UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 25-cv-80880-Leibowitz/McCabe

JANE DOE 1, et al.,

Plaintiffs,

v.

UNITED STATES OF AMERICA,

Defendant.
_____/

REPORT & RECOMMENDATION

THIS CAUSE comes before the Court on Defendant's motion to dismiss Plaintiffs' Fourth Amended Complaint, which was referred to the undersigned by United States District Judge David S. Leibowitz. (DE 110, DE 111). For the reasons set forth below, the undersigned **RECOMMENDS** that the motion be **DENIED** and that the District Judge allow a limited period of jurisdictional discovery.

I. BACKGROUND

This is a negligence case against the United States brought by numerous sexual abuse victims of Jeffrey Epstein. The Court accepts the following facts as true, taken from Plaintiffs' Fourth Amended Complaint ("FAC"). (DE 104).

A. Maria Farmer Reports Epstein in New York

In 1996, Maria Farmer contacted an FBI agent in New York and reported that Epstein had sexually assaulted her, that he possessed child sexual abuse material ("CSAM"), and that he had sexually abused and trafficked numerous young girls. (DE 104 ¶¶ 102, 105, 108). At the end of the conversation, Farmer asked the FBI agent if she should report Epstein to anyone else, including any other law enforcement agencies. (DE 104 ¶ 110). The FBI agent instructed Farmer not to share her

report with anyone else. (DE 104 ¶ 111). Based on this conversation, Farmer believed that the FBI agent would help her and investigate her allegations. (DE 104 ¶ 114). In accordance with the agent's instructions, Farmer did not contact any other law enforcement agency about Epstein or his associates. (DE 104 ¶ 116).

The FBI agent never followed up on Farmer's allegations. (DE 104 ¶ 118). Plaintiffs allege that FBI agents knew or should have known that their failure to investigate Farmer's allegations would create an unreasonable risk of harm to other victims, including Plaintiffs. (DE 104 ¶ 126). Plaintiffs allege that FBI agents created a foreseeable zone of risk to future Epstein victims, including themselves, by failing to investigate Farmer's credible allegations. (DE 104 ¶ 127).

B. FBI Agents in Unidentified States Ignore Additional Tips & Red Flags

Between 1996 and 2005, FBI agents in unidentified states continued to receive additional reports, complaints, and tips concerning Epstein's criminal activities, including illegal sex trafficking of women and minors, sexual abuse, and human rights violations. (DE 104 ¶ 132). In response, FBI agents failed to act upon and investigate these complaints and tips and failed to follow internal protocols for sex trafficking investigations. (DE 104 ¶ 133). FBI agents also failed to investigate numerous red flags, including the following:

- In October 2002, a New York magazine article reported that "Epstein is frequently seen around town with a bevy of comely young women." (DE 104 ¶ 135).
- In 2002, federal authorities gave Epstein clearance to travel on his private plane to Africa with the former president of the United States, as well as a famous actor, and several very young women. (DE 104 ¶ 137).
- Epstein's office frequently initiated passports and visas for young women and

underage girls for the purpose of sex trafficking them. (DE 104 ¶¶ 138-40).

- Epstein frequently requested new passports, reported lost passports, and used multiple passports for traveling. (DE 104 ¶ 141).

C. Audra Christiansen Reports Epstein to FBI Agents in an Unidentified State

At some point prior to 2005, Epstein sexually abused and trafficked Plaintiff Audra Christiansen. (DE 104 ¶ 142). In 2005, Plaintiff Christiansen sought help from Hugh Hefner, the founder of Playboy magazine. (DE 104 ¶ 145). Thereafter, in 2005, Hefner contacted FBI agents multiple times in an unidentified state to report that Epstein had trafficked and abused Plaintiff Christiansen. (DE 104 ¶¶ 148-51). An FBI agent spoke to Hefner and explained that the FBI would investigate the allegations and help Plaintiff Christiansen. (DE 104 ¶ 152). Relying on the FBI to investigate her claims, Plaintiff Christiansen did not contact other law enforcement agencies. (DE 104 ¶ 154).

FBI agents did not follow up on Plaintiff Christiansen's allegations until fifteen years later, when FBI agents finally interviewed her. (DE 104 ¶¶ 155-59). Plaintiffs allege that FBI agents knew or should have known that their failure to follow up on Plaintiff Christiansen's allegations would create an unreasonable risk of harm to future victims, including the other Plaintiffs. (DE 104 ¶ 166). Plaintiffs further allege that FBI agents created a foreseeable zone of risk to future Epstein victims, including themselves, by failing to investigate Plaintiff Christiansen's allegations more quickly. (DE 104 ¶ 167).

D. The 2006 FBI Investigation in Florida

In March 2005, a woman contacted the Palm Beach Police Department to report that a 14-year-old girl had been recruited to Epstein's home for a sexual massage in exchange for money. (DE 104 ¶ 172). The Palm Beach Police Department promptly launched an investigation that included

trash runs, witness interviews, and execution of a search warrant at Epstein's Palm Beach home. (DE 104 ¶¶ 173-80). The investigation uncovered compelling evidence that Epstein and others had recruited minors to travel to Epstein's Palm Beach home to give him massages and engage in sexual activity. (DE 104 ¶¶ 173-80).

In July 2006, the Palm Beach Police Department referred the case to the FBI's West Palm Beach field office, which opened a case on July 24, 2006. (DE 104 ¶¶ 184, 188). Plaintiffs allege that FBI agents thereafter conducted a negligent investigation marked by numerous defects, including but not limited to the following:

- failure to interview or contact all victims even though FBI agents had their names and telephone numbers (DE 104 ¶¶ 190, 198),
- failure to secure a signed statement from each victim as required by FBI protocols (DE 104 ¶ 193),
- failure to secure all possible evidence to corroborate the statements of victims as required by FBI protocols (DE 104 ¶ 194), and
- making victims feel like they, the victims, had done something wrong or illegal during victim interviews (DE 104 ¶ 201).

In 2007, federal prosecutors in the Southern District of Florida declined to bring federal charges against Epstein. (DE 104 ¶ 222). Instead, on September 24, 2007, the U.S. Attorney for the Southern District of Florida entered into a non-prosecution agreement with Epstein. (DE 104 ¶¶ 223-24). The agreement called for Epstein to plead guilty to a Florida state charge for solicitation of a minor and to serve thirteen months in state jail. (DE 104 ¶ 232). Epstein was allowed to leave the jail every day for work release. (DE 104 ¶ 233). While on work release, Epstein continued to sexually

abuse women and teenagers. (DE 104 ¶ 233).

