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

DAVID JON MARTIN (TRUST),

Plaintiff,

v.

VA REGIONAL SAN DIEGO
BENEFIT OFFICE, *et al.*,

Defendants.

Case No. 15-cv-290-BAS(DHB)

**ORDER GRANTING
DEFENDANTS’ MOTION TO
DISMISS**

[ECF No. 29]

On February 12, 2015, Plaintiff David Jon Martin (Trust), proceeding *pro se*, commenced this action for alleged constitutional violations and breach of contract arising from the denial of pension benefits against Defendants VA Regional San Diego Benefit Office (“VA”), Gary Chesterton, Patrick Prieb, and “Assistant Director / Agents and / or Assigns.” Defendants now move to dismiss this action pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). Plaintiff opposes.

The Court finds this motion suitable for determination on the papers submitted and without oral argument. *See* Civ. L.R. 7.1(d)(1). For the following reasons, the Court **GRANTS** Defendants’ motion to dismiss.

1 **I. LEGAL STANDARD**

2 “Federal courts are courts of limited jurisdiction.” *Kokkonen v. Guardian Life*
3 *Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). “They possess only that power authorized
4 by Constitution or a statute, which is not to be expanded by judicial decree.” *Id.*
5 (internal citations omitted). “It is to be presumed that a cause lies outside this limited
6 jurisdiction and the burden of establishing the contrary rests upon the party asserting
7 jurisdiction.” *Id.* (internal citations omitted); *see also Abrego Abrego v. The Dow*
8 *Chem. Co.*, 443 F.3d 676, 684 (9th Cir. 2006).

9 “Subject matter jurisdiction based upon diversity of citizenship requires that no
10 defendant have the same citizenship as any plaintiff.” *Tosco Corp. v. Communities for*
11 *a Better Env’t*, 236 F.3d 495, 499 (9th Cir. 2001) (per curiam), *abrogated on other*
12 *grounds by Hertz Corp v. Friend*, 130 S. Ct. 1181 (2010). Alternatively, federal
13 district courts also have “original jurisdiction of all civil actions arising under the
14 Constitution, laws, or treaties of the United States.” 28 U.S.C. § 1331. “A plaintiff
15 suing in federal court must show in his pleading, affirmatively and distinctly, the
16 existence of whatever is essential to federal jurisdiction, and, if he does not do so, the
17 court . . . on discovering the [defect], must dismiss the case, unless the defect be
18 corrected by amendment.” *Tosco*, 236 F.3d at 499 (quoting *Smith v. McCullough*, 270
19 U.S. 456, 459 (1926)).

20
21 **II. ANALYSIS**

22 Defendants challenge this Court’s subject matter jurisdiction over both claims
23 Plaintiff asserts in his First Amended Complaint (“FAC”). With respect to Plaintiff’s
24 allegation that Defendants wrongfully denied his claims for pension benefits,
25 Defendants argue that district courts lack jurisdiction over VA benefit disputes under
26 *Veterans for Common Sense v. Shinseki*, 678 F.3d 1013 (9th Cir. 2012) and the
27 Veterans’ Judicial Review Act (“VJRA”). (Defs.’ Mot. 2:15–3:12.) With respect to
28 the breach-of-contract claim, Defendants argue that district courts lack jurisdiction over

1 contract claims against the United States pursuant to the Contract Disputes Act
2 (“CDA”) in conjunction with the Tucker Act and the Little Tucker Act. (Defs.’ Mot.
3 3:13–4:10.) Plaintiff believes Defendants are mistaken based on various theories.

