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

<p>ROBERT RUBIDOUX,  Plaintiff,  v.  UNITED STATES OF AMERICA, et al.,  Defendants.</p>	<p>Case No. 16-cv-02205-BAS-BGS  <b>ORDER GRANTING DEFENDANT UNITED STATES’ MOTION TO DISMISS</b>  [ECF No. 8]</p>
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**I. INTRODUCTION**

In May 2015, Plaintiff commenced this action as a limited civil case in San Diego Superior Court seeking damages for injuries arising out of two automobile accidents. (Complaint, Notice of Removal Ex. A, ECF No. 1-2.) Plaintiff pleads a single negligence claim against Defendants Manuel Payan and Jocelyn Perelia (Id. ¶¶ 5-9.) On August 31, 2016, the United States removed this action to federal court on the basis that Defendant Payan is a federal employee who was acting within the course and scope of his employment when the accident involving Defendant Payan occurred. (ECF No. 1.) On September 7, 2016, the United States Attorney certified

1 that Defendant Payan “was acting within the scope of his employment as an  
2 employee of the Department of Homeland Security with regard to the events  
3 described in Plaintiff’s Complaint”—invoking the Federal Tort Claims Act  
4 (“FTCA”). (ECF No. 2.)

5 At the request of the United States and pursuant to 28 U.S.C. § 2679(d), the  
6 Court then ordered that the United States be substituted in place of Defendant Payan  
7 and dismissed Plaintiff’s state law negligence claim against Mr. Payan. (ECF Nos.  
8 4, 6.) The Court thus construed Plaintiff’s claim against the United States as being  
9 under the FTCA. (ECF No. 6.)

10 The United States now moves to dismiss Plaintiff’s claim for lack of  
11 jurisdiction, on the grounds that Plaintiff has failed to comply with the FTCA, and  
12 has not first filed an administrative claim with the applicable agency before seeking  
13 damages in a lawsuit against the United States. (ECF No. 8.) For the reasons  
14 discussed below, the Court **GRANTS** the Motion to Dismiss.

## 15 16 **II. LEGAL STANDARD**

17 “It is well-settled that the FTCA . . . provides the exclusive statutory remedy  
18 for torts committed by employees of the United States who act within the scope of  
19 their employment, that the United States is the only proper defendant in an action  
20 under the FTCA and that a plaintiff may not file a suit under the FTCA unless he first  
21 exhausts his administrative remedies under the FTCA.” *Salcedo-Albanez v. United*  
22 *States*, 149 F. Supp. 2d 1240, 1243 (S.D. Cal. 2001) (citing 28 U.S.C. § 2675). The  
23 requirement that a plaintiff exhaust his administrative remedies is jurisdictional in  
24 nature, may not be waived, and “must be strictly adhered to.” *Jerves v. United States*,  
25 966 F.2d 517, 519, 521 (9th Cir. 1992). “[G]iven the clarity of the statutory text [of  
26 section 2675],” these requirements are “certainly not a trap for the unwary.” *McNeil*  
27 *v. United States*, 508 U.S. 106, 113 (1993). “It is no doubt true that there are cases  
28 in which a litigant proceeding without counsel may make a fatal procedural error, but

1 the risk that a lawyer will be unable to understand the exhaustion requirement is  
2 virtually nonexistent.” Id.

3 The timely filing of an administrative claim, as a jurisdictional prerequisite to  
4 bringing a lawsuit under the FTCA, should be affirmatively alleged in the complaint.  
5 *Gillespie v. Civilette*, 629 F.2d 637, 640 (9th Cir. 1980). A district court may dismiss  
6 the complaint for failing to allege this jurisdictional prerequisite, but should give the  
7 plaintiff the opportunity to file an amended complaint to attempt to cure such  
8 pleading defects. Id.

### 9 10 **III. ANALYSIS**

11 The United States moves to dismiss pointing out that Plaintiff has not alleged  
12 that he exhausted his administrative remedies under the FTCA. Plaintiff alleges he  
13 was injured when Manuel Payan rear-ended a vehicle in which Plaintiff was a  
14 passenger. The United States has certified that Mr. Payan is a federal employee who  
15 was acting within the course and scope of his employment at the time the accident  
16 occurred. If this is the case, the FTCA provides the exclusive statutory remedy for  
17 Plaintiff, the United States is the only proper defendant, and Plaintiff must allege that  
18 he exhausted his administrative remedies. See 28 U.S.C. § 2675; *Salcedo-Albanez*,  
19 149 F. Supp. 2d at 1243.

20 Plaintiff does not allege he exhausted his administrative remedies. Instead, he  
21 appears to argue that Agent Payan was not acting within the scope of his employment  
22 at the time the accident occurred because neither Plaintiff nor the driver of the vehicle  
23 he was in was “illegally in the country or engaged in any illegal or suspicious conduct  
24 related to immigration matters,” and therefore there is “an inadequate factual basis  
25 that Manuel Payan was detaining or attempting to detain plaintiff or his passenger  
26 [sic] with probable cause related to any immigration issue.” (ECF No. 13.)

