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8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA
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11 RONALD LEWIS MARTIN,
12 Plaintiff,
13 v.
14 UNITED STATES OF AMERICA, and
15 AVIATION SAFETY INSPECTOR
16 WAYNE LANER,
17 Defendants.

Case No.: 15-CV-278 JLS (DHB)

**ORDER: (1) GRANTING
DEFENDANTS' MOTION TO
DISMISS, AND
(2) DISMISSING WITH PREJUDICE
PLAINTIFF'S FIRST AMENDED
COMPLAINT**

(ECF No. 17)

18 Presently before the Court is Defendants the United States of America and Wayne
19 Laner's Motion to Dismiss. (MTD, ECF No. 17.) Also before the Court are Plaintiff
20 Ronald Lewis Martin's Opposition to (ECF No. 19) and the Defendants' Reply in Support
21 of (ECF No. 20) the MTD. The Court vacated the hearing and took the matter under
22 submission without oral argument pursuant to Civil Local Rule 7.1(d)(1). (ECF No. 21.)
23 Having considered the parties' arguments and the law, the Court **GRANTS** Defendants'
24 MTD (ECF No. 17) and **DISMISSES WITH PREJUDICE** Plaintiff's First Amended
25 Complaint (FAC, ECF No. 16).

26 **BACKGROUND**

27 Plaintiff is an air carrier pilot with over thirty years of piloting experience. (FAC
28 ¶ 16, ECF No. 16.) In 2006, Plaintiff was the Chief Pilot for Air Charter Express, Inc. (*Id.*

1 at ¶ 18.) While employed by Air Charter Express, Inc., Plaintiff had several confrontations
2 with Defendant Wayne Laner, the Federal Aviation Administration’s (FAA) Principal
3 Operations Inspector for Air Charter Express, Inc. (*Id.* at ¶¶ 18–19.) Although Plaintiff
4 prevailed on the merits of these confrontations, Plaintiff resigned from Air Charter Express,
5 Inc. to avoid further confrontations with Defendant Laner. (*Id.* at ¶ 19.)

6 In January 2007, Plaintiff began piloting for an FAA-certified air ambulance carrier,
7 Critical Air Medicine, Inc., based in San Antonio, Texas. (*Id.* at ¶ 20.) Later that year,
8 Plaintiff became San Diego Lead Pilot, earning over \$68,000 per year. (*Id.*) When Critical
9 Air Medicine, Inc. transferred its FAA Operating Certificate from San Antonio, Texas to
10 San Diego, California in early 2008, Defendant Laner was assigned as its FAA Principal
11 Operations Inspector. (*Id.* at ¶ 21.)

12 In February 2008, Defendant Laner flight-tested Critical Air Medicine, Inc.’s Chief
13 Pilot Bobby Wilson to determine his competence as a flight instructor. (*Id.* at ¶ 22.) Mr.
14 Wilson played the role of flight instructor, while Plaintiff acted as his student. (*Id.* at ¶ 23.)
15 Plaintiff’s decisions and actions during this check ride did not meet Defendant Laner’s
16 expectations, and Defendant Laner proceeded to prepare a failure report for Plaintiff at the
17 conclusion of the ride. (*Id.* at ¶¶ 24–25.) Plaintiff protested, noting that he was not acting
18 as pilot-in-command and was not being “checked” by Defendant Laner. (*Id.* at ¶ 26.)
19 Consequently, Defendant Laner did not issue a failure notice to Plaintiff, although he did
20 discuss the check ride with Raymond Barrera, the General Manager of Critical Air
21 Medicine, Inc. (*Id.* at ¶¶ 27–28.)

22 Following the check ride and without explanation, Plaintiff was removed from flight
23 status by Critical Air Medicine, Inc. and assigned menial tasks within the company. (*Id.*
24 at ¶ 29.) As a part-time employee and general laborer, Plaintiff now earns twelve dollars
25 per hour, or approximately \$24,000 per year. (*Id.* at ¶ 32.)

26 On February 15, 2012, Plaintiff requested a meeting with Defendant Laner. (*Id.* at
27 ¶ 53.) At the meeting, Defendant “LANER became agitated and ejected [Plaintiff] from
28 LANER’s office.” (*Id.* at ¶ 53 (emphasis in original).) Defendant Laner then “caused to

1 be placed in [Plaintiff]’s FAA Program Tracking and Reporting System (PTRS) file[] a
2 three-page letter” concerning the incident. (*Id.* at ¶ 54.)

3 In May 2014, a pilot friend of Plaintiff informed Plaintiff that Defendant Laner had
4 told a third party that Defendant Laner “had put a letter in [Plaintiff]’s FAA file that assured
5 [Plaintiff] would never again fly for an air carrier.” (*Id.* at ¶ 34 (internal quotation marks
6 omitted).) Mr. Barrera confirmed that Defendant Laner made that statement, and Plaintiff
7 since has obtained through a Freedom of Information Act request a copy of the letter
8 Defendant Laner placed in Plaintiff’s FAA PTRS file. (*Id.* at ¶¶ 35–36.)

