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8 UNITED STATES DISTRICT COURT  
9 SOUTHERN DISTRICT OF CALIFORNIA  
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11 R.N., a minor by and through his guardian  
12 ad litem Elizabeth Neel,

13 Plaintiff,

14 v.

15 UNITED STATES OF AMERICA et al.,

16 Defendants.

Case No.: 17cv1583-L-BGS

**ORDER DENYING THE  
GOVERNMENT'S MOTION FOR  
SUMMARY JUDGMENT**

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18 Pending before the Court in this action alleging personal injuries to a minor at  
19 Marine Corps Air Station Miramar Child Care Development Center ("CDC") is a motion  
20 for summary judgment filed by Defendant the United States ("government"). Plaintiff, a  
21 minor represented by his mother as guardian ad litem, filed an opposition. The  
22 government replied. For the reasons which follow, the government's motion is denied.

23 **I. BACKGROUND**

24 Plaintiff, who was enrolled at CDC, was injured twice in two months, suffering a  
25 broken finger and a broken leg. He filed this action under the Federal Tort Claims Act,  
26 28 U.S.C. §§2670-2680, 1346(b) ("FTCA"), alleging that his injuries were caused by  
27 Defendants' negligence. The Court has subject matter jurisdiction under 28 U.S.C.  
28 §1346(b).

1 In its summary judgment motion the government contends that Plaintiff's claims  
2 are barred by the Hold Harmless Release ("Release") included in the CDC's registration  
3 papers which Plaintiff's parents had signed. (Joint Separate Statement of Undisputed  
4 facts (doc. no. 25 ("Joint Statement")) ¶7.) Signing the Release was required of all  
5 parents to enroll their children in the CDC. (*Id.*)

6 The parties disagree whether the Release is enforceable. Plaintiff contends it is not  
7 because the government had waived this defense and, alternatively, because it is  
8 unenforceable under California law. The government counters that California law does  
9 not apply and that the Release is enforceable under federal law.

## 10 **II. DISCUSSION**

11 Federal Rule of Civil Procedure 56 empowers the Court to enter summary  
12 judgment on factually unsupported claims or defenses, or parts thereof, and thereby  
13 "secure the just, speedy and inexpensive determination of every action." *Celotex Corp. v.*  
14 *Catrett*, 477 U.S. 317, 325, 327 (1986). A party seeking summary judgment bears the  
15 initial burden of establishing the absence of a genuine issue of material fact. *Id.* at 323.  
16 If the moving party meets this initial burden, the nonmoving party cannot defeat  
17 summary judgment merely by demonstrating "that there is some metaphysical doubt as to  
18 the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586  
19 (1986); *Triton Energy Corp. v. Square D Co.*, 68 F.3d 1216, 1221 (9th Cir. 1995).  
20 Rather, the nonmoving party must "go beyond the pleadings" and by "the depositions,  
21 answers to interrogatories, and admissions on file," designate "specific facts showing that  
22 there is a genuine issue for trial." *Celotex*, 477 U.S. at 324 (quoting Fed. R. Civ. P.  
23 56(e)).

24 Credibility determinations, the weighing of the evidence, and the drawing of  
25 legitimate inferences from the facts are jury functions, not those of a judge  
26 . . . . The evidence of the non-movant is to be believed, and all justifiable  
27 inferences are to be drawn in [its] favor.

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1 *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). The facts relevant to the  
2 government's motion are undisputed.

3 **A. Waiver**

4 Initially, Plaintiff argues that the government's motion should be denied because it  
5 has forfeited release as an affirmative defense. An affirmative defense is forfeited unless  
6 asserted in the answer to the complaint. *In re Cellular 101, Inc. (Lowery v. Channel*  
7 *Comm'ctns, Inc.)*, 539 F.3d 1150, 1155 & n.2 (9<sup>th</sup> Cir. 2008); *In re Adbox, Inc. (Metcalf v.*  
8 *Golden)*, 488 F.3d 836, 841 (9<sup>th</sup> Cir. 2007). Rule 8(c) expressly requires that "[i]n  
9 responding to a pleading, a party must affirmatively state any avoidance or affirmative  
10 defense, including . . . release . . . ." Consistently, Rule 12(b) requires that "[e]very  
11 defense to a claim for relief in any pleading must be asserted in the responsive pleading,"  
12 except certain enumerated defenses which do not include release.

