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CLERK US DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

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8 **UNITED STATES DISTRICT COURT**  
9 **SOUTHERN DISTRICT OF CALIFORNIA**  
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11 EDGARDO ISRAEL ORTEGA-CHAVEZ,  
12 Plaintiff,  
13 vs.  
14 UNITED STATES OF AMERICA,  
15 Defendant.  
16

CASE NO. 11-CV-1507 BEN (DHB)  
**ORDER GRANTING  
DEFENDANT'S MOTION FOR  
SUMMARY JUDGMENT AND  
DENYING PLAINTIFF'S  
REQUEST FOR LEAVE TO  
AMEND**  
[ECF Nos. 15, 28]

17 United States border patrol agents allegedly shot a man who was on Mexican soil, less than a  
18 football field from the United States border. The man filed suit against the United States under the  
19 Federal Tort Claims Act ("FTCA"). The United States asserts that it is immune from liability under  
20 an exception to the FTCA's waiver of sovereign immunity for claims "arising in a foreign country."  
21 This Court agrees and **GRANTS** summary judgment for the government. The Court also **DENIES**  
22 Plaintiff's belated request for leave to amend.  
23

24 **BACKGROUND**

25 Plaintiff Edgardo Israel Ortega-Chavez seeks damages from the United States for injuries  
26 allegedly sustained in a shooting at the U.S.-Mexico border in August 2008. Plaintiff alleges that  
27 Border Patrol agents shot him while dispersing a crowd on the Mexican side of the border. Plaintiff  
28 testified at a deposition, that he was on Mexican soil when the incident occurred. Mot. for Summ. J.,  
Ex. 1. Plaintiff also appears to have testified that the agents crossed into Mexico before firing. *Id.*

1 Plaintiff filed suit in July 2011. The complaint asserts a single cause of action against the  
2 United States under the FTCA, 28 U.S.C. § 1346(b). ECF No. 1. In a case management order,  
3 Magistrate Judge Louisa Porter set May 7, 2012 as the deadline for amendment of the pleadings. ECF  
4 No. 13. The deadline passed without Plaintiff filing a motion to amend, and the government  
5 apparently notified Plaintiff of its intent to file for summary judgment. Plaintiff's counsel responded  
6 by letter dated June 5, declaring that he would "immediately seek court permission to allow us to  
7 amend the *Ortega* complaint and to pursue claims under the ATS [Alien Tort Statute]." Opp'n to  
8 Def.'s Mot. for Summ. J., Ex. B. On June 20, the government moved for summary judgment. ECF.  
9 No. 15. Not only did it address the FTCA claim in its brief, it addressed a *potential* ATS claim,  
10 presumably as a safeguard against Plaintiff's possible amendment. In his opposition, Plaintiff argues  
11 his case under both the FTCA and ATS.

12 On November 20, with the government's motion still pending, Plaintiff finally sought leave  
13 to amend. ECF No. 28. The Court addresses both parties' motions in this Order.

## 14 LEGAL STANDARD

### 15 A. SUMMARY JUDGMENT

16 Summary judgment is appropriate "if the movant shows that there is no genuine dispute as to  
17 any material fact and the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(a). The  
18 Court "must view the evidence on summary judgment in the light most favorable to the non-moving  
19 party and draw all reasonable inferences in favor of that party." *Bank of N.Y. v. Fremont Gen. Corp.*,  
20 523 F.3d 902, 909 (9th Cir. 2008).

### 21 B. LEAVE TO AMEND

22 Once a court sets a deadline for the amendment of pleadings in a case management order, that  
23 schedule "may be modified only for good cause and with the judge's consent." FED. R. CIV. P.  
24 16(b)(4). "Rule 16(b)'s 'good cause' standard primarily considers the diligence of the party seeking  
25 the amendment." *Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 604, 609 (9th Cir. 1992).

