

1 A district court has jurisdiction to review a Magistrate Judge's report and
2 recommendation. Fed. R. Civ. P. 72(b). "The district judge must determine de novo any part
3 of the magistrate judge's disposition that has been properly objected to." *Id.* "A judge of the
4 court may accept, reject, or modify, in whole or in part, the findings or recommendations
5 made by the magistrate judge." 28 U.S.C. § 636(b)(1).

6 The R&R cites older precedents for the principle that, ordinarily, courts do not
7 consider the validity of a proposed amended pleading in deciding whether to grant leave to
8 amend. (R&R at 2:5–8.) While this standard has been repeated in some newer cases in
9 district courts within this circuit, see, e.g., *Green Valley Corp. v. Caldo Oil Co.*, 2011 WL
10 1465883, at *6 (N.D. Cal., Apr. 18, 2011) (citing cases), it appears to be a holdover from the
11 old, lenient pleading standard under *Conley v. Gibson*, 355 U.S. 41 (1957). After *Conley's*
12 overruling by *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) and *Ashcroft v. Iqbal*, 556
13 U.S. 662 (2009), it has become much easier for federal courts to determine when
14 amendment would be futile. And when it is apparent that amendment would be futile, and
15 amending would only result in needless delay and expense, a federal court should deny
16 leave. See Fed. R. Civ. P. 1. In the Court's own experience, denying leave to amend for this
17 reason is not unusual. The Court therefore disapproves of this legal standard and the R&R
18 is deemed modified to omit it.

19 When he was preparing the R&R, Judge Skomal did not have the benefit of Rivera-
20 Vazquez's representation that he had exhausted his FTCA claims. The R&R's
21 recommendation is correct insofar as it recommends denying leave to amend the complaint
22 to add FTCA claims where exhaustion is not alleged. But in light of Rivera-Vazquez's
23 representations, it is clear he is now prepared to allege exhaustion. The R&R is therefore
24 deemed modified to recommend allowing amendment subject to those conditions.

25 Because the R&R recommended denying leave to amend, it had no occasion to
26 address the merits of the proposed FTCA claims. Rivera-Vazquez proposed adding a claim
27 for assault and battery, a claim for excessive force, and a claim for negligence. The assault
28 and battery claim is an intentional tort, and as such is specifically excluded from the FTCA's

1 sovereign immunity waiver. See 28 U.S.C. § 2680(h). The excessive force claim is
2 somewhat more complex, because as Rivera-Vazquez proposes to plead it, it is a hybrid
3 between assault and excessive force by law enforcement officers incident to arrest, which
4 could be either intentional or negligent. To the extent it is an intentional tort, it is barred. But
5 even if it is not barred, use of excessive force in violation of constitutional rights is not a tort
6 that a private person can commit. As such, it cannot be brought under the FTCA. See
7 *Reynosa v. Prater*, 2013 WL 5937223, at *4 (S.D.Cal., Nov. 4, 2013) (citing cases for the
8 principle that an excessive force claim against law enforcement officers is improper under
9 the FTCA).

10 The proposed negligence claim is not necessarily barred, but it is inadequately pled.
11 In part it is merely a reiteration of the excessive force claim, but it mentions negligence as
12 well. It identifies both direct liability for harm the officers caused, and employer liability on
13 some kind of failure to train theory, but without specifying what the United States failed to
14 do. It also, without explanation mentions failure to “timely cause the administration of life-
15 saving aid to a person inside a burning car.” (Prop’d Second Amd. Compl., ¶ 65.) But the
16 pleadings do not refer to any kind of car fire, or injury from burning; the only alleged injury
17 was from a beating.

18 Adding the assault and battery and excessive force claims would therefore be futile,
19 and will be denied. Rivera-Vazquez may be able to amend to add a negligence claim, but
20 he has not shown that he can successfully do so. Accordingly, his request is **DENIED**
21 **WITHOUT PREJUDICE** as to the negligence claim.

22 With these modifications, the R&R is **ADOPTED**, and the *ex parte* motion for leave
23 to amend (Docket no. 10) is **DENIED**. Rivera-Vazquez may not amend to add FTCA claims
24 for assault and battery or excessive force. But if he thinks he can successfully add a claim

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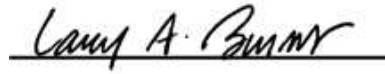
1 for negligence, he should file a renewed *ex parte* application by **May 18, 2016**. His renewed
2 application must show that he can remedy all the defects this order has identified.

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4 **IT IS SO ORDERED.**

5 DATED: May 2, 2016

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Handwritten signature of Larry A. Burns in black ink, written over a horizontal line.

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HONORABLE LARRY ALAN BURNS
United States District Judge

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