

1 runway 12 as authorized but was unable to execute the landing. The pilot announced the
2 missed approach to air traffic control. Serco’s air traffic controller instructed the pilot to
3 turn left immediately. The complaint alleges that the direction was given in an urgent
4 manner. The pilot complied with the instruction and in doing so stalled the aircraft, which
5 then crashed.

6 Grant Aviation alleges negligence on the part of Serco’s air traffic controller for
7 failing to keep the required separation between landing aircraft and instructing the N9448B
8 pilot to turn left. More specifically, Grant Aviation claims that the instruction from Serco’s
9 air traffic controller “violated the applicable standard of care for control tower operators”
10 and that such an instruction would not have been necessary if the controller “had
11 maintained the required separation between landing aircraft.”¹ It alleges that these acts
12 and omissions were the sole cause of the accident.

13 **III. STANDARD OF REVIEW**

14 Rule 12(b)(6) tests the legal sufficiency of a plaintiff’s claims. In reviewing such a
15 motion, “[a]ll allegations of material fact in the complaint are taken as true and construed in
16 the light most favorable to the nonmoving party.”² To be assumed true, the allegations,
17 “may not simply recite the elements of a cause of action, but must contain sufficient
18 allegations of underlying facts to give fair notice and to enable the opposing party to defend
19 itself effectively.”³ Dismissal for failure to state a claim can be based on either “the lack of
20 a cognizable legal theory or the absence of sufficient facts alleged under a cognizable
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26 ¹Doc. 7 at ¶ 13.

27 ²*Vignolo v. Miller*, 120 F.3d 1075, 1077 (9th Cir. 1997).

28 ³*Starr v. Baca*, 652 F.3d 1202, 1216 (9th Cir. 2011).

1 legal theory.”⁴ “Conclusory allegations of law . . . are insufficient to defeat a motion to
2 dismiss.”⁵

3 To avoid dismissal, a plaintiff must plead facts sufficient to “state a claim to relief
4 that is plausible on its face.”⁶ “A claim has facial plausibility when the plaintiff pleads
5 factual content that allows the court to draw the reasonable inference that the defendant is
6 liable for the misconduct alleged.”⁷ “The plausibility standard is not akin to a ‘probability
7 requirement,’ but it asks for more than a sheer possibility that a defendant has acted
8 unlawfully.”⁸ “Where a complaint pleads facts that are ‘merely consistent with’ a
9 defendant’s liability, it ‘stops short of the line between possibility and plausibility of
10 entitlement to relief.’”⁹ “In sum, for a complaint to survive a motion to dismiss, the non-
11 conclusory ‘factual content,’ and reasonable inferences from that content, must be
12 plausibly suggestive of a claim entitling the plaintiff to relief.”¹⁰ “In all cases, evaluating a
13 complaint’s plausibility is a ‘context-specific’ endeavor that requires courts to ‘draw on ...
14 judicial experience and common sense.’”¹¹

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19 ⁴*Balistreri v. Pacifica Police Dept.*, 901 F.2d 696, 699 (9th Cir. 1990).

20 ⁵*Lee v. City of Los Angeles*, 250 F.3d 668, 679 (9th Cir. 2001).

21 ⁶*Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*,
22 550 U.S. 544, 570 (2007)).

23 ⁷*Id.*

24 ⁸*Id.* (quoting *Twombly*, 550 U.S. at 556).

25 ⁹*Id.* (quoting *Twombly*, 550 U.S. at 557).

26 ¹⁰*Moss v. U.S. Secret Serv.*, 572 F.3d 962, 969 (9th Cir. 2009); *see also Starr*, 652
27 F.3d at 1216.

28 ¹¹*Levitt v. Yelp! Inc.*, 765 F.3d 1123, 1135 (9th Cir. 2014) (quoting *Eclectic Props. E., LLC v. Marcus & Millichap Co.*, 751 F.3d 990, 996 (9th Cir. 2014)).

