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28UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIAKEVIN ABBEY, et al.,
Plaintiffs,

v.

UNITED STATES OF AMERICA,
DEPARTMENT OF THE NAVY, et al.,
Defendants.Case No. [20-cv-06443-JD](#)**ORDER RE MOTION TO DISMISS
SECOND AMENDED COMPLAINT**

This case alleges tort claims against the United States of America, Department of the Navy, by current and former San Francisco Police Department (SFPD) employees who have worked at Building 606 at the former Hunters Point Naval Shipyard (HPNS) in San Francisco. The City and County of San Francisco (which is not a party to this case) leased the Building 606 property from the Navy, and the SFPD has stationed “hundreds” of employees there since 1997. Dkt. No. 88 ¶ 15. The SFPD employee plaintiffs say that they were exposed to “unsafe levels of radioactive and otherwise hazardous substances” while working at the Building 606 property. *Id.* ¶ 1. Plaintiffs also include the spouses and domestic partners of the SFPD employees, and surviving family members or personal representatives of deceased former employees. *Id.* ¶¶ 32-33.

After the Court dismissed the first amended complaint with leave to amend, Dkt. No. 87, plaintiffs filed a second amended complaint (SAC), Dkt. No. 88, which is now the operative complaint. The SAC alleges that the Navy “fail[ed] to warn the City and County of San Francisco about the hazardous substances used and released at HPNS,” and that this “failure to warn” was “a

1 substantial factor in causing the plaintiffs' acute symptoms and elevated risk of developing life-
2 threatening cancers and other diseases." SAC ¶ 1. As before, plaintiffs allege claims against the
3 United States for (1) negligent undertaking, negligent failure to warn, negligent supervision,
4 negligence per se, and negligent misrepresentation; (2) public nuisance; (3) loss of consortium;
5 (4) wrongful death; (5) negligent infliction of emotional distress -- fear of cancer; and
6 (6) intentional infliction of emotional distress. *Id.* ¶¶ 219-87.

7 The United States asks to dismiss plaintiffs' complaint under Federal Rule of Civil
8 Procedure 12(b)(1) for lack of subject matter jurisdiction. Dkt. No. 91. The United States
9 contends that plaintiffs' claims are not within the United States' waiver of sovereign immunity
10 under the Federal Tort Claims Act because they are subject to several waiver exceptions, 28
11 U.S.C. §§ 1346(b), 2671-80. *Id.* The parties' familiarity with the facts is assumed, and the
12 complaint is dismissed with prejudice.

13 DISCUSSION

14 The United States may be sued only to the extent that it has waived its sovereign
15 immunity. *United States v. Mitchell*, 445 U.S. 535, 538 (1980). In the absence of an express
16 waiver, the Court has no jurisdiction over tort claims against the federal government. *Id.* The
17 United States has waived immunity for a broad category of claims under the Federal Tort Claims
18 Act (FTCA). In pertinent part, the United States has consented to be sued in civil actions for
19 money damages for "personal injury or death caused by the negligent or wrongful act or omission
20 of any employee of the Government while acting within the scope of his office or employment,
21 under circumstances where the United States, if a private person, would be liable to the claimant in
22 accordance with the law of the place where the act or omission occurred." 28 U.S.C. § 1346(b)(1).

23 There are exceptions to this broad waiver of immunity, several of which the government
24 has invoked here. Dkt. No. 91. The first of these is the "misrepresentation exception" under 28
25 U.S.C. § 2680(h). *Id.* at 3-6. This section carves out from waiver "[a]ny claim arising out of . . .
26 misrepresentation," subject to qualifications for "acts or omissions of investigative or law
27 enforcement officers of the United States Government" that are not applicable here.

