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8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA
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11 GARRETT JAMES CLUFF,

12 Plaintiff,

13 v.

14 UNITED STATES CUSTOMS AND
15 BORDER PROTECTION et al.,

16 Defendants.

Case No.: 21cv115-L-LL

**ORDER GRANTING MOTION TO
DISMISS WITH LEAVE TO AMEND**

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18 Pending before the Court in this action under the Federal Tort Claims Act, 28
19 U.S.C. §§1346(b) & 2671-2680 ("FTCA"), is a motion filed by the United States
20 ("Government") to dismiss for lack of subject matter jurisdiction and for failure to state a
21 claim. Fed. R. Civ. Proc. 12(b)(1), (6). Plaintiff filed an opposition and the Government
22 replied. For the reasons stated below, the Government's motion is granted with leave to
23 amend.

24 **I. Background**

25 In his operative first amended complaint Plaintiff alleges a personal injury
26 negligence action arising from a vehicle accident allegedly caused by Gary M. Richards,
27 a United States Customs and Border Protection ("USCBP") employee while operating a
28 USCBP vehicle. (*See* ECF no. 5 ("Compl.").)

1 The Government moves for dismissal because Plaintiff alleges that Richards acted
2 in the scope of his employment as an employee of a federal agency, argues that under
3 these circumstances the Government is the only proper defendant, but the complaint does
4 not name the Government as a Defendant. (ECF nos. 8, 10.) The Government also
5 argues that should this case proceed to trial, it cannot be tried to a jury. (*Id.*) Further, the
6 Government contends Plaintiff cannot state any claims against Doe Defendants, and the
7 action should be dismissed for lack of timely service of process.

8 Plaintiff counters that, although the caption of the first amended complaint
9 erroneously names USCBP as a Defendant, it is apparent from the substantive allegations
10 (Compl. ¶ 6) that USCBP is no longer a Defendant, and that the Government is a named
11 Defendant. (ECF no. 9.) Further, Plaintiff argues that Richards is a proper Defendant
12 because the Government has not certified that he was acting in the scope of his
13 employment. (*Id.* citing 28 U.S.C. § 2679.) Plaintiff maintains that, should the
14 Government fail to so certify, or the Court find Richards acted in the scope of
15 employment, Plaintiff can bring a negligence action against Richards individually. (ECF
16 no. 9; *see also* 28 U.S.C. § 2679(d).) Plaintiff also argues he can name other individual
17 defendants he claims caused his injuries and can try such claims to the jury.

18 **II. Discussion**

19 **A. Subject Matter Jurisdiction**

20 The Court first turns to the Government’s motion to dismiss for lack of subject
21 matter jurisdiction. Unlike state courts,

22 Federal courts are courts of limited jurisdiction. They possess only that
23 power authorized by Constitution and statute, which is not to be expanded
24 by judicial decree. It is to be presumed that a cause lies outside this limited
25 jurisdiction, and the burden of establishing the contrary rests upon the party
asserting jurisdiction.

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1 *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994).¹ A federal court
2 must satisfy itself of its jurisdiction over the subject matter before proceeding to the
3 merits of the case. *Ruhrigas AG v. Marathon Oil Co.*, 526 U.S. 574, 577, 583 (1999).

4 A plaintiff suing in a federal court must show in his pleading, affirmatively
5 and distinctly, the existence of whatever is essential to federal jurisdiction,
6 and, if he does not do so, the court, on having the defect called to its
7 attention or on discovering the same, must dismiss the case, unless the defect
be corrected by amendment.

8 *Tosco Corp. v. Communities for a Better Env't*, 236 F.3d 495, 499 (9th Cir. 2001),
9 *abrogated on other grounds by Hertz Corp. v. Friend*, 559 U.S. 77, 82-83 (2010).

10 Federal jurisdiction must be supported “with the manner and degree of evidence
11 required at the successive stages of the litigation.” *Maya v. Centex Corp.*, 658 F.3d 1060,
12 1068 (9th Cir. 2011). At the pleading stage the court must accept as true all material
13 allegations of the complaint and construe it in plaintiff’s favor. *Id.* “[A] nonfrivolous
14 allegation of jurisdiction generally suffices to establish jurisdiction upon initiation of a
15 case.” *Perry v. Merit Systems Protection Bd.*, 137 S. Ct. 1975, 1984 (2017).

