**IN THE UNITED STATES DISTRICT COURT**
**FOR THE EASTERN DISTRICT OF NORTH CAROLINA**
**WESTERN DIVISION**

**Case No. 4:10-cv-142-D**

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| **MARK DANIEL LYTTLE,** | |
| **Plaintiff,** | **UNITED STATES' MOTION TO DISMISS** |
| **v.** | |
| **UNITED STATES OF AMERICA, et al.,** | |
| **Defendants.** | **Fed. R. Civ. P. 12(b)(1), 12(b)(6)** |

## UNITED STATES' MOTION TO DISMISS

Pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6), defendant, the United States, respectfully submits this motion to dismiss the three claims asserted against it in plaintiff's amended complaint (Counts 4-6), all of which are brought under the Federal Tort Claims Act ("FTCA"). In support of this motion, the United States relies upon the attached memorandum of law and accompanying exhibits. As explained in that memorandum of law, Lyttle's FTCA claims should be dismissed due to a lack of subject matter jurisdiction and because they fail to state a claim upon which relief can be granted.

Respectfully submitted this 24th day of June 2011,

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| **MARK DANIEL LYTTLE,**<br><br>**Plaintiff,**<br><br>**v.**<br><br>**UNITED STATES OF AMERICA, et al.,**<br><br>**Defendants.** | **MEMORANDUM IN SUPPORT OF UNITED STATES' MOTION TO DISMISS**<br><br>**Fed. R. Civ. P. 12(b)(1), 12(b)(6)** |

## MEMORANDUM IN SUPPORT OF THE UNITED STATES' MOTION TO DISMISS

The plaintiff in this case, Mark Daniel Lyttle, alleges that he was detained and then deported to Mexico despite being a U.S. citizen. While his complaint obviously tells only his side of the story, it is an unfortunate one even though it appears Lyttle may have played a role in the deportation decision. All that said, Lyttle's three claims against the United States under the Federal Tort Claims Act ("FTCA") are not legally viable.[1]

## INTRODUCTION

As discussed below, the Court lacks subject matter jurisdiction over Lyttle's FTCA claims because they are subject to the FTCA's "discretionary function" and "due care" exceptions. *See* 28 U.S.C. § 2680(a). Nor can Lyttle satisfy all of the elements under North

[1] Lyttle also has sued three federal employees in their individual capacity; they have filed their own motion to dismiss on this same date. The present motion addresses only those claims against the United States (Counts 4-6). Lyttle separately has sued the United States and several other federal employees in both their official and individual capacities based on his deportation in the Northern District of Georgia. *See Lyttle v. United States*, No. 10-3302 (N.D. Ga.). All of the federal defendants in that action have recently moved to dismiss all of Lyttle's claims against them as well. *See id*. Docket Nos. 47, 49.

Carolina law for the underlying torts. A claim for false imprisonment (Count 4) cannot lie because Lyttle was detained under legal authority. Next, the United States cannot be liable for an allegedly negligent investigation of his citizenship (Count 5) because a private person would not owe a duty to Lyttle in similar circumstances. And in the absence of allegations that federal immigration officials engaged in "utterly intolerable" conduct while interviewing Lyttle and processing his case, an intentional infliction of emotional distress ("IIED") cause of action (Count 6) fails as well. Finally, to the extent the Court does not dismiss Lyttle's FTCA claims in their entirety, it should at the very least limit any damages from those claims to only the harm that Lyttle allegedly suffered while in federal custody and inside the United States under the FTCA's foreign country exception. *See id*. § 2680(k).

## BACKGROUND[2]

On August 14, 2008, Lyttle was sentenced to a term of 100 days in the custody of the North Carolina Department of Correction ("NCDOC") on a charge of assaulting a female. FAC ¶ 27. A week later, on August 22, 2008, he was booked into the Neuse Correctional Institution to begin serving that sentence. *Id*. ¶ 28. During the booking process, a NCDOC employee by the name of Marilyn Stephenson (a defendant in this case) asked Lyttle, who is of Puerto Rican descent, a series of biographical questions, including one about his birthplace. *Id*. ¶¶ 7, 32. Lyttle alleges that he said he was born in North Carolina, but that Stephenson listed his birth country as Mexico. *Id*. ¶¶ 32-33. Based on the intake interview, NCDOC referred Lyttle to the U.S. Immigration and Customs Enforcement ("ICE") as a possible criminal alien. *Id*. ¶¶ 30, 36.

[2] Unless otherwise noted, the allegations recited *infra* are derived from Lyttle's first amended complaint (Docket No. 44) ("FAC"), which are assumed to be true solely for the purpose of this motion.

Dashanta Faucette, an ICE immigration enforcement agent and defendant in this action, then interviewed Lyttle at Neuse on September 2, 2008, and documented his statements during that interview in a "Record of Sworn Statement in Affidavit Form" and a "Record of Deportable/Inadmissible Alien" (copies of which are attached to this motion as Exhibits A and B, respectively).[3] FAC ¶ 39-46. By signing the sworn statement, Lyttle affirmed that he was born in and was a citizen of Mexico, that his correct name was Jose Thomas, that Mark Daniel Lyttle was an alias, and that he entered the United States without permission when he was three years old. *See* Exh. A; FAC ¶¶ 41-43. Faucette's handwritten notes from her interview with Lyttle also make reference to "Mental Illness – Bipolar." FAC ¶ 46; Exh. B.

