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28UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIARANDY STANSBERRY,  
Plaintiff,  
v.  
UNITED STATES OF AMERICA,  
Defendant.

Case No. 4:18-cv-01563-KAW

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

Re: Dkt. No. 18

On June 29, 2019, Defendant United States of America ("Defendant") filed a Motion to Dismiss Plaintiff's Complaint. (Def.'s Mot., Dkt. No. 18.) On July 27, 2018, Plaintiff Randy Stansberry ("Plaintiff") opposed. (Pl.'s Opp'n, Dkt. No. 24.) On August 10, 2018, Defendant replied. (Def.'s Reply, Dkt. No. 26.)

The Court finds this matter suitable for resolution without hearing pursuant to Civil Local Rule 7-1 (b), and hereby vacates the hearing initially set for September 20, 2018. For the reasons set forth below, the Court GRANTS Defendant's Motion to Dismiss with prejudice.

**I. BACKGROUND**

Plaintiff is an elderly, disabled woman who was receiving Title XVI supplemental security income benefits when on February 2, 2013 and March 8, 2013, the Social Security Administration ("SSA") issued notices informing her that she was overpaid benefits in the amount of \$19,233.80 for the period from January 2011 through March 2013. (Compl., Dkt. No. 1 ¶ 10; Ex. A, Dkt. No. 28 at 6.) On March 18, 2013, Plaintiff requested waiver of the overpayment, stating that she was not at fault in causing the overpayment and could not afford to pay. (Ex. A at 6.) On May 21, 2013, her request for waiver was denied. (Id.) Plaintiff filed a request for reconsideration on August 1, 2013. (Id.) On February 6, 2014, the Administration decreased the amount of the overpayment by \$2,732.07. (Id.) On March 11, 2013, Plaintiff filed a written request for a hearing

United States District Court  
Northern District of California

1 with an Administrative Law Judge ("ALJ"). (Id.) ALJ Michael Blume held a hearing on May 19,  
2 2015 in Oakland, California. (Id.) On August 6, 2015, ALJ Blume rendered a partially favorable  
3 decision finding that Plaintiff was overpaid benefits in the amount of \$19,349.96 during January 1,  
4 2011 to March 1, 2013, that Plaintiff was at fault in causing a portion of the overpayment for the  
5 amount of \$13,902.52, that Plaintiff was not at fault in causing a portion of the overpayment for  
6 the amount of \$5,447.44, that recovery of the overpayment would be against equity and good  
7 conscience for a portion of the overpayment and recovery of the overpayment was not waived, and  
8 Plaintiff is liable for repayment of a portion of the overpayment, \$13,390.52, but is not liable for  
9 repayment of \$5,447.44 during the period of January 2011 to March 2013. (Id. at 8-9.)

10 ALJ Blume also mentioned in his opinion that:

11 As previously noted, the Administration has failed woefully in its  
12 legal requirement to provide adequate and proper accounting of the  
13 overpayment amount and the basis for this calculation. The myriad  
14 of confusing and even conflicting notices are well documented in  
15 the record. Further exacerbating the situation, the Administration  
16 has failed to adequately resolve these deficiencies notwithstanding  
17 the many attempts of the claimant and her representative. In fact, the  
18 record indicates the Administration had alleged absurdly that the  
19 claimant owned real property in Simi Valley, CA based on the fact  
20 that Texas was sending tax bills to a Simi Valley property for a  
21 Texas property the claimant jointly owned. Apparently, the claimant  
22 was living at the Simi Valley property owned by her brother. As a  
23 result of the Administration's mistaken assumption, her payments  
24 were ceased and she lost her home to foreclosure.

19 (Id.) Plaintiff's Complaint alleges that as a direct result of the Administration's negligence  
20 in the handling of Ms. Stansberry's overpayment issue, Ms. Stansberry's home was lost to  
21 foreclosure proceedings, as her main source of income was from social security income, and as a  
22 direct result of losing her home to foreclosure, Ms. Stansberry has been homeless. (Compl. ¶ 13)  
23 Plaintiff's Complaint also alleges that as a direct result of the Administration's negligence, Ms.  
24 Stansberry has suffered extreme emotional distress and continues to suffer emotional distress from  
25 the loss of her home and the use of many of her personal possessions. (Id.)

