UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

DAVID SCOTT, JEREMY CERDA, OSMAN AK, MERUDH PATEL, GREGORY HARDY, and LARRY WILLIAMS, individually and on behalf of all others similarly situated,

Plaintiffs,

v.

FORMER WARDEN HERMAN E. QUAY, FACILITIES MANAGER JOHN MAFFEO, and THE UNITED STATES OF AMERICA,

Defendants.

Civil Action No.: 19-cv-1075

(Brodie, J.)
(Gold, M.J.)

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT UNITED STATES' OBJECTIONS TO THE PORTION OF THE REPORT AND RECOMMENDATION PERTAINING TO FEDERAL TORT CLAIMS ACT CLAIMS

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December 7, 2020

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PRELIMINARY STATEMENT

Defendant United States of America[1] ("Defendant") submits this memorandum of law in support of its objections to the portion of Magistrate Judge Gold's Report and Recommendation dated November 16, 2020 (ECF Dkt. 95) (the "R&R") recommending denial of its motion to dismiss Plaintiffs' claims under the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671 *et seq*. ("FTCA"), for lack of subject matter jurisdiction.

Plaintiffs are six former federal prisoners who were housed at the Federal Bureau of Prisons' ("BOP") Metropolitan Detention Center in Brooklyn, New York ("MDC"). They allege that, during a one-week period from January 27 until February 3, 2019, individuals detained in the West Building at the facility experienced substandard conditions, including a lack of light, heat and proper medical care. In their Amended Complaint, Plaintiffs brings claims against defendant Herman Quay, the former Warden of MDC, and John Maffeo, the Facilities Manager at MDC, under *Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388 (1971), alleging that they violated Plaintiffs' rights under the Fifth and Eighth Amendments to the Constitution. Plaintiffs also bring a cause of action for negligence against the United States pursuant to the FTCA. ECF Dkt. 29 (Am. Compl.), ¶¶ 370-80.

Defendant United States moved, along with Defendants Quay and Maffeo, to dismiss Plaintiffs' Amended Complaint. Specifically as to the United States, the motion sought dismissal of Plaintiffs' FTCA claims pursuant to Fed. R. Civ. P. 12(b)(1) for lack of subject matter jurisdiction claims because, *inter alia*, the alleged negligent acts or omissions fall within the FTCA's Discretionary Function Exception, 28 U.S.C. § 2680(a) ("DFE"). On June 6, 2020, the

[1] This Office also represents defendants Quay and Maffeo in this matter, who do not object to the Report and Recommendation as it pertains to the separate *Bivens* claims against them.

Court referred the motion to Magistrate Judge Gold for a report and recommendation.

On November 16, 2020, Judge Gold issued the detailed R&R, recommending the Court grant Defendants' motion insofar as it sought dismissal of the Amended Complaint as against Quay and Maffeo for failure to state a claim upon which relief can be granted,[2] but deny Defendant United States' motion to dismiss for lack of subject matter jurisdiction over the FTCA claims.

Specifically as to the FTCA claims, Judge Gold recognized that Plaintiffs' claims may well fall within the DFE. R&R, p. 29 ("It is conceivable that the United States could establish that MDC officials engaged in the conduct and made the decisions challenged by plaintiffs based upon considerations of public policy."). However, Judge Gold also stated that Plaintiffs' allegations, if true, could establish that the negligent acts or omissions at issue were borne solely of laziness and inattentiveness rather than an act of discretion – and therefore actionable under the FTCA pursuant to the Second Circuit's so-called "negligent guard" theory of liability. Concluding that such allegations are all Plaintiffs need to set forth "[a]t the Rule 12(b)(1) stage," Judge Gold recommended that the Court deny the United States' motion to dismiss the FTCA claims. R&R, p. 29 (quoting *Hartman v. Holder*, 00-CV-6107 (ENV), 2009 WL 792185, at *11 (E.D.N.Y. Mar. 23, 2009)).

