. The Task Force provided extraordinary administrative review beyond any requirement of the

Therefore, as demonstrated above, FEMA's treatment of plaintiffs with respect to the adjustment of their flood insurance claims was fair and reasonable given the numerous options provided by statute and regulation to dissatisfied policyholders. FEMA's extraordinary establishment of a secondary Task Force review also demonstrated FEMA's fair and reasonable treatment of plaintiffs' claims. Accordingly, the procedures used by FEMA in adjusting plaintiffs' flood insurance claims provided adequate procedural safeguards and do not constitute a denial of due process of law; and the statutory and administrative remedies available to plaintiffs preclude a Bivens claim.

C. The Plaintiffs' Bivens Action Must Be Dismissed For Failure To Allege Specific Actions That Each Federal Official Individually Performed That Allegedly Violated A Constitutional Right.

Finally, the plaintiffs' Bivens complaint must be dismissed because it fails to allege with particularity what specific actions each of the federal defendants individually took that allegedly violated the constitutional rights of individual plaintiffs. A complaint advancing constitutional claims must plead with factual specificity the personal involvement of each defendant; mere conclusory allegations will not make out a claim for relief. A plaintiff must plead specific facts with sufficient particularity to meet all the elements necessary to lay a foundation for recovery against each particular defendant named in the suit. See, e.g., Northington v. Jackson, 973 F.2d 1518, 1521 (10th Cir. 1992)(holding that although a court should construe a pro se plaintiff's complaint liberally, "the court should not assume the role of advocate, and should dismiss claims which are supported by vague and conclusory allegations."); Martin v. Malhoyt, 830 F.2d 237, 257 (D.C. Cir. 1987); Weathers v. Ebert, 505 F.2d 514, 517 (4th Cir. 1974), cert. denied, 424 U.S. 975 (1976).

SFIP. Third, if plaintiffs' were still not satisfied with the offered settlement amount under their SFIPs or any disallowance by FEMA, the NFIA provided for suit against the Director within one year from FEMA's or the WYO's denial or partial denial of a claim. 42 U.S.C. § 4072; 44 C.F.R. Pt. 61 App. A(1), Article VII, R.

Similarly, the courts of appeal have articulated pleading standards that require the plaintiff to allege facts that show the existence of the asserted constitutional or statutory right recited in the complaint and what the defendant did to violate the asserted right. See, e.g., Cronn v. Buffington, 150 F.3d 538, 544 (5th Cir. 1998)(affirming dismissal where plaintiff failed to state facts indicating “personal involvement in the acts causing the deprivation of a person’s constitutional rights”); Grossmeyer v. McDonald, 128 F.3d 481, 495 (7th Cir. 1997)(stating that “[p]ersonal involvement is a prerequisite for individual liability.”); Simpkins v. District of Columbia Government, 108 F.3d 366, 369 (D.C. Cir. 1997)(“The complaint must at least allege that the defendant federal official was personally involved in the illegal conduct.”); Tallman v. Reagan, 846 F.2d 494 (8th Cir. 1988)(per curiam)(affirming dismissal of complaint which did not allege officials’ personal involvement in the alleged wrong); Dewey v. University of New Hampshire, 694 F.2d 1, 3 (1st Cir. 1982)(plaintiff must allege facts demonstrating “who did what to whom and why”), cert. denied, 461 U.S. 444 (1983).

A close reading of the First Amended Complaint shows that the plaintiffs have fallen woefully short with respect to this requirement. The only allegations that the Complaint makes against the federal officials are that they were “aware of” the allegedly illegal tactics used by the other private defendants to settle insurance claims and “failed to take corrective action,” instead recommending that the plaintiffs “avail themselves of their legal remedies.” See Amnd. Compl. at ¶¶ 32, 33. The plaintiffs do not specify how the federal defendants were made aware of allegedly illegal acts by the private insurance companies and adjusters, nor what “corrective action” was required as a matter of constitutional right of the federal defendants. The plaintiffs do not explain, as they must, how recommending that someone who believes they have been cheated pursue their legal remedies violates a Constitutional right.

