IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

T. TERREL BRYAN,

Plaintiff, No. CIV S-10-2241 KJM GGH P

vs.

DEFENSE TECHNOLOGY U.S., et al., ORDER &

Defendants. FINDINGS AND RECOMMENDATIONS

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Introduction

This case was removed to federal court from Sacramento County Superior Court on August 20, 2010, pursuant to 28 U.S.C. §§ 1441 and 1442. See Docket # 1. Plaintiff herein is a prisoner incarcerated in South Carolina proceeding pro se.

In his complaint, plaintiff expressly named as defendants: "Defense Technology U.S." and "United States Attorney of Sacramento." See Complaint, Dkt.# 1-1. Plaintiff alleges that on August 9, 2008, he was "assaulted and battered by [] mace" as a bystander inmate on a wing of Perry Correctional Institution (in South Carolina) when officers sprayed an unreasonable amount of mace into a cell. Id. at 6-7. Plaintiff claims that Defense Technology U.S., a manufacturer of, inter alia, mace and pepper spray intended for law enforcement, correctional and military personnel, have violated his due process rights "a.) by failing to ensure their product

is not used to unreasonably violate a person, b.) by creating a bigger mace canister so that others can use more mace." Id. at 8-9. Plaintiff also alleges that defendant Defense Technology U.S. is liable for gross negligence by failing to provide adequate information both about the dangerous side of effects of mace on bystanders and about how and when to treat a victim and/or bystander; by failing to ensure their product is not misused and failing to provide information as to proper decontamination procedures; and by not reporting criminal use of their product and failing to discontinue distributing their product to any who have used their product in a criminal manner. Id. at 9.

Plaintiff alleges that the defendant United States Attorney violated his due process rights under the state constitution and by failing, under "criminal statutes 18 U.S.C. [§]§ 241 and 242 [to] give plaintiff's letter of request a minimal amount of consideration." Dkt. # 1-1, p. 8. Plaintiff also accuses defendant U.S. Attorney of gross negligence under the same statutes, stating that plaintiff promptly notified this defendant of the spraying incident after which plaintiff was left for several hours in mace-contaminated air without medical assistance leaving him to suffer painful side effects. Id. Plaintiff claims that due to his status as an inmate, defendant U.S. Attorney had a responsibility and duty to him to consider his request regarding the question of probable cause for the commission of a crime, but failed to do so. Id. Plaintiff seeks money damages, including punitive, and asks for injunctive relief in the form of defendant U.S. Attorney being required to give plaintiff's allegations "a fair consideration of whether to investigate and/or prosecute." Id. at 9.

Pending before the court are: 1) a motion to dismiss under Fed. R. Civ. P. 12(b)(1) for lack of subject matter jurisdiction, filed on August 27, 2010, by defendants United States Attorney of Sacramento and United States of America,[1] to which plaintiff filed a response on

[1] By filing dated August 20, 2010, defendant U.S Attorney of Sacramento, i.e., the United States Attorney for the Eastern District of California, was certified as having acted within the scope of his employment as a representative of the United States Department of Justice at the time of the alleged acts that underlie plaintiff's tort claim. See Dkt. # 2. Thereafter, on the same

September 16, 2010, after which defendants filed their reply, on September 23, 2010; 2) plaintiff's motion for summary judgment, filed on September 29, 2010, to which the federal defendants filed their opposition on October 15, 2010; 3) plaintiff's second motion for appointment of counsel, filed on December 16, 2010; 4) plaintiff's motion for substitution of parties, filed on December 27, 2010, to which the federal defendants filed a response on January 7, 2011, after which plaintiff filed a reply on January 10, 2011.[2]

Motion to Dismiss

The federal defendants move for dismissal under Fed. R. Civ. 12(b)(1), on the grounds that the court lacks subject matter jurisdiction over plaintiff's claims and expressly preserve their right to the defense of insufficiency of service of process.[3] Motion to Dismiss (MTD), dkt. # 8.

