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**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA**

CONIE R. ROBERTSON,

No. 2:14-cv-2888-TLN-CMK

Plaintiff,

vs.

FINDINGS AND RECOMMENDATION

RYAN S. HARVEY, et al.,

Defendants.

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Plaintiffs, proceeding pro se, filed this civil action in the Trinity County Small Claims Court against Ryan Harvey, an employee of the United States Forest Service (USFS). On December 11, 2014, the United States removed the case from the Small Claims Court to this Court, pursuant to 28 U.S.C. §§ 1442 and 2679(d), because Ryan Harvey was certified to be a federal employee of the United States Forest Service “acting within the scope of his employment at the time of the alleged incident giving rise to plaintiff’s claim,” bringing him under the protection of the Federal Tort Claims Act (“FTCA”), 28 U.S.C. §§ 2671–2680. Accordingly, the United States also noticed the Court that the United States was the proper defendant in this matter, pursuant to 28 U.S.C. § 2679(d). Pending before the court is the United States’ motion to dismiss for lack of jurisdiction (Doc. 7).

1                   **I.     Background**

2                   In plaintiff’s small claims complaint, he alleges that due to a fire at his home in  
3 Junction City on August 14, 2013, he lost his home and belongings, vehicles, boat, and trailer.  
4 Several agencies responded to the fire, including the Junction City Volunteer Fire Department,  
5 USFS, and Cal-Fire. Plaintiff was informed that the fire occurred in USFS responsibility area,  
6 and that any report would come from that agency. Plaintiff had difficulty obtaining a copy of the  
7 fire report. On September 11, 2013, USFS employee Ryan Harvey arrived at the property, asked  
8 some questions, walked around, and took pictures. Plaintiff provided him information, including  
9 witness names and locations. Plaintiff informed Mr. Harvey that his insurance company had  
10 requested a copy of the fire report within 90 days of the loss. After making several inquiries,  
11 plaintiff was informed that the way to obtain a copy of the report to was file a Freedom of  
12 Information Request. After doing so, plaintiff received a copy of the report on November 16,  
13 2013. “There were so many errors on the report that I couldn’t believe any one would submit  
14 such a report.” (Doc. 1, Ex. A at 8). Plaintiff appealed the report due to the errors. He then  
15 received a letter from USFS on March 26, 2014, stating he was indebted to them for \$13, 611.27  
16 for suppression costs of the fire. Sometime thereafter, he received a second copy of the fire  
17 report, with some errors being corrected. Plaintiff states he was not allowed a hearing during his  
18 appeal of the report, he was only allowed to submit a rebuttal in writing. Plaintiff contends that  
19 Mr. Harvey’s report “was a fraudulent report, comprised of numerous lies.” (Id. At 9). He states  
20 that he filed the small claims action against Mr. Harvey so an unbiased court could look at the  
21 evidence he has, and to recoup a small fraction “of what this persons fraudulent document” cost  
22 plaintiff and his wife. “I cannot understand what kind of a person would fabricate mis-leading  
23 data, in an attempt to extort money from people that have had their lifetime possessions  
24 destroyed, many of which are not replaceable.” (Id.)

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1                   **II.     Motion to Dismiss**

2                   A.     Motion

3                   Defendant filed the motion to dismiss pursuant to Federal Rules of Civil  
4 Procedure 12(b)(1) for lack of jurisdiction. Defendant contends that plaintiff failed to exhaust  
5 his administrative remedies by filing a claim under the Federal Torts Claim Act (FTCA) prior to  
6 filing this case, and that even if plaintiff had filed an administrative claim, his claim is barred by  
7 sovereign immunity under the FTCA. Plaintiff did not specifically file an opposition to the  
8 motion addressing the jurisdictional issues raised, but filed briefs in support of his complaint.

9                   B.     Standards

10                  Rule 12(b) (1) of the Federal Rules of Civil Procedure allows a defendant to move  
11 for dismissal on the grounds that the court lacks jurisdiction over the subject matter. See Fed. R.  
12 Civ. P. 12(b)(1). Plaintiff has the burden to establish that the court has subject matter jurisdiction  
13 over an action. Assoc. of Med. Colls. v. United States, 217 F.3d 770, 778–779 (9th Cir.2000).  
14 “Federal courts are courts of limited jurisdiction. They possess only that power authorized by  
15 Constitution and statute, which is not to be expanded by judicial decree. It is to be presumed that  
16 a cause lies outside this limited jurisdiction, and the burden of establishing the contrary rests  
17 upon the party asserting jurisdiction.” Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375,  
18 377 (1994) (citations omitted).

19                  “A Rule 12(b)(1) jurisdictional attack may be facial or factual. In a facial attack,  
20 the challenger asserts that the allegations contained in a complaint are insufficient on their face to  
21 invoke federal jurisdiction. By contrast, in a factual attack, the challenger disputes the truth of  
22 the allegations that, by themselves, would otherwise invoke federal jurisdiction.” Safe Air for  
23 Everyone v. Meyer, 373 F.3d 1035, 1039 (9th Cir.2004). When a defendant files a facial  
24 challenge to jurisdiction, all material allegations in the complaint are assumed true, and the  
25 question for the court is whether the lack of federal jurisdiction appears from the face of the  
26 pleading itself. See Wolfe v. Strankman, 392 F.3d 358, 362 (9th Cir.2004); see also Meyer, 373

1 F.3d at 1039. When a defendant makes a factual challenge “by presenting affidavits or other  
2 evidence properly brought before the court, the party opposing the motion must furnish affidavits  
3 or other evidence necessary to satisfy its burden of establishing subject matter jurisdiction.”  
4 Meyer, 373 F.3d at 1039. The court need not presume the truthfulness of the plaintiff’s  
5 allegations under a factual attack. See id.