26 Plaintiff has not timely appealed the ALJ's decision, because well over 60 days have  
27 expired since August 6, 2015, the date of the ALJ's decision. (Def.'s Mot. at 3; Ex. A at 3.)  
28 Instead, Plaintiff filed this instant action on March 12, 2018, where she sued the United States of

1 America under the Federal Tort Claims Act, 28 U.S.C. §§ 2671-2680 and 28 U.S.C. § 1346(b)(1),  
2 alleging negligence in connection with Ms. Stansberry's application for appeal and waiver of  
3 overpayment of benefits. (Compl. ¶¶ 1-3, 15-18.) Defendant's Motion to Dismiss Plaintiff's  
4 Complaint followed. (Def.'s Mot.)

## 5 II. LEGAL STANDARD

### 6 A. Rule 12(b)(1)

7 Under Federal Rule of Civil Procedure 12(b)(1), a party may file a motion to dismiss based  
8 on a lack of subject-matter jurisdiction. Fed. R. Civ. P. 12(b)(1). A complaint must contain a short  
9 and plain statement of the ground for the court's jurisdiction. Fed. R. Civ. P. 8(a)(1). The plaintiff  
10 has the burden of establishing jurisdiction. See *Kokkoken v. Guardian Life Ins. Co. of Am.*, 511  
11 U.S. 375, 377 (1994); *Farmers Ins. Exchange v. Portage La Prairie Mut. Ins. Co.*, 907 F.2d 911,  
12 912 (9th Cir. 1990). A defendant's Rule 12(b)(1) jurisdictional attack can be either factual or  
13 facial. *White v. Lee*, 227 F.3d 1214, 1242 (9th Cir. 2000). "A 'facial' attack asserts that a  
14 complaint's allegations are themselves insufficient to invoke jurisdiction, while a 'factual' attack  
15 asserts that the complaint's allegations, though adequate on their face to invoke jurisdiction, are  
16 untrue." *Courthouse News Serv. v. Planet*, 750 F.3d 776, 780 n.3 (9th Cir. 2014). Under a facial  
17 attack, the court "accept[s] all allegations of fact in the complaint as true and construe[s] them in  
18 the light most favorable to the plaintiffs." *Warren v. Fox Family Worldwide, Inc.*, 328 F.3d 1136,  
19 1139 (9th Cir. 2003). In a factual attack, the court "need not presume the truthfulness of the  
20 plaintiff's allegations" and "may review evidence beyond the complaint without converting the  
21 motion to dismiss into a motion for summary judgment." *Safe Air for Everyone v. Meyer*, 373 F.3d  
22 1035, 1039 (9th Cir. 2004).

### 23 B. Rule 12(b)(6)

24 Under Federal Rule of Civil Procedure 12(b)(6), a party may file a motion to dismiss based  
25 on the failure to state a claim upon which relief may be granted. Fed. R. Civ. P. 12(b)(6). A  
26 motion to dismiss under Rule 12(b)(6) tests the legal sufficiency of the claims asserted in the  
27 complaint. *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001). In considering such a motion, a  
28 court must "accept as true all of the factual allegations contained in the complaint." *Erickson v.*

1 Pardus, 551 U.S. 89, 94 (2007). The court may also dismiss the case or a claim "only where there  
2 is no cognizable legal theory" or there is an absence of "sufficient factual matter to state a facially  
3 plausible claim to relief." *Shroyer v. New Cingular Wireless Servs., Inc.*, 622 F.3d 1035, 1041 (9th  
4 Cir. 2010) (citing *Ashcroft v. Iqbal*, 556 U.S. 662, 677-78 (2009)).

5 Generally, if the court grants a motion to dismiss and dismisses a complaint, it should grant  
6 leave to amend even if no request to amend is made "unless it determines that the pleading could  
7 not possibly be cured by the allegation of other facts." *Lopez v. Smith*, 203 F.3d 1122, 1127 (9th  
8 Cir. 2000). Moreover, dismissal with prejudice is proper only if amendment is futile or if the  
9 "complaint could not be saved by any amendment." *United States v. Corinthian Colleges*, 655  
10 F.3d 984, 995 (9th Cir. 2011).

11 **C. Sovereign Immunity**

12 "It is axiomatic that the United States may not be sued without its consent and that the  
13 existence of consent is a prerequisite for jurisdiction." *Jachetta v. United States*, 653 F.3d 898, 903  
14 (9th Cir. 2011) (quoting *United States v. Mitchell*, 463 U.S. 206, 212 (1983)). "As a sovereign, the  
15 United States is immune from suit unless it waives such immunity." *Chadd v. United States*, 794  
16 F.3d 1104, 1108 (9th Cir. 2015). "Similarly, suits against officials of the United States...in their  
17 official capacity are barred if there has been no waiver." *Sierra Club v. Whitman*, 268 F.3d 898,  
18 901 (9th Cir. 2001). This is the doctrine of sovereign immunity.