Legal Standard for Rule 12(b)(1) Motion to Dismiss

Federal district courts are courts of limited jurisdiction. U.S. Const. Art. III, § 1 provides that the judicial power of the United States is vested in the Supreme Court, "and in such inferior Courts as the Congress may from time to time ordain and establish." Congress therefore confers jurisdiction upon federal district courts, as limited by U.S. Const. Art. III, § 2. See Ankenbrandt v. Richards, 504 U.S. 689, 697-99, 112 S. Ct. 2206, 2212 (1992). Since federal courts are courts of limited jurisdiction, a case presumably lies outside the jurisdiction of the

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day, a notice of substitution of the United States of America in place of the U.S. Attorney with regard to plaintiff's tort claim was filed, "by operation of 28 U.S.C. § 2769, as amended by Public Law 100-694...." Dkt. # 3. The court recognizes the substitution as appropriate and plaintiff's motion to strike this substitution contained within his response to the motion to dismiss is baseless. Dkt. # 17, p. 1.

[2] Plaintiff's motion for a default judgment seeking specific damages against defendant Defense Technology U.S., filed on December 16, 2010, will be addressed in a separate order.

[3] Although the court has found no further service of the federal defendants necessary inasmuch as defendants filed a motion to dismiss and served it upon plaintiff, see Order, filed on September 3, 2010, counsel asserts that by the motion to dismiss, counsel is making a special appearance on behalf of the federal defendants and is not thereby waiving, inter alia, the service of process requirements of Fed. R. Civ. P. 4(I).

federal courts unless proven otherwise. Kokkonen v. Guardian Life Ins. Co. of America, 511 U.S. 375, 376-78, 114 S. Ct. 1673, 1675, 128 L. Ed. 2d 391 (1994). Lack of subject matter jurisdiction may be raised at any time by either party or by the court. See Attorneys Trust v. Videotape Computer Products, Inc., 93 F.3d 593, 594-95 (9th Cir. 1996).

On a Rule12(b)(1) motion to dismiss for lack of subject matter jurisdiction, plaintiff bears the burden of proof that jurisdiction exists. See, e.g., Sopcak v. Northern Mountain Helicopter Serv., 52 F.3d 817, 818 (9th Cir.1995); Thornhill Pub. Co. v. General Tel. & Electronics Corp., 594 F.2d 730, 733 (9th Cir.1979). Different standards apply to a 12(b)(1) motion, depending on the manner in which it is made. See, e.g., Crisp v. U.S., 966 F. Supp. 970, 971-72 (E.D. Cal. 1997).

First, if the motion attacks the complaint on its face, often referred to as a "facial attack," the court considers the complaint's allegations to be true, and plaintiff enjoys "safeguards akin to those applied when a Rule 12(b)(6) motion is made." Doe v. Schachter, 804 F. Supp. 53, 56 (N.D. Cal. 1992). Presuming its factual allegations to be true, the complaint must demonstrate that the court has either diversity jurisdiction or federal question jurisdiction. For diversity jurisdiction pursuant to 28 U.S.C. § 1332, plaintiff and defendants must be residents of different states. For federal question jurisdiction pursuant to 28 U.S.C. § 1331, the complaint must either (1) arise under a federal law or the United States Constitution, (2) allege a "case or controversy" within the meaning of Article III, § 2, or (3) be authorized by a jurisdiction statute. Baker v. Carr, 369 U.S. 186, 198, 82 S. Ct. 691, 699-700, 7 L. Ed. 2d 663 (1962).

Second, if the motion makes a "factual attack" on subject matter jurisdiction, often referred to as a "speaking motion," the court does not presume the factual allegations of the complaint to be true. Thornhill, 594 F.2d at 733. In a factual attack, defendant challenges the truth of the jurisdictional facts underlying the complaint. "Faced with a factual attack on subject matter jurisdiction, the trial court may proceed as it never could under Rule 12(b)(6). . . . No presumptive truthfulness attaches to plaintiff's allegations, and the existence of disputed material

facts will not preclude the trial court from evaluating for itself the merits of jurisdictional claims." Id. (quotations and citation omitted). The court may hear evidence such as declarations or testimony to resolve factual disputes. Id.; McCarthy v. United States, 850 F.2d 558, 560 (9th Cir. 1988).[4]