1 Consequently, a claim based on an alleged misrepresentation is barred by sovereign
2 immunity. This principle should be of no surprise because the Court expressly advised plaintiffs
3 in the prior dismissal order that “the misrepresentation exception, 28 U.S.C. § 2680(h), appears
4 likely to bar at least some portion of plaintiffs’ allegations as currently pleaded in the FAC.” Dkt.
5 No. 87 at 3. The Court noted that “the exception applies -- and bars the government’s liability --
6 when plaintiff’s claim is one ‘arising out of misrepresentation,’” and that that characterization
7 appeared to “fit the allegations based directly on statements made by the Navy.” *Id.* (citations
8 omitted). Plaintiffs were directed in any amended complaint to “clearly identify those aspects of
9 the government’s conduct other than alleged misrepresentations that form the basis of plaintiffs’
10 claims. *See Block v. Neal*, 460 U.S. 289, 298 (1983).” *Id.*

11 Even so, plaintiffs in effect doubled down on the misrepresentation theory in the SAC.
12 The lead paragraph of the SAC makes this abundantly clear. Plaintiffs say that the United States’
13 “failure to warn the City and County of San Francisco about the hazardous substances used and
14 released at HPNS was a substantial factor in causing the plaintiffs’ acute symptoms and elevated
15 risk of developing life-threatening cancers and other diseases.” SAC ¶ 1. The misrepresentation
16 theme is repeated throughout the SAC. *See, e.g., id.* ¶ 11 (the Navy “negligently told the City that
17 there was no history of any radioactive substances at the Building 606 Property”); ¶ 12 (the Navy
18 “told the City that the SFPD could use the Building 606 Property without exposing SFPD
19 employees to health risk from exposure to hazardous substances”); ¶ 13 (the Navy “provided the
20 City with a Finding of Suitability to Lease and property-specific environmental baseline survey
21 results that included numerous material misrepresentations” and “false statements and failures to
22 warn”); ¶ 24 (“As a result of these misrepresentations, concealments, omissions, and failures to
23 warn by the Navy and by Tetra Tech, under the Navy’s negligent supervision, the City continued
24 to have plaintiffs work at HPNS during Tetra Tech’s remediation activities”); ¶ 93 (the Navy
25 “made false, misleading, and incomplete disclosures to the City, and failed to warn the City and its
26 employees, related to and regarding the release and use of hazardous substances at the Subject
27 Leased Property”); p. 37 (“After 1996, . . . the Navy continued to misrepresent the true extent of
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1 hazardous contamination affecting plaintiffs’ safety”); ¶¶ 243-44 (the Navy “negligently failed to
2 warn the City and its employees” and “negligently misrepresented [the] facts”).

3 As the Court cautioned last time, this will not do. The alleged misrepresentations in this
4 case are by no means “collateral to the gravamen” of the SAC. *Esquivel v. United States*, 21 F.4th
5 565, 578 (9th Cir. 2021). “By [plaintiffs’] own account, the alleged misrepresentations are within
6 the chain of causative events upon which plaintiffs’ claim is founded.” *Id.* (quotations and citation
7 omitted). This is readily apparent in allegations that the Navy’s failure to warn “was a substantial
8 factor in causing” plaintiffs’ injuries, and that “[r]elying on [the Navy’s] representations and
9 omissions, the SFPD relocated hundreds of its police employees to begin working at HPNS in
10 1997,” thereby exposing plaintiffs to the harms they are complaining of. SAC ¶¶ 1, 15.
11 Misrepresentation is at the heart of all of the claims in the SAC. Consequently, the
12 misrepresentation exception to waiver of immunity applies, and the Court lacks jurisdiction over
13 the SAC. *See Esquivel*, 21 F.4th at 578.

14 The same holds for omissions. A “negligent failure to inform,” namely an omission, “is
15 misrepresentation within the meaning of 28 U.S.C. § 2680(h),” and “[t]he intent of the section is
16 to except from the Act cases where mere ‘talk’ or failure to ‘talk’ on the part of a government
17 employee is asserted as a proximate cause of the damage sought to be recovered from the United
18 States.” *City and Cnty. of San Francisco v. United States*, 615 F.2d 498, 505 (9th Cir. 1980)
19 (quotations and citations omitted); *see also Lawrence v. United States*, 340 F.3d 952, 958 (9th Cir.
20 2003) (“The misrepresentation exception shields government employees from tort liability for
21 failure to communicate information, whether negligent, or intentional.”) (citation omitted).