19 As the Ninth Circuit has explained: "Before we may exercise jurisdiction over any suit  
20 against the government, we must have 'a clear statement from the United States waiving sovereign  
21 immunity, together with a claim falling within the terms of the waiver.'" *Jachetta*, 653 F.3d at 903  
22 (citing *United States v. White Mountain Apache Tribe*, 537 U.S. 465, 472 (2003)). Furthermore,  
23 "limitations and conditions upon which the Government consents to be sued must be strictly  
24 observed and exceptions thereto are not to be implied." *Mollison v. United States*, 568 F.3d 1073,  
25 1075 (9th Cir. 2009) (citing *Soriano v. United States*, 352 U.S. 270, 276 (1957)) (internal  
26 quotations omitted; alteration in original)). Absent a waiver, "a court does not have authority to  
27 award relief against the United States or a federal agency." *Isaacs v. United States*, No. 13-cv-  
28 01394-WHO, 2013 WL 4067597, at \*1 (N.D. Cal. Aug. 1, 2013). "As the party asserting a claim

1 against the United States, [the plaintiff] has the burden of 'demonstrating unequivocal waiver of  
2 immunity.'" United States v. Park Place Associates, Ltd., 563 F.3d 907, 924 (9th Cir. 2009)  
3 (quoting Cunningham v. United States, 786 F.2d 1445, 1446 (9th Cir. 1986)). Waivers must be  
4 "unequivocally expressed in the statutory text" and "are to be strictly construed, in terms of its  
5 scope, in favor of the sovereign." Jordan v. The Presidio Trust, 4:16-cv-02122-KAW, 2017 WL  
6 396169, at \*3 (N.D. Cal. Jan. 30, 2017) (quoting Dep't of the Army v. Blue Fox, 525 U.S. 255, 261  
7 (1999)). The party seeking the waiver must also meet this "high standard" in order to obtain it. Id.  
8 (quoting Hajro v. U.S. Citizenship and Immigration Servs., 811 F.3d 1086, 1101 (9th Cir. 2016)).

9 **D. Judicial Review of Decisions Under the Social Security Act**

10 "The Social Security Act contains a limited waiver of sovereign immunity." Bulletti v.  
11 Astrue, Nos. C11-5368 MEJ, 12-682 MEJ, 2012 WL 4120536, at \*4 (N.D. Cal. Sept. 19, 2012)  
12 (citing 42 U.S.C. § 405(g), (h)) (emphasis added). 42 U.S.C. § 405(g) ("Section 405(g)") provides:

13 Any individual, after any final decision of the Commissioner of  
14 Social Security made after a hearing to which he was a party,  
15 irrespective of the amount in controversy, may obtain a review of  
16 such decision by a civil action commenced within sixty days after  
the mailing to him of notice of such decision or within such further  
time as the Commissioner of Social Security may allow.

17 42 U.S.C. § 405(g). Section 405(g) thus "limits judicial review to...a 'final decision' of the  
18 Secretary made after a hearing." Califano v. Sanders, 430 U.S. 99, 108 (1977). Under the relevant  
19 regulations, a claimant obtains a final decision only after completing the four steps of the  
20 administrative review process: (1) an initial determination; (2) reconsideration; (3) a hearing  
21 before an ALJ; and (4) review by the Appeals Council. Lopez v. Gumushyan, No. 16-CV-07236-  
22 LB, 2017 WL 2118313, at \*3 (N.D. Cal. May 16, 2017) (citing Kildare v. Saenz, 325 F.3d 1078,  
23 1082 (9th Cir. 2003) ("A final decision has two elements: (1) presentment of the claim to the  
24 Commissioner, and (2) complete exhaustion of administrative remedies."); Johnson v. Shalala, 2  
25 F.3d 918, 921 (9th Cir. 1993)). Before appealing to district court, a "plaintiff must exhaust all  
26 administrative remedies by seeking a reconsideration decision, then an ALJ decision after a  
27 hearing, and then a final review by the Appeals Council." Lopez, 2017 WL 2118313, at \*3 (citing  
28 20 C.F.R. 404.900(a)(1)-(5)).

