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

GAVIN B. DAVIS,

Plaintiff,

v.

FEDERAL BUREAU OF
INVESTIGATION, JOHN
GREGORY UNRUH,

Defendants.

Case No. 17-cv-00701-BAS-AGS

- ORDER:**
- (1) GRANTING DEFENDANT
FBI’S MOTION TO DISMISS
(ECF No. 18);**
 - (2) DENYING PLAINTIFF’S
MOTION TO ADD DEFENDANT
(ECF No. 13);**
 - (3) DENYING PLAINTIFF’S
MOTION FOR SANCTIONS (ECF
No. 7);**
 - (4) DISMISSING DEFENDANT
UNRUH WITHOUT PREJUDICE;
AND**
 - (5) DENYING AS MOOT
PLAINTIFF’S MOTION FOR
SERVICE BY PUBLICATION
(ECF No. 15) AND FOR MENTAL
EXAMINATION (ECF No. 17)**

1 In his Complaint, filed pro per, Plaintiff Gavin B. Davis alleges that Defendant
2 John Gregory Unruh committed domestic terrorism by “cyberstalking” him in
3 violation of 18 U.S.C. § 2331(5) (domestic terrorism/Patriot Act) and 47 U.S.C. §
4 223 (use of telecommunications device in interstate commerce to harass). (Compl. ¶¶
5 10, 14a (ECF No. 1)). Plaintiff further alleges that the Federal Bureau of Investigation
6 (“FBI”) failed to investigate this cyberstalking despite Plaintiff’s emails and
7 telephone calls “imploing them” to do so. (Compl. ¶6.) Plaintiff now seeks to add a
8 new defendant, who apparently is an FBI employee. (ECF No. 13.) Plaintiff claims
9 this FBI agent “failed[ed] to reasonably follow-up on bona-fide evidence” identifying
10 an individual on the FBI most-wanted list as Defendant Unruh. (ECF No. 13.)

11 The FBI moves to dismiss (ECF No. 18). The Court finds this motion suitable
12 for determination on the papers submitted and without oral argument. *See* Civ. L.R.
13 7.1(d)(1). Because the allegations involve the FBI’s “discretionary function,” the
14 Court **GRANTS** the Motion to Dismiss the FBI with prejudice and **DENIES** the
15 Motion to Add a New Defendant.¹

16 17 **I. Legal Standard**

18 Under Rule 12 of the Federal Rules of Civil Procedure, a party may move to
19 dismiss an action based on a lack of subject matter jurisdiction. Fed. R. Civ. P.
20 12(b)(1). “Federal courts are courts of limited jurisdiction.” *Kokkonen v. Guardian*
21 *Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). “They possess only that power
22 authorized by Constitution and statute, which is not to be expanded by judicial
23 decree.” *Id.* (citations omitted). “It is to be presumed that a cause lies outside this
24 limited jurisdiction, and the burden of establishing the contrary rests upon the party

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26 ¹ Plaintiff also admits he failed to exhaust administrative remedies (ECF No. 19), so
27 the Motion to Dismiss could be granted on this ground as well. Furthermore, because
28 Plaintiff fails to allege the basis for federal subject matter jurisdiction and Plaintiff
has failed to state a claim against Defendant Unruh under Rule 12(b)(6), the Court
sua sponte dismisses the Complaint against Unruh with leave to amend. Plaintiff’s
remaining motions are dismissed as moot. (ECF Nos. 7, 15, 17.)

1 asserting jurisdiction.” *Id.* (citations omitted). Thus, “[w]hen subject matter
2 jurisdiction is challenged under the Federal Rule of Procedure 12(b)(1), the plaintiff
3 has the burden of proving jurisdiction in order to survive the motion.” *Kingman Reef*
4 *Atoll Invs., L.L.C. v. United States*, 541 F.3d 1189, 1197 (9th Cir. 2008), quoting
5 *Tosco Corp. v. Communities for a Better Env’t*, 236 F.3d 495, 499 (9th Cir. 2001),
6 abrogated on other grounds *Hertz Corp. v. Friend*, 559 U.S. 77 (2010). The Court
7 may raise the issue of lack of subject matter jurisdiction *sua sponte* at any point in
8 the proceedings. Fed. R. Civ. P. 12(h)(3); *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S.
9 574, 583-84 (1999).

10 A motion to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil
11 Procedure tests the legal sufficiency of the claims asserted in the complaint. Fed. R.
12 Civ. P. 12(b)(6); *Navarro v. Block*, 250 F.3d 729, 731 (9th Cir. 2001). The Court may
13 also dismiss a complaint *sua sponte* under Rule 12(b)(6). *Omar v. Sea-Land Serv.*
14 *Inc.*, 813 F.2d 986, 991 (9th Cir. 1987) (citing *Wong v. Bell*, 642 F.2d 359, 361-62
15 (9th Cir. 1981).