Defendant United States now respectfully objects pursuant to Rule 72(b) and 28 U.S.C. §

[2] Judge Gold recommended that the Court dismiss Plaintiffs' claims brought against Defendants Quay and Maffeo pursuant to *Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388 (1971) for a number of reasons. First, Judge Gold recognized, in light of the Supreme Court's decision in *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1855 (2017) and its progeny, the general *unavailability* of the *Bivens* remedy, except in the three narrow contexts approved by the Court more than 40 years ago in *Bivens*, *Davis v. Passman*, 442 U.S. 228 (1979), and *Carlson v. Green*, 446 U.S. 14 (1980). Judge Gold found that the claims here arise in new contexts, and that special factors counseled against the Court creating a *Bivens* remedy in these contexts. Defendant United States respectfully requests the Court adopt this portion of the R&R.

636(b)(1)(B) only to the portion of the R&R recommending denial of the United States' motion to dismiss, and asks the Court not to adopt that portion of the R&R and instead grant the United States' motion to dismiss Plaintiffs' FTCA claims for lack of jurisdiction pursuant to Rule 12(b)(1) for two principal reasons. First, the R&R relies on a novel application of the negligent guard theory to discretionary acts of prison management grounded in policy considerations, which would extend its application well beyond the boundaries set in the small number of cases where the theory was applied. Second, the R&R improperly adopts as true Plaintiffs' conclusory allegations that Defendant's decisions were solely the result of inaction, and fails to consider Plaintiffs' own allegations to the contrary and evidence in the existing record that establishes the conduct at issue falls within the DFE.

Accordingly, for the reasons set forth below, Defendant United States respectfully requests that the Court adopt the R&R, except to the extent it recommends denial of the motion to dismiss Plaintiffs' FTCA claims for lack of subject matter jurisdiction. Defendant further respectfully requests that, upon *de novo* review of the motion to dismiss the FTCA claims for lack of subject matter jurisdiction, the Court grant that motion and dismiss the FTCA claims.

OBJECTIONS TO THE PORTION OF THE R&R ADDRESSING THE FTCA CLAIMS

I. Standard of Review

Review of a Magistrate Judge's R&R to which a timely objection has been made is *de novo*. *See* 28 U.S.C. 636(b)(1); Fed. R. Civ. P. 72(b)(3); *United States v. Raddatz*, 447 U.S. 667, 676 (1980); *Grassia v. Scully*, 892 F.2d 16, 19 (2d Cir. 1989); *United States v. Incorporated Village of Island Park*, No. 90-CV-992 (ILG/SMG), 2008 WL 4790724, at *5 (E.D.N.Y. Nov. 3, 2008). "Far from making the decision of a magistrate final, [Rule 72(b)(3)] specifically states that the 'district judge *must determine de novo* any part of the magistrate judge's disposition that has been

properly objected to.'" *United States ex rel. Anti-Discrimination Ctr. of Metro New York, Inc. v. Westchester Cty.*, 712 F.3d 761, 768 (2d Cir. 2013) (emphasis added).

II. Plaintiffs' FTCA Claims Must Be Dismissed Because the Conduct at Issue Is Shielded By the FTCA's DFE

For the sake of expediency, Defendant incorporates by reference Defendants' memorandum of law (ECF Dkt. 66) and reply memorandum (ECF Dkt. 67) in support of the motion to dismiss, which set forth in detail the relevant factual and procedural background as well as the points and authorities in support of the motion. In sum, the United States moves to dismiss Plaintiffs' FTCA claims because the alleged acts or omissions that Plaintiffs rely on to establish a breach of Defendant's duty are discretionary and subject to policy analysis, and fall within the DFE. Therefore, the Court lacks jurisdiction over those claims. For the reasons set forth below, upon *de novo* review, the Court should grant the motion.