9 On September 12, 2014, Plaintiff filed an administrative claim with the FAA, which
10 complained of Defendant Laner’s “causing written libelous statements to be entered into
11 [Plaintiff]’s [PTRS] ‘file.’” (*Id.* at ¶ 7; *see also* FAC Ex. C, ECF No. 16 at 33.¹) The FAA
12 denied Plaintiff’s claim on October 30, 2014. (FAC ¶ 7, ECF No. 16; *see also* FAC Ex. C,
13 ECF No. 16 at 35.)

14 On February 10, 2015, Plaintiff filed an initial complaint. (ECF No. 1.) The Court
15 dismissed Plaintiff’s cause of action for denial of due process against Defendant United
16 States and dismissed Plaintiff’s cause of action for negligence per se in its entirety. (ECF
17 No. 13.) Plaintiff filed his FAC on December 17, 2015 (ECF No. 16), and Defendants filed
18 the instant MTD on January 19, 2016 (ECF No. 17).

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23 ¹ Pin citations to docketed materials refer to the CM/ECF page numbers electronically stamped at the top
24 of each page. The Court may properly consider the exhibits attached to Plaintiff’s FAC in evaluating
25 Defendants’ MTD. *See United States v. Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003) (“A court may . . .
26 consider certain materials[, including] documents attached to the complaint, . . . without converting the
27 motion to dismiss into a motion for summary judgment.”) (citing *Van Buskirk v. CNN*, 284 F.3d 977, 980
28 (9th Cir. 2002); *Barron v. Reich*, 13 F.3d 1370, 1377 (9th Cir. 1994); 2 James Wm. Moore et al., *Moore’s
Federal Practice* § 12.34[2] (3d ed. 1999)); *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir.
2004) (“In resolving a factual attack on jurisdiction, the district court may review evidence beyond the
complaint without converting the motion to dismiss into a motion for summary judgment.”) (citing *Savage
v. Glendale Union High Sch.*, 343 F.3d 1036, 1039 n.2 (9th Cir. 2003)).

1 **LEGAL STANDARD**

2 **I. Dismissal Under Rule 12(b)(1)**

3 Federal courts are courts of limited jurisdiction, and as such have an obligation to
4 dismiss claims for which they lack subject-matter jurisdiction. *Demarest v. United States*,
5 718 F.2d 964, 965 (9th Cir. 1983). “The party asserting jurisdiction bears the burden of
6 establishing subject matter jurisdiction on a motion to dismiss for lack of subject matter
7 jurisdiction.” *In re Dynamic Random Access Memory (DRAM) Antitrust Litig.*, 546 F.3d
8 981, 984 (9th Cir. 2008) (citing *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375,
9 377 (1994); *Stock W., Inc. v. Confederated Tribes of the Colville Reservation*, 873 F.2d
10 1221, 1225 (9th Cir. 1989)). “Dismissal for lack of subject matter jurisdiction is
11 appropriate if the complaint, considered in its entirety, on its face fails to allege facts
12 sufficient to establish subject matter jurisdiction.” *Id.* (citing *Love v. United States*, 915
13 F.2d 1242, 1245 (9th Cir. 1990)).

14 Motions for dismissal under Federal Rule of Civil Procedure 12(b)(1) may challenge
15 jurisdiction facially or factually. *Safe Air*, 373 F.3d at 1039. A facial attack is one in which
16 “the challenger asserts that the allegations contained in a complaint are insufficient on their
17 face to invoke federal jurisdiction.” *Id.* In evaluating such a challenge, the court accepts
18 the factual allegations in the complaint as true. *See Miranda v. Reno*, 238 F.3d 1156, 1157
19 n.1 (9th Cir. 2001). In contrast, where the defendant challenges the factual basis underlying
20 the allegations, the court need not accept the allegations as true and may
21 make factual determinations. *White v. Lee*, 227 F.3d 1214, 1242 (9th Cir. 2000). “In ruling
22 on a challenge to subject matter jurisdiction, the district court is ordinarily free to hear
23 evidence regarding jurisdiction and to rule on that issue prior to trial,
24 resolving factual disputes.” *Augustine v. United States*, 704 F.2d 1074, 1077 (9th Cir.
25 1983) (citing *Thornhill Publ’g Co. v. Gen. Tel. Corp.*, 594 F.2d 730, 733 (9th Cir. 1979)).
26 When making such a ruling, the district court may review evidence beyond the complaint
27 without converting the motion to dismiss into a motion for summary
28 judgment. *Savage*, 343 F.3d at 1039 n.2 (citing *White*, 227 F.3d at 1242).