Despite the non-prosecution agreement, FBI agents thereafter sent numerous letters to Epstein victims in October 2007, January 2008, and May 2008, claiming the case was "currently under investigation." (DE 104 ¶ 225). This representation was false, as the case had ended with the non-prosecution agreement. (DE 104 ¶ 226). By sending these letters, FBI agents misled victims into believing federal prosecution was still a possibility. (DE 104 ¶ 226). The victims relied on the FBI's misrepresentation that it was continuing to investigate Epstein. (DE 104 ¶ 228).

E. The 2019 Investigation & Arrest in New York

Following his release from state jail under the non-prosecution agreement, Epstein continued to sexually assault underage girls up to the date of his eventual arrest in 2019. (DE 104 ¶ 234). On July 6, 2019, FBI agents finally arrested Epstein on federal sex trafficking and conspiracy charges resulting from an investigation in the Southern District of New York. (DE 104 ¶ 271). On August 10, 2019—approximately one month after his arrest—Epstein died in prison from an apparent suicide. (DE 104 ¶ 272). As a result, Epstein never went to trial on federal sex trafficking charges. (DE 104 ¶ 272).

F. Tort Claims

Plaintiffs allege that Epstein sexually abused each of them on various occasions between 1996 and 2017. (DE 104 ¶¶ 30-63). Plaintiffs allege that employees of the FBI and the Department of Justice ("DOJ")[1] owed them a duty of care on two bases: first, that these employees voluntarily

[1] As a matter of organizational structure, the FBI is a federal agency within the larger agency of DOJ. During the hearing on this matter, the Court questioned Plaintiffs' counsel as to whether Plaintiffs seek relief for the conduct of non-FBI employees of DOJ, such as Assistant United States Attorneys. Plaintiffs' counsel clarified that Plaintiffs do not seek any such relief and that they seek relief solely for the conduct of FBI employees. (DE 126 at 25-26).

undertook a duty to protect them from Epstein (DE 104 ¶ 323), and second, that these employees created a foreseeable zone of risk that gave rise to a legal duty to prevent Epstein from harming Plaintiffs. (DE 104 ¶ 332). According to Plaintiffs, FBI agents breached these legal duties in numerous ways, including the following:

a. Failing to properly investigate or follow up on Maria Farmer's report in 1996. (DE 104 ¶¶ 325.a, 334.a).

b. Failing to properly respond to tips and reports regarding sex trafficking of minors and sexual abuse of minors from 1996 until 2005. (DE 104 ¶¶ 325.b, 334.b).

c. Failing to investigate or follow up on Plaintiff Christiansen's allegations of sexual abuse and trafficking in 2005. (DE 104 ¶¶ 325.c, 334.c).

d. Failing to follow up and investigate reports and tips of suspicious banking activity from financial institutions, including payments to minor girls. (DE 104 ¶¶ 243-55, 325.d, 334.d).

e. Failing to properly investigate evidence provided by the Palm Beach Police Department. (DE 104 ¶¶ 325.e, 334.e).

f. Negligently investigating reports of a 14-year-old being sexually abused in Epstein's Palm Beach home. (DE 104 ¶¶ 325.f, 334.f).

g. Negligently failing to investigate CSAM during the 2005 raid of Epstein's Palm Beach home. (DE 104 ¶¶ 325.g, 334.g).

h. Negligently failing to interview and assist the victim whose name was mentioned in "Important Messages" from 2001 to 2005. (DE 104 ¶¶ 325.h, 334.h).

i. Negligently permitting Epstein to be a judge at a beauty pageant in the U.S. Virgin

Islands in 2007 despite impending charges of sex trafficking of minors and sex abuse. (DE 104 ¶¶ 325.i, 334.i).

j. Negligently permitting Epstein to sex traffic minors and young women via the clearing of background checks for passengers on Epstein's private jet. (DE 104 ¶¶ 325.j, 334.j).

k. Ignoring reports of violence and threats to victims if they cooperated with authorities. (DE 104 ¶¶ 325.k, 334.k).

l. Ignoring reports of child sex trafficking. (DE 104 ¶¶ 325.l, 334.l).

m. Ignoring evidence of minors procuring other minors for sex abuse. (DE 104 ¶¶ 325.m, 334.m).

n. Prematurely closing an FBI file in the face of evidence of sex trafficking and sexual abuse of minors. (DE 104 ¶¶ 325.n, 334.n).

o. Ignoring reports of suspicious banking activities. (DE 104 ¶¶ 325.o, 334.o).

p. Ignoring CSAM and child pornography. (DE 104 ¶¶ 325.p, 334.p).

q. Failing to follow up on improper issuing of passports and federal passport fraud. (DE 104 ¶¶ 325.q, 334.q).

Plaintiffs allege that the negligent conduct of FBI agents proximately caused them to suffer injuries. (DE 104 ¶¶ 328, 336). Specifically, they allege that, but for FBI agents' failure to comply with their mandatory obligations to investigate and intervene based on the information they received, Epstein would not have been able to continue to commit further crimes, including those committed against Plaintiffs. (DE 104 ¶¶ 329, 337). Based on the above, Plaintiffs bring two counts of negligence under the Federal Tort Claims Act, 28 U.S.C. § 2671 et seq. ("FTCA") as follows:

Count	Claim	Defendants
I	Negligence Under the Voluntary Undertaking Doctrine	Unidentified Employees of the FBI
II	Negligence Under the Zone of Risk Doctrine	Unidentified Employees of the FBI

(DE 104 ¶¶ 322-40). Plaintiffs seek $320 million in compensatory damages as well as other relief. (DE 104 ¶¶ 339-40).

II. LEGAL STANDARD

By way of this motion, the Government seeks dismissal of the FAC pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure. As to Rule 12(b)(1), the Government argues that the case must be dismissed for lack of subject matter jurisdiction because the FTCA does not waive sovereign immunity for the claims alleged in the FAC. (DE 110 at 5, 11). As the Eleventh Circuit has recognized, Rule 12(b)(1) allows for two types of attacks on subject matter jurisdiction: "facial" attacks and "factual" attacks. *Lawrence v. Dunbar*, 919 F.2d 1525, 1529 (11th Cir. 1990). When a defendant makes a facial attack, a court must "look and see if [the] plaintiff has sufficiently alleged a basis of subject matter jurisdiction, and the allegations in his complaint are taken as true for the purposes of the motion." *Id.*

When a defendant raises a factual attack, the parties may offer extrinsic evidence, at which point, the district court must "weigh the evidence and satisfy itself as to the existence of its power to hear the case." *Id.* Moreover, when a defendant makes a factual attack, a district court cannot dismiss the complaint without first affording the plaintiff an opportunity for discovery. *See Williamson v. Tucker*, 645 F.2d 404, 414 (5th Cir. 1981) (noting that district courts have the power to decide

disputed issues of fact related to subject matter jurisdiction but that district courts "must" give the plaintiff an opportunity for discovery before doing so).