Defendant brings its motion pursuant to Fed. R. Civ. P. 12(b)(1), seeking dismissal for lack of subject matter jurisdiction. A claim is properly dismissed under Rule 12(b)(1) of the Federal Rules of Civil Procedure "when the district court lacks the statutory or constitutional power to adjudicate it." *Makarova v. United States*, 201 F.3d 110, 113 (2d Cir. 2000); Fed. R. Civ. P. 12(b)(1). In resolving a challenge to subject matter jurisdiction, the Court does not draw inferences in plaintiff's favor. *See Newson-Lang v. Warren Int'l*, 129 F. Supp. 2d 662, 665 (S.D.N.Y. 2001). Unlike a motion to dismiss for failure to state a claim, it is entirely proper for the Court to rely upon evidence outside the pleadings on a motion pursuant to Fed. R. Civ. P. 12(b)(1). *Libertarian Party of Erie Cty. v. Cuomo*, 970 F.3d 106, 121 (2d Cir. 2020) (citing *Makarova*, 201 F.3d at 113); *Hall v. Bank of New York Mellon*, 15-CV-7156 (MKB), 2017 WL 1030710, at *2 (E.D.N.Y. Mar. 13, 2017) (citing *M.E.S., Inc. v. Snell*, 712 F.3d 666, 671 (2d Cir. 2013); *Romano v. Kazacos*, 609 F.3d 512, 520 (2d Cir. 2010)). Furthermore, on a motion pursuant to Fed. R. Civ. P. 12(b)(1), the

plaintiff bears the ultimate burden of proving the court's jurisdiction by a preponderance of the evidence. *See Luckett v. Bure*, 290 F.3d 493, 497 (2d Cir. 2002). Defendant United States respectfully submits that the R&R did not properly apply this standard because it recommended denial of the motion based on inferences drawn in Plaintiffs' favor based on their conclusory assertions and without addressing the evidence outside the pleadings properly submitted by Defendant. As discussed below, that evidence provides important context to the events underlying the Amended Complaint and warrants a finding that the DFE applies. Moreover, irrespective of that evidence, a number of Plaintiffs' allegations of negligence plainly implicate discretionary decision-making, notwithstanding Plaintiffs' attempt to evade dismissal by framing all actions as the product of laziness.

A. The Law Applicable to the FTCA and DFE

It is well settled that "[t]he United States, as sovereign, is immune from suit save as it consents to be sued . . . and the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit.'" *Lehman v. Nakshian*, 453 U.S. 156, 160 (1981) (internal quotation marks and citations omitted). The only method authorized by Congress for resolving claims against the United States for alleged tortious conduct is the FTCA, 28 U.S.C. §§ 2671-2680. *See United States v. Kubrick*, 444 U.S. 111, 117-18 (1979).

The FTCA's limited waiver of sovereign immunity does not authorize claims against the United States 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 employee of the Government, whether or not the discretion involved be abused. 28 U.S.C. § 2680(a); *see* R&R, p. 24. The DFE 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; it is, moreover, intended to prevent judicial second-guessing of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort. *United States v. Varig Airlines*, 467 U.S. 797, 808, 814 (1984); *see also, Berkovitz v. United States*, 486 U.S. 531, 536 (1988); R&R p. 26 (citing *Enigwe v. Zenk*, 03-CV-854 (CBA), 2007 WL 2713849, at *8 and *Berkovitz*). However, not all discretionary acts are shielded by the DFE – only those acts and omissions based in policy considerations. R&R, p. 26; *see United States v. Gaubert*, 499 U.S. 315, 324, 111 S.Ct. 1267, 113 L.Ed.2d 335 (1991). When the DFE applies, courts lack subject matter jurisdiction over the claim. *See O'Toole v. United States*, 295 F.3d 1029, 1033 (9th Cir. 2002); *Fazi v. United States*, 935 F.2d 535, 539 (2d Cir. 1991).

B. The Law Applicable to the So-Called "Negligent Guard" Theory of Liability

As the R&R sets forth, in a limited number of cases involving ministerial kinds of acts by employees inexplicably acting counter to established policy or practice, the Second Circuit has held that discretionary conduct attributable solely to laziness or inattentiveness cannot be based in policy consideration and therefore is not shielded by the DFE. R&R, p. 26-27 (citing *Chen v. United States*, 09-CV-2306 (ARR), 2011 WL 2039433, at *6 (E.D.N.Y. May 24, 2011), *aff'd*, 494 F. App'x 108 (2d Cir. 2012); *Triestman v. Fed. Bureau of Prisons*, 470 F.3d 471, 475–76 (2d Cir. 2006); *Young v. United States*, 12-CV-2432 (ARR)(SMG), 2014 WL 1153911, at *15 (E.D.N.Y. Mar. 20, 2014); *Hartman*, 2009 WL 792185, at *7-*8. This theory of liability has come to be known as the negligent guard theory ("NGT"). *Id.* Where the NGT applies, the Second Circuit has held it creates an exception to the DFE and confers jurisdiction over the claim. *Triestman*, 470 F.3d at 476.

