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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

JACK RUBEN WADEL,

vs.

UNITED STATES OF AMERICA
(erroneously sued as Social Security
Administration),

Plaintiff,

Defendant.

CASE NO. 10 CV 0756 MMA (JMA)

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

[Doc. No. 5]

Before the Court is Defendant United States of America's motion to dismiss Plaintiff Jack Ruben Wadel's complaint.¹ [Doc. No. 5.] Plaintiff did not oppose Defendant's motion. The Court in its discretion under Civil Local Rule 7.1(d)(1) found Defendant's motion suitable for decision on the papers and without oral argument. [Doc. No. 7.] For the reasons set forth below, the Court **GRANTS** Defendant's motion to dismiss.

BACKGROUND

This action arises from events related to Plaintiff's state conviction for resisting an executive officer, and the resulting cessation of his social security benefits during his incarceration. On March 8, 2010, Plaintiff, proceeding *pro se*, filed a complaint in the San Diego Superior Court against the Social Security Administration, which appears to allege various tort and breach of contract claims. [Doc. No. 1, Exhibit 1.]

¹ Plaintiff erroneously sued Defendant as Social Security Administration.

1 Although portions of the complaint are virtually incomprehensible, including Plaintiff's
2 enumeration of his purported claims, the Court has discerned the following allegations. Plaintiff
3 asserts the Social Security Administration ("SSA") is liable for breach of contract for its "failure to
4 administer benefits [sic] & intentional infliction of punitive damages." [Doc. No. 1, p.5.]²
5 According to Plaintiff, the SSA has wrongfully withheld his social security benefits of \$800 per
6 month for approximately twenty-one months, which caused his bank account balance to drop
7 below zero, prohibited Plaintiff from paying his creditors, impacted his credit score, and caused
8 Plaintiff to become homeless. [Id. at p.10.] Plaintiff seeks \$16,800 in damages for unpaid social
9 security benefits, plus interest at the rate of 55% and attorney's fees. [Id. at p.5.]

10 Plaintiff further alleges the SSA participated in "obstructions of justice" and "[o]ppression
11 of [his] character" by wrongfully producing his confidential medical records to the prosecution
12 during his state criminal trial to prejudice him. [Id. at p.9-10.] Plaintiff asserts the SSA produced
13 records that contained "alot [sic] of fiction and slander," for fraudulent purposes to enable the SSA
14 to stop paying Plaintiff his monthly benefit check. [Id. at p.8.] Finally, Plaintiff alleges generally,
15 that social security recipients such as himself receive "[u]nfair and unequal sentences," and are
16 treated more "cruelly" than others in the prison system. [Id. at p.10.]

17 Plaintiff attempted to serve Defendant with his complaint on or about March 10 or March
18 15, via first class mail. [Id. at p.15-17.] On April 12, 2010, Defendant removed the action to the
19 Southern District of California. [Id. at p.1-2.] On June 11, 2010, Defendant moved to dismiss
20 Plaintiff's complaint for lack of subject matter jurisdiction and failure to state a claim upon which
21 relief may be granted. [Doc. No. 5.]

22 LEGAL STANDARD

23 A complaint survives a motion to dismiss if it contains "enough facts to state a claim to
24 relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). The
25 court reviews the contents of the complaint, accepting all factual allegations as true, and drawing
26 all reasonable inferences in favor of the nonmoving party. *Knievel v. ESPN*, 393 F.3d 1068, 1072

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28 ² Because this matter is before the Court on a motion to dismiss, the Court must accept as true
the allegations of the complaint in question. *Hospital Bldg. Co. v. Rex Hospital Trustees*, 425 U.S.
738, 740 (1976).

1 (9th Cir. 2005). When a plaintiff is proceeding *pro se*, the Court has a duty to liberally construe
2 his pleadings. *Resnick v. Hayes*, 213 F.3d 443, 447 (9th Cir. 2000). In giving liberal interpretation
3 to a *pro se* complaint, however, the court may not “supply essential elements of claims that were
4 not initially pled.” *Ivey v. Board of Regents of the University of Alaska*, 673 F.2d 266, 268 (9th
5 Cir. 1982). It is improper for a court to assume “the [plaintiff] can prove facts that [he] has not
6 alleged.” *Associated General Contractors of California, Inc. v. California State Council of*
7 *Carpenters*, 459 U.S. 519, 526 (1983). Similarly, notwithstanding the court’s deference to
8 plaintiff’s allegations, the reviewing court need not accept “legal conclusions” as true. *Ashcroft v.*
9 *Iqbal*, -- U.S. -- , 129 S. Ct. 1937, 1949 (2009).

