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5 **UNITED STATES DISTRICT COURT**
6 **EASTERN DISTRICT OF CALIFORNIA**
7

8 DOMINIC ESQUIBEL,

9 Plaintiff,

10 v.

11 UNITED STATES OF AMERICA; UNITED
12 STATES DEPARTMENT OF THE
13 INTERIOR; NATIONAL PARK SERVICE;
14 SEQUOIA AND KINGS CANYON
15 NATIONAL PARKS; AND DOES 1 to 50,

16 Defendants.

CASE NO. 1:14-CV-1702 SMS

ORDER GRANTING DEFENDANTS'
MOTION TO DISMISS AND MOTION TO
STRIKE

(Doc. 23)

17 Plaintiff Dominic Esquibel's first amended complaint ("FAC") brings six tort causes of
18 action under the Federal Tort Claims Act ("FTCA" 28 U.S.C. § 1346(b)) in response to his arrest
19 outside of Sequoia National Park in December 2012. Defendants collectively move to dismiss and
20 strike portions of the FAC that request attorney's fees, punitive damages, and a trial by jury as
21 barred by law. Plaintiff only opposes the motion to strike his demand for jury trial. For the
22 following reasons, Defendants' motion will be granted.

23 I. BACKGROUND

24 In Plaintiff's original complaint, he alleged that he was unlawfully and violently arrested
25 near the entrance of Sequoia National Park in December 2012. Plaintiff alleges that an entrance
26 gate kiosk employee harassed him while he was lawfully parked in a handicapped parking space.
27 Later, a park ranger arrived, violently arrested and frisked him, placed him in the ranger vehicle
28 for about fifteen minutes, and released him with a citation for failure to follow a lawful order.
Plaintiff alleged that he heard the park ranger say that the kiosk employee had lied in order to

1 move Plaintiff from the parking space because she wished to reserve it for someone else.

2 Plaintiff brought his original complaint against the United States, the U.S. Department of
3 the Interior, the U.S. National Park Service, and Sequoia and Kings Canyon National Parks. He
4 also sought damages against certain federal employees, but was unaware of their names. Plaintiff
5 brought two claims under 42 U.S.C. § 1983 (“section 1983”) and six tort claims pursuant to the
6 “FTCA”

7 Defendants moved to dismiss Plaintiff’s original complaint on the grounds that section
8 1983 does not provide a right of action against the federal government, its agencies, or its officers.
9 Defendants also moved to dismiss the FTCA claims as to all defendants other than the United
10 States, the only proper party for money damages for actions of federal employees while acting
11 with the scope of their employment. Plaintiff conceded these points. The Court granted
12 Defendants’ motion to dismiss Plaintiff’s original complaint with leave to amend in order to
13 convert the 1983 claim into a *Bivens* claim (pursuant to *Bivens v. Six Unknown Named Agents*,
14 403 U.S. 388 (1971)) in order to maintain a claim against a federal actor. Doc. 20 at 3:27-4:1,
15 4:16-19. The Court also noted, “Pursuant to the FTCA, the United States is the only proper party
16 to suits for ‘injury [...] resulting from the negligent or wrongful act or omission of any employee
17 of the Government while acting within the scope of his office or employment.’” Doc. 20 at 4:21-
18 23. The Court dismissed Plaintiff’s six tort causes of action as to all defendants other than the
19 United States without leave to amend. Doc. 20 at 4:24-25.

20 Plaintiff filed his first amended complaint, which alleges six tort claims under the FTCA.
21 Doc. 22. There are no claims brought against any individual actor. Defendants now move to
22 dismiss Plaintiff’s requests for attorney’s fees and punitive damages, which Plaintiff does not
23 oppose. Defendants also move to strike Plaintiff’s demand of trial by jury as barred by law.
24 Plaintiff argues that he believes the entrance kiosk employee committed separate tort acts that are
25 not covered by the FTCA. However, he does not know the name of the kiosk employee and would
26 like to conduct discovery and amend the complaint to add a proper cause of action against her and
27 preserve his right for a jury trial. Doc. 24, FAC at 2:3-11.
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1 II. LEGAL STANDARD

2 To survive a Rule 12(b)(6) motion to dismiss, a plaintiff must allege “enough facts to state
3 a claim to relief that is plausible on its face.” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570
4 (2007). “A claim has facial plausibility when the pleaded factual content allows the court to draw
5 the reasonable inference that the defendant is liable for the misconduct alleged.” *Ashcroft v. Iqbal*,
6 556 U.S. 662, 663 (2009). “The plausibility standard is not akin to a ‘probability requirement,’
7 but it asks for more than a sheer possibility that a defendant has acted unlawfully.” *Id.* (quoting
8 *Twombly*, 550 U.S. at 556). While factual allegations are accepted as true, legal conclusions are
9 not. *Iqbal*, 556 U.S. at 678.