Importantly, the NGT does not apply merely because the conduct at issue arises in the federal prison context and a plaintiff's allegations contain buzzwords like laziness, carelessness,

or inattentiveness. *See Coulthurst v. United States*, 214 F.3d 106, 110 (2d Cir. 2000); *Chen*, 2011 WL 2039433. Rather, application of the NGT is typically "defined by negligent disregard of official policy." *Nabe v. United States*, 10-CV-3232 (NGG), 2014 WL 4678249, at *6-7 (E.D.N.Y. Sept. 19, 2014) (citing *Coulthurst*, 214 F.3d 106; *Hartman*, 01-CV-6107 (JG), 2005 WL 2002455 (E.D.N.Y. Aug. 21, 2005); *Triestman*, 470 F.3d 471).

In each decision cited in the R&R regarding the NGT, the courts identify the individual negligent acts alleged in their cases and distinguish which acts plausibly could be borne out of laziness, carelessness, or inattentiveness versus those involving policy-based discretion. Critically, decisions that address the NGT recognize that management-level decisions and negligence claims based on facility management decisions that prove to be flawed are nevertheless discretionary and are shielded by the DFE, even where a plaintiff alleges that those management or policy decisions were the result of laziness, carelessness, or inattentiveness. For example, in *Coulthurst*, the Second Circuit held that that allegations regarding decisions establishing procedures and "how frequently [a safety] inspection should be conducted" involve elements of judgment or choice and a balancing of policy considerations, and are "shielded from suit by the DFE." 214 F.3d at 109-10. By comparison, allegations of carelessness and negligence in that "the official assigned to inspect the machine may in laziness or haste have failed to do the inspection" or was distracted while inspecting are ones that may be outside the scope of the DFE, and, therefore, actionable. *Id.* Similarly, in *Triestman*, the Second Circuit distinguished between an allegation of the negligent development of a staffing policy, which would not be actionable, and the failure, out of laziness, to *enforce* a staffing policy, which would be actionable under the NGT. 470 F.3d at 475-476. Ultimately, in that case, the court declined to express an ultimate view on the "complex" issue "of the merits of the negligent guard theory" and the "possible inextricable

relationship between the negligent guard and negligent policy theories of liability," in part resulting from that plaintiff's *pro se* status, and remanded to the district court for further proceedings. *Id.* at 476-77.

Importantly, all of the actions at issue here are entitled to a presumption of being grounded in policy considerations – a presumption overcome only with a showing by a plaintiff that the actions are not of the kind grounded in such considerations. *Young*, 2014 WL 1153911, at *13 (citing *Gaubert*, 499 U.S. at 324). In *Chen*, for instance, although the parties were still at the pleadings stage, the court held that the plaintiff's conclusory allegations of carelessness or laziness were insufficient to overcome the presumption that the conduct fell within the DFE. 2011 WL 2039433, at *9. Noting the distinction between the allegations of negligence there and the kinds of facts that can implicate the NGT (such as an officer acting contrary to training due to carelessness), the court found that NGT did not apply because the alleged conduct that was not "so 'outside the range of appropriate judgment that [it] can no longer be viewed as an exercise of discretion'[.]" *Id.* at *9-10 (quoting *Enigwe*, 2007 WL 2713849). The same analysis was conducted (and same result was reached) in *Young*, albeit at a later stage in litigation. 2014 WL 1153911, *16-17. In *Young*, the court concluded "plaintiff's allegations regarding the officers' response do not establish that the officers acted negligently, lazily, or carelessly" and declined to accept the plaintiff's invitation to "infer that the officers must have been lazy or careless because it took them longer than usual to arrive at the scene." 2014 WL 1153911, at *16.

C. The Conduct at Issue in the Amended Complaint Is Shielded by the DFE and the NGT Does Not Apply

In considering whether subject matter jurisdiction exists over Plaintiffs' FTCA claim, the Court should first identify the specific acts or omissions at issue in Plaintiffs' Amended Complaint. Then, the Court should consider whether the specific conduct could plausibly be borne solely of

laziness or carelessness, or instead, are policy-based decisions that fall within the DFE. As set forth below, such an analysis compels a conclusion that Plaintiffs' FTCA claims must be dismissed because they are shielded by the DFE, even assuming the truth of the underlying factual allegations.