1 **II. Dismissal Under Rule 12(b)(6)**

2 Federal Rule of Civil Procedure 12(b)(6) permits a party to raise by motion the
3 defense that the complaint “fail[s] to state a claim upon which relief can be granted,”
4 generally referred to as a motion to dismiss. The Court evaluates whether a complaint
5 states a cognizable legal theory and sufficient facts in light of Federal Rule of Civil
6 Procedure 8(a), which requires a “short and plain statement of the claim showing that the
7 pleader is entitled to relief.” Although Rule 8 “does not require ‘detailed factual
8 allegations,’ . . . it demands more than an unadorned, the-defendant-unlawfully-harmed-
9 me accusation.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v.*
10 *Twombly*, 550 U.S. 544, 555 (2007)). In other words, “a plaintiff’s obligation to provide
11 the ‘grounds’ of his ‘entitle[ment] to relief’ requires more than labels and conclusions, and
12 a formulaic recitation of a cause of action’s elements will not do.” *Twombly*, 550 U.S. at
13 555 (alteration in original). “Nor does a complaint suffice if it tenders ‘naked assertion[s]’
14 devoid of ‘further factual enhancement.’” *Iqbal*, 556 U.S. at 678 (alteration in original)
15 (quoting *Twombly*, 550 U.S. at 557).

16 “To survive a motion to dismiss, a complaint must contain sufficient factual matter,
17 accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Id.* (quoting
18 *Twombly*, 550 U.S. at 570); *see also* Fed. R. Civ. P. 12(b)(6). A claim is facially plausible
19 when the facts pled “allow[] the court to draw the reasonable inference that the defendant
20 is liable for the misconduct alleged.” *Id.* (citing *Twombly*, 550 U.S. at 556). That is not to
21 say that the claim must be probable, but there must be “more than a sheer possibility that a
22 defendant has acted unlawfully.” *Id.* (citing *Twombly*, 550 U.S. at 556). “[F]acts that are
23 ‘merely consistent with’ a defendant’s liability” fall short of a plausible entitlement to
24 relief. *Id.* (quoting *Twombly*, 550 U.S. at 557). Further, the Court need not accept as true
25 “legal conclusions” contained in the complaint. *Id.* at 678–79 (citing *Twombly*, 550 U.S.
26 at 555). This review requires “context-specific” analysis involving the Court’s “judicial
27 experience and common sense.” *Id.* at 679. “[W]here the well-pleaded facts do not permit
28 the court to infer more than the mere possibility of misconduct, the complaint has alleged—

1 but it has not ‘show[n]’—‘that the pleader is entitled to relief.’” *Id.* (quoting Fed. R. Civ.
2 P. 8(a)(2)). The Court will grant leave to amend unless it determines that no modified
3 contention “consistent with the challenged pleading . . . [will] cure the deficiency.” *DeSoto*
4 *v. Yellow Freight Sys., Inc.*, 957 F.2d 655, 658 (9th Cir. 1992) (quoting *Schriber Distrib.*
5 *Co. v. Serv-Well Furniture Co.*, 806 F.2d 1393, 1401 (9th Cir. 1986)).

6 ANALYSIS

7 Plaintiff’s FAC alleges two causes of action under the Federal Tort Claims Act
8 (FTCA), 28 U.S.C. §§ 1346(b), 2671–2680: abuse of process and negligence per se. (*See*
9 *generally* FAC ¶¶ 37–69, ECF No. 16.) In addition to arguing that Plaintiff’s FAC is
10 procedurally improper pursuant to Federal Rule of Civil Procedure 15(a)(2), Defendants
11 move to dismiss both causes of action under Rule 12(b)(1) and Plaintiff’s first cause of
12 action for abuse of process under Rule 12(b)(6). (*See generally* MTD Mem., ECF No. 17-
13 1.) “Plaintiff admits that the claim against [Defendant] LANER and against the DOE
14 defendants should be dismissed, and the United States should be the only defendant in this
15 matter.” (Opp’n 2, ECF No. 19 (emphasis in original).) The Court therefore **DISMISSES**
16 Plaintiff’s claims against Defendant Laner and analyzes Defendants’ grounds for dismissal
17 with respect only to Defendant United States.

18 **I. Procedural Propriety of the FAC Under Rule 15(a)(2) and Local Rule 15.1(c)**

19 Defendants first argue that Plaintiff’s FAC should be dismissed for failure to obtain
20 Defendants’ written consent or this Court’s leave under Rule 15(a)(2) and for failure to file
21 a red-lined version of the FAC as required by Civil Local Rule 15.1(c). (MTD Mem. 14,
22 ECF No. 17-1.) Plaintiff explains that he “presumed that Defendant[s]’ joining in th[e]
23 Motion [to extend Defendants’ time to respond to the FAC] was evidence of their
24 agreement [to Plaintiff’s filing his FAC], as was the Court’s granting of Leave to Amend
25 that Complaint.” (Opp’n 2, ECF No. 19.)

26 Although it is true that—strictly speaking—Plaintiff’s FAC is procedurally
27 improper, the Court will review Plaintiff’s FAC on the merits in light of the liberal policy
28 favoring amendment. *See, e.g., Vogelsang v. Zine*, No. 2:09-CV-02885, 2010 WL

1 2737190, at *8 n.7 (E.D. Cal. July 12, 2010) (reviewing complaint on the merits despite
2 plaintiff's failure to seek leave to amend or to attach a proposed amended complaint as
3 required under the local rules); *High Tech Burrito Corp. v. Amresco Commercial Fin. LLC*,
4 No. C 06-4341 SI, 2006 WL 2846737, at *3 (N.D. Cal. Sept. 29, 2006) (granting leave to
5 amend despite plaintiff's failure to submit a proposed amended complaint).