> If a plaintiff has no standing, the court has no subject matter jurisdiction.
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> "[B]efore reaching a decision on the merits, we [are required to] address the standing issue to determine if we have jurisdiction." Nat'l Wildlife Fed'n v. Adams, 629 F.2d 587, 593 n. 11 (9th Cir.1980). "[T]he standing question is whether the plaintiff has 'alleged such a personal stake in the outcome of the controversy' as to warrant his invocation of federal-court jurisdiction and to justify the exercise of the court's remedial powers on his behalf." Warth v. Seldin, 422 U.S. 490, 498- 99, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975) (quoting Baker v. Carr, 369 U.S. 186, 204, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962)). There are three requirements for standing: (1) "a plaintiff must have suffered an 'injury in fact'--an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not 'conjectural' or 'hypothetical;'" (2) "there must be a causal connection between the injury and the conduct complained of--the injury has to be 'fairly ... trace[able] to the challenged action of the defendant, and not ... th[e] result [of] the independent action of some third party not before the court;'" and (3) "it must be 'likely' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'" Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992) (citations omitted) (alterations in original).

Washington Legal Foundation v. Legal Foundation of Washington, 271 F.3d 835, 847 (9th Cir. 2001) (en banc).

Argument & Analysis

Defendants first argue that plaintiff lacks Article III standing to sue the U.S. Attorney because he is an officer of the U.S. Department of Justice (DOJ) and, as such, is subject

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[4] If the jurisdictional issue is intertwined with the merits of the case, the trial court cannot determine the jurisdictional issue until such facts are appropriately resolved. See Roberts v. Corrothers, 812 F.2d 1173, 1177-78 (9th Cir.1987); see also Trentacosta v. Frontier Pac. Aircraft Indus., 813 F.2d 1553, 1558 (9th Cir. 1987) (summary judgment standard applied if motion determines facts where jurisdictional issue and merits are intertwined).

to the discretionary authority vested in the Attorney General of the federal government's executive branch, not in the federal judiciary. MTD, dkt. #8-1, p. 6. An alternative way of framing the argument would be to assert that plaintiff has no private right of action against the federal defendants on the basis of their exercise of discretion not to prosecute a particular individual or entity. In framing their argument as one based on plaintiff's lack of Article III standing because discretionary authority is vested in the Attorney General, the federal defendants are construed to be implicating the third prong requisite for standing, as set forth above, i.e., that this court could not redress the injury alleged. The Ninth Circuit and other authority cited by the federal defendants (id.) points unequivocally to the proposition that neither plaintiff nor this court has authority to require the defendant Attorney General to prosecute Defense Technology U.S.

> Federal courts exercise the judicial power of the United States pursuant to Article III of the Constitution and specific statutory grants of power. While district courts have certain responsibilities in connection with selecting, instructing, and supervising grand juries, Fed.R.Crim.P. 6, the investigation of crime is primarily an executive function. Nowhere in the Constitution or in the federal statutes has the judicial branch been given power to monitor executive investigations before a case or controversy arises. Without an indictment or other charge bringing a defendant before the court, or in the absence of a pending grand jury investigation, a district court has no general supervisory jurisdiction over the course of executive investigations.

Jett v. Castaneda, 578 F.2d 842, 845 (9th Cir. 1978); see also Linda R.S. v. Richard D., 410 U.S. 614, 619, 93 S. Ct. 1146 (1973) ("in American jurisprudence at least, a private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution of another"); Sargeant v. Dixon, 130 F.3d 1067, 1069 (D.C. Cir. 1997)(accord).