Over the next few days, ICE agents performed computer database searches on Lyttle's criminal history. *See* FAC ¶¶ 47-48. Lyttle alleges these searches revealed "evidence of [his] citizenship." *Id.* ¶ 51. In light of his sworn statement, however, ICE Supervisory Detention and Deportation Officer Dean Caputo (a co-defendant in this action) executed several documents on September 5, 2008, to begin removal proceedings against Lyttle. *Id*. ¶¶ 49-51. Those included a "Warrant for Arrest of Alien," a "Notice of Intent to Issue Final Administrative Removal Order," and a "Notice of Custody Determination." *See id.*; Exhs. C, D, E. Also on September 5, ICE Immigration Enforcement Agent Robert Kendall (another defendant here) issued an "Immigration Detainer – Notice of Action." FAC ¶ 52; Exh. F. The first three of these

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[3] The Court may consider these documents without converting this motion into one for summary judgment, either because it is proper to submit evidence outside the pleadings on a motion to dismiss for lack of subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1), *see Velasco v. Gov't of Indonesia*, 370 F.3d 392, 398 (4th Cir. 2004), or because, for purposes of Rule 12(b)(6), Lyttle has incorporated these particular documents into his complaint by reference and their authenticity cannot be reasonably challenged, *see Cozzarelli v. Inspire Pharm. Inc.*, 549 F.3d 618, 625 (4th Cir. 2008); FAC ¶¶ 41-46. The foregoing is equally true of Exhibits C through F, which are also submitted with this motion and incorporated by reference into the complaint. FAC ¶¶ 49-53.

documents were served on Lyttle personally on September 8, 2008. FAC ¶¶ 53-55; Exhs. C, D, E. Lyttle also signed his name to the "Notice of Intent" and "Notice of Custody Determination;" by doing so, he reaffirmed the representations he had made to Agent Faucette of being a Mexican citizen and illegally inside the United States, agreed to be voluntarily deported to Mexico, and waived his rights to a hearing before an immigration judge. FAC ¶¶ 54-55, Exhs. D, E. The immigration detainer was sent to the NCDOC to notify it that it should transfer Lyttle to ICE custody once he had served the remainder of his state criminal sentence. FAC ¶ 52; Exh. F.

Lyttle was scheduled to be released from NCDOC custody on October 26, 2008. FAC ¶ 63. Two days later, in compliance with the immigration detainer, ICE took custody of Lyttle and transported him to the Stewart Detention Center in Lumpkin, Georgia, pending removal proceedings. *Id*.

Shortly after arriving at the Stewart Detention Center, ICE Deportation Officer David Collado took another sworn statement from Lyttle, who this time indicated he was a U.S. citizen, born in North Carolina. *Id*. ¶ 65. Collado thus reclassified Lyttle's case "from an administrative removal to a Notice to Appear," meaning Lyttle's immigration status would be decided by an immigration judge. *Id.* ¶ 68. On December 9, 2008, the immigration judge heard Lyttle's case and issued an order of removal. *Id*. ¶¶ 83-84. Lyttle was then transported to the Mexican border on December 18, 2008, and spent the next four months in Central America. *Id*. ¶¶ 95-111.

On April 22, 2009, Lyttle returned to the United States on a plane bound for Nashville, Tennessee, which first stopped over at the international airport in Atlanta, Georgia. *Id*. ¶¶ 112-13. As he tried to pass through customs in Atlanta, Lyttle was detained as a criminal alien. *Id.* ¶ 113. He was ultimately held there for two days while his family provided proof of his citizenship to immigration officials, and was released on April 24, 2009. *Id.* ¶¶ 113-17, 122.

Four days later, on April 28, 2009, the Department of Homeland Security filed a motion with the immigration court to terminate deportation proceedings against Lyttle. *Id*. ¶ 123. That motion summarized the events leading up to that point, including the fact that Lyttle had represented to immigration officials and the immigration court "that he was a Mexican citizen who had illegally entered the United States without inspection or parole." FAC Exh. C.

**DISCUSSION**

Lyttle's FTCA claims should be dismissed both for a lack of subject matter jurisdiction under Rule 12(b)(1) and a failure to state a claim upon which relief can be granted under Rule 12(b)(6). As to the former, Lyttle bears the burden of proving that jurisdiction exists by a preponderance of the evidence. *See United States ex rel. Vuyyuru v. Jadhav*, 555 F.3d 337, 347 (4th Cir. 2009). Even more specifically with respect to the FTCA, "it is the plaintiff's burden to show that an unequivocal waiver of sovereign immunity exists and that none of the statute's waiver exceptions apply to his particular claim." *Welch v. United States*, 409 F.3d 646, 651 (4th Cir. 2005). "If the plaintiff fails to meet this burden, then the claim must be dismissed." *Id*.

Dismissal is required under Rule 12(b)(6) when a plaintiff does not "plead sufficient factual matter to show" an entitlement to relief. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1948 (2009). Only a "plausible claim for relief survives a motion to dismiss" and a claim is plausible only when the well-pled factual allegations allow "the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id*. at 1949-50. When weighing the legal sufficiency of a complaint, a court must be careful to disregard "legal conclusions, elements of a cause of action, [] bare assertions devoid of further factual enhancement," unwarranted inferences, or arguments. *Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.*, 591 F.3d 250, 255 (4th Cir. 2009); *see Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (holding that

defeating a Rule 12(b)(6) motion to dismiss "requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do").