1           Furthermore, 42 U.S.C. § 405(h) limits federal-court jurisdiction to claims brought through  
2 the above 42 U.S.C. § 405(g) framework, and provides:

3           The findings and decision of the Commissioner of Social Security  
4 after a hearing shall be binding upon all individuals who were  
5 parties to such hearing. No findings of fact or decision of the  
6 Commissioner of Social Security shall be reviewed by any person,  
7 tribunal, or governmental agency except as herein provided. No  
8 action against the United States, the Commissioner of Social  
9 Security, or any other officer or employee thereof shall be brought  
10 under section 1331 or 1346 of title 28 to recover on any claim  
11 arising under this subchapter.

12 42 U.S.C. § 405(h). The U.S. Supreme Court has broadly interpreted the last sentence of 42 U.S.C.  
13 § 405(h), or: "No action against the United States, the Commissioner of Social Security, or any  
14 other officer or employee thereof shall be brought under section 1331 or 1346 of title 28 to recover  
15 on any claim arising under this subchapter." See *Hooker v. United States Dep't of Health and*  
16 *Human Servs.*, 858 F.2d 525, 529 (1988) (citing *Weinberger v. Salfi*, 422 U.S. 749, 760-61  
17 (1975)). In doing so, the U.S. Supreme Court has held that the phrase "arising under" the Act  
18 includes "a claim in which 'both standing and the substantive basis for the presentation' of the  
19 claim is the Social Security Act." *Hooker*, 858 F.2d at 529 (citing *Weinberger*, 422 U.S. at 760-  
20 61); see also *Marin v. HEW, Health Care Financing*, 769 F.2d 590, 592 (9th Cir. 1985)  
21 ("Congress envisioned just this type of [social security] claim and provided an administrative  
22 remedy for it" under section 405(h) and any tort cause of action that a party would pursue is  
23 "anticipated by the statute" of section 405(h) as well). Section 405(h) thus bars for example,  
24 constitutional challenges to the Social Security Act's requirements (see *Weinberger*, 422 U.S. at  
25 760-61), FTCA-based tort claims for wrongful disability determinations (see *Hooker*, 858 F.2d at  
26 529-30) and Bivens-based due-process claims for the wrongful termination of benefits (see  
27 *Schweiker v. Chilicky*, 487 U.S. 412, 413, 329 (1988)). *Lopez*, 2017 WL 2118313, at \*4.

28           In a "typical" Social Security benefits case – "where an individual seeks a monetary benefit  
from the agency, ... the agency denies the benefit, and the individual challenges the lawfulness of  
that denial" – 42 U.S.C. § 405(h) "plainly bars § 1331 review ... irrespective of whether the  
individual challenges the agency's denial on evidentiary, rule-related, statutory, constitutional, or  
other legal grounds." *Id.* (quoting *Shalala*, 529 U.S. at 10.)

1                   **E. The Federal Tort Claims Act (28 U.S.C. §§ 2671-2680) & 20 C.F.R. § 429.101**

2                   28 U.S.C. § 2675(a) of the Federal Tort Claims Act (28 U.S.C. §§ 2671-2680) provides:

3                                   (a) An action **shall not be instituted** upon a claim against the  
4                                   United States for money damages for injury or loss of property or  
5                                   personal injury or death caused by the negligent or wrongful act or  
6                                   omission of any employee of the Government while acting within  
7                                   the scope of his office or employment, **unless the claimant shall**  
8                                   **have first presented the claim to the appropriate Federal agency in**  
9                                   **writing and sent by certified or registered mail.** The failure of an  
10                                  agency to make final disposition of a claim within six months after it  
11                                  is filed shall, at the option of the claimant any time thereafter, be  
12                                  deemed a final denial of the claim for purposes of this section. The  
13                                  provisions of this subsection shall not apply to such claims as may  
14                                  be asserted under the Federal Rules of Civil Procedure by third party  
15                                  complaint, cross-claim, or counterclaim.