The *only* allegations against any of the federal officials that go beyond vague accusations that the federal officials “knew” certain things and “failed to take corrective action,” appear in Paragraphs 34 and 58 with regard to the activities of James Shortley, FEMA’s Claims Section Chief. Mr. Shortley is criticized for having failed to disclose a claims guidance memorandum setting forth FEMA’s position regarding claim adjustment (Para. 34) and for having failed to convene an “independent” task force to review Hurricane Isabel claims (Para. 58). These allegations also are not sufficient under the case law cited above because they do not specify how those actions actually violated the constitutional rights of individual plaintiffs.

III. COUNTS II AND III MUST BE DISMISSED FOR FAILURE TO PLEAD FRAUD WITH PARTICULARITY AS REQUIRED BY F. R. C. P. 9(b)

Even if plaintiffs filed administrative tort claims with FEMA prior to filing this action, plaintiffs’ Second and Third Causes of Action, which allege adjustment fraud and procurement fraud should be dismissed because they are not plead with sufficient particularity. Fed. R. Civ. P. Rule 9(b) provides that “[i]n all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity.” In construing the requirements of Rule 9(b), courts require that a plaintiff plead the “time, place, and contents of the false representations, as well as the identity of the person making the misrepresentation and what he [or she] obtained thereby.” Harrison v. Westinghouse Savannah River Co., 176 F.3d 776, 784 (4th Cir. 1999). Here, plaintiffs’ fraud allegations (paragraphs 72–85) fail to state “time, place, and contents of the false representations,” and fail to set forth “the identity of the person making the misrepresentation” as required under Rule 9(b). Id. Instead, plaintiffs make general averments of fraud without specifying what was specifically represented to each of the 182 named plaintiffs. Accordingly, plaintiffs’ fraud claims should be dismissed for failing to plead their

allegations with particularity.

IV. FEMA IS NOT A PROPER PARTY WHERE A FLOOD INSURANCE POLICY IS PURCHASED THROUGH A WYO COMPANY.

A substantial number of plaintiffs in this action purchased SFIPs through the WYO program from companies that have been named as defendants and those claims brought by plaintiffs insured by WYOs should be dismissed against the Federal defendants because there has been no waiver of sovereign immunity and there is no privity of contract with Federal defendants.¹⁵ Pursuant to 42 U.S.C. § 4072, the disallowance of a claim by FEMA is a precondition for filing a lawsuit against FEMA for flood insurance benefits.¹⁶ With respect to plaintiffs who purchased SFIPs through the WYO program, these plaintiffs cannot demonstrate that FEMA and/or the Federal defendants denied their flood claims because the WYO companies are responsible for the adjustment, settlement, payment and defense of all claims arising from policies of flood insurance it issues under the program. 44 C.F.R. § 62.23(d). Federal courts routinely recognize that in circumstances where an insured obtained an SFIP from a private WYO company, any suit against FEMA must be dismissed because there has been no waiver of sovereign immunity or privity of contract. See e.g., Hower v. FEMA, 2004 U.S. Dist. LEXIS 22486 (E.D. Pa. October 20, 2004) Accordingly, because certain plaintiffs in this lawsuit purchased SFIPs through WYO insurance companies, these claims are barred against the Federal defendants for lack of subject matter jurisdiction as there has been no waiver of sovereign immunity.

V. SFIP POLICYHOLDERS AND THEIR SPOUSES ARE THE ONLY PROPER PLAINTIFFS TO THIS ACTION

Additionally, there are numerous plaintiffs in the First Amended Complaint who are

¹⁵ See Revised Attachment A to Plaintiffs' First Amended Complaint.

¹⁶ The National Flood Insurance Act, 42 U.S.C. § 4072, also provides Federal jurisdiction for participating WYO companies on disputes over claims on SFIPs written by the companies. See e.g., Van Holt v. Liberty Mut. Fire Ins. Co., 163 F.3d 161, 166 (3rd Cir. 1998).

neither the named insured and/or spouse of the named insured and/or mortgagee and/or loss payee as designated in the SFIP Declarations Page. Specifically, it appears that plaintiffs in this action include other household members, such as children and/or other relatives who are not named on the Declarations Page. To the extent that such plaintiffs are included in this action, they should be dismissed in their entirety because they are not proper party plaintiffs. Under the SFIP, the insureds are defined as the individuals named on the Declarations Page of the policy as well as a spouse so long as they are a resident of the same household. 44 C.F.R. Pt. 61, App. A(1), Art. II, A. Insureds are also defined to include any mortgagee or loss payee named in the Application and Declarations Page. *Id.* In this case, plaintiffs cannot demonstrate that all named plaintiffs are contained in their respective Declarations Pages. Because these plaintiffs are not the insureds, there is no privity of contract with the Federal defendants and they are not proper party plaintiffs to this action.