## I. SUBJECT MATTER JURISDICTION IS NOT PROPER AS TO LYTTLE'S FTCA CLAIMS

The FTCA acts as a "limited waiver of the United States' sovereign immunity" from money damages. *Welch*, 409 F.3d at 651. It is one that, as with any such waiver, must "be strictly construed, in terms of scope, in favor of the sovereign." *Williams v. United States*, 242 F.3d 169, 172 (4th Cir. 2001) (internal quotations and citation omtted). The boundaries of that waiver are marked "by a series of specific exceptions outlined in the Act, each of which is considered jurisdictional." *Welch*, 409 F.3d at 651. Two such exceptions—the "discretionary function" and "due care" exceptions, *see* 28 U.S.C. § 2680(a)—bar all of Lyttle's FTCA claims.[4]

### A. The "Discretionary Function" Exception

Under the FTCA, the United States retains its sovereign immunity from claims "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." 28 U.S.C. § 2680(a). This is true "whether or not the discretion involved be abused." *Id*.; *see Williams*, 242 F.3d at 175 (finding that hospital run by federal government on Indian reservation had discretion to provide treatment to non-Indians and its exercise of that discretion in refusing treatment to plaintiff, "even if it amounts to an abuse" by causing plaintiff's death, fell within discretionary function exception).

[4] In fact, another exception to the FTCA—the "foreign country" exception, *see* 28 U.S.C. § 2680(k)—is also relevant here. But because it would not preclude Lyttle's FTCA claims entirely (although it would severely curtail them), it is discussed separately below in the event that the Court does not dismiss such claims altogether. *See infra* Section III.

The Supreme Court has developed a two-part test to determine if the conduct in question is subject to the discretionary function exception. First, the action or conduct must be "a matter of choice for the acting employee." *Berkovitz v. United States*, 486 U.S. 531, 536 (1988). The exception thus "will not apply when a federal statute, regulation, or policy specifically prescribes a course of action for an employee to follow." *Id*. Second, "the challenged conduct must implicate considerations of public policy," as the "very purpose of the discretionary function exception is to prevent judicial 'second-guessing' of administrative decisions grounded in social and political policy." *Medina v. United States*, 259 F.3d 220, 228 (4th Cir. 2001) (citing *United States v. Gaubert*, 499 U.S. 315, 322-23 (1991)). But the employee need not subjectively weigh policy considerations before acting (or not); rather, the focus at this stage of the analysis is "on the nature of the actions taken and whether they are susceptible to policy analysis." *Gaubert*, 499 U.S. at 325; *see Indem. Ins. Co. of N. Am. v. United States*, 569 F.3d 175, 180 (4th Cir. 2009) (explaining that "a court should look to the nature of the challenged decision in an objective, or general sense, and ask whether that decision is one which [the court] would expect inherently to be grounded in considerations of policy") (internal quotations and citation omitted). As a result, the discretionary function exception protects conduct beyond the policy and planning level: "Day-to-day management . . . regularly requires judgment as to which of a range of permissible courses is the wisest." *Gaubert*, 499 U.S. at 325.

The FTCA claims in this case primarily challenge the decision by immigration officials to begin deportation proceedings against Lyttle and the alleged manner in which they came to that decision. More specifically, Lyttle asserts that they failed to review "readily available documentation" indicative of his citizenship, provide him "assistance" due to his alleged cognitive limitations, or use proper procedures when having him sign sworn statements

concerning his citizenship, and that they lacked adequate training and supervision in these matters. FAC ¶¶ 87-94, 155.[5] Such conduct, however, undeniably "involves an element of judgment or choice," *Berkovitz*, 486 U.S. at 536, and falls well within the discretionary function exception.

Indeed, the Fourth Circuit has held in the immigration context that the decision to arrest an alien and "institute deportation proceedings" is a "quintessential exercise of" immigration officials' "broad discretion." *Medina*, 259 F.3d at 227. The same is equally true of how a determination of citizenship is made. *See Diaz v. United States*, No. 99-6374, 2002 WL 31002842 (N.D. Ill. Sept. 3, 2002) (noting that immigration officials' "determination of [plaintiff's] citizenship was discretionary"). In short, the way that an immigration officer interrogates and investigates a person believed to be an alien and that officer's decision to initiate deportation proceedings against such a person is inherently discretionary conduct and "clearly meets the first prong" of the discretionary function analysis. *Medina*, 259 F.3d at 226.

That conduct just as clearly meets the second prong too. ICE is tasked with enforcing federal immigration laws, which involves ensuring that certain criminal aliens in this country are removed. *See* 6 U.S.C. §§ 251-52, 542 (note). Operating with limited resources, ICE must weigh various policy considerations in deciding which suspected aliens to detain, how to detain them, and how to investigate claims of citizenship by detained aliens. *Cf. Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 483-84 (1999) (explaining that at each stage of the deportation process the Executive "has discretion to abandon the endeavor" and often exercises "that discretion for humanitarian reasons or simply for its own convenience"); *Hughes v. United*

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[5] Lyttle's FTCA claims also appear to challenge the mere fact of his detention and deportation. That issue is discussed separately below in Section I-B.

*States*, 110 F.3d 765, 769 (11th Cir. 1997) (applying discretionary function so as not to "second guess the Postal Service's resource allocation decisions").