10 “When there are well-pleaded factual allegations, a court should assume their veracity and
11 then determine whether they plausibly give rise to an entitlement to relief.” *Id.* A claim has “facial
12 plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable
13 inference that the defendant is liable for the misconduct alleged.” *Id.* at 1949. “The plausibility
14 standard is not akin to a ‘probability requirement,’ but it asks for more than a sheer possibility that
15 a defendant has acted unlawfully.” *Id.* “Where a complaint pleads facts that are ‘merely
16 consistent with’ a defendant’s liability, it ‘stops short of the line between possibility and
17 plausibility of entitlement to relief.’” *Id.* (citing *Twombly*, 550 U.S. at 557).

18 DISCUSSION

19 **I. SOVEREIGN IMMUNITY & THE FEDERAL TORT CLAIMS ACT**

20 Defendant first argues the Court lacks subject matter jurisdiction over Plaintiff’s tort claims
21 because he did not file an administrative claim prior to pursuing his claims in court. [Doc. No. 5,
22 p.2.] As a sovereign, the United States is immune from suit except to the extent it consents to be
23 sued. *Marley v. United States*, 567 F.3d 1030, 1034 (9th Cir. 2009). Sovereign immunity extends
24 to agencies of the United States, including the SSA. *See Rodriguez-Vallejo v. MVM, Inc.*, 621 F.
25 Supp. 2d 21, 25 (D.C. Puerto Rico 2009). The Federal Tort Claims Act (“FTCA”), however,
26 provides “a limited waiver of the federal government’s historical immunity from tort liability.”
27 *Marley*, 567 F.3d at 1034. Under the FTCA, plaintiffs may bring “tort claims [against the United
28 States] arising out of the negligent conduct of government employees acting within the scope of

1 their employment” if they comply with the guidelines and limitations provided in 28 U.S.C. §§
2 2671 *et seq.* *Terbush v. United States*, 516 F.3d 1125, 1128 (9th Cir. 2008). As applicable here,
3 the FTCA requires a plaintiff to provide written notice to the federal agency responsible for the
4 alleged wrongful conduct before instituting an action against the United States. 28 U.S.C. §§
5 2401(b), 2675(a); *Avery v. United States*, 680 F.2d 608, 609 (1982). If a plaintiff fails to provide
6 the required notice, the court is without jurisdiction to adjudicate plaintiff’s grievances. *Martin v.*
7 *United States*, 436 F. Supp. 535, 538 (S.D. Cal. 1977) (“The timely filing of an administrative
8 claim has long been recognized to be a jurisdictional prerequisite to suit under the Federal Tort
9 Claims Act.”) (citing *Caton v. United States*, 495 F.2d 635 (9th Cir. 1974)).

10 Accordingly, Defendant argues Plaintiff’s tort claims should be dismissed with prejudice
11 for lack of subject matter jurisdiction, because a search of the SSA’s FTCA records revealed that
12 “no administrative tort claim has been filed against SSA by JACK RUBEN WADEL.” [Doc. No.
13 5-2, Decl. of Mark Ledford, ¶¶2-3.] Plaintiff did not oppose Defendant’s motion. However,
14 Plaintiff did check the box on his form complaint indicating that he has complied with the requisite
15 claim statute. [Doc. No. 1, p.5.] In cases such as this, where the defendant asserts the plaintiff has
16 not complied with the FTCA’s notice requirements, the Court “may rely on evidence extrinsic to
17 the pleadings and resolve factual disputes relating to jurisdiction.” *Pineda v. Golden Valley*
18 *Health Centers*, 2010 U.S. Dist. LEXIS 64217 *5-6 (E.D. Cal.) (citing *St. Clair v. City of Chico*,
19 880 F.2d 199, 201 (9th Cir. 1989)); *Meza v. Davis*, 2009 U.S. Dist. LEXIS 48160 *3-4 (S.D. Cal.)
20 (citing *Safe Air for Everyone v. Dole*, 373 F.3d 1035, 1039 (9th Cir. 2004)). Because Plaintiff
21 offers no evidence to contradict Mark Ledford’s declaration, the Court concludes he has failed to
22 demonstrate compliance with the FTCA’s notice requirement. Accordingly, the Court lacks
23 jurisdiction over Plaintiff’s tort claims premised on negligent conduct by government employees,
24 and those claims are **DISMISSED** without prejudice.