10 Rule 12(f) allows the court to “strike from a pleading an insufficient defense or any
11 redundant, immaterial, impertinent, or scandalous matter.” FRCP 12(f).

12 To the extent that the pleadings can be cured by the allegation of additional facts, the
13 plaintiff should be granted leave to amend. *Cook, Perkiss and Liehe, Inc. v. Northern California*
14 *Collection Service Inc.*, 911 F.2d 242, 247 (9th Cir. 1990) (*citations omitted*). However, a court
15 may deny leave to amend due to futility or legal insufficiency if the amendment would fail a
16 motion to dismiss under Rule 12(b)(6). *Miller v. Rykoff-Sexton, Inc.*, 845 F.2d 209, 214 (9th Cir.
17 1988).

18 III. DISCUSSION

19 Plaintiff’s claims for attorney’s fees and punitive damages against the government are
20 barred by law. *Anderson v. United States*, 127 F.3d 1190, 1191-1192 (9th Cir. 1997)(“[A] waiver
21 of sovereign immunity in the FTCA ‘is to be construed narrowly so that the government is never
22 held liable for a plaintiff’s attorney fees.’”); 28 U.S.C. § 2674 (“The United States [...] shall not
23 be liable [...] for punitive damages.”). These claims will be dismissed without leave to amend.

24 Plaintiff’s request for a jury trial is also barred by law. “[A]ny action against the United
25 States under section 1346 [...] shall be tried by the court without a jury [...]” 28 U.S.C. § 2402.
26 All FTCA actions are tried to the court without a jury. *Liebsack v. United States*, 540 Fed. Appx.
27 640, 642 fn. 1 (9th Cir. 2013).

28 As mentioned, the Court’s prior order on Defendants’ motion to dismiss the original

1 complaint found that, pursuant to the FTCA, “the United States is the only proper party to suits for
2 ‘injury [...] resulting from the negligent or wrongful act or omission of any employee of the
3 Government while acting within the scope of his office or employment.’” Doc. 20 at 4:21-23.
4 Plaintiff’s FAC alleges assault, battery, false imprisonment, intentional infliction of emotional
5 distress, negligence, and negligent infliction of emotional distress. See Doc. 22. Each of these
6 causes of action alleges injury resulting from the negligent or wrongful act or omission of U.S.
7 government employees and is explicitly brought “pursuant to the FTCA.” Plaintiff specifically
8 alleges in his FAC that “[a]ll federal employees, including the Entrance Kiosk Employee, [...]
9 were employees of Defendant [United States of America] and acting in their official governmental
10 employee capacity at all times alleged herein.” Doc. 22 at 2:17-19.

11 As pled, Plaintiff has not stated any grounds on which he is permitted to demand a trial by
12 jury. He has alleged six tort causes of action against the United States, against which the action
13 must be tried without a jury. Plaintiff’s argument that he intends to amend the complaint in order
14 to allege a tort action against the kiosk employee is unsustainable because he has also alleged that
15 the kiosk employee was acting within the scope of her federal employment at all relevant times,
16 and any such action is precluded by the FTCA. Leave to amend in order to allege a tort claim
17 against the kiosk employee would be futile. Hence, Plaintiff’s demand for jury trial will be
18 stricken. Should Plaintiff desire to amend his complaint, he must first file a motion requesting the
19 same.

20 IV. ORDER

21 For the foregoing reasons, Defendants’ motion to dismiss and motion to strike portions of
22 Plaintiff’s first amended complaint is GRANTED without leave to amend.

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25 IT IS SO ORDERED.

26 Dated: July 1, 2015

/s/ Sandra M. Snyder
UNITED STATES MAGISTRATE JUDGE