As to Rule 12(b)(6), the Government argues that, even if subject matter jurisdiction exists, the FAC nevertheless fails to state claims upon which relief can be granted. (DE 110 at 5, 11). In evaluating a Rule 12(b)(6) motion, a court must accept a plaintiff's allegations as true and construe them in the light most favorable to the plaintiff. *Pielage v. McConnell*, 516 F.3d 1282, 1284 (11th Cir. 2008). Although Rule 8(a)(2) requires only "a short and plain statement of the claim showing that the pleader is entitled to relief," a mere "formulaic recitation of the elements of a cause of action will not do[.]" *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). Instead, "a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (cleaned up). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.*

III. DISCUSSION

The Government raises four arguments in support of dismissal, which the Court will address in logical order below. For the sake of completeness and for the benefit of the District Judge, the Court makes recommendations on all arguments raised by the parties, even where a given recommendation may moot another argument.

A. Discretionary Function Exception

The Government first urges dismissal based on the discretionary function exception. (DE 110 at 12). By way of the FTCA, the Government agrees to waive its sovereign immunity for limited categories of cases. *Motta ex rel. A.M. v. United States*, 717 F.3d 840, 843 (11th Cir. 2013). Because

the FTCA operates as a waiver of sovereign immunity, the statute "must be strictly construed in favor of the United States" and "not enlarged beyond what the language of the statute requires." *Smith v. United States*, 14 F.4th 1228, 1231 (11th Cir. 2021) (quoting *United States v. Idaho ex rel. Dir., Idaho Dep't of Water Res.*, 508 U.S. 1, 7 (1993)). If a claim falls outside the scope of the FTCA, a district court lacks subject matter jurisdiction, and the case must be dismissed. *Id.* at 1234 (finding that the Government's sovereign immunity "remains intact" for claims outside of the FTCA and that "no subject matter jurisdiction exists" over such claims).

Here, the Government makes a facial attack on subject matter jurisdiction, relying on the discretionary function exception, which provides as follows:

> The provisions of this chapter and section 1346(b) of this title shall not apply to—
>
> (a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or *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.*

28 U.S.C. § 2680(a) (emphasis added). This 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." *United States v. Varig Airlines*, 467 U.S. 797, 808 (1984).

In applying the discretionary function exception, a court must first determine "exactly what conduct is at issue." *Autery v. United States*, 992 F.2d 1523, 1527 (11th Cir. 1993). Here, the conduct at issue involves the following:

- The mishandling of Maria Farmer's complaint to FBI agents in New York in 1996, including the taking of "no action" in response to that complaint. (DE 104 ¶¶ 102-16, 121-22).
- The mishandling of additional tips and red flags by FBI agents in unidentified states from 1996 to 2005, including the failure to act upon and investigate those complaints and tips, and the failure to comply with mandatory protocols and guidelines. (DE 104 ¶¶ 132-34).
- The mishandling of Plaintiff Christiansen's complaint to FBI agents in an unidentified state in 2005, including the failure to interview Plaintiff Christiansen until fifteen years later. (DE 104 ¶¶ 147-60).
- The mishandling of a referral from the Palm Beach Police Department to FBI agents in Florida in 2006, including the failure to interview all victims and witnesses and to secure all possible evidence to corroborate victim statements, all of which resulted in a federal non-prosecution agreement that allowed Epstein to plead guilty to state charges and serve only thirteen months in a state jail with daily work release, rather than face more severe charges and consequences. (DE 104 ¶¶ 184-97, 222-23, 232-33).
- The failure of FBI agents to prevent Epstein from committing further crimes. (DE 104 ¶¶ 15, 16, 128, 129, 169, 283, 287, 326, 329, 337).

Once a court has identified the exact conduct at issue, a two-step test determines whether the discretionary function exception applies: (1) whether the conduct at issue involves "an element of judgment or choice" by the federal employee, and (2) "whether that judgment is of the kind that the

discretionary function exception was designed to shield." *Berkovitz v. United States*, 486 U.S. 531, 536–37 (1988). Of significance here, the discretionary function exception does not apply where a federal employee fails to follow a mandatory, non-discretionary policy or procedure. *See Ochran v. United States*, 117 F.3d 495, 499 (11th Cir. 1997) (noting that "conduct does not involve an element of judgment or choice, and thus is not discretionary, if a federal statute, regulation, or policy specifically prescribes a course of action for an employee to follow, because the employee has no rightful option but to adhere to the directive") (cleaned up).

In this case, Plaintiffs argue that the discretionary function exception does not apply because FBI agents failed to follow certain mandatory, non-discretionary policies and procedures set forth in the FBI Manual and the FBI Manual of Investigative Operations and Guidelines ("MIOG"), concerning the investigation of child sexual abuse and CSAM cases, including the following:

- Failure to conduct a preliminary inquiry and investigation as required by the MIOG. (DE 104 ¶¶ 283, 290-91).
- Failure to interview the subject of the investigation, Epstein, as required by the MIOG. (DE 104 ¶ 285).
- Failure to draft the FD-71 form as required by the MIOG in response to a report of child pornography. (DE 104 ¶¶ 288-89).
- Failure to interview the complainant for each allegation of child sexual abuse and failure to secure a signed statement from each victim, as required by the FBI Manual. (DE 104 ¶¶ 294-95, 303).
- Failure to secure all possible evidence to corroborate the statement of the victim as required by the FBI Manual. (DE 104 ¶ 304).

- Failure to obtain "names (with aliases), descriptions, brief personal histories, reputation, marital status, and identification records of subject and victim," as required by the FBI Manual. (DE 104 ¶ 306).