6 **II. Subject-Matter Jurisdiction Under Rule 12(b)(1)**

7 Defendants argue that Plaintiff's causes of action against the United States must be
8 dismissed because Plaintiff has failed to show a waiver of the United States' sovereign
9 immunity. (MTD Mem. 18–21, 22–25, ECF No. 4-1.) “[T]he doctrine of sovereign
10 immunity . . . ‘is an important limitation on the subject matter jurisdiction of federal
11 courts.’” *Dunn & Black, P.S. v. United States*, 492 F.3d 1084, 1087 (9th Cir.
12 2007) (quoting *Vacek v. U.S. Postal Serv.*, 447 F.3d 1248, 1250 (9th Cir. 2006)). As a
13 sovereign, the United States “is immune from suit unless it has expressly waived such
14 immunity and consented to be sued.” *Dunn & Black*, 492 F.3d at 1087–88 (quoting *Gilbert*
15 *v. DaGrossa*, 756 F.2d 1455, 1458 (9th Cir. 1985)). Plaintiff bears the burden of showing
16 that the United States has waived its sovereign immunity. *Cato v. United States*, 70 F.3d
17 1103, 1107 (9th Cir. 1995) (citing *Baker v. United States*, 817 F.2d 560, 562 (9th Cir.
18 1987)).

19 The FTCA “waived the sovereign immunity of the United States for certain torts
20 committed by federal employees.” *Fed. Deposit Ins. Corp. v. Meyer*, 510 U.S. 471, 475–
21 76 (1994) (citing 28 U.S.C. § 1346(b)). Under the FTCA, a court has jurisdiction to hear
22 any claim

23 [1] against the United States, [2] for money damages, . . . [3] for
24 injury or loss of property, or personal injury or death [4] caused
25 by the negligent or wrongful act or omission of any employee of
26 the Government [5] while acting within the scope of his office or
27 employment, [6] under circumstances where the United States, if
a private person, would be liable to the claimant in accordance
with the law of the place where the act or omission occurred.

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1 *Id.* at 477 (quoting 28 U.S.C. § 1346(b)) (alterations in original). The FTCA expressly
2 excludes, however, “[a]ny claims arising out of . . . abuse of process[and] libel” 28
3 U.S.C. § 2680(h). An abuse of process claim—but not a libel claim—is allowable,
4 however, to the extent it arises from “acts or omissions of investigative or law enforcement
5 officers of the United States Government.” *Id.* “For the purposes of this subsection,
6 ‘investigative or law enforcement officer’ means any officer of the United States who is
7 empowered by law to execute searches, to seize evidence, or to make arrests for violations
8 of Federal law.” *Id.*

9 **A. First Cause of Action: Abuse of Process**

10 Defendants argue that Plaintiff’s first cause of action for abuse of process is
11 expressly disallowed by 28 U.S.C. § 2680(h) of the FTCA. (*See* MTD Mem. 18, ECF No.
12 17-1.) Moreover, although Plaintiff alleges that Defendant Laner is “empowered under 49
13 U.S.C. 44709 to execute searches and seize evidence for the purposes of actions to suspend
14 or revoke . . . certificates, usually in the event of non-compliance with federal aviation
15 safety regulations (Title 14 CFR)” (FAC ¶ 15, ECF No. 16), 49 U.S.C. § 44709 “does not
16 authorize FAA aviation safety inspectors to execute searches or to seize evidence (or to
17 make arrests) for ‘violations of Federal law’” (MTD Mem. 18–19, ECF No. 17-1).
18 Consequently, Plaintiff “fail[s] to meet his burden of showing an unequivocal waiver of
19 sovereign immunity, particularly with respect to the ‘investigative or law enforcement
20 officer’ exception to the FTCA’s bar on abuse of process claims.” (*Id.* at 20.)

21 Plaintiff counters that Defendant Laner’s actions constitute “an ‘Abuse of Process’
22 under the FTCA, because the Federal Aviation Administration’s well-established ‘Due
23 Process’ before suspending or revoking an Airman’s or Air Operator’s certificate, upon
24 which [Plaintiff’s] livelihood depends, was neither invoked nor followed.” (Opp’n 4, ECF
25 No. 19.) He argues that Defendant Laner, “in the capacity of Aviation Safety Inspector,
26 . . . was empowered to conduct investigations; search aircraft, search premises, or personal
27 property; seize evidence; and report the results of those investigations to the FAA’s
28 Regional Counsel for enforcement through legal action.” (*Id.* at 5 (citing FAA Order

1 2150.3B.) Consequently, “FAA Aviation Safety Inspectors meet the definition of
2 ‘investigative or law enforcement officer’ under 28 U.S. Code, Section 1346, the Federal
3 Tort Claims Act.” (*Id.* at 6.)