With these and similar considerations in mind, courts have found that the discretionary function exception bars FTCA claims analogous to those brought by Lyttle. In *Medina*, for example, an immigration officer independently inquired into the plaintiff's immigration status, obtained an arrest warrant through the proper channels, and, along with other immigration officers, arrested the plaintiff. *Medina*, 259 F.3d at 222. The government ultimately decided not to pursue the plaintiff's deportation. *Id.* at 229. The plaintiff sued under the FTCA for assault and battery, false arrest, malicious prosecution, and infliction of emotional distress. *Id.* at 223. Even though the government did not raise the issue, *see id.*, the Fourth Circuit *sua sponte* dismissed the case based on the discretionary function exception, concluding that the government's "decision to arrest Medina was clearly clothed in public policy considerations" and that the "initial decision to initiate proceedings and arrest him was the type of agency conduct Congress intended to immunize in the discretionary function exception." *Id.* at 229.

The Fifth Circuit used similar reasoning in a case where the plaintiff was subjected to deportation proceedings and remained in federal custody for fifteen months before being released. *See Nguyen v. United States*, 65 F. App'x 509, *1 (5th Cir. 2003) (*per curiam*). He then filed suit under the FTCA, alleging among other things that the immigration officials were negligent in failing to "determine from various documents that [he] was entitled to derivative citizenship." *Id*. at *2. The court of appeals held this was essentially a claim that immigration agents "failed to adequately perform a discretionary duty, which falls squarely within the discretionary function exception." *Id*. It also noted that "[d]ecisions to investigate, how to investigate and whether to prosecute generally fall within this exception." *Id*. at *1; *see Bernado*

*v. United States*, No. 02-0974, 2004 WL 741287, *3 (N.D. Tex. Apr. 5, 2004) (holding that discretionary function exception barred claim that immigration officials were "negligent in failing to independently investigate [plaintiff's] eligibility for derivative citizenship"); *accord O'Ferrell v. United States*, 253 F.3d 1257, 1267 (11th Cir. 2001) (stating that "[j]ust how law enforcement agents are to conduct interrogations would appear to be a paradigmatic example of a discretionary function," as the "process is one that involves elements of judgment and choice—the central ingredients of discretion."); *Mesa v. United States*, 123 F.3d 1435, 1438 (11th Cir. 1997) (applying discretionary function exception to claim that DEA agents "negligently or recklessly failed to cease detaining and questioning" the plaintiffs after realizing they had arrested wrong person).

Applying the above precedent here, the discretionary function exception forecloses nearly all of Lyttle's FTCA claims. The ICE agents in this case unquestionably exercised "choice and judgment," *Gaubert*, 499 U.S. at 331, in gathering and reviewing the relevant evidence, evaluating whether Lyttle could understand what was happening during his interview, and deciding whether to initiate removal proceedings against him.[6] Lyttle's conclusory allegations

[6] With respect to his alleged cognitive impairments, Lyttle asserts that his "medical and criminal records show that he was unable to execute a knowing, voluntary and intelligent waiver of his legal rights so as to admit that he was a Mexican national, in effect consenting to removal to Mexico." FAC ¶ 93. But the ICE agents investigating Lyttle's immigration status would not have had access to his confidential medical records. As for his criminal records, they actually confirm what common sense suggests: that being bipolar does not by itself mean that Lyttle was or is incompetent, or that he could not understand the questions being asked of him or what he signed. In the criminal matter that led to Lyttle's incarceration at Neuse in August 2008, there is no indication that the state court ever found or thought Lyttle to be incompetent to stand trial, and the sentencing judge in fact specifically decided not to recommend "[p]sychiatric and/or psychological counseling" for him. *See* Exh. G. (A copy of that judge's order is attached hereto as Exhibit G, which the Court again may consider under Rule 12(b)(1). *See Velasco*, 370 F.3d at 398. Alternatively, the Court may take judicial notice of it as a matter of public record under Rule 12(b)(6). *See Philips v. Pitt Cnty. Mem'l Hosp*., 572 F.3d 176, 180 (4th Cir. 2009).) Under such circumstances, Agent Faucette's assessment of Lyttle's ability to understand the

about negligent supervision and training, and "creating and/or sanctioning" policies concerning detention, interrogation, and deportation, FAC ¶¶ 88-92, 155, are even more readily subject to the discretionary function exception. *See Gaubert*, 499 U.S. at 325 ("Discretionary conduct is not confined to the policy or planning level."); *Suter v. United States*, 441 F.3d 306, 312 n.6 (4th Cir. 2006) ("Courts have repeatedly held that government employers' hiring and supervisory decisions are discretionary functions."); *Vickers v. United States*, 228 F.3d 944, 950 (9th Cir. 2000) ("This court and others have held that decisions relating to the hiring, training, and supervision of employees usually involve policy judgments of the type Congress intended the discretionary function exception to shield.") (collecting cases). This Court therefore should dismiss most of Counts 4-6 for lack of subject matter jurisdiction based on the discretionary function exception.

**B. The "Due Care" Exception**

The remainder of Lyttle's FTCA claims is predicated on the notion that the North Carolina immigration agents detained Lyttle pending his removal proceedings and then physically deported him. FAC ¶¶ 148, 155, 160. Putting aside the fact that Lyttle was detained by ICE in North Carolina for at most two days (after his scheduled release from NCDOC custody) and was physically deported by ICE agents in Georgia acting pursuant to an immigration judge's order of removal, *id*. ¶¶ 63, 86, this portion of Lyttle's FTCA claims is barred by the FTCA's "due care" exception.

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proceedings and her decision to not refer him for an independent mental health examination were exercises in judgment and precisely the sort of conduct grounded in policy considerations that the discretionary function is meant to protect from "judicial 'second-guessing.'" *United States v. Varig Airlines*, 467 U.S. 797, 814 (1984).