Moreover, as previously stated, the SFIP provides a limited waiver of sovereign immunity for an insured to file suit against the Director in U.S. District Court within one year from the date of FEMA's denial or partial denial of his/her claim. 44 C.F.R. Pt. 61, Appendix A(1), Article VII, R. Because family members are not insureds as defined in the SFIP, they have no cause of action against the federal defendants and there is no waiver of sovereign immunity for such actions.

VI. PLAINTIFFS ARE NOT ENTITLED TO A JURY TRIAL ON THEIR FIRST, SECOND, THIRD AND FOURTH CAUSES OF ACTION.

Plaintiffs in the last paragraph of their first four causes of action. Despite plaintiffs' demand sovereign immunity has not been waived under the National Flood Insurance Act for a jury trial. Center Glass and Trim Co. v. United States, FEMA, 637 F. Supp. 209, 212 (S.D. W.Va. 1986). Plaintiffs have a right to a jury trial against the United States only when Congress has

expressly granted that right by statute and the NFIA does not grant that right. See e.g., Kolner v. Director, Federal Emergency Management Agency, 547 F. Supp. 828, 829-30 (N.D. Ill 1982); Latz v. Gallagher, 550 F. Supp. 257 (W.D. Mich. 1982); Yonker v. Giuffrida, 581 F. Supp. 1243, 1246 (S.D.W.Va 1984). Therefore, plaintiffs' request for a jury trial should be denied.

Moreover, to the extent that plaintiffs' first four Causes of Action are governed by the FTCA, they are not entitled to a jury trial as the FTCA is clear that there are no jury trials in FTCA cases. See 28 U.S.C. § 2402; United States v. Neustadt, 366 U.S. 696, 701 (1961), Tucker v. United States, 385 F. Supp. 717, 720-21 (D. S.C. 1974). Accordingly, plaintiffs are not entitled to a jury trial.

VII. PLAINTIFFS ARE NOT ENTITLED TO RECOVER PRE-JUDGMENT INTEREST, POST-JUDGMENT INTEREST OR ATTORNEYS' FEES AND COSTS FROM THE UNITED STATES

Plaintiffs seek pre-judgment interest, post-judgment interest, attorneys' fees and costs from FEMA that they cannot recover. Amnd. Compl. at "Wherefore" paragraphs preceding ¶¶ 72, 79, 86, 89; ¶ 92. See e.g., Cunningham v. Federal Bureau of Investigation, 664 F.2d 383, 384 (3d Cir. 1981) ("In the absence of any express waiver of sovereign immunity, costs and expenses of litigation are not recoverable from the United States."). The National Flood Insurance Act does not provide for recovery of costs, attorney's fees, prejudgment or post judgment interest in suits brought on flood insurance policies. See e.g., Newton v. Capital Assur. Co., Inc., 245 F.3d 1306, 1309-10 (11th Cir. 2001); In re Estate of Lee v. NFIP, 812 F.2d 253, 256 (5th Cir. 1987); L'Augerge deFrance, Inc. v. FEMA, 1985-86 Fire & Casualty Cas. (CCH) 1157 (D.N.J. 1985); Sandia Oil Co. v. Beckton, 889 F.2d 258, 261-62 (10th Cir. 1989). Accordingly, plaintiffs' demand for pre-judgment interest, post-judgment interest, attorneys' fees and costs should be dismissed.

CONCLUSION

For all the foregoing reasons, the Court should dismiss plaintiffs' first four Causes of Action for lack of subject matter jurisdiction and/or failure to state a claim as plaintiffs have failed to show a waiver of sovereign immunity and failed to establish the necessity for a Bivens remedy against the Federal defendants. Moreover, plaintiffs who are not designated in the Declarations Page are improper party plaintiffs to this action and should be dismissed in their entirety. Finally, plaintiffs' demand for a jury trial, attorney's fees and costs, and pre and post

judgment interest should be dismissed because there is no waiver of sovereign immunity for such items and the FTCA does provide for jury trials.

Respectfully Submitted,

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