As the federal defendants argue (MTD, dkt. # 8-1, p. 5), it has long been "well settled that the question of whether and when prosecution is to be instituted is within the discretion of the Attorney General. Mandamus will not lie to control the exercise of this

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discretion." Powell v. Katzenbach, 359 F.2d 234 (D.C. Cir. 1965);[5] People of State of New York v. Muka, 440 F. Supp. 33, 36 (N.D.N.Y. 1977) (the U.S. Attorney "possesses an absolute and unreviewable discretion as to what [federal] crimes to prosecute"); Milliken v. Stone, 7 F.2d 397, 399 (S.D.N.Y. 1925) ("federal courts are without power to compel the prosecuting officers to enforce the penal laws, whatever the grounds of their failure may be. The remedy for inactivity of that kind is with the executive and ultimately with the people."). In addition, see, e.g., Ray v. U.S. Dept. of Justice, 658 F.2d 608, 610 (8th Cir. 1981) ("initiation of a federal criminal prosecution is a discretionary decision within the Executive Branch not subject to judicial compulsion" [internal citation omitted]); Inmates of Attica Correctional Facility v. Rockefeller, 477 F.2d 375, 378 (2nd Cir. 1973) ("federal courts have traditionally and, to our knowledge, uniformly refrained from overturning, at the instance of a private person, discretionary decisions of federal prosecuting authorities not to prosecute persons regarding whom a complaint of criminal conduct is made"); United States v. Zonca, 97 F. Supp.2d 1127, 1128 n. 1 (M.D. Fla. 1999) ("[t]he selection of a case for prosecution is a matter resting solely within the discretion of the Chief Executive, acting through the Attorney General and the United States Attorney").

Plaintiff's contention, in opposition, that pro se pleadings are held to less stringent standards is correct, as far as it goes. Opposition (Opp.), dkt. # 17, pp. 2-3. Pro se pleadings are, indeed, liberally construed. See Haines v. Kerner, 404 U.S. 519, 520-21, 92 S. Ct. 594, 595-96 (1972); Balistreri v. Pacifica Police Dep't., 901 F.2d 696, 699 (9th Cir. 1988). Unless it is clear that no amendment can cure the defects of a complaint, a pro se plaintiff proceeding in forma pauperis is entitled to notice and an opportunity to amend before dismissal. See Noll v. Carlson,

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[5] The Katzenbach Court assumed, "without deciding, that where Congress has withdrawn all discretion from the prosecutor by special legislation, a court might be empowered to force prosecutions in some circumstances. Cf., e.g., Moses v. Kennedy, 219 F.Supp. at 765; Note, 74 Yale L.J. 1297 (1965)." Powell v. Katzenbach, at 235. However, the statute cited by appellant therein failed "to disclose a congressional intent to alter the traditional scope of the prosecutor's discretion." Id. Nor has plaintiff cited any such statute.

809 F.2d 1446, 1448 (9th Cir. 1987); Franklin v. Murphy, 745 F.2d 1221, 1230 (9th Cir. 1984). However, while the pleadings of pro se litigants are construed liberally, Abassi v. I.N.S., 305 F.3d 1028, 1032 (9th Cir. 2002), pro se litigants are expected to comply with procedural rules, McNeil v. United States, 508 U.S. 106, 113, 113 S. Ct. 1980 (1993), American Ass'n of Naturopathic Physicians v. Hayhurst, 227 F.3d 1104, 1107-1108 (9th Cir. 2000). Defendants (Reply, pp.4-5) are also correct that this court cannot disregard jurisdictional bars.

Plaintiff attempts to counter the federal defendants' argument with respect to standing by seeking to reframe his claim regarding the failure of the U.S. Attorney to prosecute defendant Defense Technology U.S. in response to his letter regarding the August 9, 2008 spraying incident as a Fourteenth Amendment equal protection violation. Opp., dkt. # 17, p. 3. He thereby seeks to somehow transmute his claim into an allegation that by not prosecuting, or considering prosecuting, Defense Technology U.S., the U.S. Attorney is discriminating against plaintiff because of his prisoner status. Id. The federal defendants are correct that there is no way to construe plaintiff's allegations of a lack of due process or gross negligence as an equal protection claim. Reply, pp. 4-5. Moreover, even if plaintiff had framed his claim as an equal protection violation, such a claim would not be cognizable.