6 C. Discussion

7 Defendants argue the court should dismiss this action for lack of jurisdiction on  
8 two basis. First, they contend plaintiff failed to exhaust his administrative remedies prior to  
9 bringing this action. Second, they argue that even if plaintiff had properly exhausted, this action  
10 would be barred by sovereign immunity, pursuant to 28 U.S.C. § 2680(h).

11 1. Failure to Exhaust

12 The Federal Tort Claims Act (FTCA) bars claimants from seeking damages  
13 against the United States in federal court until they have exhausted their administrative remedies.  
14 See 28 U.S.C. § 2675(a); McNeil v. United States, 508 U.S. 106, 113 (1993). The FTCA  
15 provides in part:

16 An action shall not be instituted upon a claim against the United  
17 States for money damages for injury or loss of property or personal  
18 injury or death caused by the negligent or wrongful act or omission  
19 of any employee of the Government while acting within the scope  
20 of his office or employment, unless the claimant shall have first  
21 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. The failure of an agency to make final  
disposition of a claim within six months after it is filed shall, at the  
option of the claimant any time thereafter, be deemed a final denial  
of the claim for purposes of this section.

22 28 U.S.C. § 2675(a). This exhaustion requirement is jurisdictional, which must be strictly  
23 adhered to. See Brady v. United States, 211 F.3d 499, 502 (9th Cir. 2000).

24 Here, defendant has provided a sworn declaration stating that there is “no record  
25 to indicate that Mr. Robertson had submitted an administrative tort claim in accordance with the  
26 Federal Tort Claims Act, 28 U.S.C. § 2675(a).” (Decl. Of Cynthia Zabolzadeh, Doc. 7-3 at 2).

1 Plaintiff has offered no evidence to the contrary. Indeed, plaintiff has not filed an opposition to  
2 defendant's motion addressing the jurisdictional issues raised, and thus made no attempt to  
3 establish whether this Court has subject matter jurisdiction over the claim. Accordingly, the  
4 Court has no choice but to find that it lacks jurisdiction over plaintiff's claim against the United  
5 States.

6 2. Sovereign Immunity

7 Plaintiff's exclusive remedy for his tort claims is an action against the United  
8 States under the FTCA. The FTCA waives the federal government's sovereign immunity for  
9 certain tort claims by persons injured by actions of a federal employee "acting within the scope of  
10 his office or employment." 28 U.S.C. § 1346(b)(1). However, 28 U.S.C. § 2680(h) specifically  
11 excludes "[a]ny claim arising out of ... misrepresentation, deceit, or interference with contract  
12 rights" from liability under the FTCA. The Supreme Court has determine that the retention of  
13 sovereign immunity under § 2680(h) covers both claims of negligent misrepresentation and  
14 claims of fraudulent misrepresentation. See United States v. Neustadt, 366 U.S. 696, 702  
15 (1961). To determine whether a claim is barred by § 2680(h), the court "looks beyond the labels  
16 used" by the plaintiff. Thomas-Lazear v. FBI, 851 F.2d 1202, 1207 (9th Cir.1988). Rather, the  
17 court is to "examine whether the conduct upon which the claim is based constitutes one of the  
18 torts listed in § 2680(h)." Sabow v. United States, 93 F.3d 1445, 1456 (9th Cir.1996).

19 Here, plaintiff alleges Mr. Harvey issued a fraudulent fire report, intentionally  
20 misrepresenting the facts of the fire involving plaintiff's property causing him harm. Even  
21 reading the complaint broadly, the only claim the court sees alleged is a tort claim for fraud or  
22 misrepresentation. No other claims are articulated by plaintiff in his opposition. As such claims  
23 are barred by § 2680(h), the undersigned sees no option but to dismiss this case. However, to the  
24 extent plaintiff has some other claim against the defendant he intended to raise, the undersigned  
25 will recommend dismissal without prejudice so he may have the opportunity to bring those  
26 claims by following the proper administrative procedure, if any is available to him.

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**III. Conclusion**

Based on the foregoing, the undersigned recommends that:

1. Defendant’s motion to dismiss (Doc. 7) be granted;
2. Plaintiff’s complaint be dismissed without prejudice; and
3. The Clerk of the Court be directed to enter judgment and close this case.

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)(1). Within 20 days after being served with these findings and recommendations, any party may file written objections with the court. The document should be captioned “Objections to Magistrate Judge's Findings and Recommendations.” Failure to file objections within the specified time may waive the right to appeal. See Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

DATED: September 17, 2015

  
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**CRAIG M. KELLISON**  
UNITED STATES MAGISTRATE JUDGE