The Court expresses skepticism as to whether these policies and procedures remove this case from the discretionary function exception. "The overwhelming consensus of federal case law establishes that criminal law enforcement decisions—investigative and prosecutorial alike—are discretionary in nature and, therefore, by congressional mandate, immune from judicial review." *Mesa v. United States*, 837 F. Supp. 1210, 1213 (S.D. Fla. 1993), *aff'd*, 123 F.3d 1435 (11th Cir. 1997). In the Court's view, law enforcement investigations remain discretionary exercises regardless of the preliminary steps that a particular agency might require its field agents to follow. This is because law enforcement agents retain discretion, at all times, to weigh and evaluate the evidence they recover and make decisions going forward in the investigation. Put differently, even if FBI agents had followed all of the policies and procedures cited by Plaintiffs, the ultimate decision to assess the credibility of the evidence recovered would have remained within the discretion of the agents who gathered the evidence. As the Ninth Circuit observed:

> FBI agents, like detectives and police officers, must evaluate whether the information requires immediate action, deferred action, or no action at all. They have to make myriad judgments about how the potential for future criminal activity fits the agency's mission and enforcement priorities. Indeed, agents may disagree among themselves about the significance or credibility of information they receive.

Gonzalez v. United States, 814 F.3d 1022, 1029 (9th Cir. 2016).

More to the point, Plaintiffs brought this suit based on the failure of FBI agents to prevent Epstein from committing further crimes. (DE 104 ¶¶ 15, 16, 128, 129, 169, 283, 287, 326, 329, 337). Plaintiffs have not alleged the existence of any mandatory, non-discretionary policies or procedures

that would have *required* FBI agents to arrest Epstein or to prioritize his case over other serious cases. Likewise, Plaintiffs have not alleged the existence of any mandatory, non-discretionary policies or procedures that would have *required* FBI agents to initiate criminal charges against Epstein or recommend that state or federal prosecutors do so. These types of decisions go to the core of law enforcement discretion. *See Martinez v. United States*, 587 F. Supp. 2d 245, 248 (D.D.C. 2008) ("The decision to allocate limited governmental resources to investigate a reported crime, like the decision to allocate limited resources to prosecute a crime, is a discretionary function.").

Nevertheless, the undersigned recommends that the District Judge defer resolution of this issue until after Plaintiffs have had an opportunity for limited jurisdictional discovery. Judge Dimitrouleas faced a similar issue in *In re Marjory Stoneman Douglas High Sch. Shooting*, 482 F. Supp. 3d 1273 (S.D. Fla. 2020) (hereafter "*MSD*"), a case involving the school shooting at Marjory Stoneman Douglas High School. In that case, the Government raised the discretionary function exception in response to FTCA claims brought against FBI agents concerning their response to tips regarding a potential school shooting. *Id.* at 1280-81. Before considering the issue on the merits, Judge Dimitrouleas allowed "jurisdictional discovery regarding the existence and content of any mandatory established policies, protocols, and procedures, whether written or otherwise, governing the FBI's conduct in assessing or handling tips regarding potential threats to life, active shooters, mass shootings, terrorism threats, and/or school shootings." (DE 27, Case No. 18-cv-62758-WPD). In this case, the District Judge likewise opined, in response to earlier motion practice, that this case should not be dismissed on discretionary function grounds without first affording Plaintiffs an opportunity for discovery. (DE 97 at 12).

The Court makes this recommendation based on the unique facts of this case. Given that the Government raised the discretionary function exception by way of a *facial* attack on subject matter

jurisdiction, this recommendation marks an exception to the general rule. In contrast to *factual* attacks, plaintiffs have no *per se* right to discovery before a dismissal can be ordered in response to a *facial* attack on subject matter jurisdiction. *See McElmurray v. Consol. Gov't of Augusta–Richmond Cty.*, 501 F.3d 1244, 1247 (11th Cir. 2007) (distinguishing between facial and factual attacks and finding that "discovery was not necessary" before dismissal on a facial attack). Similarly, district courts enjoy broad discretion to control the timing of discovery, and plaintiffs have no automatic right to conduct discovery in order to "learn" the facts that would enable them to state a plausible claim for relief. *Sovereign Bonds Exch. v. Fed. Republic of Ger.*, No. 10-219440, 2011 WL 13100214, at *1 (S.D. Fla. Aug. 9, 2011). Instead, plaintiffs must allege such facts at the outset of the case. *Id.*

By making this recommendation, the undersigned does not announce or advocate a blanket rule that FTCA plaintiffs *always* have a right to discovery when the Government raises the discretionary function exception by way of a facial attack on subject matter jurisdiction. In the Court's view, district courts retain discretion to stay discovery in such cases and may order dismissal even without the benefit of discovery. The undersigned nevertheless recommends that the District Judge, in the exercise of his discretion in this case, allow a ninety-day period of jurisdictional discovery limited to the existence and content of any mandatory established policies, protocols, and procedures, whether written or otherwise, governing the FBI's conduct in assessing or handling tips, reports, and complaints regarding sexual abuse, child sexual abuse, and/or child sexual abuse material. Once this discovery has been completed, the Government may renew this motion seeking dismissal under the discretionary function exception.

B. Lack of Private Party Analogs Under State Law

The Government next urges dismissal based on the lack of private party analogs under applicable state law. (DE 110 at 5). By way of the FTCA, the Government only agrees to waive its sovereign immunity "in the same manner and to the same extent as a *private individual under like* circumstances[.]" 28 U.S.C. § 2674 (emphasis added). Likewise, the FTCA only gives federal courts subject matter jurisdiction over—and hence the Government only waives its sovereign immunity for—claims in which "the United States, *if a private person*, would be liable to the claimant *in accordance with the law of the place where the act or omission occurred*." 28 U.S.C. § 1346(b)(1) (emphasis added). For purposes of this statute, "the law of the place where the act or omission occurred" means the law of the state where the alleged tort occurred. *Zelaya v. United States*, 781 F.3d 1315, 1323 (11th Cir. 2015) (citation omitted).

In other words, FTCA liability cannot be triggered unless the federal employee's conduct would be "independently tortious" against a private person under applicable state law. *Smith*, 14 F.4th at 1233. Courts often refer to this requirement as the "private party analog." *See, e.g., McLaughlin v. Fla. Int'l Univ. Bd. of Trustees*, 533 F. Supp. 3d 1149, 1166 (S.D. Fla. 2021), *aff'd,* 2022 WL 1203080 (11th Cir. Apr. 22, 2022). In a medical malpractice case, for example, a government doctor working at a Veterans Administration hospital could be compared to a private doctor working at a private hospital. In that situation, the FTCA would waive sovereign immunity to the same extent that a private doctor could be held liable under state tort law under like circumstances.