16                   28 U.S.C. § 2675(a) (emphasis added). Therefore, it is clear that in order to bring an action in  
17                   federal court under the Federal Tort Claims Act, a party must first present the claim to the  
18                   appropriate federal agency (here the SSA) in writing and send it by certified or registered mail.  
19                   The failure of an agency to make a final disposition of that claim within six months after it filed  
20                   shall be deemed a final denial of the claim for purposes of the Federal Tort Claims Act, thereby  
21                   enabling the filing of an action in federal court. Moreover, 20 C.F.R. § 429.101(a) provides:

22                                   (a) This subpart applies only to claims filed **under the**  
23                                   **Federal Tort Claims Act, as amended, 28 U.S.C. 2671- 2680**  
24                                   **(FTCA)**, for money damages against the United States for damage  
25                                   to or loss of property or personal injury or death that is caused by  
26                                   the negligent or wrongful act or omission of an employee of the  
27                                   Social Security Administration (SSA). The loss, damage, injury or  
28                                   death must be caused by the employee in the performance of his or  
                                 her official duties, under circumstances in which the United States,  
                                 if a private person, would be liable in accordance with the law of the  
                                 place where the act or omission occurred. This subpart does not  
                                 apply to any tort claims excluded from the FTCA under 28 U.S.C.  
                                 2680.<sup>1</sup>

29                   20 C.F.R. § 429.101(a) (emphasis added).

30                   \_\_\_\_\_  
31                   <sup>1</sup> 28 U.S.C. § 2680(a) provides:

32                   The provisions of this chapter and section 1346(b) of this title shall not apply to—  
33                   (a) Any claim based upon an act or omission of an employee of the Government, **exercising due**  
34                   **care, in the execution of a statute or regulation**, whether or not such statute or regulation be  
35                   valid, or **based upon the exercise or performance or the failure to exercise or perform a**  
36                   **discretionary function or duty on the part of a federal agency or an employee of the**  
37                   **Government**, whether or not the discretion involved be abused.

1 **III. DISCUSSION**

2 Defendant argues in its Motion to Dismiss that there is no jurisdiction over Plaintiff's case  
3 because Congress has not waived the government's sovereign immunity for a tort claim against the  
4 SSA based on the way it handled Plaintiff's benefits. (Def.'s Mot. at 2-4.) Defendant further asserts  
5 that Congress created a specific administrative mechanism for handling any judicial review of  
6 SSA final decisions in 42 U.S.C. §§ 405(g) and 405(h), and because Plaintiff has not exhausted all  
7 of her administrative remedies by not appealing the ALJ's decision, she is barred from bringing a  
8 tort claim against the United States or the SSA due to sovereign immunity. (Id. at 4-7.) In  
9 response, Plaintiff argues that she does not seek judicial review of any decision rendered by the  
10 SSA and instead seeks damages for personal injury and loss of property caused by the  
11 government's negligent handling of her Social Security Benefits. (Pl.'s Opp'n at 1.) Plaintiff also  
12 asserts that they brought this action against the United States under the Federal Tort Claims Act  
13 ("FTCA"), and 28 U.S.C. section 1346(b)(1), for the gross negligence in the SSA's handling of  
14 Plaintiff's appeal and waiver of overpayment benefits. (Id.)

15 Accordingly, the Court will first analyze whether Plaintiff properly brought her complaint  
16 under the FTCA. Second, the Court will assess whether the government waived its immunity  
17 against Plaintiff's negligence tort claim and also whether Plaintiff is limited to only pursuing  
18 administrative remedies with the SSA under 42 U.S.C. § 405(g) and 405(h) because her tort claim  
19 "arises under" the Social Security Act.

20 **A. Whether Plaintiff Properly Brought an Action Under the FTCA**

21 Here, Plaintiff's Complaint states that "[t]his is an action against the Defendant United  
22 States of America under the Federal Tort Claim Act, (28 U.S.C. § 2671, et seq.) and 28 U.S.C. §  
23 1346(b)(1), for negligence in connection with Ms. Stansberry's application for appeal and waiver  
24 of overpayment of benefits. (Compl. ¶ 1.) Plaintiff also argues that Congress has waived the  
25 government's sovereign immunity because California's substantive tort law provides a right of  
26 action against a private person for negligence and that liability can be asserted against the United  
27 States when an SSA employee is negligent when performing official duties under the FTCA, 28  
28 U.S.C. § 1346(b)(1) and 20 C.F.R. §429.101(a). (Pl.'s Opp'n at 2, 6.) The Court disagrees.