16 The court must accept all factual allegations pleaded in the complaint as true
17 and must construe them and draw all reasonable inferences from them in favor of the
18 nonmoving party. *Cahill v. Liberty Mut. Ins. Co.*, 80 F.3d 336, 337-38 (9th Cir. 1996).
19 To avoid a Rule 12(b)(6) dismissal, a complaint need not contain detailed factual
20 allegations, rather, it must plead “enough facts to state a claim to relief that is
21 plausible on its face.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A claim
22 has “facial plausibility when the plaintiff pleads factual content that allows the court
23 to draw the reasonable inference that the defendant is liable for the misconduct
24 alleged.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Twombly*, 550 U.S. at
25 556). “Where a complaint pleads facts that are ‘merely consistent with’ a defendant’s
26 liability, it stops short of the line between possibility and plausibility of ‘entitlement
27 to relief.’” *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 557). Despite the
28 deference the court must pay to the plaintiff’s allegations, it is not proper for the court

1 to assume that “the [plaintiff] can prove facts that [he or she] has not alleged or that
2 defendants have violated the . . . laws in ways that have not been alleged.” *Associated*
3 *Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 526
4 (1983).

5 As a general rule, a court freely grants leave to amend a complaint which has
6 been dismissed. Fed. R. Civ. P. 15(a). However, leave to amend may be denied when
7 “the court determines that the allegation of other facts consistent with the challenged
8 pleading could not possibly cure the deficiency.” *Schreiber Distrib. Co. v. Serv-Well*
9 *Furniture Co.*, 806 F.2d 1393, 1401 (9th Cir. 1986).

10
11 **II. FBI**

12 Under the doctrine of sovereign immunity, the United States may not be sued
13 unless it expressly consents to be sued or unequivocally waives sovereign immunity.
14 *United States v. Mitchell*, 463 U.S. 206, 212 (1983); *Gilbert v. DaGrossa*, 756 F.2d
15 1455, 1458 (9th Cir. 1985) (citing *United States v. King*, 395 U.S. 1, 4 (1969).) The
16 Federal Torts Claims Act (“FTCA”), alleged by Plaintiff in this case, is such a waiver
17 of sovereign immunity, but it is limited by the discretionary function exception.
18 *Sabow v. United States*, 93 F.3d 1445, 1451 (9th Cir. 1996). “The discretionary
19 function exception covers any FTCA claims ‘based upon the exercise or performance
20 *or failure to exercise or perform* a discretionary function or duty on the part of a
21 federal agency or an employee of the Government, whether or not the discretion
22 involved be abused.” *Id.* (quoting 28 U.S.C. § 2680(a)). “Where the discretionary
23 function exception to the FTCA applies, no federal subject matter jurisdiction exists.”
24 *Id.* (citing *In re Glacier Bay*, 71 F.3d 1447, 1450 (5th Cir. 1995)).

25 The United States bears the burden of showing the discretionary function
26 exception applies. *Id.* The Government must show that: (1) the action or inaction
27 involved “an element of judgment or choice” (*id.* (quoting *United States v. Gaubert*,

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1 499 U.S. 315, 322 (1991))) and (2) the action or inaction involved “considerations of
2 social, economic or political policy” (*id.* (quoting *Glacier Bay*, 71 F.3d at 1480)).

3 The failure of the FBI to investigate Defendant Unruh, as alleged in this
4 Complaint, is such a discretionary function. It involves an element of judgment or
5 choice. When deciding whether to investigate an alleged crime, the FBI considers
6 many factors including the source of the information, its credibility, the amount of
7 detail provided by the reporter, the seriousness of the alleged criminal activity, the
8 FBI’s jurisdiction over the crime, and the agency’s priorities, not to mention funding
9 limitations and how those funds can best be allocated to various priorities. *See*
10 *Gonzalez v. United States*, 814 F.3d 1022, 1029 (9th Cir. 2016) (FBI decision whether
11 to share information involves an element of judgment or choice).

12 Furthermore, this decision involved considerations of social, economic, or
13 political policy. *See Sabow*, 93 F.3d at 1453 (“Investigations by federal law
14 enforcement officials . . . clearly require investigative officers to consider relevant
15 political and social circumstances in making decisions about the nature and scope of
16 a criminal investigation.”)

17 Therefore, the FBI, in its Motion to Dismiss, has met its burden of showing
18 the discretionary function exception applies to the allegations in the Complaint. The
19 Court lacks subject matter jurisdiction. Therefore, under Rule 12(b)(6), the Motion
20 to Dismiss is **GRANTED**. (ECF No. 18.) Furthermore, because this Court finds that
21 no facts claiming the FBI was negligent due to its failure to investigate another
22 individual could avoid the discretionary function exception, the Court grants the
23 Motion to Dismiss without leave to amend. *See Schreiber Distrib. Co.*, 806 F.2d at
24 1401.