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1 deposition, he testified he was “35 to 40 meters” inside Mexico. Mot. for Summ. J., Ex. 1. The harm,  
2 therefore, occurred on foreign soil. See *Hernandez v. United States*, 802 F. Supp. 2d 834, 844 (W.D.  
3 Tex. 2011) (holding that the foreign country exception barred claims based on the fatal shooting of a  
4 boy in Mexico by a Border Patrol agent on the other side of the border). Plaintiff’s effort to distinguish  
5 this case from *Sosa* by asserting that the border patrol’s domestic training regimen was the “exclusive”  
6 proximate cause of his injury ignores the Court’s unambiguous interpretation of the statutory text. The  
7 United States’ motion for summary judgment is **GRANTED**.

8 **B. MOTION FOR LEAVE TO AMEND. ECF No. 28.**

9 Before closing the case, the Court must decide whether Plaintiff should be allowed to amend  
10 his complaint. Plaintiff seeks to add a claim under the Alien Tort Statute.<sup>1</sup> His request for leave  
11 comes more than six months after the amendment cut-off date.

12 Typically, motions for leave to amend are governed by Federal Rule of Civil Procedure  
13 15(a)(2), which provides that a court “should freely give leave when justice so requires.” Once a  
14 scheduling order has issued, however, an untimely motion must satisfy the more stringent requirements  
15 of Rule 16. *Johnson*, 975 F.2d at 607-08. The purpose of a scheduling order is to assure that, at some  
16 point, pleadings become fixed. FED. R. CIV. P. 16(b) advisory committee’s note. It “is not a frivolous  
17 piece of paper, idly entered, which can be cavalierly disregarded by counsel without peril.” *Johnson*,  
18 975 F.2d at 610 (citation and quotation marks omitted). Rule 16(b) requires “good cause” to modify  
19 a scheduling order. The “good cause” standard “primarily considers the diligence of the party seeking  
20 the amendment. . . . If that party was not diligent, the inquiry should end.” *Id.* at 609.

21 Judge Porter’s scheduling order stated that motions to amend “shall be filed on or before May  
22 7, 2012.” Scheduling Order 1. Plaintiff failed to meet that deadline and fails now to demonstrate good  
23 cause to modify the order. That Plaintiff discussed his ATS theory in response to the government’s  
24 motion for summary judgment does not change the Court’s conclusion. See *Wasco Prods., Inc. v.*  
25 *Southwall Techs., Inc.*, 435 F.3d 989, 992 (9th Cir. 2006) (“Simply put, summary judgment is not a  
26 procedural second chance to flesh out inadequate pleadings.”).

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27  
28 <sup>1</sup> The Alien Tort Statute provides: “The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.” 28 U.S.C. § 1350.

1 The Court also suspects amendment would be futile. In actions against the United States,  
2 “[t]he waiver of sovereign immunity is a prerequisite to federal-court jurisdiction.” *Tobar v. United*  
3 *States*, 639 F.3d 1191, 1195 (9th Cir. 2011). “Where a suit has not been consented to by the United  
4 States, dismissal of the action is required . . . [because] the existence of such consent is a prerequisite  
5 for jurisdiction.” *Dunn & Black, P.S. v. United States*, 492 F.3d 1084, 1088 (9th Cir. 2007) (quotation  
6 marks and citation omitted). The ATS is a jurisdiction statute only. *Tobar*, 639 F.3d at 1196. It does  
7 not waive sovereign immunity. *Id.* As a result, “any party asserting jurisdiction under the Alien Tort  
8 Statute must establish, independent of that statute, that the United States has consented to suit.” *Id.*  
9 Plaintiff fails to cite specific language that explicitly authorizes a lawsuit against the United States.

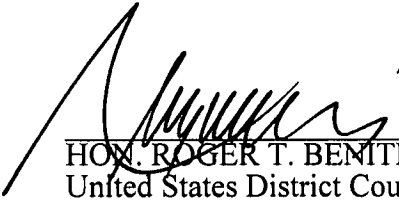
10 For the reasons stated above, the Court **DENIES** Plaintiff leave to amend.

11 **CONCLUSION**

12 The United States’ Motion for Summary Judgment is **GRANTED**. Plaintiff’s Motion for  
13 Leave to Amend is **DENIED**. The hearing on Plaintiff’s motion, scheduled for December 17, is  
14 **VACATED**.

15 **IT IS SO ORDERED.**

16 DATED: November 28, 2012

  
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HON. ROGER T. BENITEZ  
United States District Court Judge

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