1. Identifying the Specific Acts and Omissions at Issue

The Court should take the "crucial first step" of properly framing the conduct at issue. *Rosebush v. United States*, 119 F.3d 438, 441 (6th Cir. 1997). Plaintiffs' Amended Complaint does not set forth which allegations constitute a breach of duty required to establish an actionable claim of negligence. Rather, Plaintiffs circularly point to each and every one of their allegations to support what amounts to a "catch all" negligence claim, leaving it to Defendant and the Court to figure out which of their allegations form a proper basis for liability under the FTCA.[3] *See* Amended Complaint, ¶ 343 (acknowledging that it is an open question whether the conditions they allege "amounts to a tort claim of negligence").

[3] The FTCA's private analogue requirement limits the government's waiver of sovereign immunity to "circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U.S.C. § 1346(b)(1); *see also id*. § 2674 ("[t]he United States shall be liable, [with respect] to tort claims, in the same manner and to the same extent as a private individual under like circumstances"). In other words, for liability to arise under the FTCA, "a plaintiff's cause of action must be 'comparable' to a 'cause of action against a private citizen' recognized in the jurisdiction where the tort occurred." *McGowan v. United States*, 825 F.3d 118, 125 (2d Cir. 2016) (citations omitted). Without a private analogue, the Court lacks subject matter jurisdiction over a plaintiff's claim and the claim must be dismissed. *Id.* For example, under New York law, a private individual would not owe a duty of fully disclosing circumstances of an institutional emergency to the media, yet the Amended Complaint could be read as relying upon these acts as a basis for the negligence claim. *See* Amended Complaint, ¶¶ 52, 53, 54, 55, 56, 314-317, 324, 325-327. The Court need not consider whether this conduct would fall under the DFE (and it does), because it is clear Plaintiffs would not be able to bring an FTCA claim for these acts. While Defendant did not argue lack of a private analogue, the Court nonetheless may consider the issue at any time because it implicates its subject matter jurisdiction. *See Fed. Dep. Ins. Corp. v. Four Star Holding Co.,* 178 F.3d 97, 100 n. 2 (2d Cir.1999).

Defendant contends that Plaintiffs' negligence claim appears to be based on the following acts or omissions,[4] most of which are also identified in the R&R: (1) MDC staff failed to prioritize needed HVAC and electrical maintenance ahead of the January 27 fire despite notice that infrastructure improvement was needed (Am. Compl., ¶¶ 49-50, 301-03; R&R pp. 27-28); (2) Warden Quay erred when he declined to order an evacuation of the West Building after the fire or otherwise refused to move the inmates out of affected areas (Am. Compl., ¶ 307(e)(ix); R&R, pp. 27-28); (3) Warden Quay and other BOP staff improperly managed the facility during the resulting partial power outage, including deciding to lock inmates in their cells and that he could not safely provide for legal visitation, failing to move inmates who required medical attention to a powered area of the facility, and refusing to accept blankets and heaters from the City of New York (*see* Am. Compl., ¶ 307(e), R&R pp. 27-28); and (4) Maffeo failed to properly hire and supervise the contractors responsible for conducting repairs and failed to ensure that the repairs were completed as quickly as possible (Am. Compl., ¶ 307(d)).

2. Application of the DFE Analysis to the Acts or Omissions at Issue

a. Facility Maintenance Decisions are Shielded by the DFE

The alleged decision not to prioritize long term HVAC and electrical maintenance, even where there were indications of potential failure, is exactly the kind of discretionary, policy-based decision that fits squarely within the DFE. These decisions necessarily require balancing the competing needs of the institution, including keeping inmates, staff, and the public safe, in the face of limited personnel and financial resources. In recognition of these difficult policy choices,

[4] Defendant does not concede that a private analogue exists under New York law for negligence for any of these acts or omissions, and anticipates moving on this ground, among others, at the close of discovery in the event the Court adopts the recommendation and directs the FTCA claims to proceed to discovery.