1 **IV. DISCUSSION**

2 Serco argues that even accepting the factual allegations as true the air traffic
3 controller cannot be liable for negligence here because the pilot was ultimately responsible
4 for decisions affecting the operations of the aircraft. That is, it argues that as a matter of
5 law Grant Aviation’s pilot was responsible for his or her decision to comply with the air
6 traffic controller’s instruction to turn left, which placed the aircraft at risk. Serco relies on
7 14 C.F.R. § 91.3, which is part of the FAA’s regulations governing air traffic and general
8 flight operations. The regulation states that “[t]he pilot in command of an aircraft is directly
9 responsible for, and is the final authority as to, the operation of that aircraft.”¹²

10 Grant Aviation asserts that while its pilot may have had a duty to safely operate the
11 aircraft, he had a concurrent obligation to comply with the air traffic controller’s instruction
12 to turn left. It relies on 14 C.F.R. § 91.123, which states that except in an emergency “no
13 person may operate an aircraft contrary to an [air traffic control] instruction in an area in
14 which air traffic control is exercised.”¹³ While Serco acknowledges the pilot’s obligation to
15 comply with air traffic control directions, it argues that such an obligation is secondary to
16 the pilot’s ultimate duty to operate the aircraft safely and that the instruction provided by its
17 air traffic controller created a situation that in fact required the pilot to exercise ultimate
18 authority over the aircraft and deviate from that instruction in order to operate the plane
19 safely.

20 Serco’s position that Grant Aviation has not stated a plausible claim is without
21 adequate support. The applicable case law makes clear that in airplane tort cases the
22 standard of due care is concurrent; the pilot and the air traffic controller are both
23 responsible for the safe conduct of the aircraft when that aircraft is landing or taking off.¹⁴
24 While a pilot may be directly responsible for the aircraft’s operation, a pilot’s negligent

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26 ¹²14 C.F.R. § 91.3(a).

27 ¹³14 C.F.R. § 91.123(b).

28 ¹⁴*Spaulding v. United States*, 455 F.2d 222, 226 (9th Cir. 1972).

1 performance of that duty does not necessarily relieve air traffic control of its own
2 responsibilities.¹⁵ Indeed, in order for a pilot to be legally responsible, “he must know those
3 facts which are material to the operation of his plane” and one source of such information
4 is air traffic control.¹⁶ Air traffic control has a duty to provide warnings required in the
5 applicable manuals and other warnings as necessary given the circumstances. “This duty
6 to warn is based on the simple tort principle that once the Government has assumed a
7 function or service [such as air traffic control], it is liable for negligent performance.”¹⁷
8 Indeed, there are cases to support Grant Aviation’s specific claim that an air traffic
9 controller breaches its duty of care if he or she gives a pilot a deficient instruction upon
10 which the pilot relies.¹⁸

11 The court cannot conclude that as a matter of law the pilot here was required to
12 deviate from the air traffic controller’s instruction to turn left. Such a conclusion would
13 require the court to consider what the pilot should have known and done in light of all the
14 circumstances, which is not for the court to decide on a Rule 12(b)(6) motion. The issue
15 is simply whether Grant Aviation has stated a plausible claim for relief, and it has.

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20 ¹⁵*Webb v. United States*, 840 F.Supp. 1484, 1511 (D. Utah 1994).

21 ¹⁶*Spaulding*, 455 F.2d at 226.

22 ¹⁷*Id.*

23 ¹⁸*See Yates v. United States*, 497 F.2d 878, 883 (10th Cir. 1974) (rejecting the
24 defendant’s argument that the pilot had no right to rely on instructions which the air
25 controller gave him and that the pilot is required to form his own judgment about the
26 prudence of the controller’s instruction and declining to find the controller’s directions as
27 “merely advisory”); *Rodriquez v. United States*, 823 F.2d 735, 740-42 (3d Cir. 1987)
28 (upholding the district court’s finding of negligence on the part of the air traffic controller
based upon an inadequate instruction); *Himmler v. United States*, 474 F. Supp. 914 (E.D.Pa.
1979) (“Where . . . the pilot places himself in the hands of the controller and thereafter
follows the controller’s suggestions or instructions, the pilot is entitled to rely upon such
information and directions and is not free or expected to disregard same.”).

V. CONCLUSION

Based on the preceding discussion, the motion to dismiss at docket 9 is DENIED.

DATED this 11th day of September 2020.

/s/ JOHN W. SEDWICK
SENIOR JUDGE, UNITED STATES DISTRICT COURT

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