Complementing the discretionary function exception is the "due care" exception, which prohibits claims "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." 28 U.S.C. § 2680(a). This part of § 2680(a) "prevents the United States from being held liable for actions of its officers undertaken while reasonably executing the mandates of a statute." *Welch*, 409 F.3d at 651. For the due care exception to apply, there must be a statute or regulation that "specifically proscribes a course of action for an officer to follow" and the officer must have "exercised due care in following the dictates of that statute or regulation." *Id.* at 652. That is indisputably true here, as the Fourth Circuit's decision in *Welch* is on all fours with this case.

Like the plaintiff in *Welch*, Lyttle was detained "under the mandate of [8 U.S.C.] § 1226(c)(1)(B)." *Id.*; Exhs. C, D, E. "Once [Lyttle] was deemed deportable" pursuant to this provision, the "decision to detain him was statutorily required." *Welch*, 409 F.3d at 652; *see Demore v. Kim*, 538 U.S. 510, 517-18 (2003) (explaining that § 1226(c) "mandates detention" of individuals charged as criminal aliens "during removal proceedings"). Because there is no allegation in this case that an immigration officer "deviated from the statute's requirements," *Welch*, 409 F.3d at 652, the due care exception scotches Lyttle's FTCA claims to the extent they depend on the fact of his detention in North Carolina. *See id.* (affirming dismissal under Rule 12(b)(1) of FTCA false imprisonment claim based on due care exception where plaintiff was detained pursuant to § 1226(c)(1)(B) for 422 days).

## II. EACH OF LYTTLE'S THREE FTCA CLAIMS FAILS AS A MATTER OF LAW

Besides being jurisdictionally barred by the discretionary function and due care exceptions, Lyttle's individual FTCA causes of action are substantively flawed too, as none of them states a violation of North Carolina law. The United States is liable under the FTCA only 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), and only "in the same manner and to the same extent as a private individual under like circumstances" would be liable, *id*. § 2674. The FTCA thus "does not create new causes of action." *Florida Auto Auction of Orlando, Inc. v. United States*, 74 F.3d 498, 502 (4th Cir. 1996). Instead, "the underlying cause of action in an FTCA claim is derived from the applicable state law." *Kerns v. United States*, 585 F.3d 187, 194 (4th Cir. 2009). For the reasons explained below, Lyttle has not alleged valid claims for false imprisonment, negligence, or IIED under the laws of North Carolina. The Court therefore should dismiss his FTCA claims under Rule 12(b)(6) as well.

### A. The False Imprisonment Claim (Count 4) Fails Because Lyttle's Detention Was Pursuant To Legal Process

In his "Fourth Claim for Relief," Lyttle seeks to hold the United States liable for false imprisonment because the North Carolina ICE agents "obtain[ed] custody" of him from NCDOC, held and detained him "for an appreciable period of time," and "physically expell[ed]" him from the United States. FAC ¶ 148.[7] Yet Lyttle admits, as he must, that those ICE agents used legal process throughout his deportation proceedings. *Id*. ¶¶ 49- 52; Exhs. C, D, E, F. Because that fact defeats a claim of false imprisonment under North Carolina law, Lyttle's fourth cause of action must be dismissed.

False imprisonment is "based upon the deprivation of one's liberty without legal process." *Melton v. Rickman*, 36 S.E.2d 276, 703 (N.C. 1945). Thus, if an imprisonment "is under legal authority[,] it may be malicious but it cannot be false." *Rhodes v. Collins*, 150 S.E.

[7] To be clear, the "appreciable period of time" at issue in this case is limited to just the two days Lyttle allegedly was in ICE custody while in North Carolina, after completing his state criminal sentence. *See* FAC ¶ 63.

492, 494 (N.C. 1929) (internal quotations and citation omitted). This remains true, and an action for false imprisonment will not lie, even if the process is later shown to be irregular, voidable, or erroneously issued. *Id.*; *Bryan v. Stewart*, 31 S.E. 286, 287 (N.C. 1898). When an arrest or imprisonment is "made under the form of legal process," a false imprisonment claim is properly brought only if the process is "absolutely void"—*i.e.*, the warrant "charged no criminal offense known to the law" or was issued by a court having no jurisdiction, or the person arrested is not the person named in the warrant. *Rhodes*, 150 S.E. at 494-95; *see Bryan*, 31 S.E. at 288; *Robinson v. City of Winston-Salem*, 238 S.E.2d 628, 630-31 (N.C. Ct. App. 1977).

In this case, Lyttle acknowledges that the North Carolina ICE agents issued several types of legal process to initiate and process his removal proceedings. FAC ¶¶ 49-52; Exhs. C, D, E, F. There can be no question that this process was procedurally valid, as the agents acted pursuant to their statutory and regulatory authority to arrest and detain individuals suspected of being removable aliens. *See* 8 U.S.C. § 1226(c); 8 C.F.R. § 236.1. Lyttle thus does not—because he cannot—allege that the agents detained him without legal authority. At most he has alleged that the legal process used to begin removal proceedings against him was erroneously issued, which is not enough to sustain a false imprisonment claim. *See Bryan*, 31 S.E. at 288 (finding that claim for false imprisonment must be dismissed where clerk of court had "the right—the jurisdiction—to issue the process under which the plaintiff was arrested" and the process thus "was not void, although it was erroneous"). The Court accordingly should dismiss Lyttle's false imprisonment cause of action.[8]

[8] Lyttle's reliance on the fact that he was "physically expell[ed]" from the United States—several weeks after ICE transferred him from North Carolina to Georgia—as part of his false imprisonment claim, FAC ¶ 148, is irrelevant to this action, as the North Carolina agents did not "physically expel[]" him from the United States. It is also illogical, as his removal ended his detention, which is an essential element for false imprisonment, *see Melton*, 36 S.E.2d at 703.

