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8 # UNITED STATES DISTRICT COURT

9 EASTERN DISTRICT OF CALIFORNIA

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11 JASON HARRIS,	Case No. 1:17-cv-01683-DAD-BAM (PC)
12 Plaintiff,	ORDER VACATING FINDINGS AND RECOMMENDATIONS
13 v.	(ECF No. 18)
14 UNITED STATES OF AMERICA,	ORDER DIRECTING PLAINTIFF TO SHOW
15 Defendant.	CAUSE WHY ACTION SHOULD NOT BE DISMISSED FOR FAILURE TO ALLEGE
16	COMPLIANCE WITH CLAIM PRESENTATION REQUIREMENT OF THE
17	FEDERAL TORT CLAIMS ACT
18	**TWENTY-ONE (21) DAY DEADLINE**

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20   Plaintiff Jason Harris ("Plaintiff") is a federal prisoner proceeding *pro se* and *in forma*

21 *pauperis* in this action filed pursuant to the Federal Tort Claims Act ("FTCA"), 28 U.S.C.

22 §§ 2401 *et seq.*

23   On June 28, 2018, the Court issued findings and recommendations recommending that

24 this action be dismissed for failure to state a cognizable <u>Bivens</u> claim for relief under federal law.

25 (ECF No. 18.) Those findings and recommendations were served on Plaintiff and contained

26 notice that any objections thereto were to be filed within fourteen (14) days after service. (<u>Id.</u> at

27 5.) Plaintiff timely filed objections on July 9, 2018. (ECF No. 19.)

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1   In his objections, Plaintiff argues that his complaint was filed solely under the FTCA, and

2   did not include any claims pursuant to Bivens v. Six Unknown Named Agents of Fed. Bureau of

3   Narcotics, 403 U.S. 388 (1971). Plaintiff requests that his complaint be reviewed and properly

4   filed as a FTCA action. (ECF No. 19.)

5   The United States is the only proper defendant in a FTCA action." Lance v. United

6   States, 70 F.3d 1093, 1095 (9th Cir. 1995) (citing Woods v. United States, 720 F.2d 1451, 1452

7   n.1 (9th Cir. 1983)). The United States is not liable under the Federal Tort Claims Act for

8   constitutional tort claims. FDIC v. Meyer, 510 U.S. 471, 478 (1994); Cato v. United States, 70

9   F.3d 1103, 1111 (9th Cir. 1995). The FTCA authorizes tort actions against the United States if

10   the United States, as a private person, would be liable to the plaintiff under California tort law.

11   United States v. Olson, 546 U.S. 43, 44 (2005); Delta Savings Bank v. United States, 265 F.3d

12   1017, 1025 (9th Cir. 2001). Any duty owed to the plaintiff by the United States "must be found

13   in California state tort law." Delta Savings Bank, 265 F.3d at 1025.

14   In addition, a suit may not be instituted against the United States under the FTCA unless

15   the claim is first presented to the appropriate federal agency and one of the following conditions

16   is met: the claim is finally denied, or six months have passed without a final resolution having

17   been made. 28 U.S.C. § 2675(a). The claim presentation requirement is a jurisdictional

18   prerequisite to bringing suit and must be affirmatively alleged in the complaint. Gillespie v.

19   Civiletti, 629 F.2d 637, 640 (9th Cir. 1980).

20   Although Plaintiff has named the United States the sole defendant, Plaintiff has not

21   alleged compliance with the FTCA. Plaintiff's allegation in the complaint that he filed an inmate

22   appeal does not satisfy the exhaustion requirement with respect to his FTCA claim. In light of

23   Plaintiff's objections, Plaintiff will be permitted an opportunity to supplement or amend his

24   complaint to allege compliance with the claim presentation requirement of the FTCA.

25   Accordingly, Plaintiff is HEREBY ORDERED to show cause within **twenty-one (21)**

26   **days** from the date of service of this order why this action should not be dismissed for failure to

27   allege compliance with the claim presentation requirement of the FTCA. Plaintiff may comply

28   with this order to show cause by filing a first amended complaint curing the deficiencies

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identified in this order. **The failure to comply with this order will result in dismissal of this action for failure to obey a court order and failure to prosecute.**

IT IS SO ORDERED.

Dated: **July 17, 2018**   /s/ *Barbara A. McAuliffe*   _
                                                                        UNITED STATES MAGISTRATE JUDGE