25 In addition, since any amendment to add an FBI agent—who allegedly failed
26 to investigate Unruh’s similarity to an individual on the most-wanted list—would
27 face similar subject matter dismissal, the Motion to Add a Defendant is **DENIED** as
28 such an amendment would be futile. (ECF No. 13.) In his Response to the Motion to

1 Dismiss, Plaintiff withdraws his Motion for Sanctions against the FBI, and the Court
2 agrees the Motion is baseless, hence it too is **DENIED**. (ECF No. 7.)

3
4 **III. Defendant Unruh**

5 Plaintiff alleges claims against Defendant Unruh based on two federal criminal
6 statutes, 18 U.S.C. § 2331(5) (domestic terrorism) and 47 U.S.C. § 223(a) (use of
7 telecommunications device in interstate communications to annoy, abuse, harass, or
8 threaten any person). “[T]he fact that a federal statute has been violated and some
9 person harmed does not automatically give rise to a private right of action.” *Touche*
10 *Ross & Co. v. Redington*, 442 U.S. 560, 568 (1979) (quotation omitted). “Instead, the
11 statute must either explicitly create a right of action or implicitly contain one.” *In re*
12 *Digimarc Corp. Derivative Litig.*, 549 F.3d 1223, 1230 (9th Cir. 2008) (citation
13 omitted); *see also Alexander v. Sandoval*, 532 U.S. 275, 286 (2001 (Scalia, J.) (“Like
14 substantive federal law itself, private rights of action to enforce federal laws must be
15 created by Congress”); *Aldabe v. Aldabe*, 616 F.2d 1089, 1092 (9th Cir. 1980)
16 (finding that criminal provisions that provide no basis for civil liability do not give
17 rise to a civil cause of action); *Chrysler Corp. v. Brown*, 441 U.S. 281, 316 (1979)
18 (“[T]his Court has rarely implied a private right of action under a criminal statute.”)

19 Neither statute Plaintiff seeks to invoke in his Complaint is a criminal
20 provision providing for a private cause of action. Thus, various courts have concluded
21 allegations that these criminal statutes were violated are insufficient to state a claim.
22 *See Jianjun Xie v. Oakland Unified Sch. Dist.*, No. C 12-02950 CRB, 2012 WL
23 5869707 at *6 (N.D. Cal. Nov. 19, 2012) (holding that harassment under 47 U.S.C.
24 § 223 provides no civil remedy); *Cox v. Randazza*, No. 2:13-cv-00297-MMD-VCF,
25 2013 WL 6408736, at *6 (D. Nev. Nov. 27, 2013) (stating that claims under 47
26 U.S.C. § 223 are not properly brought in a civil complaint); *Sloan v. Truong*, 573 F.
27 Supp. 2d 823, 829 (S.D.N.Y. 2008) (same); *Boyd v. City of Oceanside Police Dep’t*,
28 No. 11-cv-3039-LAB (WMc), 2013 WL 5671164, at *5 (S.D. Cal. Oct. 11, 2013)

1 (finding no private civil right of action under domestic terrorism statute, 18 U.S.C. §
2 2331); *Archer v. City of Taft*, No. 1:12-cv-00261-AWI-JLT, 2012 WL 1458136, at
3 *6 (E.D. Cal. Apr. 26, 2012) (same). This Court agrees. To the extent Plaintiff is
4 claiming federal jurisdiction because of a violation of a federal criminal statute, he
5 fails to state a claim and the Complaint should be dismissed pursuant to Rule
6 12(b)(6).

7 To the extent Plaintiff is alleging some other state law claim, because there are
8 no allegations about the amount in controversy, he fails to state sufficient information
9 to show that subject matter jurisdiction exists in federal court. Therefore, the Court
10 **DISMISSES** *sua sponte* the Complaint against Unruh, mooted the Motions for
11 Service by Publication (ECF No. 15) and the Motion for Mental Examination of
12 Unruh (ECF No. 17). However, the Court will give Plaintiff leave to amend the
13 Complaint against Unruh only. If Plaintiff elects to file an amended Complaint
14 against Unruh, he must put the basis of his claim and why it belongs in federal court.
15 Simply alleging violation of a federal criminal statute is insufficient.

17 **III. CONCLUSION**

18 The Court **GRANTS** the FBI's Motion to Dismiss with prejudice and
19 **DENIES** Plaintiff's motion to add another FBI employee defendant. (ECF Nos. 13,
20 18.) The Court **DISMISSES** *sua sponte* the remaining claims against Defendant
21 Unruh, but gives Plaintiff leave to file an amended Complaint against Unruh only.
22 Any amended Complaint must address the concerns expressed by the Court in this
23 Order and must be filed no later than **October 20, 2017**. The remaining Motions
24 (ECF Nos. 7, 15, 17) are **DISMISSED** as moot or withdrawn.

25 **IT IS SO ORDERED.**

26
27 **DATED: September 27, 2017**

28

Hon. Cynthia Bashant
United States District Judge