4
5 **A. *Veterans for Common Sense* and the VJRA**

6 In *Veterans for Common Sense*, the Ninth Circuit examined the VJRA, 38 U.S.C.
7 § 511, and concluded that “§ 511 precludes jurisdiction over a claim if it requires the
8 district court to review ‘VA decisions that relate to benefits decisions,’ including ‘any
9 decision made by the Secretary in the course of making benefits determinations.’”
10 *Veterans for Common Sense*, 678 F.3d at 1025 (citations omitted). The court went on
11 to explain that “[t]his standard is consistent with Congress’s intention to ‘broaden the
12 scope’ of the judicial preclusion provision . . . and is reflected in § 511’s plain
13 statement that [federal courts] may not review ‘a decision by the Secretary under a law
14 that affects the provision of [veterans’] benefits[.]” *Id.* (citations omitted). “This
15 preclusion extends not only to cases where adjudicating veterans’ claims requires the
16 district court to determine whether the VA acted properly in handling a veteran’s
17 request for benefits, but also to those decisions that may affect such cases.” *Id.* “If that
18 test is met, then the district court must cede any claim to jurisdiction over the case, and
19 parties must seek a forum in the Veterans Court and the Federal Circuit.” *Id.* at 1026.

20 In the FAC, Plaintiff alleges the following:

21 On multiple occasions the Veteran made claims for a pension
22 since 2007 only to be denied summarily because the United
23 States Department of Veteran Affairs and its agencies have
24 stated the Veteran’s military service was during peacetime.
25 Because of these denials[,] the Veteran is stating his 5th
26 Amendment of the U.S. Constitution of due process, equal
27 protection under the law has been violated by Defendant and
28 loss of property, a pension, has affected his life, and liberty.
(FAC 1.) In essence, Plaintiff alleges that the VA acted improperly in denying his
pension claim. These allegations clearly demonstrate that Plaintiff seeks review of the
VA’s denial of his claim for pension benefits, which, as stated in *Veterans for Common
Sense*, is outside the scope of this Court’s subject matter jurisdiction. As the Ninth

1 Circuit instructed in *Veterans for Common Sense*, this Court must cede jurisdiction
2 over Plaintiff’s claim challenging the VA’s denial of pension benefits, and Plaintiff
3 “must seek a forum in the Veterans Court and the Federal Circuit.” *Veterans for*
4 *Common Sense*, 678 F.3d at 1025.

5 Accordingly, having also reviewed Plaintiff’s opposition, which fails to address
6 the impact of *Veterans for Common Sense* and the VJRA, the Court **DISMISSES**
7 **WITHOUT PREJUDICE** Plaintiff’s constitutional claim and any other potential
8 claim arising from the VA’s denial of pension benefits. *See Veterans for Common*
9 *Sense*, 678 F.3d at 1025.

10 11 **B. The CDA and Tucker Act**

12 The CDA applies to any express or implied contract made by an executive
13 agency for: (1) the procurement of property, other than real property; (2) the
14 procurement of services; (3) the procurement of construction, alteration, repair, or
15 maintenance of real property; or (4) the disposal of personal property. 41 U.S.C. §
16 7102 (formerly cited as 41 U.S.C. § 602). Under the CDA, claims are first submitted
17 in writing to the contracting officer, who must issue a decision in writing. 41 U.S.C.
18 § 7103. Upon receipt of the contracting officer’s final decision, the contractor must
19 elect either to appeal the decision to either the appropriate board of contract appeals or
20 the Court of Federal Claims. *Id.* § 7104(a)-(b).

21 Under the Tucker Act, “[t]he United States Court of Federal Claims shall have
22 jurisdiction to render judgment upon any claim against the United States founded either
23 upon the Constitution, or any Act of Congress or any regulation of an executive
24 department, or upon any express or implied contract with the United States . . . in cases
25 not sounding in tort.” 28 U.S.C. § 1491(a)(1). The Little Tucker Act grants the district
26 court jurisdiction to hear a “claim against the United States, not exceeding \$10,000 in
27 amount founded . . . upon any express or implied contract with the United States . . .
28 in cases not sounding in tort[.]” 28 U.S.C. § 1346(a)(2). These provisions, read

1 together, “create a presumption of the exclusive jurisdiction in the Court of Federal
2 Claims [for contract claims over \$10,000], but that presumption can be overcome by
3 an independent statutory grant of jurisdiction to another court.” *Tritz v. U.S. Postal*
4 *Serv.*, 721 F.3d 1133, 1137 (9th Cir. 2013); *see also Suburban Mortg. Assocs., Inc. v.*
5 *U.S. Dep’t of Hous. & Urban Dev.*, 480 F.3d 1116, 1121 (Fed. Cir. 2007).