22 Plaintiffs’ efforts to sidestep this conclusion are unavailing. They say that the exception
23 should not apply because they did not personally rely on false statements, and were the
24 “unfortunate and foreseeable victims of the misrepresentations that were made to the City.” Dkt.
25 No. 94 at 4-5. But as plaintiffs acknowledge, our circuit has “found that the exception applied,
26 even though there had been no reliance by the plaintiffs.” *Id.* at 6 (citing *Lawrence*, 340 F.3d 952,
27 and *Doe v. Holy See*, 557 F.3d 1066 (9th Cir. 2009)). This applies here, as our circuit has signaled
28 in an unpublished decision. In *Andrade v. United States*, 845 F. App’x. 594, 595 (9th Cir. 2021),

1 plaintiff Andrade went to CVS to pick up her opioid prescription, only to have a federally funded
 2 clinic, San Ysidro Health, “incorrectly claim[] that Andrade was not a patient” both to CVS staff
 3 as well as to the police, leading to Andrade’s arrest. Andrade argued that the FTCA’s
 4 misrepresentation exception did not apply to her negligence claim against the United States
 5 because “misrepresentation requires reliance and . . . there was no reliance here” by plaintiff or her
 6 daughter. *Andrade*, 845 F. App’x. at 595-56. The circuit stated that “we already rejected this
 7 argument in *Alexander v. United States*, 787 F.2d 1349, 1350-51 (9th Cir. 1986).” *Id.* The panel
 8 concluded that “[i]t does not matter whether the federal clinic negligently misinformed Andrade, a
 9 CVS pharmacist, or a San Diego Police officer. The ‘gravamen of the claim’ is still
 10 misrepresentation.” *Id.* (citing *United States v. Neustadt*, 366 U.S. 696, 704 (1961)). The district
 11 court consequently lacked jurisdiction over Andrade’s negligence claim. *Id.* at 596.

12 In *Alexander*, 787 F.2d 1349, the case cited by the *Andrade* panel, the circuit held that
 13 plaintiff Alexander’s negligence claim against the United States was barred by the FTCA’s
 14 misrepresentation exception even though the alleged misrepresentation had not been made directly
 15 to the plaintiff and thus he was not the one who had relied on it. Alexander had conditionally been
 16 hired by the Pacific Stock Exchange to work as a security officer, but his employment was
 17 terminated after the FBI provided to Pacific Stock Exchange a background check that “contained
 18 two arrest items that should not have been released because they had been ordered sealed by a
 19 California court.” *Alexander*, 787 F.2d at 1350. Alexander did not himself rely on the erroneous
 20 “rap sheet.” Nevertheless, noting the “broad reach of the ‘misrepresentation’ exception of section
 21 2680(h),” the circuit held that “Alexander’s claim . . . fits squarely into the category of ‘negligent
 22 misrepresentation’” covered by that section, and was consequently barred. *Id.* at 1351 (citing
 23 *Neustadt*, 366 U.S. 696).

24 So too, here. These cases stand for the principle that the misrepresentation at the heart of
 25 the claim need not have been made directly to plaintiffs, and plaintiffs need not have directly
 26 relied, in order for the misrepresentation exception to apply and bar the claims. In *Neustadt*, 366
 27 U.S. 696, the Supreme Court held that “§ 2680(h) comprehends claims arising out of negligent, as
 28 well as willful, misrepresentation,” and that “[w]hile we do not condone carelessness by

1 government employees in gathering and promulgating . . . information, neither can we justifiably
2 ignore the plain words Congress has used in limiting the scope of the Government’s tort liability.”
3 *Neustadt*, 366 U.S. at 702, 710-11. The plain language of 28 U.S.C. § 2680(h) excepts from the
4 United States’ waiver of sovereign immunity “[a]ny claim arising out of . . . misrepresentation.”
5 Nothing in this language nor common sense supports the view that the government is immunized
6 when sued directly by the party to which it makes a misrepresentation, but not when it is sued by
7 downstream third parties who allege they were indirectly harmed by the alleged misrepresentation.
8 The government is immunized from all claims “arising out of . . . misrepresentations,” and
9 plaintiffs’ allegations show that their claims are such claims.