"In the limited settings where *Bivens* does apply, the implied cause of action is the 'federal analog to suits brought against state officials under...42 U.S.C. § 1983.'" Ashcroft v. Iqbal, 129 S. Ct. 1937, 1948 (2009). See also, Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388, 91 S.Ct. 1999 (1971). As noted, Bivens applies in a more limited context than do § 1983 actions. While, conceivably, a plaintiff in a § 1983 action against a state Attorney General might state an equal protection claim by alleging that the state officer had refused to prosecute an action simply based on the race of the hypothetical complaining party, the same plaintiff would not be able to make such a claim against the U.S. Attorney General under Bivens because of the sheer weight of federal jurisprudence finding prosecutorial discretion vested so fully in the executive branch. In Bush v. Lucas, 462 U.S. 367, 390, 103 S. Ct. 2402 (1983), the

Supreme Court declined "'to create a new substantive legal liability without legislative aid and as at the common law" quoting United States v. Standard Oil, 332 U.S. 301, 302 67 S. Ct. 1604, 1605 (1947), because the high court was "convinced that Congress is in a better position to decide whether or not the public interest would be served by creating it." Id. While alternative statutory or administrative remedies available in Bush do not apply in this case, the underlying principle does: that a judicial remedy for the specific alleged constitutional violation must be recognized by the Supreme Court, and in this instance in light of precedent, no such remedy is available.[6]

Thus, this court finds that plaintiff has no standing to sue the federal defendants for any perceived failure of theirs to criminally prosecute defendant Defense Technology U.S. based on plaintiff's having written to inform the U.S. Attorney for the Eastern District of California of the alleged spraying incident of August 9, 2008.

The federal defendants also contend that plaintiff's tort claim is barred by sovereign immunity because plaintiff failed to exhaust his administrative remedies in accordance with the Federal Tort Claims Act, 28 U.S.C. §§ 2761, et seq. MTD, dkt. # 8-1, pp. 5-7. Pursuant to 28 U.S.C. § 2679(b)(1), the FTCA is the exclusive remedy against the United States for property loss or personal injury resulting from the alleged wrongful (tortious) act of a government employee acting within the course and scope of employment.

Absent a waiver of sovereign immunity, the United States may not be sued. United States v. Mitchell, 445 U.S. 535, 38 100 S. Ct. 1349 (1980), ("[i]t is elementary that '[t]he United States, as sovereign, is immune from suit save as it consents to be sued..., and the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit.'"

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[6] Moreover, even if a Bivens claim was possible, the United States Attorney would be absolutely immune from suit for a decision not to prosecute. Fields v. Soloff, 920 F.2d 1114, 1119 (2nd Cir. 1990); Meade v. Grubbs, 841 F.2d 1512, 1532-33 (10th Cir. 1988); Buck v. Stewart, 2008 WL 901716 (D. Utah 2008) (involving *inter alia* a U.S. Attorney at the time the decision not to prosecute was made.

[Internal citation omitted]. Unless plaintiff can establish that the United States' sovereign immunity has been waived, a federal court has no jurisdiction. Clinton v. Babbitt, 180 F.3d 1081, 1087 (9th Cir. 1999).

As the federal defendants contend, by way of the FTCA, Congress consented for the United States to be sued in tort actions. MTD, dkt #8-1, p. 6, citing Jerves v. United States, 966 F.2d 517, 518 (9th Cir. 1992). The FTCA "vests the federal district courts with exclusive jurisdiction over suits arising from the negligence of Government employees." Id. However, in relevant part, under the FTCA:

> An action shall not be instituted upon a claim against the United States for money damages for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, unless the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency in writing and sent by certified or registered mail.

28 U.S.C. § 2675(a).

According to the federal defendants, plaintiff did not present an administrative tort claim to the Department of Justice, the appropriate agency, before filing suit. MTD, Declaration of Brent Phipps, Paralegal, Torts Branch, Civil Division of the DOJ, dkt# 8-2, ¶ 3. As the federal defendants note, plaintiff does not contend in his opposition that he did exhaust his administrative remedies. Reply, p. 6.