As the Eleventh Circuit observed in *Zelaya*, it can be "conceptually difficult" to find private party analogs for cases that involve "uniquely governmental functions." 781 F.3d at 1324 (noting that "it can be difficult to imagine how a private person could be liable for breaches of such quintessentially governmental functions as the regulation of air travel, prisoners, drugs, and livestock

because no private person has such duties under state law"). Notwithstanding this conceptual difficulty, "the Supreme Court long ago made clear that there is no exception from FTCA liability solely because the particular tort arose from the performance of uniquely governmental functions." *Id.* (citing *Indian Towing Co. v. United States*, 350 U.S. 61, 64 (1955)). As such, federal courts must look for private party analogs even for quintessentially governmental functions. *See Indian Towing*, 350 U.S. at 64-65 (applying FTCA to the operation of a lighthouse); *Rayonier Inc. v. United States*, 352 U.S. 315, 319-20 (1957) (applying FTCA to a government firefighter).

Significantly, however, when analyzing private party analogs, federal courts cannot superimpose limitations that state law affords its own state or municipal actors, such as state-law protections of sovereign immunity. *See MSD,* 482 F. Supp. 3d at 1281-82 (citing *Indian Towing*, 350 U.S. at 65). To do so would ignore the word "private" as used in § 1346(b)(1) and § 2674. *See United States v. Olson*, 546 U.S. 43, 45-46 (2005) (noting that the FTCA "waives sovereign immunity under circumstances where the United States, if a private person, not the United States, if a state or municipal entity, would be liable") (cleaned up). Accordingly, in searching for private party analogs, federal courts must ignore state-law doctrines that afford a "special role" to state or municipal actors. *See MSD*, 482 F. Supp. 3d at 1281-82.

In this case, Plaintiffs have alleged negligence on the part of FBI agents in New York, Florida, and other unidentified states. In order to determine whether subject matter jurisdiction exists, therefore, this Court must determine whether the common law of these states would impose tort liability upon private persons under circumstances "like" those alleged in the FAC. *See Turner ex rel. Turner v. United States*, 514 F.3d 1194, 1203 (11th Cir. 2008) (recognizing that "like circumstances" need not be "identical" or "same" circumstances).

The Court has considered, but rejects, Plaintiffs' argument that the Court should analyze the conduct of all FBI agents under the common umbrella of Florida law. (DE 128 at 1). As stated, the

Eleventh Circuit has made clear that "the law of the place where the act or omission occurred," as used in the FTCA, means the law of the state where the alleged tort occurred. *Zelaya*, 781 F.3d at 1323. Moreover, the FTCA does not authorize suits based on the conduct of an entire federal agency writ large; it only authorizes suits based on the conduct of individual federal employees. *See Lee v. United States*, No. 19-08051-PCT (DMF), 2020 WL 6573258, at *6 (D. Ariz. Sept. 18, 2020) (noting that "[t]he FTCA applies only to 'the negligent or wrongful act or omission of any employee of the United States while acting within the scope of his office or employment,' not to generalized theories of negligence asserted against the staff and employees of federal institutions as a whole") (citing 28 U.S.C. § 1346(b)(1)). Accordingly, the Court must analyze private party analogs on a state-by-state basis based on the conduct of FBI employees in each state.[2]

1. New York & Florida

The FAC alleges negligence on the part of FBI agents in, among other places, New York and Florida. (DE 104 ¶¶ 102-16, 121-24, 184-97). As a general rule, the common law of both states imposes no duty on the part of a private person to prevent or control the criminal conduct of a third person. *See Purdy v. Public Adm'r of Westchester County*, 72 N.Y.2d 1, 8 (1988) (citing Restatement (Second) of Torts § 315); *Trianon Park Condo. Ass'n v. City of Hialeah*, 468 So. 2d 912, 918 (Fla. 1985) (citing Restatement (Second) of Torts § 315). Nevertheless, the common law of both states also recognizes a version of the "voluntary undertaker" or "Good Samaritan" doctrine as embodied in the Restatement (Second) of Torts, which provides as follows:

[2] The Court notes the scarcity of case law concerning whether a crime victim can show a private party analog for a negligent law enforcement investigation (likely because most such claims fail under the discretionary function exception before reaching the secondary issue of private party analog). The parties cited only one case on point, *MSD*, 482 F. Supp. 3d at 1297-98. In that case, Judge Dimitrouleas denied the Government's discretionary-function argument as a remedy to address discovery violations committed by the Government. *Id.* at 1277.

> One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person or his things, is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care to protect his undertaking, if
>
> (a) his failure to exercise reasonable care increases the risk of such harm, or
>
> (b) he has undertaken to perform a duty owed by the other to the third person, or\
>
> (c) the harm is suffered because of reliance of the other or the third person upon the undertaking.

Restatement (Second) of Torts § 324A; *see also Miller v. Rivard*, 180 A.D.2d 331, 337 (N.Y. App. Div. 1992) (citing Restatement (Second) of Torts § 324A); *Clay Elec. Co-op., Inc. v. Johnson*, 873 So. 2d 1182, 1186 (Fla. 2003) (citing Restatement (Second) of Torts § 324A).

In support of a common law duty, Plaintiffs cite *MSD*, 482 F. Supp. 3d at 1273, where Judge Dimitrouleas allowed a negligence claim to proceed against FBI agents in connection with their failure to prevent a school shooting. In that case, Judge Dimitrouleas relied on Florida's voluntary undertaking doctrine to find a private party analog for purposes of the FTCA. *Id.* at 1297-98. Judge Dimitrouleas found the doctrine applicable based on the unique facts alleged in the *MSD* complaint. In particular, the *MSD* complaint alleged that the FBI had established a Public Access Line or "PAL" to serve as a central repository and conduit for information regarding potential threats to life, and to handle and relay that information to FBI field agents and analysts, even to the exclusion of other law enforcement entities that could have handled the information. *Id.* at 1297-98.

The *MSD* complaint alleged that, several weeks prior to the school shooting, a person close to the shooter telephoned the PAL to report "extremely urgent and highly specific" concerns about the shooter's behavior, including the fact that he had a desire to kill people, that he was fixated with ISIS, that he had access to guns and ammunition, and that he had the potential to become a school shooter.

Id. at 1278. The complaint further alleged that an FBI employee affirmatively assured the caller that the FBI would follow up on the information provided. *Id.* at 1278-79. In reliance on this assurance, the caller forwent contacting other law enforcement agencies and forwent contacting the high school itself. *Id.* The FBI thereafter failed to take appropriate investigative steps in response to the call. *Id.* at 1279.

