UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
CENTRAL DIVISION

CHARLEE ARCHAMBAULT, individually and as Personal Representative of the Estate of JACOB ARCHAMBAULT, Plaintiff, v. UNITED STATES OF AMERICA, JOSHUA ANTMAN, AND JAY A. ROMERO, SR., individually and in their official capacity as police officers for the ROSEBUD SIOUX TRIBAL LAW ENFORCEMENT SERVICES, and UNKNOWN SUPERVISORY PERSONNEL OF THE UNITED STATES, individually, Defendants.	3:22-CV-3002-RAL **JOSHUA ANTMAN'S MOTION AND MEMORANDUM TO DISMISS ACTION**

Joshua Antman, by and through counsel of record, moves to dismiss the claims against him for lack of subject matter jurisdiction pursuant to Federal Rules of Civil Procedure 12(b)(1) and pursuant to Rule 12(b)(6) for failure to state a claim upon which relief may be granted.

ALLEGATIONS OF COMPLAINT

Plaintiff, Charlee Archambault, seeks damages for alleged constitutional violations resulting in the death of her son, Jacob Archambault. Jacob Archambault, a/k/a Jacob Spotted Tail, was shot and died in an incident involving Rosebud Sioux Tribal Officers Joshua Antman and Jay Romero. The complaint asserts claims under *Bivens v. Six Unknown Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971) in Count 1, and 42 USC 1983 in Counts II, III,

and IV.

Charlee Archambault brings this action against the United States, Joshua Antman and Jay Romero, individually and in their official capacity as police officers for the RST Tribal Law Enforcement Services, and unknown supervisory personnel of the United States, individually. Docket 1, p. 1. Charlee Archambault alleges that Antwan and Romero acted as police officers under color of federal and state law. Docket 1 at 2 ¶ 6.

In count I, Archambault brings a *Bivens* claim seeking compensatory damages against the "defendants" in their individual capacities. She alleges that Officers Antman and Romero, while acting under the color of federal law and as federal employees, used excessive, unreasonable, and unwarranted force violating Jacob Archambault's rights under the Fourth and Fifth Amendment of the United States Constitution. Docket 1 at pp. 6-9 ¶¶ 40-55.

In count II, Archambault brings a claim under 42 USC 1983 seeking compensatory damages against the defendants in their individual capacities. She alleges that Officers Antman and Romero, while acting under the color of law, used excessive force and deprived Jacob Archambault of protected rights under the Fourth and Fourteenth Amendments. Docket 1 at pp. 9-10 ¶¶ 54-56.

In count III, Archambault brings a claim under 42 USC 1983. Archambault alleges that Officers Antman and Romero, while acting under color of law, used unreasonable, unjustified, and deadly force which caused the death of Jason Archambault. She states that she seeks damages against defendants in the form of general compensatory damages. Docket 1 at pp. 10-11 ¶¶ 57-60.

In count IV, Archambault brings a claim under 42 USC 1983. She alleges that Officers

Antman and Romero unjustifiably shot and killed Jacob Archambault violating his protected rights under the Fourth and Fourteenth Amendments of the United States Constitution. The complaint states she is entitled to money damages on behalf of Jacob Archambault for the severe physical, emotional, and psychological damage suffered as a result of the conduct of defendants Antman and Romero. Docket 1 at p. 11 ¶¶ 61-66.

The Declaration of Joshua Antman in support of this motion and memorandum is filed separately.

Defendant Antman joins in the brief submitted by defendant Romero in I (A) dealing with the application of sovereign immunity, I (B) individual capacity claims, IV failure to exhaust tribal court remedies, and V time barred complaint.

STANDARD OF REVIEW

I. Rule 12(b)(1) Standard

Pursuant to Federal Rule of Civil Procedure 12(b)(1), a plaintiff bears the burden of establishing by a preponderance of the evidence that the court possess subject matter jurisdiction. *Kokkonen v. Guardian Life Ins. Co. Of Am.*, 511 U.S. 375, 377 (1994). Federal courts have limited jurisdiction and the law presumes that a cause of action lies outside this jurisdiction. *Id.*

When considering a motion pursuant to Federal Rule of Civil Procedure 12(b)(1), this Court may look at matters outside the pleadings. *Osborn v. United States*, 918 F.2d 724, 728 n. 4(8th Cir. 1990). Under a 12(b)(1) motion:

> the trial court may proceed as it never could under 12(b)(6) or Fed. R. Civ. P. 56. Because at issue in a factual 12(b)(1) motion is the trial court's jurisdiction--its very power to hear the case--there is substantial authority that the trial court is free to weigh the evidence and satisfy itself as to the existence of its power to hear the case. *Id*. at 730.