Plaintiff does argue that he is suing the U.S. Attorney in his individual capacity and therefore his lawsuit is not one against the United States and, as noted, protests the substitution of the United States as a defendant. Opp., dkt # 17, pp. 1, 3. However, as the federal defendants assert in their reply, whether or not the U.S. Attorney is being sued in an individual capacity, he has been certified to have been acting within the scope of his employment by operation of 28 U.S.C. § 2679(d)(2). Reply, dkt. 3 19, p. 2, referencing dkt. # 2. Title 28 U.S.C. § 2679(d)(2), states:

> Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a State court shall be removed without bond at any time before trial by the Attorney General to the district court of the United States for the district and division embracing the place in which the action or proceeding is pending. Such action or proceeding shall be deemed to be an action or proceeding brought against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant. This certification of the Attorney General shall conclusively establish scope of office or employment for purposes of removal.

Thus, the United States has been properly substituted in for the U.S. Attorney for all tort actions pled by plaintiff by operation of law. Because plaintiff fails to make any showing whatever that he has met the administrative exhaustion requirements of the FTCA (28 U.S.C. § 2675(a), this court lacks subject matter jurisdiction over any tort claim. See Jerves v. United States, 966 F.2d at 521 ("[b]ecause Jerves failed to comply with the administrative claim requirements of the FTCA, the district court correctly dismissed her suit for lack of subject matter jurisdiction."). Plaintiff's tort claim must be dismissed for plaintiff's failure to exhaust his administrative remedies pursuant to the FTCA.

Plaintiff also argues that the federal defendants should not have removed this action if they are now contending the court lacks subject matter jurisdiction. Opp., dkt # 17, p. 2. This argument is without merit. By virtue of the fact that plaintiff sued, inter alia, a U.S. Attorney, the federal defendants were authorized to remove this case from state court to federal court. See 28 U.S.C. § 1442(a)(1) (suits against the U.S. or a federal agency or officer may be removed from state to federal court by defendant). In addition, as the federal defendants observe (Reply, dkt. # 19, p. 3), the Ninth Circuit has affirmed removal by the United States of a case from state court, after which the district court dismissed the claims for lack of subject matter jurisdiction. State of Neb. ex rel. Dept. of Social Services v. Bentson, 146 F.3d 676, 679 (9th Cir. 1998) ("[o]nce a case is properly removed, a district court has the authority to decide whether it has subject matter jurisdiction over the claims.").

Nor can plaintiff proceed against the defendant United States Attorney in an official capacity. An official capacity suit against a federal employee is in essence a suit against the United States. Gilbert v. DaGrossa, 756 F.2d 1455, 1458 (9th Cir. 1985); Hutchinson v. United States, 677 F.2d 1322, 1327 (9th Cir. 1982) ("[t]he bar of sovereign immunity cannot be avoided merely by naming officers and employees of the United States as defendants"). As previously noted, without a waiver of sovereign immunity, the United States may not be sued unless it consents to be sued. United States v. Mitchell, 445 U.S. 535, 38 100 S. Ct. 1349; see also, Gilbert v. DaGrossa, 756 F.2d at 1458 ("[i]t is well settled that the United States is a sovereign, and, as such, is immune from suit unless it has expressly waived such immunity and consented to be sued."). Bivens does not permit official capacity suits against either the United States or federal officials. Kreines v. United States, 33 F.3d 1105, 1109 (9th Cir. 1994) ("[f]ederal agents are sued in their individual capacities rather than their official capacities in *Bivens* actions...."); id. ("*Bivens* action is not a civil action ... against the United States...." [internal quotations omitted]); Daly-Murphy v. Winston, 820 F.2d 1470, 1478 (9th Cir. 1987) (money damages suit by individual against U.S. cannot be maintained absent waiver of sovereign immunity); Clemente v. United States, 766 F.2d 1358, 1363 n. 5 (9th Cir. 1985) (*Bivens*, in permitting recovery against governmental officials sued in their individual capacities, does not contemplate damages against the government itself); (Arnsberg v. United States, 757 F.2d 971, 980 (1984) ("*Bivens* does not provide a means of cutting through the sovereign immunity of the United States itself"); Holloman v. Watt, 708 F.2d 1399, 1401-02 (9th Cir. 1983) (damages suit against individual federal employee is not an official capacity suit against the sovereign).