13 The government does not deny that it failed to plead release in the answer (*see*  
14 Answer (doc. no. 5)), but counters that its defense should not be forfeited because  
15 Plaintiff suffered no prejudice, as the defense had been discussed between counsel and  
16 they had conducted discovery on the issue. (Reply (doc. no. 23) at 3 n.1.)<sup>1</sup> Although the  
17 defendant is required to timely raise affirmative defenses in the answer, "an affirmative  
18 defense may be raised for the first time at summary judgment" if the plaintiff is not  
19 prejudiced. *Garcia v. Salvation Army*, 918 F.3d 997, 1008 (9<sup>th</sup> Cir. 2019) (quoting  
20 *Camarillo v. McCarthy*, 998 F.2d 638, 639 (9<sup>th</sup> Cir. 1993)). In order to preclude the  
21 application of the untimely asserted affirmative defense, "a party must point to a tangible  
22 way in which it was prejudiced by the delay." *Garcia*, 998 F.3d at 1009 (internal  
23 quotation marks and citation omitted). As Plaintiff does not contend he was prejudiced  
24 by the government's delay in asserting release, the government's failure to raise it in the  
25 answer does not bar its summary judgment motion.

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28 <sup>1</sup> Page number references are as assigned by the electronic case filing system.

1           **B.    Release**

2           The government argues that Plaintiff's claims are barred by the Release. Plaintiff  
3 counters that the Release is unenforceable under California law.

4                   **1.    Choice of Law**

5           The parties disagree whether federal or California law applies to the Release.  
6 Plaintiff relies on *Air Transportation Associates v. United States*, 221 F.2d 467 (9<sup>th</sup> Cir.  
7 1955), for the proposition that California law applies to determine whether the Release  
8 provides a valid defense to his negligence claim. In *Air Transportation* the plaintiff's  
9 airplane was damaged at a military airfield due to the government's negligence. 221 F.2d  
10 at 469. The plaintiff filed an action for damages under the FTCA. *Id.* at 470-71. The  
11 government, as here, defended by pointing to a release for the plaintiff's use of the  
12 airfield. *See od.* at 469. The Court relied on 28 U.S.C. § 2674, which provides for  
13 government liability under the FTCA in pertinent part as follows: "The United States  
14 shall be liable . . . in the same manner and to the same extent as a private individual under  
15 like circumstances . . ." The Court held that the same principle applied to the validity of  
16 the release:

17                   The Federal Tort Claims Act specifically adopts the law of the place where  
18 an accident occurs as the law in accordance with which liability is to be  
19 determined. This adoption of the proper state law applies not only as to the  
20 creation of liability but also as to release from liability.

21 *Id.* at 471 (citations omitted). It went on to consider whether the release was a valid  
22 defense under state law. *Id.* at 472-73. Under *Air Transportation*, California law  
23 determines whether Plaintiff's claims are barred by the Release.

24           The government counters that subsequent case law makes clear that federal law  
25 applies to bar the released claims. The subsequent cases cited by the government do not  
26 contradict *Air Transportation* and support the government's contention only insofar as  
27 federal law controls contract interpretation.