1 "One of the main purposes of the FTCA is to establish consistency between the liability  
2 incurred by individuals and by the government for the commission of tortious acts. Hence, the  
3 government can be sued 'under circumstances where the United States, if a private person, would  
4 be liable to the claimant in accordance with the law of the place where the act or omission  
5 occurred.'" *Faber v. United States*, 56 F.3d 1122, 1124 (9th Cir. 1995) (citing 28 U.S.C. §  
6 1346(b)). In other words, the "broad and just purpose" of the FTCA is "to compensate the victims  
7 of negligence in the conduct of governmental activities in circumstances like...those in which a  
8 private person would be liable and not to leave just treatment to the caprice and legislative burden  
9 of individual private laws." *Bailey v. United States*, 623 F.3d 855, 868 (9th Cir. 2010) (citing  
10 *Indian Towing Co. v. United States*, 350 U.S. 61, 68-69 (1955); 28 U.S.C. § 1346(b)(1)). "It would  
11 be wrong to apply the discretionary function exception in a case where ... [the government's]  
12 judgment would be no different than a judgment made by a private individual not to take certain  
13 measures to ensure the safety" of others. *Faber*, 56 F.3d at 1125; see also *Bailey*, 623 F.3d at 868  
14 ("A private landowner in the Corps' position would have had to consider the exact same factors the  
15 Corps did when deciding to delay replacing the warning signs. This is exactly the kind of scenario  
16 that Congress intended to be covered by the FTCA."); *Dalehite v. United States*, 346 U.S. 15, 28  
17 (1953) ("Uppermost in the collective mind of Congress were the ordinary common-law torts.").  
18 The Supreme Court also noted that the purpose of the FTCA was to "waive immunity from  
19 recognized causes of action, not to visit the government with novel and unprecedented liabilities."  
20 *Feres v. United States*, 340 U.S. 135, 142 (1950).

21 Here, Plaintiff alleges that the SSA committed tortious negligence in the handling of  
22 overpayment of benefits (Pl.'s Opp'n at 6-7), which is not an ordinary common-law tort but instead  
23 a task strictly associated with the daily operation of the SSA. Moreover, although the FTCA, 28  
24 U.S.C. § 1346(b)(1) and 20 C.F.R. §429.101(a) may hold federal employees liable for torts  
25 committed while those employees are acting within the scope of their office or employment or  
26 performing official duties, the FTCA actually has an "exception" provision that is also noted in 20  
27 C.F.R. §429.101(a) as: "This subpart does not apply to any tort claims excluded from the FTCA  
28 under 28 U.S.C. § 2680."

1           The first provision of 26 U.S.C. § 2680, 26 U.S.C. § 2680(a) provides that: "The  
2 provisions of this chapter and section 1346(b) of this title shall not apply to— (a) Any claim based  
3 upon an act or omission of an employee of the Government, **exercising due care, in the execution**  
4 **of a statute or regulation**, whether or not such statute or regulation be valid, or based upon the  
5 exercise or performance or **the failure to exercise or perform a discretionary function or duty on**  
6 **the part of a federal agency or an employee of the Government**, whether or not the discretion  
7 involved be abused." Arguably, in assessing, processing, handling and dealing with the Plaintiff's  
8 overpayment of benefits that lies at the core of her tortious negligence claim, the SSA or the SSA  
9 employee working on Plaintiff's case exercised due care in the execution of various statutes or  
10 regulations, or failed to exercise or perform a discretionary function or duty on the part of the  
11 SSA. See (Ex. A at 6-9) (citing statutes and regulations pertaining to overpayment such as Section  
12 1631(b)(1)(B) of the Social Security Act (42 U.S.C. § 1983(b)(1)(B)), 20 CFR §§ 404.508(a),  
13 416.535, 416.537(a), 416.550, 416.551, 416.552, 416.553, 416.554, 416.555, 416.560, 416.570).  
14 Thus, Plaintiff's tortious negligence claim would be barred under the FTCA (26 U.S.C. § 2680)  
15 and 20 C.F.R. §429.101(a) for at least this reason.

16           Moreover, Plaintiff does not appear to have complied completely with all the provisions of  
17 the FTCA, in particular 28 U.S.C. § 2675(a), which requires that, under the FTCA, a federal court  
18 action against the United States (on behalf of a federal agency such as the SSA) "**shall not be**  
19 **instituted**" unless "the claimant **shall have first presented the claim to the appropriate Federal**  
20 **agency and his claim shall have been finally denied by the agency in writing and sent by**  
21 **certified or registered mail.**" 28 U.S.C. § 2675(a) (emphasis added). Here, Plaintiff has not  
22 alleged in her Complaint or elsewhere that she presented her tort claim of negligence to the SSA  
23 first before filing suit, nor is there any evidence that the negligence claim was finally denied by the  
24 SSA in writing and sent by certified or registered mail. (Id.) Title 28 U.S.C. § 2675(a) also  
25 provides that: "The failure of an agency to make final disposition of a claim within six months  
26 after it is filed shall, at the option of the claimant any time thereafter, be deemed a final denial of  
27 the claim for purposes of this section." Plaintiff has not alleged the above either. Thus, Plaintiff's  
28 FTCA claim is improper and must be dismissed.

