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3 UNITED STATES DISTRICT COURT  
4 Northern District of California  
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6 ROBERT W. TULLY,

No. C 12-1591 MEJ

7 Plaintiff,

**ORDER GRANTING DEFENDANT'S  
MOTION TO DISMISS**

8 v.

9 TRANSPORTATION SECURITY ADMIN.,

**Re: Docket No. 4**

10 Defendant.  
\_\_\_\_\_ /

11 **INTRODUCTION AND BACKGROUND**

12 Plaintiff Robert Tully initiated this pro se action against Defendant Transportation Security  
13 Administration (TSA) on March 30, 2012.<sup>1</sup> Compl., Dkt. No. 1. Plaintiff's claim stems from an  
14 incident that occurred on July 26, 2011 when he was traveling through Oakland International  
15 Airport. Compl. ¶ 3. Plaintiff alleges that he notified a TSA agent that he was placing his watch,  
16 ring, and two bracelets in a container before he proceeded through the security checkpoint. Compl.  
17 ¶ 4. Afterwards, Plaintiff momentarily forgot about his jewelry and walked away from the  
18 checkpoint. *Id.* He returned five minutes later, but could not locate his jewelry and was informed  
19 by the TSA agent that it was no longer there. *Id.* Plaintiff alleges that the TSA agent stole his  
20 jewelry, and he seeks reimbursement from Defendant for \$5600.00 — the claimed value of his  
21 watch, ring, and bracelets. Compl. ¶¶ 4-5. Before initiating this action, Plaintiff timely filed an  
22 administrative claim against Defendant pursuant to the Federal Tort Claims Act (FTCA), which was  
23 denied on October 4, 2011. Compl., Ex. A.

24 Defendant has moved to dismiss Plaintiff's Complaint, pursuant to Federal Rules of Civil  
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26 <sup>1</sup> This Court treats Plaintiff's Complaint against the TSA as a lawsuit against the United  
27 States government, and uses "Defendant" in this Order to specifically refer to the government.  
28 *See Bradley v. Transp. Sec. Admin.*, 552 F.Supp.2d 957, 960 (E.D. Mo. 2008) ("The TSA is a  
division of the United States Department of Homeland Security, and is accordingly an agency of the  
United States government. Therefore, a lawsuit against the TSA is ultimately a lawsuit against the  
United States government.").

1 Procedure (FRCP) 12(b)(1) and 12(b)(6), for lack of subject matter jurisdiction and failure to state a  
2 claim. Dkt. No. 4. Plaintiff has filed an Opposition, to which Defendants have filed a Reply. Dkt.  
3 Nos. 9 and 14. The Court has reviewed the parties' papers and considered the legal authorities. It  
4 first finds that this matter is suitable for resolution without oral argument and the hearing currently  
5 calendared for August 9, 2012 is VACATED. *See* Fed. R. Civ. P. 78(b); Civ. L.R. 7-1(b). Second,  
6 the Court GRANTS Defendant's Motion to Dismiss for lack of subject matter jurisdiction, which is  
7 explained in further detail below.<sup>2</sup> Because this Court lacks jurisdiction, Plaintiff's Complaint is  
8 DISMISSED WITH PREJUDICE.

9 **LEGAL STANDARD UNDER FRCP 12(B)(1)**

10 Federal courts are courts of limited jurisdiction and these limits, whether imposed by the  
11 Constitution or by Congress, cannot be disregarded or evaded. *Kokkonen v. Guardian Life Ins. Co.*  
12 *of Amer.*, 511 U.S. 375, 377 (1994); *Al Nieto v. Ecker*, 845 F.2d 868, 871 (9th Cir. 1988) (holding  
13 that a federal court's "power to adjudicate claims is limited to that granted by Congress, and such  
14 grants are not to be lightly inferred"). Federal courts have original jurisdiction over cases that  
15 involve diversity of citizenship, a federal question, or cases to which the United States is a party.  
16 *Kokkonen*, 511 U.S. at 377 (1994). A federal court is presumed to lack jurisdiction in a particular  
17 case unless the contrary affirmatively appears. *Cal. ex rel. Younger v. Andrus*, 608 F.2d 1247, 1249  
18 (9th Cir. 1979).

19 A motion to dismiss under FRCP 12(b)(1) tests the subject matter jurisdiction of the court.  
20 *See, e.g., Savage v. Glendale Union High Sch.*, 343 F.3d 1036, 1039-40 (9th Cir. 2003), *cert. denied*,  
21 541 U.S. 1009 (2004). Courts will not infer evidence supporting federal subject matter jurisdiction.  
22 *Kokkonen*, 511 U.S. at 377 ("It is to be presumed that a cause lies outside [the federal court's]  
23 limited jurisdiction."). The burden of proof on a FRCP 12(b)(1) motion is on a party asserting  
24 jurisdiction. *Sopcak v. N. Mountain Helicopter Serv.*, 52 F.3d 817, 818 (9th Cir. 1995).

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26 <sup>2</sup> Because Defendant's FRCP 12(b)(1) argument is dispositive to this matter, the Court does  
27 not analyze Defendant's argument that Plaintiff's Complaint fails to state a claim under FRCP  
28 12(b)(6).



1 agent in this case would not serve the United States, but would serve to further a personal interest.  
2 Therefore, the alleged action is outside the agent’s scope of employment and, as a result, the claim  
3 cannot be brought against the United States under the FTCA.”) (internal citations omitted). The  
4 Court agrees with these decisions and finds that Plaintiff’s allegations against the TSA agent in this  
5 matter, even if true, would not state a viable claim under the FTCA because that agent was not  
6 acting within the scope of his employment when allegedly stealing Plaintiff’s jewelry.<sup>3</sup>  
7 Accordingly, this Court lacks subject matter jurisdiction to preside over this matter since Defendant  
8 is immune from suit pursuant to the FTCA.

9 **CONCLUSION**

10 For the foregoing reasons, Defendant’s Motion to Dismiss is GRANTED and Plaintiff’s  
11 Complaint is DISMISSED WITH PREJUDICE. The hearing calendared for August 9, 2012 is  
12 VACATED and will not be held.

13 **IT IS SO ORDERED.**

14  
15 Dated: August 7, 2012

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17 \_\_\_\_\_  
18 Maria-Elena James  
19 Chief United States Magistrate Judge

20 \_\_\_\_\_  
21 <sup>3</sup> To the extent that one may argue that the TSA agent’s conduct was reasonably foreseeable  
22 in light of his employer’s business, the Court does not find such an argument persuasive.  
23 Respondeat superior liability requires a nexus between the employee’s tort and the employment to  
24 ensure that liability is properly placed on the employer, and the fact that employment brought the  
25 employee tortfeasor and victim together in time and place is not enough. *Bailey*, 48 Cal.App.4th at  
26 1560. “An intentional tort is foreseeable, for purposes of respondeat superior, only if in the context  
27 of the particular enterprise an employee’s conduct is not so unusual or startling that it would seem  
28 unfair to include the loss resulting from it among other costs of the employer’s business.” *Lisa M. v. Henry Mayo Newhall Mem’l Hosp.*, 12 Cal.4th 291, 302 (1995) (internal quotations and citations omitted). “The question is not one of statistical frequency, but of a relationship between the nature of the work involved and the type of tort committed.” *Id.* Here, the TSA agent’s duties are to ensure the safety of those using the airport. While he may have access to the belongings of passengers, the theft of these belongings is not related to his duties and would be unusual enough that it would be unfair to assess that cost on Defendant.