### B. The Negligence Claim (Count 5) Fails Because Lyttle Cannot Establish A Duty Of Care

Lyttle's next FTCA claim (Count 5) is premised on the alleged negligence of the North Carolina ICE agents who initiated removal proceedings against him. FAC ¶¶ 153-58. This claim should be dismissed because it would impose a duty of care on the government that a private person would not owe to Lyttle under similar circumstances.[9]

As noted above, an "action under the FTCA may only be maintained if the Government would be liable as an individual under the law of the state where the negligent act occurred." *Kerns*, 585 F.3d at 194; *see* 28 U.S.C. § 1346(b)(1). The Fourth Circuit has explained further that the "FTCA only serves to convey jurisdiction when the alleged breach of duty is tortious under state law, or when the Government has breached a duty under federal law that is analogous to a duty of care recognized by state law." *Goldstar (Panama) S.A. v. United States*, 967 F.2d 965, 969 (4th Cir. 1992) (emphasis omitted). Accordingly, if state law would not impose upon a private person a duty of care towards the plaintiff "under like circumstances," 28 U.S.C. § 2674, then the United States cannot be held liable under the FTCA. *See Florida Auto Auction of Orlando*, 74 F.3d at 505-05 (reversing district court's denial of summary judgment on FTCA negligence claim where state law did "not impose liability for breach of a duty that is sufficiently analogous to the duty" allegedly breached by federal customs officers).

In his "Fifth Claim for Relief," Lyttle asserts that the North Carolina ICE agents "breached their duty of reasonable care by negligently acting or failing to act in such a way that

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[9] Not to mention the fact that Lyttle contributed to the alleged negligence by representing he was a Mexican citizen to immigration officials. *See* FAC ¶¶ 40-45, 54; FAC Exh. C; Exhs. A-E; *Thompson v. Bradley*, 544 S.E.2d 258, 261 (N.C. Ct. App. 2001) (stating that under North Carolina law contributory negligence is "the breach of [a] duty of a plaintiff to exercise due care for his or her own safety, such that the plaintiff's failure to exercise due care is a proximate cause of his or her injury" and acts as a complete bar to a plaintiff's recovery).

resulted in [his] wrongful detention and deportation by ICE." FAC ¶ 154. By this he appears to mean that those agents negligently investigated his claim of citizenship and failed to provide him "with assistance" due to his alleged "mental deficiencies" during his interview and before letting him sign sworn statements concerning his citizenship. *Id.* ¶ 155. A canvass of North Carolina law, however, uncovers no precedent holding private parties liable in circumstances like those at issue in Lyttle's FTCA negligence claim.

If anything, the case law indicates just the opposite. As the North Carolina Supreme Court has explained: "Private persons do not possess public duties. Only governmental entities possess authority to enact and enforce laws for the protection of the public." *Stone v. N. Carolina Dep't of Labor*, 495 S.E.2d 711, 714 (N.C. 1998). It has held further that, under the "public duty doctrine," the duty of a governmental entity and its officers to protect the public and enforce the law is owed to the citizenry at large, not to a specific individual, and that (absent the existence of a "special relationship" or a "special duty") the negligent performance of that function cannot subject such entities or officers to liability because they owe no legal duty to the plaintiff. *See id*. at 713-17 (finding that state entities could not be held liable for negligently failing to conduct safety inspections of food processing plant in light of public duty doctrine and language of North Carolina Tort Claims Act, which imposed liability on state only if "a private person" would be liable under the circumstances); *Hunt v. N. Carolina Dep't of Labor*, 499 S.E.2d 747, 749-51 (N.C. 1998) (finding that public duty doctrine barred claims against state entity under North Carolina Tort Claims Act for negligently inspecting amusement park rides). Like the FTCA's discretionary function, the public duty doctrine is "grounded in the notion that an officer's duty to protect the public requires the officer to make discretionary decisions on a regular basis." *Scott v. City of Charlotte*, 691 S.E.2d 747, 752 (N.C. Ct. App. 2010).

The public duty doctrine thus has special relevance in the law enforcement context. *See*, *e.g.*, *Walker v. City of Durham*, No. COA02-1297, 2003 WL 21499222, *1-2 (N.C. Ct. App. July 1, 2003) (unpublished) (holding that negligence claim based on police technician's conduct in destroying evidence and submitting false testimony was barred by public duty doctrine). Even more specifically, the Fourth Circuit has held that the United States could not be liable under the FTCA for the alleged negligence of customs officers in allowing the exportation of vehicles without proper documentation in part because public officers would not be liable under South Carolina's public duty doctrine. *See Florida Auto Auction of Orlando*, 74 F.3d at 502-05; *accord Lippman v. City of Miami*, 622 F. Supp. 2d 1337, 1341-42 (S.D. Fla. 2008) (dismissing FTCA negligence claim based on conduct of FBI agents in surveilling plaintiff and searching and damaging his truck because "Florida law is clear that the negligent conduct of police investigations does not give rise to a cause of action for negligence under Florida law," as the "duty to protect citizens and enforce the law is one owed generally to the public" and "Florida law does not impose an analogous duty of care on a private party under like circumstances") (internal quotations and citation omitted).