4 The Court concludes that it lacks subject-matter jurisdiction over Plaintiff’s first
5 cause of action because Plaintiff has not established unequivocally that Defendant Laner
6 was an “investigative or law enforcement officer” under 28 U.S.C. § 2680(h). As
7 mentioned previously, “[f]or the purposes of [Section 2680(h)], ‘investigative or law
8 enforcement officer’ means any officer of the United States who is empowered by law to
9 execute searches, to seize evidence, or to make arrests for violations of Federal law.” 28
10 U.S.C. § 2680(h). “The court is permitted to review allegations of the complaint and
11 evidence regarding the job duties and job descriptions of the federal employees in question
12 to determine if they are ‘investigative or law enforcement officer[s]’ under section
13 2680(h).” *Lorsch v. United States*, No. CV 14-2202 AJW, 2015 WL 6673464, at *8 (C.D.
14 Cal. Oct. 29, 2015) (collecting cases).

15 Plaintiff summarily alleges that Defendant Laner was “empowered under 49 U.S.C.
16 44709 to execute searches and seize evidence for the purposes of actions to suspend or
17 revoke [airman’s] certificates, usually in the event of non-compliance with federal aviation
18 safety regulations (Title 14 CFR).” (FAC ¶ 15, ECF No. 16.) That provision does
19 authorize certain FAA employees to conduct investigations: “The Administrator may issue
20 an order amending, modifying, suspending, or revoking . . . any part of a certificate issued
21 under this chapter if . . . the Administrator decides after conducting a reinspection,
22 reexamination, or other investigation that safety in air commerce of air transportation and
23 the public interest require that action.” 49 U.S.C. § 44709(b)(1)(A). That provision does
24 not, however, explicitly authorize FAA employees generally—or aviation safety inspectors
25 in particular—“to execute searches, to seize evidence, or to make arrests,” as required
26 under Section 2680(h).

27 In his Opposition, Plaintiff also points to FAA Order 2150.3B. (*See, e.g.*, Opp’n 5–
28 6, ECF No. 19; *see also* Opp’n Ex. C, ECF No. 19 at 9–21.) A marking in the margin—

1 whether or not intentional—appears to direct the Court to the following passage:

2 Field offices conduct surveillance inspections of persons,
3 aircraft, manufacturers of aircraft and parts, or operations to
4 determine compliance with statutory and regulatory
5 requirements and issues related to qualifications of persons or
6 aircraft certified or approved by the FAA. Field office
7 enforcement personnel investigate, coordinate, and report
8 violations of all statutory and regulatory requirements that are
9 discovered within the geographical area for their office and for
10 which they have enforcement responsibility.

11 (Opp'n Ex. C, ECF No. 19 at 12.) There is also a lengthy section on the role of FAA
12 investigative personnel in enforcement investigations:

13 FAA investigative personnel's role in an investigation is to
14 gather *all* material, relevant evidence that either proves or
15 disproves the potential violation that precipitated the
16 investigation. . . . If the evidence is sufficient to support a
17 violation, FAA investigative personnel recommend . . . action, as
18 appropriate, in accordance with the policy and guidance of this
19 order.

20 (*Id.* at 13 (emphasis in original).) Finally, with respect to constitutional protections for
21 inspections or investigations on private property, the order provides that FAA investigative
22 personnel are subject to the Fourth Amendment:

23 Although administrative inspections and investigations are not
24 criminal in nature, administrative inspections and investigations
25 conducted on private property are subject to the constitutional
26 limitations of the Fourth Amendment When an owner of
27 private property refuses consent to an administrative inspection
28 or investigation, FAA investigative personnel must first obtain a
warrant from judicial authority, unless the [open fields]
exception . . . applies.

29 (*Id.* at 15.) Plaintiff does not make clear to what extent these provisions apply to Defendant
30 Laner, but the plain language of FAA Order 2150.3B could plausibly place Defendant
31 Laner within the investigative or law enforcement officer exception of Section 2680(h).

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1 The legal precedents cited by Plaintiff, however, are not persuasive. As Defendants
2 note (*see, e.g.*, Reply 5–7 & n.1, ECF No. 20), in *Millbrook v. United States*, 133 S. Ct.
3 1441 (2013), the issue was not whether the Bureau of Prisons employees were investigative
4 or law enforcement officers. Indeed, the government in that case conceded as much. *Id.*
5 at 1445 n.3. In this case, by contrast, the question is contested and the law is not definitive:
6 no court within this Circuit has determined whether FAA safety inspectors are subject to
7 the investigative or law enforcement officer exception under Section 2680(h). The Court
8 finds persuasive, however, Defendants’ case *Sottile v. United States*, 608 F. Supp. 1040
9 (D.D.C. 1985), in which the United States District Court for the District of Columbia noted
10 in dicta that, “[o]n a preliminary inquiry, the Court finds nothing in the Federal Aviation
11 Act, 49 U.S.C. § 1301 *et seq.*, which would support an assertion that FAA investigators
12 have the authority to execute searches, seize evidence, or make arrests for federal law
13 violations.” *Id.* at 1042 (citing 49 U.S.C. §§ 1482(b), 1484; *Equal Emp’t Opportunity*
14 *Comm’n v. First Nat’l Bank of Jackson*, 614 F.2d 1004, 1007–08 (5th Cir. 1980), *cert.*
15 *denied*, 450 U.S. 917 (1981); *United States v. Rubin*, 573 F.Supp. 1123, 1124–25 (D. Colo.
16 1983)). The Court is also persuaded by *Matsko v. United States*, 372 F.3d 556 (3d Cir.
17 2004), in which the Third Circuit held that “employees of administrative agencies, no
18 matter what investigative conduct they are involved in, do not come within the § 2680(h)
19 exception.” *Id.* at 560 (citing *First Nat’l Bank of Jackson*, 614 F.2d at 1007–08). These
20 authorities would tend to suggest that Defendant Laner—as an FAA investigator and
21 employee of an administrative agency—does not fall within the Section 2680(h)
22 investigative or law enforcement officer exception.