Under Ninth Circuit case law, district courts are only required to grant leave to amend if a complaint can possibly be saved. Courts are not required to grant leave to amend if a complaint lacks merit entirely." Lopez v. Smith, 203 F.3d 1122, 1129 (9th Cir. 2000). See also, Smith v. Pacific Properties and Development Corp., 358 F.3d 1097, 1106 (9th Cir. 2004), citing Doe v. United States, 58 F.3d 494, 497(9th Cir.1995) ("a district court should grant leave to

amend even if no request to amend the pleading was made, unless it determines that the pleading could not be cured by the allegation of other facts."). "[A] district court retains its discretion over the terms of a dismissal for failure to state a claim, including whether to make the dismissal with or without leave to amend." Lopez v. Smith, 203 F.3d at 1124. The federal defendants' motion to dismiss for lack of subject matter jurisdiction should be granted with prejudice as it appears that the defects of the claims against these defendants cannot be cured by amendment.

Plaintiff's Motion for Summary Judgment

Because the court has found that it lacks subject matter jurisdiction over the federal defendants, plaintiff's dispositive motion which, in addition, does not conform to the requirements of Fed. R. Civ. P. 56, is moot and will be vacated.

Plaintiff's Motion for Appointment of Counsel

Plaintiff has made a second request for the appointment of counsel. The United States Supreme Court has ruled that district courts lack authority to require counsel to represent indigent prisoners in § 1983 cases. Mallard v. United States Dist. Court, 490 U.S. 296, 298 (1989). In certain exceptional circumstances, the court may request the voluntary assistance of counsel pursuant to 28 U.S.C. § 1915(e)(1). Terrell v. Brewer, 935 F.2d 1015, 1017 (9th Cir. 1991); Wood v. Housewright, 900 F.2d 1332, 1335-36 (9th Cir. 1990). In the present case, the court does not find the required exceptional circumstances. Plaintiff's renewed request for the appointment of counsel will therefore be denied.

Plaintiff's Motion for Substitution of Parties

Despite his opposition to the motion to dismiss, asserting that he had made federal claims, plaintiff in a filing directed to the Clerk of the Court disavows any such claim, belatedly seeking to have this case remanded to state court as improperly removed. Plaintiff suggests the dismissal from this action of defendant U.S. Attorney, but instead seeks to amend to add Bobbie J. Montoya as a party. See dkt. # 45. In the first place, this filing is not a properly made motion, nor does plaintiff include a copy of a proposed amended complaint. Although the federal

defendants do not oppose (dkt. # 46) dismissal of the Bivens claim against the U.S. Attorney or the negligence claim against the United States, as they note to add Bobbie Montoya as a party, the Assistant U.S. Attorney, serving as counsel for the federal defendants herein, would provide a basis for removal once again to the district court pursuant to 28 U.S.C. § 1442(a)(1). This would presumably defeat plaintiff's intended purpose in seeking to have this case remanded. Plaintiff's defective motion for substitution of parties will be denied.

Accordingly, IT IS ORDERED that:

1. Plaintiff's motion for summary judgment, filed on September 29, 2010 (dkt. # 21) is vacated;

2. Plaintiff's second motion for appointment of counsel, filed on December 16, 2010 (dkt. # 44) is denied; and

3. Plaintiff's motion for substitution of parties, filed on December 27, 2010 (dkt. # 45) is denied.

IT IS HEREBY RECOMMENDED that the motion to dismiss, pursuant to Fed. R. Ci. P. 12(b)(1), brought by defendants United States Attorney of Sacramento and United States of America, filed on August 27, 2010 (docket # 8) be granted, and these defendants be dismissed with prejudice.

These findings and recommendations are submitted to the United States District Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(l). Within fourteen days after being served with these findings and recommendations, any party may file written objections with the court and serve a copy on all parties. Such a document should be captioned "Objections to Magistrate Judge's Findings and Recommendations." Any reply to the objections shall be served and filed within fourteen days after service of the objections. The parties are

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advised that failure to file objections within the specified time may waive the right to appeal the District Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

DATED: 02/09/2011

/s/ Gregory G. Hollows

GREGORY G. HOLLOWS
UNITED STATES MAGISTRATE JUDGE

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