To be sure, the U.S. Supreme Court has held that a court must "look to the state-law liability of private entities, not to that of public entities, when assessing the Government's liability under the FTCA in the performance of activities which private persons do not perform" (*e.g.*, enforcing the nation's immigration laws). *United States v. Olson*, 546 U.S. 43, 46 (2005) (internal quotations and citation omitted). Private persons admittedly are not responsible for enforcing the law or investigating suspected criminals or aliens. *See Stone*, 495 S.E.2d at 714. But at the same time, there is no authority of which we are aware that imposes a duty on a private person in North Carolina that is analogous to Lyttle's proposed "duty of reasonable care" when

investigating a suspected alien or, more generally, investigating another person in "like circumstances." 28 U.S.C. § 2674.

The only conceivable analogy to the situation presented here is one in which a private person "voluntarily takes the custody of another under circumstances such as to deprive the other of his normal opportunities for protection." Restatement (Second) of Torts § 314A(4) (1965). Although the North Carolina case law applying this particular provision of the Restatement is sparse, it confirms that the duty imposed by this rule is limited to protecting "against unreasonable risk of physical harm." *Id*. § 314A(1); *cf. Klassette by Klassette v. Mecklenburg Cnty. Area Mental Health, Mental Retardation & Substance Abuse Auth*., 364 S.E.2d 179, 184 (N.C. Ct. App. 1988) (finding that supervisor of treatment center "assumed a duty of care toward plaintiff" to protect plaintiff from harm and possible brain injury after plaintiff's friend had dropped plaintiff off in parking lot of center and supervisor had taken "affirmative" steps of "locking plaintiff in plaintiff's car and regularly monitoring plaintiff's vital signs"). Such a duty has no relevance to the negligence claim in this case, as Lyttle does not allege that the North Carolina ICE agents failed to protect him from physical injury while he was in their custody between October 26 and 28, 2008. We again are aware of no case in North Carolina imposing a duty on private individuals who have voluntarily taken custody of another to conduct any kind of investigation into that person, ensure that he understands his rights, or provide assistance to him during an interrogation or before signing legal forms. Because North Carolina law would not hold a private citizen (or even a police officer) liable under such circumstances, the United States cannot be held liable under the FTCA.

### C. The IIED Claim (Count 6) Fails Because Lyttle Has Not Sufficiently Alleged Extreme And Outrageous Conduct

Lyttle's FTCA claim for intentional infliction of emotional distress (his "Sixth Claim for Relief") also fails as a matter of law. To succeed on an IIED claim in North Carolina, a plaintiff must plead and prove the following: "(1) extreme and outrageous conduct, (2) which is intended to cause and does cause (3) severe emotional distress to another." *Dickens v. Puryear*, 276 S.E.2d 325, 335 (N.C. 1981). The standard of outrageousness under the first element is "'a stringent one.'" *Jolly v. Academy Collection Serv., Inc.*, 400 F. Supp. 2d 851, 866 (M.D.N.C. 2005) (quoting *Patterson v. McLean Credit Union*, 805 F.2d 1143, 1146 (4th Cir. 1986), *aff'd in part and vacated in part on other grounds*, 491 U.S. 164 (1989)). It requires a plaintiff to show that the defendant's conduct "is so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." *Foster v. Crandell*, 638 S.E.2d 526, 537 (N.C. Ct. App. 2007). Determining whether "the conduct complained of may reasonably be found to be sufficiently outrageous as to permit recovery" is initially a question of law for the court. *Beck v. City of Durham*, 573 S.E.2d 183, 191 (N.C. Ct. App. 2002) (internal quotations and citation omitted) (affirming grant of motion to dismiss as to IIED claim, among others).

Lyttle has not come close to meeting the "high threshold for a finding that" the alleged conduct of the North Carolina ICE agents was sufficiently extreme and outrageous to sustain an IIED claim. *Dobson v. Harris*, 521 S.E.2d 710, 715 (N.C. Ct. App. 1999), *rev'd on other grounds*, 530 S.E.2d 829 (N.C. 2000). To begin, Lyttle was first identified as a possible criminal alien and had been referred to ICE as such by local North Carolina authorities. FAC ¶¶ 30-33. The North Carolina ICE agents thus were merely following up on that referral. *Id*. ¶ 36 (alleging

that, "[a]s a direct and proximate result of the *North Carolina Defendants'* false, unfounded and unlawful misidentification of Mr. Lyttle, the Raleigh unit of [ICE's Criminal Alien Program] was notified and an investigation into Mr. Lyttle's citizenship was initiated") (emphasis added). There are certainly no credible, well-pled factual allegations that the North Carolina ICE agents singled Lyttle out for deportation knowing he was a U.S. citizen. While Lyttle hyperbolizes that one of the North Carolina immigration officials (Agent Faucette) "coerced and manipulated" him into signing a sworn statement in which he admitted foreign citizenship, *id*. ¶ 54, this is a mere conclusory assertion that is not entitled to the assumption of truth. *See Iqbal*, 129 S. Ct. at 1950. And what that assertion amounts to is, at worst, that Agent Faucette (who is not alleged to be a trained mental health care provider) perhaps misjudged Lyttle's cognitive abilities, FAC ¶¶ 54-55—something that could hardly be deemed as going "beyond all possible bounds of decency." *Foster*, 638 S.E.2d at 537.[10] Finally, once the North Carolina immigration officials had determined that there was a sufficient basis to initiate removal proceedings against Lyttle in light of his repeated representations of being a Mexican citizen, they were statutorily required to detain him pending removal proceedings. *See supra* Section I-B; 8 U.S.C. § 1226(c); *Demore*, 538 U.S. at 517-18; *Welch*, 409 F.3d at 652.