16 The Government argues it was not named as a Defendant in the operative
17 complaint. Although Plaintiff omitted the Government from the caption, the allegations
18 demonstrate that Plaintiff intended to name the Government as a Defendant. (Compl. ¶
19 6.)

20 Federal courts have subject matter jurisdiction of actions against the Government.
21 28 U.S.C. § 1346. Because Plaintiff is required to name “all the parties” in the title of the
22 complaint, Fed. R. Civ. Proc. 10(a), the Government’s motion is granted with leave to
23 amend to correct the error in the caption of the operative complaint.

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27 ¹ Unless otherwise noted internal quotation marks, ellipses, brackets, citations, and
28 footnotes are omitted from citations.

1 **B. Service of Process**

2 In passing, the Government contends it has not been served with process and
3 Plaintiff has not filed proofs of service of process as to any Defendant. (*See* ECF No. 8 at
4 2; ECF No. 10 at 1, 2.) Rule 4(m) of the Federal Rules of Civil Procedure provides that
5 an action be dismissed as to all named defendants not served with the summons and
6 complaint within 90 days after the complaint is filed, absent a showing of good cause
7 why such service was not made.

8 The operative complaint was filed on May 27, 2021. (ECF No. 5.) Reply in
9 support of the Government's motion was filed on July 2, 2021, or before the expiration of
10 the 90-day time period. Accordingly, to the extent the Government seeks dismissal for
11 lack of timely service of process, its motion is denied.

12 However, Plaintiff has not filed any proofs of service of process as of the date of
13 this Order. No later than 21 calendar days after filing his second amended complaint as
14 provided herein, Plaintiff shall file proofs of service for each named Defendant.

15 **C. Failure to State a Claim**

16 The Government argues that Plaintiff cannot state a claim against the USCBP,
17 Richards, or any Doe Defendants because such claims are precluded by the FTCA.
18 Because FTCA claims can only be asserted against the Government, and the Government
19 is not a named Defendant in the first amended complaint, the Government argues
20 Plaintiff cannot state any claim at all.

21 A motion for failure to state a claim under Rule 12(b)(6) tests the sufficiency of the
22 complaint. *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001). “[D]ismissal for failure
23 to state a claim is proper only where there is no cognizable legal theory or an absence of
24 sufficient facts alleged to support a cognizable legal theory.” *Shroyer v. New Cingular*
25 *Wireless Serv., Inc.*, 622 F.3d 1035, 1041 (9th Cir. 2010). In reviewing a Rule 12(b)(6)
26 motion, the Court must assume the truth of all factual allegations and construe them most
27 favorably to the nonmoving party. *Huynh v. Chase Manhattan Bank*, 465 F.3d 992, 997,
28 999 n.3 (9th Cir. 2006). However, legal conclusions need not be taken as true merely

1 because they are couched as factual allegations. *Bell Atlantic Corp. v. Twombly*, 550
2 U.S. 544, 555 (2007). Similarly, “conclusory allegations of law and unwarranted
3 inferences are not sufficient to defeat a motion to dismiss.” *Pareto v. Fed. Deposit Ins.*
4 *Corp.*, 139 F.3d 696, 699 (9th Cir. 1998). Generally, a plaintiff must allege only “a short
5 and plain statement of the claim showing that the pleader is entitled to relief.” Fed. R.
6 Civ. Proc. 8(a)(2); *see also Bell Atl. Corp.*, 550 U.S. at 555.

7 The FTCA encompasses torts and wrongful acts of federal employees acting within
8 the scope of official duties. The only proper defendant in a suit under the FTCA is the
9 Government. *See generally*, 14 Charles Alan Wright & Arthur R. Miller, *Fed. Practice*
10 *and Procedure* § 3856 (4th ed. & supp. 2021). In this regard, federal employees are
11 accorded absolute immunity from common-law tort claims arising out of acts they
12 undertake in the course of their official duties. *Wilson v. Horton’s Towing*, 906 F.3d 776,
13 780 (9th Cir. 2018); *see also Osborn v. Haley*, 549 U.S. 225, 229 (2007). However, only
14 conduct that is within the scope of the employee’s employment or office creates liability
15 under the FTCA. 14 Wright & Miller *supra* § 3856.