23 Because Plaintiff does not cite any binding or persuasive authority to the contrary,
24 he has not established an unequivocal waiver of sovereign immunity. “[T]o the extent that
25 there is uncertainty about whether Congress intended to encompass [FAA safety
26 inspectors] within the ‘law enforcement’ proviso, the uncertainty must be resolved against
27 the waiver of sovereign immunity.” *Hernandez v. United States*, 34 F. Supp. 3d 1168,
28 1181 (D. Colo. 2014) (citing *Trentadue v. United States*, 397 F.3d 840, 852 (10th Cir.

1 2005)); *see also Blue v. Widnall*, 162 F.3d 541, 544 (9th Cir. 1998) (“The plaintiff in a
2 lawsuit against the United States must point to an unequivocal waiver of sovereign
3 immunity.”) (citing *Holloman v. Watt*, 708 F.2d 1399, 1401 (9th Cir. 1983)). Accordingly,
4 the Court **DISMISSES** Plaintiff’s first cause of action for lack of subject-matter
5 jurisdiction.²

6 ***B. Second Cause of Action: Negligence Per Se***

7 Defendants contend that Plaintiff’s second cause of action for negligence per se must
8 also be dismissed for lack of subject-matter jurisdiction because “in truth this is a libel
9 claim, not negligence” (MTD Mem. 23, ECF No. 17-1), and “the FTCA expressly excludes
10 claims for libel and slander from its waiver of the United States’ sovereign immunity” (*id.*
11 at 24 (citing 28 U.S.C. § 2680(h)).)

12 As Defendants note (*see* Reply 3, 11, ECF No. 20), Plaintiff fails to oppose this
13 argument (*see generally* Opp’n, ECF No. 19). Under Ninth Circuit precedent, the Court
14

15 ² Even if the Court were to conclude that Defendant Laner fell within the investigative or law enforcement
16 officer proviso, Plaintiff still would face the discretionary functions exception, which neither of the parties
17 addresses in their briefing. “The discretionary function exception provides the government with immunity
18 from suit for ‘[a]ny claim . . . based upon the exercise or performance of the failure to exercise or perform
19 a discretionary function or duty on the part of a federal agency or employee of the Government, whether
20 or not the discretion involved be abused.’” *Dichter-Mad Family Partners, LLP v. United States*, 707 F.
21 Supp. 2d 1016, 1026 (C.D. Cal. 2010) (quoting 28 U.S.C. § 2680(a)), *aff’d*, 709 F.3d 749 (9th Cir. 2013).
22 “[C]ourts have repeatedly held in other contexts that the conduct of regulatory investigations are immune
23 from FTCA liability unless there are mandatory directives that limit the investigators’ discretion to
24 determine both the scope and the manner of the investigation.” *Id.* at 1039 (collecting cases). FAA Order
25 2150.3B, upon which Plaintiff relies (*see* Opp’n 5–6, ECF No. 19), illustrates the broad investigative
26 discretion conferred upon FAA investigative personnel:

23 Under Title 49 U.S.C. § 44709, the Administrator may reinspect at any time
24 a civil aircraft, aircraft engine, propeller, appliance, air navigation facility,
25 or air agency, or reexamine any airman holding a certificate issued under
26 49 U.S.C. § 44703. The Administrator also has broad authority under 49
27 U.S.C. § 40113 to conduct investigations necessary to carry out his or her
28 duties and powers under the statute.

(Opp’n Ex. C, ECF No. 19 at 15.) Despite Plaintiff’s conclusory argument that Defendant Laner’s actions
were “not a ‘discretionary’ function” (Opp’n 4, ECF No. 19), it is likely that the discretionary function
exception would provide an alternative basis for dismissal for lack of subject-matter jurisdiction of
Plaintiff’s first cause of action.

1 may therefore dismiss Plaintiff's negligence per se cause of action as abandoned. *See*
2 *Jenkins v. Cnty. of Riverside*, 398 F.3d 1093, 1095 n.4 (9th Cir. 2005) (dismissing causes
3 of action as abandoned where plaintiff did not oppose dismissal in her opposition); *Shull*
4 *v. Ocwen Loan Servicing, LLC*, No. 13-CV-299 BEN (WVG), 2014 WL 1404877, at *2
5 (S.D. Cal. Apr. 10, 2014) ("Where a party fails to address arguments against a claim raised
6 in a motion to dismiss, the claims are abandoned and dismissal is appropriate.").
7 Nevertheless, the Court addresses Defendants' arguments on the merits and concludes that
8 it lacks subject-matter jurisdiction.