Given that the FBI undertook to create the PAL and that an FBI employee made assurances to the caller, but failed to follow through on those assurances, Judge Dimitrouleas found that the *MSD* plaintiffs stated a plausible negligence claim under the voluntary undertaker doctrine. *Id*. at 1300. Likewise, Judge Dimitrouleas found that the FBI employees' "own affirmative conduct" caused the caller to forgo contact with other law enforcement, thereby creating a "foreseeable zone of risk" sufficient to give rise to a negligence claim under Florida's related "zone-of-risk" doctrine. *Id.* at 1302-03.

Applying these standards and case law here, the Court finds that the FAC makes sufficient allegations, accepted as true, to allege plausible private party analogs under both New York and Florida law. As to New York law, Plaintiffs allege that FBI agents in New York voluntarily accepted Maria Farmer's complaint in 1996, thereby undertaking to help her. (DE 104 ¶¶ 105-09). Plaintiffs further allege that FBI agents affirmatively told Farmer not to share the complaint with anyone else, including other law enforcement agencies. (DE 104 ¶¶ 110-11). As in the *MSD* case, Farmer forwent contacting other law enforcement agencies, believing FBI agents would exercise due care in their investigation. (DE 104 ¶¶ 111-16). Plaintiffs allege that FBI agents created a foreseeable zone of risk to future Epstein victims, including themselves, by failing to exercise due care in the investigation of Farmer's credible allegations. (DE 104 ¶ 127). Construing these allegations in the light most

favorable to Plaintiffs, the Court finds the allegations sufficient to survive dismissal and state a plausible common law duty of care under New York's voluntary undertaking and Good Samaritan doctrines.[3]

As to Florida law, the FAC alleges that FBI agents in Florida voluntarily accepted a referral of the Epstein case from the Palm Beach Police Department in 2006, thereby undertaking to help victims. (DE 104 ¶¶ 184-97). Plaintiffs further allege that FBI agents closed their investigation in 2007 by way of a non-prosecution agreement. (DE 104 ¶¶ 222-24). Despite this, FBI agents thereafter sent numerous letters to Epstein victims in October 2007, January 2008, and May 2008, claiming the case was "currently under investigation." (DE 104 ¶ 225). This representation was false, as the case had ended with the non-prosecution agreement. (DE 104 ¶ 226). By sending these letters, FBI agents affirmatively misled victims into believing the investigation was still ongoing. (DE 104 ¶¶ 226-31). As in the *MSD* case, the recipients of the letters mistakenly believed the FBI was doing something when in fact the FBI was doing nothing. Plaintiffs allege that FBI agents created a foreseeable zone of risk to future Epstein victims, including themselves, by misleading victims and failing to exercise due care in the Florida investigation. (DE 104 ¶¶ 333-35). Construing these allegations in the light most favorable to Plaintiffs, the Court finds the allegations sufficient to survive

[3] The Court has considered the Government's citation to cases such as *Watson v. United States*, 865 F.3d 123, 134 (2d Cir. 2017), which recognizes that, "[u]nder New York law, a plaintiff may not recover under general negligence principles for a claim that law enforcement officers failed to exercise the appropriate degree of care in effecting an arrest or initiating a prosecution." The Court finds *Watson* distinguishable because it involved a claim brought by an arrestee, alleging negligence on the part of the law enforcement officers who arrested him and caused him to be detained for a crime he did not commit. *Id.* at 134-35. This case, in contrast, involves claims brought by crime victims, alleging negligence on the part of the law enforcement officers who failed to prevent a third-party from committing crimes against them. As discussed above, this type of claim finds a private party analog in the voluntary undertaker doctrine and Good Samaritan doctrines, whereas the latter type of claim does not.

dismissal and state a plausible common law duty of care under Florida's voluntary undertaking and zone-of-risk doctrines.

The Court continues to express skepticism that Plaintiffs can ultimately prove causation, a necessary element to a negligence claim under both New York and Florida law. FBI agents have no authority to pursue criminal prosecutions or impose prison sentences on criminals; only prosecutors and judges can do that. Accordingly, even if FBI agents had taken all of the investigative steps that Plaintiffs believe they should have taken, none of those steps would have guaranteed that prosecutors would have brought criminal charges or that a judge would have imposed a prison sentence upon Epstein before he committed further crimes against Plaintiffs.

Nevertheless, New York and Florida law generally reserves causation as an issue of fact for the jury to decide. *See Palka v. Servicemaster Mgmt. Servs. Corp.*, 83 N.Y.2d 579, 585 (1994) (noting that "foreseeability and causation ... are issues generally and more suitably entrusted to fact finder adjudication"); *see also Stahl v. Metro. Dade Cnty.*, 438 So.2d 14, 21 (Fla. 3d DCA 1983) (noting proximate cause is "generally for juries to decide using their common sense upon appropriate instructions"). The issue should rarely be decided on summary judgment, let alone on a motion to dismiss. As such, the Court rejects this argument for dismissal.

2. FBI Agents in Unidentified States

Plaintiffs also allege negligence on the part of FBI agents in unidentified states, specifically, agents' mishandling of additional tips and red flags from 1996 to 2005 (DE 104 ¶¶ 132-34) and agents' mishandling of Plaintiff Christiansen's complaint in 2005 (DE 104 ¶¶ 147-60). Without knowing the states where these alleged torts took place, the Court cannot fully assess the existence or nonexistence of private party analogs in those states. Nevertheless, given that the undersigned

recommends allowing the claims to proceed as to FBI agents in New York and in Florida, the undersigned recommends allowing the remaining claims to proceed as well. The Government may revisit this issue at summary judgment, if appropriate.

C. Statute of Limitations & Equitable Tolling

The Government next urges dismissal based on the statute of limitations and Plaintiffs' failure to allege facts to show entitlement to equitable tolling. (DE 110 at 2). Specifically, the FTCA provides plaintiffs with a two-year time limit to file an administrative claim with the appropriate federal agency as follows:

> Time for commencing action against United States
>
> …
>
> (b) A tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency *within two years after such claim accrues* or unless the action is begun within six months after the date of mailing, by certified or registered mail, of notice of final denial of the claim by the agency to which it was presented.

28 U.S.C. § 2401(b) (emphasis added). For purposes of this statute, a claim generally accrues when a plaintiff suffers an injury. *Price v. United States*, 775 F.2d 1491, 1493 (11th Cir. 1985).