16 The parties disagree whether Plaintiff’s allegation on information and belief that
17 Richards acted in the scope of his employment constitutes a judicial admission so as to
18 preclude Plaintiff’s alternative claim against Richards individually. Because an
19 allegation in the complaint is subject to amendment, it is not necessarily a judicial
20 admission. *In re Bakersfield Westar Ambulance, Inc.*, 123 F.3d 1243, 1248 (9th Cir.
21 1997) (citing *Am. Title Ins. Co. v. Lacelaw Corp.*, 861 F.2d 224, 226 (9th Cir. 1988)).
22 Plaintiff did not categorically allege that Richards acted in the scope of his employment
23 with the USCBP but made the allegation on information and belief based on the fact that
24 Richards was operating a USCBP vehicle at the time of the accident. At this stage of the
25 proceedings, the Court declines to construe Plaintiff’s allegation as a judicial admission.

26 Moreover, the scope-of-employment issue is subject to certification either
27 voluntarily by the Government or, if the Government refuses to certify, by petition to the
28 court by the employee. *See* 28 U.S.C. § 2679(d)(1), (3).

1 Under . . . 28 U.S.C. § 2679(d), the Attorney General may certify that a
2 defendant employee was acting within the scope of his office or employment
3 for the United States government at the time of the incident out of which the
4 claim arose. In such cases, the action shall be deemed an action against the
5 United States, and the United States shall be substituted as the party
6 defendant.

7 *Wilson*, 906 F.3d at 780; *see also Osborn*, 549 U.S. at 229.

8 Upon the Attorney General's certification, the employee is dismissed from
9 the action, and the United States is substituted as defendant in place of the
10 employee. The litigation is thereafter governed by the [FTCA].

11 *Osborn*, 549 U.S. at 230. “An Attorney General’s certification creates a presumption that
12 the challenged activity falls within the scope of the individual’s employment.” *Wilson*,
13 906 F.3d at 782 n.9.

14 The FTCA “grants a federal employee suit immunity . . . when ‘acting within the
15 scope of his office or employment at the time of the incident out of which the claim
16 arose.’” *Osborn*, 549 U.S. at 247 (quoting § 2679(d)(1), (2)) (emphasis added). If and
17 when the Government certifies that Richards acted within the scope of employment, the
18 negligence claim against Richards will be “deemed to be brought against the United
19 States unless and until” the Court determines otherwise. *Id.* at 252.

20 The Government has not certified that Richards acted in the scope of his
21 employment, and Richards has not petitioned this Court to so certify. The Court declines
22 at this stage of the case, based solely on allegations made on information and belief, to
23 presume that Richards acted in the scope of employment.

24 Accordingly, Plaintiff may allege alternative claims, *i.e.*, an FTCA claim against
25 the Government and an alternative negligence claim against Richards. Federal Rules
26 allow for pleading alternative claims. Fed. R. Civ. Proc. 8(d)(2).

27 Plaintiff may also allege non-FTCA claims against Doe Defendants. *See, e.g.*,
28 *Wilson*, 906 F.3d 776 (separate non-FTCA claim against Horton’s Towing). Finally, any
non-FTCA claim that survives until trial could potentially be tried to a jury. *See Osborn*,

1 549 U.S. at 252 (actions against the Government excepted from the Seventh Amendment
2 right to a jury trial).

3 Based on the foregoing, Plaintiff may be able to state claims as outlined in his
4 opposition to the Government's motion. However, as presently alleged, the operative
5 first amended complaint is ambiguous on key points. For example, it is not clear whether
6 the operative complaint contains an FTCA claim against the USCBP, and whether the
7 claims against Richards and Doe Defendants are asserted under the FTCA. Accordingly,
8 the Government's motion is granted with leave to amend.

9 If Plaintiff chooses to file an amended complaint, he must (1) omit any claims
10 against the USCBP; (2) clearly state that the claim against Richards is a non-FTCA
11 negligence claim stated in the alternative to the FTCA claim against the Government; (3)
12 clearly state that any claims against Doe Defendants are not asserted under the FTCA and
13 provide factual allegations in support of the claims against Doe Defendants, *see Bell Atl.*
14 *Corp.*, 550 U.S. at 555.

15 **III. Conclusion**

16 The Government's motion is granted with leave to amend. No later than **October**
17 **4, 2021**, Plaintiff shall file his second amended complaint, if any, as provided herein. No
18 later than 21 calendar days after filing the second amended complaint, Plaintiff shall file
19 proofs of service of process on all named Defendants. Defendants shall file responses, if
20 any, to the second amended complaint no later than the time provided in Federal Rule of
21 Civil Procedure 15(a)(3).

22 **IT IS SO ORDERED.**

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24 Dated: September 14, 2021

25 
26 Hon. M. James Lorenz
27 United States District Judge
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