decisions regarding maintenance of a BOP facility are "decisions that [are] left to the discretion of prison officials." *Fernandini v. United States*, 15 Civ. 3843 (GHW), 2019 WL 1033797, at *4 (S.D.N.Y. Mar. 5, 2019) (rejecting the recommendation to deny the defendant's motion based on DFE). Notably, in *Fernandini*, the district court held that the "prison officials' day-to-day decisions at issue here—regarding prison population, facility maintenance…fall within the scope of the discretionary function exception. *These are not the type of determinations that a federal court should second guess*." *Id.* at *5 (emphasis added).

b. Decisions Pertaining to Managing an Institutional Emergency, Including Whether to Evacuate the Facility, Are Shielded by the DFE

The second and third categories of acts or omissions listed above also implicate the Warden's policy-based discretionary decision making because these decisions require the Warden to balance concerns regarding the safe and orderly running of the institution. The decision whether to evacuate the facility, for instance, is a discretionary decision that clearly implicates public policy. As noted by the acting BOP Director in an OIG report subsequently evaluating, among other things, the Warden's response, evacuating a facility is an "option of absolute last resort" because it impacts a wide variety of core prison capabilities, including safety, and even facilitating the inmates' attendance at court hearings. OIG Report, *available at*, https://oig.justice.gov/reports/2019/e1904.pdf (last visited December 1, 2020), pp. 26-27.[5] The same considerations apply with respect to the Warden and staff's decisions about how to manage a compromised institution – including the lockdown of cells, the distribution of materials, the allocation of resources, and whether to accept and distribute items from external actors, such as

[5] As discussed earlier, the Court can rely upon this kind of outside evidence on a motion pursuant to Fed. R. Civ. P. 12(b)(1). *Libertarian Party of Erie Cty.*, 970 F.3d at 121.

the City of New York.[6] In reaching these decisions, Warden Quay had to exercise his discretion to balance a host of factors, including: the expected duration of the evolving partial power outage, the habitability of the West Building, the burdens on the inmates, the delays that may accrue to their criminal proceedings, and the safety and security of not only staff and inmates at the MDC, but the general public, including visitors. As the court noted in *Ferandini*, "in general, decisions regarding the best way to comply with th[e] [BOP's] broad statutory mandate [regarding maintenance of BOP facilities and safekeeping of prisoners] are discretionary in nature." *Id*. at *4 (citing 18 U.S.C. § 4042(a)(2) and collecting cases). It was also for these reasons that the Fifth Circuit Court of Appeals affirmed the dismissal, based on the DFE, of an FTCA claim stemming from the decision of BOP's South Central Regional Director not to evacuate a portion of a BOP facility in Texas, while evacuating other portions of the facility. *Spotts v. United States*, 613 F.3d 559 (5th Cir. 2010).

Notably, the R&R only distinguishes *Spotts* in ways that are not relevant to the DFE

[6] The R&R includes in this category Plaintiffs' allegations regarding inadequate medical care provided to detainees. R&R, p. 28. To be clear, on this point Defendant does not argue that meeting the generally accepted standard of medical care is discretionary. Rather, the appropriate private analogue for an individual claiming negligence in this regard is a medical malpractice claim under New York law. *See Hogan v. Russ*, 890 F. Supp. 146, 149 (N.D.N.Y. 1995) (distinguishing constitutional deprivations of care from medical malpractice). Because the Plaintiffs here have not satisfied the pleading requirements for medical malpractice, *e.g.*, that the United States breached any applicable standards of care, *see Milano by Milano v. Freed*, 64 F.3d 91, 95 (2d Cir. 1995), nor proffered any expert support for a claim that any breach led to any injury, *e.g.*, by way of a Certificate of Merit, *see Sitts v. United States*, 811 F.2d 736, 740 (2d Cir. 1986), merely framing Defendant's actions as "carelessness" cannot save these claims. While it may be that some other individuals housed at MDC during the period may have viable FTCA claims concerning medical care, as alleged here, these Plaintiffs do not, and their claims must be dismissed for that reason. *See Jiminez v. United States*, No. 11-CV-4593, 2013 WL 1455267, at *6 (S.D.N.Y. Mar. 25, 2013) (dismissing FTCA claim for inadequate medical care where BOP inmate-plaintiff failed to allege sufficient facts regarding defendants' breach or his specific injury, relying instead on legal conclusions such as "pain and suffering . . . as a result of inadequate medical treatment").