10 Plaintiffs say that the misrepresentation exception is “limit[ed] or suspend[ed]” in this case
11 because “CERCLA imposes a specific and mandatory duty of disclosure on the Navy.” Dkt.
12 No. 94 at 6. This point is also unpersuasive. Plaintiffs did not present controlling authority for
13 this theory, and instead draw largely irrelevant distinctions between CERCLA § 120(h)(1) and the
14 National Housing Act section that was at issue in *Neustadt*. In *Neustadt*, the Supreme Court
15 rejected the argument that the FTCA’s misrepresentation exception was limited or suspended
16 because of the government’s “‘specific duty’ to make and communicate an[] accurate appraisal of
17 the property” under Section 226 of the National Housing Act. *Neustadt*, 366 U.S. at 708. Textual
18 variations between National Housing Act § 226 and CERCLA § 120(h)(1) hardly demonstrate that
19 the misrepresentation exception does not apply here, all the more so in light of plaintiffs’ cursory
20 CERCLA argument that is unburdened by any case law. Dkt. No. 94 at 7. Moreover, in finding
21 the misrepresentation exception to apply in *Neustadt*, the Supreme Court noted that Section 226 of
22 the National Housing Act was added in 1954, when it could reasonably be supposed that Congress
23 “was aware of the ‘misrepresentation’ exception in the Tort Claims Act, and that it had been
24 construed by the courts to include ‘negligent misrepresentation.’” *Neustadt*, 366 U.S. at 710. The
25 same is true of CERCLA § 120(h)(1), as the government observes, *see* Dkt. No. 96 at 4 n.2, and
26 CERCLA also lacks any express statutory language that violations of its “duty of disclosure” are
27 to fall outside the FTCA’s misrepresentation exception.
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1 Plaintiffs' closing suggestion that their "injuries were caused by the Navy's negligent
2 performance of an operational task," Dkt. No. 94 at 8, are of no moment. Plaintiffs say that their
3 allegations focus on the Navy's "duty as a landowner to exercise ordinary care or skill in the
4 management of its property." *Id.* That is not a fair characterization of the allegations in the SAC.
5 As discussed, the SAC underscores the centrality of the government's ostensible
6 misrepresentations and omissions to plaintiffs' claims. That is so even though the Court directed
7 plaintiffs to make clear "those aspects of the government's conduct other than alleged
8 misrepresentations that form the basis of [their] claims." Dkt. No. 87 at 3. Plaintiffs' opposition
9 brief also emphasizes the theory that "the Navy breached a specific and mandatory statutory duty
10 to disclose when and where hazardous substances were stored, released, or disposed of at HPNS,"
11 and the Navy's breach of a "duty to warn." Dkt. No. 94 at 9. Such alleged failures to disclose and
12 warn are claims that are encompassed by the misrepresentation exception. *Neustadt*, 366 U.S. at
13 710-11; *City and Cnty. of San Francisco*, 615 F.2d at 505; *Lawrence*, 340 F.3d at 958.

14 This is the bed plaintiffs have chosen to lie in, and they cannot avoid the consequences of
15 their decision. The government seeks dismissal of all six of the claims in the SAC on the basis of
16 the misrepresentation exception, including the claims for public nuisance, intentional and
17 negligent infliction of emotional distress, loss of consortium, and wrongful death. Dkt. No. 91 at
18 5-6. Plaintiffs did not defend their claims with any degree of specificity, and made for all of them
19 the same arguments against the misrepresentation exception. Dkt. No. 94 at 4-9. Consequently,
20 the Court lacks jurisdiction over the SAC *in toto*. The Court finds it unnecessary to reach the
21 government's additional arguments that plaintiffs' claims are barred by the FTCA's "contractor
22 exception" and "discretionary function exception" as well. Dkt. No. 91 at 6-15.

23 CONCLUSION

24 The United States' motion to dismiss is granted, Dkt. No. 91, and plaintiffs' second
25 amended complaint is dismissed in its entirety for lack of subject matter jurisdiction.

26 The Court's prior order not only flagged the misrepresentation exception issue that now
27 serves as the basis for dismissal, but also advised plaintiffs that they likely would not be given any
28 further opportunities to amend. Dkt. No. 87 at 3-4. Plaintiffs have shown no reason to believe

1 further amendment might be fruitful, nor have they requested another chance to amend. Dkt.
2 No. 94. The dismissal is consequently with prejudice. *See Chodos v. W. Publishing Co.*, 292 F.3d
3 992, 1003 (9th Cir. 2002).

4 The case is closed, and judgment will be entered against plaintiffs.

5 **IT IS SO ORDERED.**

6 Dated: January 17, 2023



JAMES DONATO
United States District Judge

United States District Court
Northern District of California

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