A motion to dismiss for lack of subject matter jurisdiction under Rule 12(b)(1) may challenge the facial sufficiency of the pleadings or the truth of the jurisdictional allegations. *Stalley v. Cath. Health Initiatives*, 509 F.3d 517, 520–21 (8th Cir. 2007) (citing *Osborn*, 918 F.2d at 729 n.6). In a facial attack, the standard of review is the same standard applied to motions brought pursuant to Federal Rule of Civil Procedure 12(b)(6). *Id.* at 521. That is, a court must "accept as true all factual allegations in the complaint, giving no effect to conclusory allegations of law," and must determine whether the plaintiff has asserted "facts that affirmatively and plausibly suggest that the pleader has the right he claims (here, the right to jurisdiction), rather than facts that are merely consistent with such a right." *Id.* (citations omitted). In contrast, "[w]hen a district court engages in a factual review, it inquires into and resolves factual disputes." *Faibisch v. Univ. of Minnesota*, 304 F.3d 797, 801 (8th Cir. 2002) (*overruled in part on other grounds by Henson v. Union Pac. R.R. Co.*, 3 F.4th 1075 (8th Cir. 2021)). In this case, the defendant Antman makes a facial attack on the jurisdictional allegations of the complaint.

II. Rule 12(b)(6) Standard

Dismissal under Federal Rule of Civil Procedure 12(b)(6) is proper when a plaintiff fails "to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). To survive dismissal, "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) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S.544, 570 (2007)). "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.* (citing *Twombly*, 550 U.S. at 556). A complaint "does not need detailed factual allegations … [but] requires more than labels and

conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Twombly*, 550 U.S. at 555.; *see also Abdullah v. Minnesota*, 261 F. App'x 926, 927 (8th Cir. 2008) (noting that a complaint must contain either direct or inferential allegations regarding all material elements necessary to sustain recovery under some viable legal theory).

ARGUMENT

I. NO BIVENS CLAIMS CAN BE MADE AGAINST TRIBAL OFFICERS

Plaintiff asserts a Bivens Claim in count I against defendant Joshua Antman as well as Jay Romero. *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*,403 U.S. 388 (1971). Antman was employed by the Rosebud Sioux Tribe as a police officer on January 27, 2019, not the United States. *Buford v. Runyon*, 160 F3d 1199, 1203 n. 6 (8th Cir. 1998). He was enforcing tribal law at the time of the incident within the exterior boundaries of the Rosebud Indian Reservation in Rosebud, South Dakota. There are no facts or law alleged in the complaint to sustain any jurisdiction in this court under *Bivens*. *Stanko v. Oglala Sioux Tribe*, 916 F3d 694, 699 (8th Cir. 2019). The Supreme Court has "made it clear that expanding the *Bivens* remedy is a disfavored judicial activity. *Ziglar v. Abbasi*, 137 S.Ct. 1843, 1857 (2017). The remedy of plaintiff lies in the Rosebud Sioux Tribal Court as pointed out in *Stanko*, *supra*.

II. 42 USC 1983 DOES NOT COVER ACTIONS BY TRIBAL OFFICERS

Counts II, III,and IV of the complaint alleges claims under 42 USC 1983. That law provides a cause of action against every person who under color of any statute, ordinance, regulation, custom, or usage of any State or Territory or the District of Columbia subjects any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the

party injured in an action at law, suit in equity, or other proper proceeding for redress.

There is no allegation in the complaint that Joshua Antman, a Tribal police officer, was acting under the color of state law in any respect on January 27, 2019. To state as a 42 USC 1983 claim, a plaintiff must allege (1) that he was deprived of a right secured by the Constitution or laws of the United States, and (2) the deprivation was caused by one acting under color of state law. *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 155-157 (1978). No claim for relief is stated under 42 USC 1983 because there is no allegation that individual Tribal defendants were acting under color of state law. *See West v. Atkins*, 487 U.S. 42, 49 (1988) ("acting under color of state law requires the defendant that in a 1983 action have exercised power possessed by virtue of state law and made possible only because the wrongoer is clothed with the authority of state law"). *Stanko v. Oglala Sioux Tribe*, 916 F3d 694, 698 (8th Cir. 2019) ("Stanko did not allege that the individual defendants were acting under color of state law, as 1983 requires").

To survive a Rule 12 (b) (6) motion, Archambault must plead "enough facts to state a claim to relief that is plausable on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). Archambault alleges that Antman and Romero acted under color of law, but fails to set forth specific facts which support that they were acting under color of state law. See *West v. Atkins*, 487 US. 42, 49 (1988) ("The traditional definition of acting under color of state law requires that the defendant in a 1983 action have exercised power "possessed by virtue of state law and made possible only the because the wrongdoer is clothed with authority of state law.") (quoting *United States v. Classic*, 313 U.S. 299, 326 (1941). Archambault does not allege that any of the defendants are state actors, that they ever acted pursuant to any state authority, or that they ever acted in concert with any state actors. To the contrary, the parties directly involved in

the incident giving rise to this action were tribal actors on tribal land, and defendants were enforcing tribal law. *Stanko v. Oglala Sioux Tribe*, 916 F3d 694, 698-699 (8th Cir. 2019).

CONCLUSION

For the above reasons, the motion to dismiss should be granted and the action dismissed.

Dated April 25, 2022.

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CERTIFICATE OF SERVICE

On the 25th day of April, 2022, I caused to be served a true and correct copy of the motion and memorandum to dismiss and the declaration of Joshua Antman upon the following persons by electronic transmission:

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