9 As noted above, the FTCA expressly excludes from its waiver of sovereign
10 immunity "[a]ny claims arising out of . . . abuse of process[and] libel" 28 U.S.C.
11 § 2680(h). The "investigative or law enforcement officer" exception does not apply to libel
12 claims. *Id.* "Libel is defined under California law as 'a false and unprivileged publication
13 by writing, printing, picture, effigy, or other fixed representation to the eye, which exposes
14 any person to hatred, contempt, ridicule, or obloquy, or which causes him to be shunned or
15 avoided, or which has a tendency [t]o injure him in his occupation.'" *Cort v. St. Paul Fire*
16 *& Marine Ins. Cos.*, 311 F.3d 979, 985 (9th Cir. 2002) (quoting Cal. Civ. Code § 45). "This
17 circuit looks beyond the labels used to determine whether a proposed claim is barred."
18 *Thomas-Lazear v. Fed. Bureau of Investigation*, 851 F.2d 1202, 1207 (9th Cir. 1988)
19 (citing *Alexander v. United States*, 787 F.2d 1349, 1350–51 (9th Cir. 1986); *Leaf v. United*
20 *States*, 661 F.2d 740, 742 (9th Cir. 1981), *cert. denied*, 456 U.S. 960 (1982)).

21 As Defendant notes (*see* MTD Mem. 25, ECF No. 17-1), Plaintiff himself originally
22 characterized his claim as one for libel:

23 On February 15, 2012, FAA Flight Standards Inspector, Wayne
24 Laner, without giving Notice, or Opportunity to be Heard, caused
25 written libelous statements to be entered into Mr. Martin's "file"
26 in the FAA's National Program Tracking and Reporting System.
27 False and Libelous statements in that record caused Martin to
lose current employment, and to lose opportunity for future
employment, as air carrier pilot.

28 (*See* FAC Ex. C, ECF No. 16 at 33.) Although Plaintiff now labels this cause of action

1 negligence per se (*see* FAC ¶¶ 65–69, ECF No. 16), he still alleges the same basic facts:

2 On February 15, 2012, contravening the Fifth Amendment
3 requirement for Due Process Of Law, and the requirement of 49
4 U.S.C. Section 44709(c) for Notice and an Opportunity to be
5 heard; [Defendant] LANER inserted the aforementioned letter in
6 [Plaintiff]’s FAA PTRS file, thereby assuring that in the event
7 any aviation employer inquired of [Plaintiff]’s background, that
8 record would be retrieved, and [Plaintiff] would enjoy no chance
9 of employment.

8 (FAC ¶ 67, ECF No. 16 (emphasis in original).) Plaintiff now adds that “[i]f the FAA had
9 not negligently failed to prevent the insertion, or to remove the offensive material from
10 [Plaintiff]’s PTRS file, [Plaintiff]’s loss of employability, and consequent damages as
11 alleged[,] would not have occurred.” (*Id.* at ¶ 68.) However, “[Defendant Laner]’s actions
12 that constitute a claim for slander are essential to [Plaintiff]’s claim for neglig[ce per
13 se].” *Thomas-Lazear*, 851 F.2d at 1207. Because the FTCA does not waive sovereign
14 immunity for libel claims, *see* 28 U.S.C. § 2680(h), the Court **DISMISSES** Plaintiff’s
15 second cause of action for negligence per se for lack of subject-matter jurisdiction.

16 **III. Failure to State a Claim Under Rule 12(b)(6)**

17 Defendants additionally argue that Plaintiff’s abuse of process cause of action must
18 be dismissed for failure to state a claim under Rule 12(b)(6). (*See* MTD Mem. 21–22, ECF
19 No. 17-1.) Specifically, Defendants note that Plaintiff’s “FAC is utterly bereft of any
20 allegation that there was a judicial proceeding involved,” as is required for an abuse of
21 process claim under California law. (*Id.* at 22.) Defendants additionally contend that, to
22 the extent Plaintiff’s first cause of action is a constitutional due process claim arising under
23 49 U.S.C. § 44709(c), “this U.S. Code section . . . is wholly inapplicable to his case”
24 because Plaintiff fails to “allege that the FAA amended, modified, suspended, or revoked
25 his airman’s certificate, or even that it instituted administrative proceedings to do so – so,
26 by its terms, this statute is not even triggered.” (MTD Mem. 26–27, ECF No. 17-1.)

27 Again, Plaintiff fails to oppose these arguments (*see* Reply 3, 4, 11, ECF No. 20; *see*
28 *also* Opp’n, ECF No. 19), entitling the Court to dismiss Plaintiff’s abuse of process cause

1 of action as abandoned. *See, e.g., Jenkins*, 398 F.3d at 1095 n.4. The Court will, however,
2 address Plaintiff’s allegations on the merits.