Here, the FAC alleges that Plaintiffs suffered injuries at various times between 2007 and 2017. (DE 104 ¶¶ 30-63). The Government has submitted a declaration attesting that Plaintiffs failed to submit their administrative claims to the appropriate agency until May 2023 and beyond—well past the two-year deadline. (DE 62-1). Plaintiffs do not dispute the accuracy of these submission dates. (DE 125). Instead, Plaintiffs argue that their claims should be deemed timely under the doctrine of equitable tolling. (DE 104 ¶ 27).

The Supreme Court recognizes that equitable tolling applies to FTCA claims. *See United States v. Wong*, 575 U.S. 402, 421 (2015). In the Eleventh Circuit, "[e]quitable tolling is appropriate when a movant untimely files because of extraordinary circumstances that are both beyond his control and unavoidable even with diligence." *Arce v. Garcia*, 434 F.3d 1254, 1261 (11th Cir. 2006). "The diligence required for equitable tolling purposes is 'reasonable diligence,' not 'maximum feasible diligence.'" *San Martin v. McNeil*, 633 F.3d 1257, 1267 (11th Cir. 2011) (quoting *Holland v. Florida*, 560 U.S. 631, 653 (2010)). The Eleventh Circuit has described equitable tolling as an "extraordinary remedy" to be applied "sparingly." *Bost v. Fed. Express Corp.*, 372 F.3d 1233, 1242 (11th Cir. 2004). The doctrine does not apply to a "garden variety claim of excusable neglect." *Irwin v. Dep't of Veterans Affs.*, 498 U.S. 89, 96 (1990).

At the motion-to-dismiss stage, a plaintiff "must allege sufficient facts to state a claim for equitable tolling that is 'plausible on its face.'" *Mesones v. Estevez*, No. 19-14119, 2021 WL 3721324, at *4 (11th Cir. Aug. 23, 2021) (quoting *Twombly*, 550 U.S. at 570). The supporting allegations must be "specific and not conclusory." *Cole v. Warden, Ga. State Prison*, 768 F.3d 1150, 1158 (11th Cir. 2014); *see also Carlsen v. One W. Bank FSB*, No. 10-80986, 2010 WL 4123573, at *2 (S.D. Fla. Oct. 20, 2010) ("Plaintiffs' conclusory assertion of equitable tolling is insufficient; the Complaint must allege facts sufficient to support the contention that equitable tolling should apply.").

Applying these standards here, the Court finds that Plaintiffs have alleged sufficient facts, accepted as true, to support a plausible claim of equitable tolling. In particular, the FAC alleges that Plaintiffs failed to discover the facts showing a causal link between their injuries and the FBI's misconduct, in part, because critical information was "willfully hidden from Plaintiffs by [the FBI] for years." (DE 104 ¶ 27). Plaintiffs allege that the FBI's suppression of information was so persistent

that Congress enacted a law in 2025 to force the FBI to disclose information, namely, the Epstein Files Transparency Act, Pub. L. 119–38b. (DE 104 ¶ 27). Plaintiffs also allege they failed to discover a causal link to the FBI's conduct until 2022, when they learned, through a publicly filed lawsuit, that JP Morgan Chase had "reached out to the federal government on numerous occasions between 2006 and 2008 and via numerous avenues regarding Epstein's transactions with the bank and *concern for sex trafficking*." (DE 104 ¶ 28) (emphasis added).

The Court finds these allegations sufficient to survive dismissal. The Court rejects the Government's counter-argument that the FAC contains references to numerous news reports and other public sources that would have alerted a reasonable person to the FBI's misconduct much earlier than Plaintiffs' claimed date of discovery.[4] The Government argues that these publicly available sources—cited in Plaintiffs' own pleading—demonstrate that Plaintiffs failed to exercise the degree of due diligence necessary to support a plausible claim of equitable tolling. (DE 110 at 3).

The Court disagrees. As the Supreme Court has noted, equitable tolling involves "fact-intensive disputes." *Credit Suisse Securities (USA) LLC v. Simmonds*, 566 U.S. 221, 229 (2012). To be sure, the FAC contains a mixed bag of allegations, some of which tend to support a claim of

[4] The public sources include (1) Sarah Fitzpatrick & Rich Schapiro, *Ex-Florida Police Chief: Epstein Case The Worst Failure of the Criminal Justice System in Modern Times*, NBC News (Sept. 20, 2019) (DE 104 ¶ 177 n.4); (2) Julie K. Brown, *Perversion of Justice: The Jeffrey Epstein Story* (New York: HarperCollins, 2021) (DE 104 ¶ 200 n.12); (3) *Everyone Heard About Jeffrey Epstein's Enablers. Few Listened to His Victims*, Fresh Air, NPR radio broadcast (July 20, 2021) (DE 104 ¶ 201 n.13); (4) Department of Justice Office of Professional Responsibility, *Investigation into the U.S. Attorney's Office for the Southern District of Florida's Resolution of its 2006-2008 Federal Criminal Investigation of Jeffrey Epstein and its Interactions with Victims During the Investigation*, at 261 (Nov. 2020) (DE 104 ¶ 225 n.14); (5) *Doe 1 v. United States*, 359 F. Supp. 3d 1201, 1219-1221 (S.D. Fla. 2019) (DE 104 ¶ 226 n.15); and (6) Sarah Fitzpatrick, et al., *Justice Department Probe Ends with No Action Against Prosecutors Who Oversaw Epstein Deal*, NBC News (Nov. 12, 2020) (DE 104 ¶ 276 n.28).

equitable tolling and some of which do the opposite. At this stage of the case, the Court will not balance the various allegations and determine which of them deserves the most weight. Instead, the Court finds the allegations sufficient at this stage of the case. *See Wright v. Waste Pro USA, Inc.*, No. 0:19-cv-62051, 2020 WL 8230193, at *3 (S.D. Fla. May 28, 2020) (denying motion to dismiss where facts alleged in complaint did not foreclose a finding of equitable tolling); *Mosley v. United States*, No. 18-cv-1004-T-35, 2018 WL 11467407, at *3 (M.D. Fla. Dec. 20, 2018) (denying motion to dismiss FTCA claim based on factual issues concerning equitable tolling). The Court therefore rejects this argument for dismissal.

D. Failure to Include a Sum-Certain Money Demand in the Administrative Claim

Finally, the Government moves to dismiss the claims of Jane Does 13, 21, and 29 for failure to exhaust administrative remedies in compliance with the FTCA, specifically, by failing to include a sum-certain demand for money damages in their administrative claims. (DE 110 at 20). In particular, the FTCA provides that "[no] action [may] be instituted upon a claim against the United States for money damages for injury … 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." 28 U.S.C. § 2675(a). The claim must be presented in writing to the appropriate agency "within two years after such claim accrues." 28 U.S.C. § 2401(b). Pursuant to federal regulations, a claim is deemed presented when the federal agency receives the claimant's Standard Form 95 ("SF 95") or "other written notification of [the] incident, accompanied by a claim for money damages *in a sum certain* for injury … alleged to have occurred by reason of the incident." 28 C.F.R. § 14.2(a) (emphasis added).