1           **B.       Whether The Government Waived Its Sovereign Immunity**

2           Defendant argues that the government has not waived sovereign immunity here (Def.'s  
3 Mot. at 4-5) since there is a specific and limited waiver of sovereign immunity in 42 U.S.C. §§  
4 405(g) and 405(h) allowing judicial review of SSA decisions (Id. at 5-6) and because Plaintiff's  
5 negligence claim "arises under" the Social Security Act due to it exclusively involving the  
6 administration of overpayment of benefits, there is no jurisdiction in this case (Id. at 6-9).  
7 Defendant also asserts that in some situations, such as an auto accident involving an SSA worker  
8 acting in the scope of her employment, a tort claim against the United States and the SSA under  
9 the FTCA may be appropriate but Congress has made clear that a plaintiff cannot seek relief from  
10 the SSA's handling of her benefits by bringing a tort claim due to Congress prescribing a different  
11 remedy (and mechanism to administer those remedies) for that situation via the Social Security  
12 Act. (Id. at 8.) In response, Plaintiff argues that she does not seek judicial review of the ALJ's  
13 decision, as such 42 U.S.C. §§ 405(g) and 405(h) are inapplicable (Pl.'s Opp'n at 4-5), that  
14 Defendant has not and cannot cite to any authority that precludes Plaintiff's claim for negligence  
15 (Id. at 5-6), that this Court has jurisdiction over Plaintiff's claim of negligence (Id. at 6-8), that  
16 negligence claims are permitted against the United States outside of auto accidents (Id. at 8), and  
17 that Congress and the SSA have waived the government's sovereign immunity regarding Plaintiff's  
18 claim for negligence (Id. at 8-9).

19           The Court finds Plaintiff's arguments unavailing. First, the Court lacks subject matter  
20 jurisdiction over Plaintiff's tort claim because it was improperly brought under the FTCA. (Pl.'s  
21 Opp'n at 6-7.) Second, although Plaintiff cites the case of *MB Financial Group, Inc. v. United*  
22 *States Postal Service*, 545 F.3d 814, 815 (9th Cir. 2008), she fails to note that the FTCA claim was  
23 properly pled in that case (e.g., alleging the filing of a claim to the U.S. Postal Service ("USPS")  
24 first and having the USPS respond before filing suit). The negligence complained of in that case  
25 also did not fall under one of the exceptions outlined in 26 U.S.C. § 2680 (e.g. negligent denial of  
26 use of a post office box is not the same as "any claim arising out of the loss, miscarriage, or  
27 negligent transmission of letters or postal matter" which is exempted by 26 U.S.C. § 2680(b)),  
28 whereas here, the SSA's handling arguably falls under the exemption specified in 26 U.S.C. §

1 2680(a). Id. Moreover, unlike the SSA with its procedures outlined in 42 U.S.C. §§ 405(g) and  
2 405(h), the USPS does not have a similar administrative mechanism to handle claims for benefits.  
3 Third, Congress and the SSA have not waived the government's sovereign immunity for Plaintiff's  
4 claim for negligence because the only limited waiver of sovereign immunity lies within 42 U.S.C.  
5 §§ 405(g) and 405(h), where parties can seek judicial review of SSA decisions from ALJs.

6 Furthermore, although Plaintiff argues that she does not seek judicial review of the ALJ's  
7 decision, and is instead seeking tort damages under the FTCA for the SSA's grossly negligent  
8 handling of her overpayments, her FTCA claim is deficient and should be dismissed, as described  
9 above. Even assuming the valid compliance of her FTCA claim, Plaintiff is still barred from suing  
10 the federal government due to the doctrine of sovereign immunity. Hence, the only avenue  
11 available to her is seeking judicial review of an SSA decision via 42 U.S.C. §§ 405(g) and 405(h).  
12 Here, Plaintiff simply did not exhaust her administrative remedies because she never appealed the  
13 ALJ's decision. (Def.'s Mot. at 3.) Plaintiff also no longer has the opportunity to appeal the ALJ's  
14 decision because a written appeal must be filed within 60 days of the date that she received the  
15 notice of the ALJ's decision, August 6, 2015, and it is clear that much more than 60 days have  
16 passed since that date. (Ex. A at 3.) Nonetheless, the notice of decision states that the Appeals  
17 Council will dismiss a late request "unless you show you had a good reason for not filing it on  
18 time," so Plaintiff technically may still be able to appeal the ALJ's decision if she provides a good  
19 enough reason for filing it at such a late period. As a result, Plaintiff's failure to timely appeal the  
20 ALJ's decision in order to exhaust all her administrative remedies does not somehow permit her to  
21 file a negligence tort claim against the U.S. government under the FTCA.