3 “The FTCA specifies that the liability of the United States is to be determined ‘in
4 accordance with the law of the place where the [allegedly tortious] act or omission
5 occurred.’” *Rhoden v. United States*, 55 F.3d 428, 430 (9th Cir. 1995) (per curiam)
6 (quoting 28 U.S.C. § 1346(b)) (alteration in original). California law therefore governs the
7 United States’ liability in Plaintiff’s FTCA claim. *See Gasho v. United States*, 39 F.3d
8 1420, 1427 (9th Cir. 1994) (“Liability is determined by the tort law of the state where the
9 claim arose.”). “[U]nder well-established California law, the tort of abuse of process
10 ‘requires misuse of a *judicial* process.’” *Estate of Tucker ex rel. Tucker v. Interscope*
11 *Records, Inc.*, 515 F.3d 1019, 1037 (9th Cir. 2008) (quoting *Stolz v. Wong Commc’ns Ltd.*
12 *P’ship*, 25 Cal. App. 4th 1811, 1822 (1994)) (emphasis in original). “Misuse of an
13 administrative proceeding—even one that is quasi-judicial—does not support a claim for
14 abuse of process.” *Id.* (citing *Stolz*, 25 Cal. App. 4th at 1823–25).

15 Plaintiff nowhere alleges misuse of a judicial process in his FAC. (*See generally*
16 FAC, ECF No. 16.) Instead, Plaintiff explains that he presented an administrative claim to
17 the FAA, which was denied. (*Id.* at ¶ 7.) While Plaintiff alleges that “[a]t least two of
18 Inspector LANER’s immediate FAA supervisors . . . had a Fifth Amendment duty, and a
19 statutory duty under **49 U.S.C. 44709(c)**[,] . . . to provide [Plaintiff] an opportunity to be
20 heard before an independent Administrative or Judicial body before depriving him of his
21 livelihood” (*id.* at ¶ 56 (emphases in original)), the statute cited contemplates an
22 administrative process, *see* 49 U.S.C. § 44709(c) (“Before acting under subsection (b) of
23 this section, the Administrator shall advise the holder of the certificate of the charges or
24 other reasons on which the Administrator relies for the proposed action. Except in an
25 emergency, the Administrator shall provide the holder an opportunity to answer the charges
26 and be heard why the certificate should not be amended, modified, suspended, or
27 revoked.”). Because Plaintiff has failed to allege a misuse of a judicial process, he has
28 failed to state a claim for abuse of process.

1 Defendants additionally argue that 49 U.S.C. § 44709(c) is not triggered because
2 there was no “order amending, modifying, suspending, or revoking” Plaintiff’s airman’s
3 certificate. (MTD Mem. 26–27, ECF No. 17-1.) Indeed, as of February 2014, Plaintiff
4 still held “an Airline Transport Pilot Certificate, issued by the [FAA].” (Decl. of Ronald
5 Lewis Martin (Martin Decl.) ¶ 1, FAC Ex. A, ECF No. 16 at 16.) Accordingly, the Court
6 concludes that 49 U.S.C. § 44709(c) is inapplicable and—to the extent Plaintiff relies upon
7 that statute as the basis for a constitutional due process claim—Plaintiff’s first cause of
8 action must be dismissed.

9 In light of the foregoing, the Court **DISMISSES** Plaintiff’s first cause of action for
10 failure to state a claim.

11 **IV. Dismissal With Prejudice**

12 Finally, Defendants argue that Plaintiff’s FAC should be dismissed with prejudice
13 “because Martin cannot state a viable cause of action under these facts, and because he has
14 now had three tries (counting his administrative claim with the FAA).” (MTD Mem. 9,
15 ECF No. 17-1.) Plaintiff does not specifically oppose this argument. (*See generally* Opp’n,
16 ECF No. 19.)

17 Generally, a dismissal for lack of subject-matter jurisdiction should be without
18 prejudice because it is not an adjudication on the merits and a plaintiff should be afforded
19 the opportunity to reassert his claims in a competent court. *See Siler v. Dillingham Ship*
20 *Repair*, 288 Fed. App’x 400, 401 (9th Cir. 2008) (citing *Freeman v. Oak Unified Sch. Dist.*,
21 179 F.3d 846, 847 (9th Cir. 1999)); *see also Kendall v. Dep’t of Veterans Affairs*, 360 Fed.
22 App’x 902, 903 (9th Cir. 2009) (citing *Kelly v. Fleetwood Enters., Inc.*, 377 F.3d 1034,
23 1036 (9th Cir. 2004)). Similarly, “[i]n dismissing for failure to state a claim, a district court
24 should grant leave to amend even if no request to amend the pleading was made, unless it
25 determines that the pleading could not possibly be cured by the allegation of other facts.”
26 *Ebner v. Fresh, Inc.*, 818 F.3d 799, 803 (9th Cir. 2016) (quoting *Doe v. United States*, 58
27 F.3d 494, 497 (9th Cir. 1995)).

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