The administrative exhaustion requirement functions as an important component of the Government's waiver of sovereign immunity as it gives "agencies an opportunity to settle suits before litigation commences, which in turn can 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." *Hernandez v. United States*, No. 25-11336, 2026 WL 1648838, at *3 (11th Cir. June 8, 2026) (cleaned up). As to the requirement of a "sum certain" demand for money damages, the Eleventh Circuit has adopted a "lenient approach" as follows:

> This circuit has taken a somewhat lenient approach to the "sum certain" requirement holding, for example, that even where a claimant had not specifically stated the value of the claim, attaching medical bills and repair estimates to the claim notice could suffice. *See Molinar v. United States*, 515 F.2d 246 (5th Cir. 1975); *see also Wardsworth v. United States*, 721 F.2d 503, 505–06 (5th Cir. 1983) (discussing sum certain requirement, and indicating that it could be met by merely providing the agency with facts from which it could estimate the value of the claim), *cert. denied*, 469 U.S. 818, 105 S.Ct. 87, 83 L.Ed.2d 34 (1984).

Tidd v. United States, 786 F.2d 1565, 1567 n.6 (11th Cir. 1986).

"At a minimum," however, the administrative claim must either (a) "expressly claim a sum certain," or (b) "provide documentation which will allow the agency to calculate or estimate the damages to the claimant." *Suarez v. United States*, 22 F.3d 1064, 1066 (11th Cir. 1994). "If the claimant fails to provide a sum certain within the claim, the administrative claim fails to meet the statutory prerequisite to maintaining a suit against the government, and leaves the district court without jurisdiction to hear the case." *Turner,* 514 F.3d at 1200; *see also Dalrymple v. United States*, 460 F.3d 1318, 1325 (11th Cir. 2006) (affirming dismissal of FTCA case where an administrative claim form failed to assert a sum certain or attach documents to "provide information as to the amount of damages the individual plaintiffs … sought").

In this case, the Government argues that Jane Does 13, 21, and 29 failed to include a sum-certain demand for money damages in their administrative claims. (DE 110 at 20). In support, the Government has provided the Court with anonymized SF 95s for these Jane Does as well as a declaration from a person who works in the FBI General Counsel's Office. (DE 110-9). Because the Government asks the Court to look beyond the four corners of the FAC, the Court interprets this argument as raising a factual, rather than a facial, attack on subject matter jurisdiction pursuant to Rule 12(b)(1). At the hearing on this matter, the Government confirmed that this argument raises a factual attack on subject matter jurisdiction. (DE 126 at 49).

As noted, when a defendant raises a factual attack on subject matter jurisdiction, a district court "must" allow discovery before dismissing a case. *McElmurray*, 501 F.3d at 1251. To date, discovery in this case has been stayed. (DE 67). Accordingly, the Court rejects this argument for dismissal. The undersigned recommends that the District Judge, exercising his discretion in this case, allow a ninety-day period of jurisdictional discovery concerning the exhaustion of administrative remedies by Jane Does 13, 21, and 29. Once this discovery has been completed, the Government may renew this motion.

The Court has considered, but rejects, Plaintiffs' argument that the Government waived the sum-certain argument by failing to raise it in earlier motion-to-dismiss practice. (DE 115 at 21). As Plaintiffs correctly point out, Rule 12(g)(2) provides that, subject to certain exceptions, "a party that makes a motion under this rule must not make another motion under this rule raising a defense or objection that was available to the party but omitted from its earlier motion." Fed. R. Civ. P. 12(g)(2). The Court agrees that the sum-certain argument was available to the Government but omitted from its earlier motion. (DE 62). The Court nevertheless rejects this argument because it overlooks one

of the exceptions set forth in the text of the rule. Specifically, Rule 12(g)(2) applies "*[e]xcept as provided in Rule 12(h)(2) or (3).*" (emphasis added). Rule 12(h)(3), in turn, provides as follows:

> (3) Lack of Subject-Matter Jurisdiction. If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action.

Fed. R. Civ. P. 12(h)(3). In other words, the defense of lack of subject matter jurisdiction cannot be waived. The issue of administrative exhaustion under the FTCA goes to this Court's subject matter jurisdiction. *See Turner*, 514 F.3d at 1200. As such, the Government did not waive the sum-certain argument by failing to raise it in earlier motion practice. The Court therefore rejects Plaintiffs' waiver argument.

V. RECOMMENDATION & NOTICE OF RIGHT TO OBJECT

For the reasons stated above, the undersigned **RECOMMENDS** that the motion to dismiss (DE 110) be **DENIED** as follows:

1. The District Judge should lift the current Stay Order (DE 67) and allow a ninety-day period of discovery on two jurisdictional issues: (a) the existence and content of any mandatory established policies, protocols, and procedures, whether written or otherwise, governing the FBI's conduct in assessing or handling tips, reports, and complaints of sexual abuse, child sexual abuse, and/or child sexual abuse material, and (b) the exhaustion of administrative remedies by Jane Does 13, 21, and 29.

2. At the conclusion of this limited discovery, the Government should be permitted to renew this motion seeking dismissal based on the discretionary function exception and the alleged failure to exhaust administrative remedies by Jane Does 13, 21, and 29.

3. The remainder of this motion should be **DENIED**.

4. The parties shall have fourteen (14) days from the date of being served with a copy of this Report and Recommendation within which to file written objections, if any, with the District Judge. Failure to file objections timely shall bar the parties from a de novo determination by the District Judge of an issue covered in the Report and Recommendation and shall bar the parties from attacking on appeal unobjected-to factual and legal conclusions contained in this Report and Recommendation. *See* 28 U.S.C. § 636(b)(1); 11th Cir. R. 3-1.

5. **IF A PARTY DOES NOT INTEND TO OBJECT TO THIS REPORT AND RECOMMENDATION, THE PARTY SHALL FILE A NOTICE TO THAT EFFECT WITHIN FIVE (5) DAYS.**

RESPECTFULLY SUBMITTED in Chambers at West Palm Beach in the Southern District of Florida, this 18th day of August 2026.

RYON M. MCCABE
U.S. MAGISTRATE JUDGE