In short, Lyttle merely alleges that the North Carolina ICE agents performed their usual duties in interviewing him, investigating him, and initiating deportation proceedings against him. *See* FAC ¶¶ 39-61. He certainly has not pled "sufficient factual matter to show," *Iqbal*, 129 S. Ct. at 1948, that those officials engaged in "extreme and outrageous" conduct to maintain an

[10] And as discussed above, Agent Faucette's actions appear all the more reasonable in light of the evidence that Lyttle was not found incompetent in connection with the criminal charge that led to his sentence at Neuse where Agent Faucette interviewed him, or even in need of psychiatric or psychological counseling at that time. *See* Exh. G; *supra* Section I-A n.7.

IIED cause of action under North Carolina law. *Cf. Dobson*, 521 S.E.2d at 575, 578-79 (finding that falsely reporting child abuse, causing plaintiff to be questioned and investigated by Department of Social Services for abusing her own child, was not extreme and outrageous conduct); *Ayerza v. Cabarrus Cnty. Dep't of Soc. Servs.*, No. COA09-1050, 2010 WL 2367204, *3 (N.C. Ct. App. June 15, 2010) (unpublished) (holding that plaintiff who sought to become adoptive parent of two juveniles could not bring IIED claim based on allegations that defendants made false statements and gave false testimony to the court, actively misled and provided false information to plaintiff, and failed to notify plaintiff and the court about material facts); *Walker*, 2003 WL 21499222, at *3 (affirming dismissal of IIED claim that police technician negligently or intentionally destroyed evidence and then submitted false testimony concerning its destruction, which led to release of man suspected of attacking and raping plaintiff, as there was no allegation that technician acted with intent or reckless disregard of plaintiff's emotional state of mind).

## III. JURISDICTION OVER LYTTLE'S FTCA CLAIMS IS LIMITED BY THE FOREIGN COUNTRY EXCEPTION

Assuming the Court does not dismiss all of Lyttle's FTCA claims in their entirety for the reasons discussed above, it nevertheless should find that any surviving FTCA claim would allow recovery for only those injuries that Lyttle allegedly suffered within the United States. This is an unavoidable consequence of the FTCA's foreign country exception.

In addition to the discretionary function and due care exceptions, another enumerated exceptions found in the FTCA is the foreign country exception. That provision preserves the United States' sovereign immunity from tort liability with respect to "[a]ny claim arising in a foreign country." 28 U.S.C. § 2680(k). The Supreme Court has interpreted the "straightforward language of the foreign country exception" to mean that it "bars all claims based on any injury

suffered in a foreign country, *regardless of where the tortious act or omission occurred*." *Sosa v. Alvarez-Machain*, 542 U.S. 692, 701, 712 (2004) (emphasis added).

This understanding of the foreign country exception is based on several considerations. First is the language of the statute itself. Unlike other exceptions found in the FTCA, *see* 28 U.S.C. §§ 2680(a), (e), the foreign country exception does not use the phrase "act or omission." *See Sosa*, 542 U.S. at 711 n.9. Reading that phrase into the foreign country exception, so that a claim would be barred only when the act or omission giving rise to the claim occurred in a foreign country, thus would contradict the plain terms of the act. *See id*.

Second, the "common usage" of the phrase "arising in," at the time of the FTCA's enactment, referred to the "jurisdiction in which injury was received." *Id*. at 704-05 (internal quotations and citation omitted); *see id*. at 711 (explaining that foreign country exception "was written at a time when the phrase 'arising in' was used in state statutes to express the position that a claim arises where the harm occurs"). There is thus "good reason . . . to conclude that Congress understood a claim 'arising in a foreign country' to be a claim for injury or harm occurring in a foreign country." *Id*. at 704 (quoting 28 U.S.C. § 2680(k)).

Third, the "dominant principle in choice-of-law analysis for tort cases" when Congress passed the FTCA was to apply "the law of the place where the injury occurred." *Id*. at 705. But because the "object" of the foreign country exception is "to avoid application of substantive foreign law," and because the place of harm or injury is "the fact that would trigger application of foreign law to determine liability," it is evident that Congress "used the modifier 'arising in a foreign country' to refer to claims based on foreign harm or injury." *Id*. at 707-08.

In this case, it appears Lyttle seeks damages against the United States based in large part on harm that allegedly befell him during the four months he spent in Central America, after he

was removed from the United States. *See* FAC ¶¶ 96-111. Under the "straightforward language of the foreign country exception," *Sosa*, 542 U.S. at 701, however, Lyttle may not recover for "any injury suffered in a foreign country." *Id*. at 712. This is so even though the allegedly tortious acts or omissions giving rise to Lyttle's foreign injuries occurred within the United States. *Id*. The Court therefore should find, at a minimum, that Lyttle's FTCA claims are jurisdictionally limited by the foreign country exception, to the extent they depend on harm or injury Lyttle may have experienced while outside the United States. As a corollary, it further should find that Lyttle's damages (if any) under such claims must be based solely on injuries he can prove occurred while in federal custody and inside the United States.

## CONCLUSION

For the reasons stated above, the United States respectfully requests that the Court grant its motion to dismiss and dismiss all of the claims against it in Lyttle's amended complaint.

Respectfully submitted this 24th day of June 2011,

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**CERTIFICATE OF SERVICE**

I certify under penalty of perjury that on June 24, 2011, I electronically filed the foregoing "Motion to Dismiss" using the Court's CM/ECF system, which will send notification of such filing to the following counsel of record:

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