22 Plaintiff's negligence tort claim is barred by the doctrine of sovereign immunity, because  
23 the only option available to her – where sovereign immunity has been waived in a limited  
24 circumstance – is seeking judicial review of a final SSA decision under 42 U.S.C. §§ 405(g) and  
25 405(h). The last sentence of 42 U.S.C. § 405(h) also bears reiteration because it states that: "No  
26 action against the United States, the Commissioner of Social Security, or any officer or employee  
27 thereof shall be brought under section 1331 or 1346 of title 28 to recover on any claim **arising**  
28 **under** this subchapter." 42 U.S.C. § 405(h) (emphasis added).

1           The Court finds that the administration and handling, however negligent, of Plaintiff's  
2 overpayment of benefits undeniably "arises under" the Social Security Act because it deals  
3 exclusively with the daily operations, legal procedures and protocol of the SSA for handling  
4 overpayments. See *Weinberger*, 422 U.S. at 760-61 (The phrase "arising under" includes a claim  
5 in which "both standing and the substantive basis for the presentation" of the claim is the Social  
6 Security Act).

7           The Court also disagrees with Plaintiff's characterization of the cases cited by Defendant  
8 because contrary to Plaintiff's assertions, all of those cases involved a plaintiff attempting to allege  
9 claims clearly "arising under" the Social Security Act but just under the guise of tortious,  
10 constitutional or non-SSA claim clothing. (Pl.'s Opp'n at 5-6.) In fact, various cases in the Ninth  
11 Circuit and from this Court have dismissed claims deceptively pled as tort or non-SSA claims  
12 because they still undoubtedly arose under the Social Security Act. See *Hooker*, 858 F.2d at 528-  
13 29 (the Ninth Circuit holding that section 405(h) barred plaintiffs' state law tort claim under the  
14 FTCA for negligent termination of disability benefits because that claim was "arising under" the  
15 Social Security Act); *Marin*, 769 F.2d at 592 (the Ninth Circuit finding that section 405(h) barred  
16 a FTCA tort claim alleging the SSA's negligent failure to process cost reports because that cause  
17 of action was "anticipated by the statute" of section 405(h)); *Lopez*, 2017 WL 2118313, at \*1, \*4  
18 (Because "there is no 'final decision' under § 405(g), and because [plaintiff]'s [tort- and  
19 constitutional-based claims for the SSA's improper disability determination and related conduct  
20 such as tampering with the information in his file, which led to his identity being stolen,] 'arise  
21 under' the Social Security Act, his claims fall outside the government's limited waiver of sovereign  
22 immunity in this context."). More directly on point, a case from this Court dismissed a tort claim  
23 pled against the SSA for negligently handling the overpayment of benefits. See *Walker v. Colvin*,  
24 No. 13-5037-BLF, 2014 WL 5462425, at \*6 (N.D. Cal. Oct. 26, 2014) ("Plaintiff appears to  
25 contend that the SSA was negligent in overpaying benefits and in recovering the overpaid  
26 benefits...To the extent Plaintiff seeks tort damages for those alleged injuries, the Court agrees  
27 with Defendant that [*Schweiker*, 487 U.S. at 412, 414, 429 (holding that § 405(h) barred Bivens-  
28 based due-process claims for the wrongful termination of benefits)] forecloses such damages.").


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The Court is in accord with the above precedent and therefore finds that because Plaintiff's negligence tort claim arising from the SSA's handling of the administration and recovery of her overpayment of benefits clearly "arises under" the Social Security Act, and because Plaintiff has not effectuated a "final decision" under § 405(g) by timely appealing the ALJ's decision, Plaintiff's Complaint falls outside of the government's limited waiver of sovereign immunity and, hence, must be dismissed for lack of subject matter jurisdiction.

Therefore, Defendant's Motion to Dismiss is GRANTED with prejudice, and without leave to amend, because it does not appear that Plaintiff's Complaint can be cured by the allegation of other facts or with any other amendment.

IT IS SO ORDERED.

Dated: October 29, 2018

  
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KANDIS A. WESTMORE  
United States Magistrate Judge