25 **II. PLAINTIFF’S FRAUD AND SLANDER CLAIMS ARE BARRED BY SECTION 2680(h)**

26 Next, Defendant argues the Court also lacks jurisdiction over Plaintiff’s fraud and slander
27 claims because they are barred by sovereign immunity. [Doc. No. 5, p.3.] As discussed above, the
28 FTCA provides a partial waiver to the United States’ sovereign immunity—section 2680 identifies

1 several types of actions exempt from the FTCA's operation. *See* 28 U.S.C. § 2680. As applicable
2 here, section 2680(h) provides the United States does not consent to sued for "[a]ny claim arising
3 out of . . . libel, slander, misrepresentation, deceit or interference with contract rights." *Id.* at
4 2680(h); *see also San Francisco v. United States*, 443 F.Supp. 1116, 1129 (N.D. Cal. 1977).
5 Accordingly, the express language of section 2680(h) bars Plaintiff's alleged slander claims. *See*
6 *also Roundtree v. United States*, 40 F3d 1036, 1039 n.2 (9th Cir. 1994). In addition, the Ninth
7 Circuit has held, that "claims against the United States for fraud or misrepresentation by a federal
8 officer are absolutely barred by 28 U.S.C. § 2680(h)." *Owyhee Grazing Assoc., Inc. v. Field*, 637
9 F.2d 694, 697 (9th Cir. 1981) (citation omitted). Because Plaintiff's claims for fraud and slander
10 are barred by 28 U.S.C. § 2680(h), any attempt to amend would be futile. Accordingly, Plaintiff's
11 fraud and slander claims are **DISMISSED** with prejudice, and without leave to amend.

12 **III. CESSATION OF PLAINTIFF'S SOCIAL SECURITY BENEFITS**

13 Plaintiff attempts to allege a breach of contract claim for "Failure to administer benefits
14 [sic] & intentional infliction of punitive damages." [Doc. No. 1, p.5.] However, because social
15 security benefits are not administered pursuant to contract, nor does Plaintiff allege the existence
16 of a contract, the Court construes this claim as a challenge to the SSA's suspension and
17 termination of certain benefits during his incarceration.

18 Defendant asserts Plaintiff's claim for unpaid social security benefits must be dismissed
19 because the SSA is prohibited from paying benefits to individuals, such as Plaintiff, who are
20 "confined in a jail, prison, or other penal institution or correctional facility pursuant to his
21 conviction of a criminal offense." [Doc. No. 5, p.4 (citing 42 U.S.C. § 402(x)(1)(A)(i); 42 U.S.C.
22 § 423(j); 42 U.S.C. § 1382(e)(1)(A); 20 C.F.R. §§ 404.468, 416.1325 (2010)).] The Court agrees.
23 As evidenced by the mailing address Plaintiff provided on each of his filings, he is confined to a
24 state-operated mental hospital.³ In addition, Plaintiff's complaint references his incarceration and
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27 ³ Plaintiff indicated his mailing address as Coalinga State Hospital, and most recently
28 Atascadero State Hospital. [Doc. No. 1, p.4 (complaint); Doc. No. 6, p.2 (Case Management
Statement, not accepted for filing).] Both facilities provide treatment for mentally ill inmates. *See*
California Department of Mental Health's website, *available at* <http://www.dmh.ca.gov/default.asp>.

1 the state conviction that resulted in his confinement. [Doc. No. 1, p.5, 8-10.]⁴ Thus, in the
2 absence of any evidence to the contrary, Plaintiff's current status as an inmate precludes the SSA
3 from disbursing benefit payments to Plaintiff at this time.