6 Insofar as Plaintiff asserts a contract claim in the amount of \$18,000,000, this
7 Court lacks jurisdiction under both the CDA and Tucker Act. *See* FAC 1 (“The
8 Veteran is also claiming that there is a contract breach by the Defendant because of
9 nonperformance after notification of the usurpation of these rights.”). Under both
10 statutes, the appropriate forum for Plaintiff’s contract claim, assuming he fulfilled his
11 statutory obligations, such as, for example, first submitting a claim to the contracting
12 officer under the CDA, is the Court of Federal Claims. *See* 41 U.S.C. § 7104(a)-(b);
13 28 U.S.C. § 1491(a)(1). Consequently, the Court **DISMISSES WITHOUT**
14 **PREJUDICE** Plaintiff’s contract claim.

15 16 **C. Federal Torts Claim Act**

17 The Federal Torts Claim Act (“FTCA”) waives sovereign immunity of the
18 United States for certain torts committed by federal employees. *Fed. Deposit Ins.*
19 *Corp. v. Meyer*, 510 U.S. 471, 477 (1994) (citing 28 U.S.C. § 1346(b)). The FTCA
20 provides that district courts have exclusive jurisdiction of civil actions against the
21 United States for money damages “for injury or loss of property, or personal injury or
22 death caused by the negligent or wrongful act or omission of any employee” of the
23 federal government while acting within the scope of his office or employment. 28
24 U.S.C. § 1346(b).

25 The United States is the only proper defendant in a suit brought pursuant to the
26 FTCA. *Fed. Deposit Ins. Corp. v. Craft*, 157 F.3d 697, 706 (9th Cir. 1988); *Kennedy*
27 *v. U.S. Postal Serv.*, 145 F.3d 1077, 1078 (9th Cir. 1998). “A claim against [a federal
28 agency] in its own name is not a claim against the United States.” *Kennedy*, 145 F.3d

1 at 1078. An agency is not a proper defendant under the FTCA. *Craft*, 157 F.3d at 706.

2 Furthermore, “[t]he FTCA bars claimants from bringing suit in federal court until
3 they have exhausted their administrative remedies.” *McNeil v. United States*, 508 U.S.
4 106, 113 (1993). “The timely filing of an administrative claim is a jurisdictional
5 prerequisite to the bringing of a suit under the FTCA, and, as such, should be
6 affirmatively alleged in the complaint.” *Gillespie v. Civiletti*, 629 F.2d 637, 640 (9th
7 Cir. 1980).


8 It is unclear from the complaint whether Plaintiff is pursuing a tort claim. But
9 if he is, he fails to satisfy at least two requirements under the FTCA. First, Plaintiff
10 fails to name the United States as the defendant; instead, he names an agency and
11 several individuals as defendants. *See Kennedy*, 145 F.3d at 1078. And second,
12 Plaintiff fails to affirmatively allege in the FAC that he timely filed an administrative
13 claim with the appropriate agency. *See Gillespie*, 629 F.2d at 640. Therefore, insofar
14 as Plaintiff asserts a tort claim, the Court **DISMISSES WITHOUT PREJUDICE** the
15 tort claim.

16
17 **III. CONCLUSION & ORDER**

18 In light of the foregoing, the Court finds that it lacks subject matter jurisdiction
19 over Plaintiff’s action and **DISMISSES WITHOUT PREJUDICE** this action in its
20 entirety. *See Tosco*, 236 F.3d at 499.

21 **IT IS SO ORDERED.**

22
23 **DATED: October 5, 2015**

24 
25 **Hon. Cynthia Bashant**
26 **United States District Judge**