analysis. R&R, pp. 28-29. For example, the cause of the emergency is an issue that speaks to the *merits* of the respective wardens' decisions when faced with emergencies potentially requiring an evacuation rather than the *discretionary* nature of those decisions. The observation in the R&R that "there is no discussion in *Spotts* of the negligent guard theory" is precisely the point. R&R, p. 29. The relevance of *Spotts* is in its application of the DFE to the exact same kind of discretionary, policy-based decision at issue in this litigation.

c. Decisions Regarding Supervision of Employees and Contractors Are Shielded by the DFE

Finally, the fourth category of alleged negligence involves Facilities Manager Maffeo's supervision of those repairing the MDC, including the allegation that he allowed electrical contractors to go home on a Friday afternoon. It is well-established that claims of negligent hiring, training, supervision, and retention on the part of federal officials fall squarely within the DFE. Courts have noted that "[t]he hiring decisions of a public entity require consideration of numerous factors, including budgetary constraints, public perception, economic conditions, 'individual backgrounds, office diversity, experience and employer intuition.'" *Burkhart v. Washington Area Transit Auth.*, 112 F.3d 1207, 1217 (D.C. Cir. 1997). Since hiring decisions require the weighing of a variety of competing policy interests, these decisions are the type of decisions which Congress intended to protect with the DFE from judicial second-guessing. *Saint-Guillen v. United States*, 657 F.Supp.2d 376, 386-387 (E.D.N.Y. 2009) (Irizarry, J.) (citing *Burkhart*); *Li v. Aponte*, 05 Civ. 6237(NRB), 2008 WL 4308127, at *8 (S.D.N.Y. Sept. 16, 2008).

3. Plaintiffs' Allegations Cannot Establish Jurisdiction Based on the NGT

Plaintiffs have not met their burden of setting forth facts that overcome the presumption that the discretionary conduct here was based in policy considerations. Instead, they offer nothing other than supposition that because the fire and resultant electrical outage were not prevented and

the consequences were not resolved immediately, Defendant's conduct must have resulted from unaccountable laziness. This conclusory theory cannot support a finding that the NGT applies. *Hartman*, 2009 WL 792185, at *7-10 (Applying the DFE only where plaintiff has provided "supporting evidence[ ] that an official has been careless or inattentive in the execution of her responsibilities"). Plaintiffs' speculative and unsupported arguments should be afforded no weight in determining jurisdiction. Indeed, where the Amended Complaint does describe the *facts* surrounding the decision-making process undertaken by Quay and Maffeo, those allegations only confirm the policy-based nature of the discretionary choices at issue. *See*, *e.g.*, Amended Complaint, ¶¶ 306 ("Throughout the [period at issue], Warden Quay has averred, he 'continued to assess the operational and security challenges presented by the facility issues on a day-by-day basis.'"); 307 ("Warden Quay also testified: "I was informed, for instance, that only essential systems, such as security equipment, fire equipment, health equipment, electrical doors, and emergency lighting systems had power.").

Moreover, in support of its motion, Defendant has put forth evidence that affirmatively establishes the policy-based nature of the discretionary decisions at issue. Defendant placed into the record sworn declarations from Quay and Maffeo demonstrating Quay and Maffeo's decision-making, and showing Plaintiffs' characterizations to the contrary to be spurious.[7] *See* Declaration of Warden Quay, ECF Dkt. 65-1, pp. 4-11 ("Quay Decl."), ¶¶ 18-28; Declaration of John Maffeo,

[7] The Court can and should consider these declarations as part of the record for two reasons. First, as discussed earlier, the Court may consider matters outside the pleadings in determining whether jurisdiction exists. Second, Plaintiffs incorporate these statements by reference in their Amended Complaint, which quotes from the *very same* documents. Amended Complaint, ¶¶ 20, 305-06. As such, it is appropriate for the Court to consider the documents as incorporated by reference when considering these allegations. *Young v. Capital One Bank*, 12-CV-4843 (MKB), 2013 WL 2456083, at *1 n 2 (E.D.N.Y June 6, 2013) (citing *Chambers v. Time Warner, Inc.*, 282 F.3d 147, 153 (2d Cir.2002)).