4 Further, Defendant provides evidence that it lawfully suspended and later terminated
5 Plaintiff's social security benefits. [Doc. No. 5, p.4.] Defendant explains,

6 Plaintiff's Title II and Title XVI benefits were suspended in December
7 2007 due to his incarceration following his felony conviction. His Title
8 II benefits remain suspended while he is incarcerated, and his Title
9 XVI payments were permanently terminated on November 1, 2008.
[Doc. No. 5-3, Garcia Declaration.] See 20 C.F.R. § 416.1335 (SSA
terminates eligibility for Title XVI payments following 12 consecutive
months of suspension).

10 [*Id.* (signal in original).] To obtain judicial review of these administrative actions, Plaintiff must
11 demonstrate he received a "final decision of the Commissioner of Social Security . . . after a
12 hearing to which [the plaintiff] was a party." *Laurie Q. v. Callahan*, 973 F. Supp. 925, 929 (N.D.
13 Cal. 1997) (brackets in original); 42 U.S.C. § 405(g). "A final [decision] consists of two elements:
14 the presentment of a claim to the Secretary and the exhaustion of administrative remedies. The
15 presentment requirement is jurisdictional, and therefore, cannot be waived by the Secretary or the
16 courts. The exhaustion requirement . . . is not jurisdictional, and thus, is waivable by either the
17 Secretary or the courts." *Johnson v. Shalala*, 2 F.3d 918, 921 (9th Cir. 1993) (citing *Mathews v.*
18 *Eldridge*, 424 U.S. 319, 330, (1975)); 42 U.S.C. § 405(g); *Del Rosa Villa v. Shalala*, 1997 U.S.
19 Dist. LEXIS 13606 *17 (C.D. Cal.) (citing 42 U.S.C. § 405(h)). Thus, if Plaintiff has not satisfied
20 the presentment requirement, the Court lacks subject matter jurisdiction to hear Plaintiff's claims.
21 See *Situ v. Leavitt*, 240 F.R.D. 551, 555 (N.D. Cal. 2007) (citation omitted); *Laurie Q.*, 973 F.
22 Supp. at 929.

23 Here, Plaintiff has not alleged he filed an administrative claim in satisfaction of the
24 presentment requirement, nor that he has exhausted the administrative remedies available to
25 challenge the SSA's decision to suspend and later terminate certain benefits. In addition,
26 Defendant presented undisputed evidence that a thorough review of the SSA's records indicated

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28 ⁴ The California Court of Appeal's unpublished decision affirming Plaintiff's state conviction
for resisting an executive officer in violation of Penal Code section 69 is available at *People v. Wadel*,
2009 Cal. App. Unpub. LEXIS 8570 (Oct. 28, 2009).


1 Plaintiff did not seek administrative review of the SSA's suspension of his Title II benefits in
2 December 2007 (for the duration of his incarceration), nor the termination of his Title XVI
3 benefits on November 1, 2008 following Plaintiff's confinement for twelve consecutive months.
4 [Doc. No. 5-3, Decl. of Joanna Garcia ¶¶2-4.] Accordingly, the Court is without jurisdiction to
5 review the SSA's decision to suspend and partially terminate Plaintiff's benefits. Plaintiff's claims
6 challenging these actions are **DISMISSED** without prejudice.

7 **CONCLUSION**

8 For the reasons stated herein, the Court **GRANTS** Defendant's motion to dismiss.
9 Plaintiff's claims for fraud and slander are **DISMISSED WITH PREJUDICE**, and without leave
10 to amend. Plaintiff's remaining tort claims are **DISMISSED WITHOUT PREJUDICE**, and with
11 leave to amend to demonstrate compliance with the Federal Tort Claims Act. Plaintiff's claims
12 challenging the SSA's suspension and termination of his social security benefits are **DISMISSED**
13 **WITHOUT PREJUDICE**, and with leave to amend to establish the existence of a judicially
14 reviewable final order. Plaintiff shall have **thirty (30) days** from the date this order is entered to
15 submit his amended complaint.

16 **IT IS SO ORDERED.**

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18 DATED: July 9, 2010

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20 Hon. Michael M. Anello
21 United States District Judge

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