27 Once the United States properly certifies that an individual was acting within  
28 the scope of his employment as a federal employee at the time the tort was committed,

1 the United States must be substituted in as a defendant and “must remain the federal  
2 defendant in the action unless and until the District Court determines that the  
3 employee, in fact, and not simply as alleged by the plaintiff, engaged in conduct  
4 beyond the scope of his employment.” *Jackson v. Tate*, 648 F.3d 729, 735 (9th Cir.  
5 2011) (emphasis in original) (quoting *Osborn v. Haley*, 549 U.S. 225, 240-41  
6 (2007)). Plaintiff, as the party seeking review of the United States’ decision to grant  
7 scope of employment certification, “bears the burden of presenting evidence and  
8 disproving [that] decision . . . by a preponderance of the evidence.” *Id.* (quoting  
9 *Kashin v. Kent*, 457 F.3d 1033, 1036 (9th Cir. 2006)). “Faced with a challenge to the  
10 scope of employment certification, a district court is authorized but not required to  
11 conduct an evidentiary hearing and resolve disputed factual questions.” *Ponds v.*  
12 *Veterans Med. Research Found.*, No. 12-cv-1745 BEN(BGS), 2013 WL 607847, at  
13 \*2 (S.D. Cal. Feb. 15, 2013) (citing *Pelletier v. Fed. Home Loan Bank*, 968 F.2d 865,  
14 874 (9th Cir. 1992)).

15 In the motion to dismiss, the United States alleges the car accident at issue  
16 occurred when Mr. Payan, an agent with Homeland Security driving his Border  
17 Patrol-issued vehicle, attempted to pull over the driver of the car in which Plaintiff  
18 was a passenger. During the stop, Agent Payan rear-ended the vehicle. (ECF No.  
19 8.) Plaintiff does not dispute these allegations. Instead, he argues that Agent Payan  
20 was not acting within the scope of his employment because he stopped the vehicle  
21 without probable cause “which arguably . . . would be an unlawful act which would  
22 be outside the course and scope of his employment.” (ECF No. 13.)

23 The phrase “acting within the scope of his office or employment” must be  
24 construed according to the law of the state where the alleged tort occurred, in this  
25 case California. *Xue Lu v. Powell*, 621 F.3d 944, 948 (9th Cir. 2010). “California  
26 no longer follows the traditional rule that an employee’s actions are within the scope  
27 of employment only if motivated, in whole or part, by a desire to serve the employer’s  
28 interests.” *Id.* (quoting *Lisa M. v. Henry Mayo Newhall Mem’l Hosp.*, 12 Cal. 4th

1 291, 297 (1995)). Thus, an employee’s willful, malicious, and even criminal torts  
2 may fall within the scope of his employment. *Id.* The question is whether a nexus  
3 exists between the employment and the tort. *Id.* This requirement is met where the  
4 tort is generally foreseeable or arising from the employment. *Id.*

5 The United States correctly recognizes that a car accident arising when Agent  
6 Payan was on duty and driving a Border Patrol vehicle both arises from his  
7 employment and is a generally foreseeable result of the conduct of the Border Patrol  
8 enterprise. Whether or not Agent Payan had probable cause to pull over the car in  
9 which Plaintiff was riding is irrelevant. The nexus still exists.

10 In this case, there are no disputed factual questions for the Court to resolve.  
11 Plaintiff fails to present any evidence that disproves the decision of the United States  
12 to certify that Agent Payan was acting within the scope of his employment at the time  
13 the car accident occurred. Thus, the certification stands, and dismissal is appropriate  
14 because Plaintiff has failed to allege he exhausted his administrative remedies.

15  
16 **IV. CONCLUSION**


17 The Court **GRANTS** the United States motion to dismiss. (ECF No. 8.)  
18 Plaintiff’s response makes it clear that he cannot allege that he exhausted his  
19 administrative remedies under the FTCA. Hence, although generally a court should  
20 give a plaintiff the opportunity to cure any pleading defect, in this case, the Court  
21 dismisses Plaintiff’s claim against the United States with prejudice. See *Schreiber*  
22 *Distrib. Co. v. Serv-Well Furniture Co.*, 806 F.2d 1393, 1401 (9th Cir. 1986)  
23 (providing leave to amend may be denied when “the court determines that the  
24 allegation of other facts consistent with the challenged pleading could not possibly  
25 cure the deficiency”).

26 Further, having dismissed Plaintiff’s claim against the United States, the basis  
27 for federal jurisdiction in this case has been eliminated. It is unclear if Plaintiff is  
28 still pursuing his negligence claim against the other Defendant—Jocelyn Perelia. If

1 he is, the Court **REMANDS** this claim to state court. See, e.g., Porter v. Hirsch, 345  
2 F. Supp. 2d 400, 404 (S.D.N.Y. 2004) (remanding claims against remaining  
3 defendants to state court after determining the plaintiffs failed to exhaust their  
4 administrative remedies against the United States under the FTCA).

5 **IT IS SO ORDERED.**

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7 **DATED: April 7, 2017**

  
8 **Hon. Cynthia Bashant**  
9 **United States District Judge**

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