ECF Dkt. 65-1, pp. 12-17 ("Maffeo Decl.") ¶¶ 15, 17, 19. Put simply, Quay and Maffeo's actions and decisions do not represent the "lazy guard" scenario in which a guard idly sits by while inmates are injured because they, in fact, "took steps to ensure the safety and security of the facility during the power outage." OIG Report, p.22. And Plaintiffs' Amended Complaint offers nothing other than unfounded assumptions that those steps were not grounded in policy considerations.

In sum, the conduct at issue here is unlike the ministerial and routine tasks that are often the subject of cases involving the NGT. As Judge Garaufis characterized the cases applying the NGT, in "each of these instances the plaintiff was able to proceed with an FTCA claim because the negligent discretion at issue was the decision to disregard the official policy, not a negligent decision made in pursuit of official policy." *Nabe*, 2014 WL 4678249, at *6. The allegations here all concern decisions made or actions taken in pursuit of an official policy -- the kinds of management-level, policy-style decisions that the Second Circuit has repeatedly recognized is shielded by the DFE, *even in cases where laziness or inattentiveness is alleged*.[8] *Coulthurst*, 214 F.3d 106; *Triestman*, 470 F.3d 471. In fact, the only similarity between this case and those where courts have held the NGT applies is that they involve BOP – and that is not enough. To hold otherwise would be to expose these kinds of management decisions to second-guessing through the medium of tort and undermine Congress' purpose in enacting the DFE – an approach all of the controlling case law recognizes is inappropriate. For this reason, the United States respectfully objects to the R&R to the extent that it recommends expanding the application of the NGT to the

[8] Even if the Court believes only some of the acts alleged plainly implicate policy considerations, while others do not, in accordance with the Second Circuit's precedent, Defendants submit that the Court should specify which acts it finds fall within the DFE, and which acts require discovery before the Court can make a determination. In that event, Defendant respectfully requests that the Court permit discovery only to the extent necessary to resolve the jurisdictional question regarding the remaining alleged negligent acts.

management-level, discretionary, policy-based matters at issue here.

Defendants also respectfully object to the R&R's conclusion that Plaintiffs have met their burden to show the NGT applies. The R&R reasoned Plaintiffs met this burden because one could read the factual allegations as supporting a finding that the claim falls within the DFE, yet "may also" suggest laziness or inattentiveness. R&R, p. 29 (quoting *Hartman*, 2009 WL 792185, at *11). But other courts in this Circuit have found a higher threshold to apply. In *Hartman*, the plaintiff set forth specific facts in support of the claim that the acts were not discretionary. *Hartman*, 2009 WL 792185, at *10-11. In *Chen*, that court held that a plaintiff's conclusory assertions of inexplicable inaction were insufficient to overcome the presumption of discretion, even at the pleadings stage. *Chen*, 2011 WL 2039433, *9-10.

In conclusion, Plaintiffs cannot overcome the presumption (buttressed by supporting evidence) that the decisions at issue in this litigation are grounded in policy considerations. To the contrary, the prison management decisions at issue in this litigation are exactly the kinds of decisions that "[u]nder the FTCA, this court may not, through hindsight, second-guess[.]" *Chen*, 2011 WL 2039433, at *10; *see also Fernandini*, 2019 WL 103379, at *5. The Court should find the DFE applies and grant Defendant's motion to dismiss the FTCA claims for lack of subject matter jurisdiction.

CONCLUSION

For the foregoing reasons, as well as those set forth in Defendants' opening and reply memoranda of law in support of their motion to dismiss, Defendants request that the Court adopt the portion of the R&R recommending dismissal of the *Bivens* claims, and Defendant United States respectfully objects to the portion of the R&R relating to Plaintiffs' FTCA claims. Defendant United States asks that, upon *de novo* review, the Court grant its motion to dismiss the FTCA claims for lack of subject matter jurisdiction.

Dated: Brooklyn, New York
December 7, 2020

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