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1            *United States v. Seckinger*, 397 U.S. 203 (1970), arises from an FTCA action filed  
2 by a government contractor's employee against the government for personal injury caused  
3 by the government's negligent maintenance of the work site. *Id.* at 204-05. The court  
4 found the government liable under the FTCA and awarded damages. *Id.* at 205.  
5 *Seckinger* is the action the government subsequently filed against the contractor under an  
6 indemnity clause of their contract, seeking indemnity for the judgment in the FTCA  
7 action. *Id.* at 206. The issue decided in *Seckinger* was whether the indemnity clause  
8 could be interpreted to shift all of government liability to the contractor. *Id.* In  
9 ultimately reaching the decision that the clause allocated liability based on comparative  
10 negligence principles, the Court noted, "Preliminarily we agree . . . that federal law  
11 controls the interpretation of the contract." *Id.* at 209. The government seizes on the  
12 latter statement to argue that the effect of the Release on Plaintiff's claims must be  
13 decided under federal law. *Seckinger* interpreted the indemnity clause under federal law.  
14 The choice of law issue relating to defense from liability was neither raised nor decided  
15 in *Seckinger*. *Seckinger* was not an FTCA action filed by a claimant against the  
16 government, but the government's action against a contractor to enforce an indemnity  
17 contract. Accordingly, *Seckinger* supports the government's argument only insofar as  
18 federal law applies to interpret a federal government contract.

19            The government also relies on *Schwarder v. United States*, 974 F.2d 1118 (9<sup>th</sup> Cir.  
20 1992), which arises from a medical malpractice claim filed by a Veterans Administration  
21 patient against the government under the FTCA. *Id.* at 1120. The government and the  
22 patient entered into a settlement agreement which included a release as provided by the  
23 FTCA, 28 U.S.C. 2672, for adjustment of claims. *Id.* The patient later died.  
24 Subsequently, his children sued the government under the FTCA alleging wrongful  
25 death. *Id.* at 1121. The government defended by arguing that the settlement release  
26 barred the wrongful death action. *Id.* at 1122.

27            In deciding whether the release provided a valid defense, the Court engaged in a  
28 two-step analysis. It first noted that interpretation of the release under 28 U.S.C. § 2672

1 is a matter of federal law. *Id.* at 1123 ("In essence, the government argues that the  
2 meaning of a release of liability under section 2672 of the FTCA is a question of federal,  
3 rather than state, law. Our interpretation of section 2672 is, of course, initially a matter of  
4 federal law.") The Court concluded that under the plain language of section 2672,<sup>2</sup> the  
5 release applied only to the settling parties. *Id.* at 1122-23. Second, the Court looked to  
6 state law as required by section 2674:

7       Some provisions of the FTCA, however, incorporate state law. See, e.g., 28  
8       U.S.C. § 2674. We must determine to what extent Congress intended to  
9       make the effect of a section 2672 settlement dependent upon state law.

10 *Id.* at 1123.

11       Citing *Air Transport*, the Court concluded that once the release is interpreted under  
12 federal law, its effect on the tort claim is governed by state law. *Id.* at 1124.

13       We conclude, as a matter of federal law, that an administrative settlement  
14 reached pursuant to section 2672 bars further claims by the settling party,  
15 without regard to the effect it would have as a matter of state law. . . .

16       However, we are persuaded that section 2672 does not directly control the  
17 effect of a settlement on persons other than the settling party. . . . With  
18 respect to the claims of other persons, a section 2672 settlement has the  
19 same effect as any other release: it is a relevant circumstance which must be  
20 taken into account in determining whether the United States is liable under  
21 state law.

22       We hold, therefore, that state law governs the question of the effect of a  
23 section 2672 release on the claims of persons other than the settling

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24 <sup>2</sup> The settlement agreement tracked the language of section 2672, which provides in  
25 relevant part:

26       The acceptance by the claimant of any such award, compromise, or  
27 settlement shall be final and conclusive on the claimant, and shall constitute  
28 a complete release of any claim against the United States and against the  
employee of the government whose act or omission gave rise to the claim,  
by reason of the same subject matter.

*Cf. Schwarzer*, 974 F.2d at 1120 (release).

1 claimant. Congress plainly intended to define the contours of a “tort claim”  
2 by reference to state law. See 28 U.S.C. § 2674. . . .

3 *Id.*

4 Accordingly, in an FTCA case, where, as here, the government relies on a federal  
5 contract provision for its defense,<sup>3</sup> federal law applies to interpret the contract provision.  
6 See *Schwarder*, 974 F.2d at 1123; see also *Kennewick Irrig. Dist.*, 880 F.2d at 1032.  
7 However, state law determines whether the contract provision bars liability for the tort  
8 claim. See *Schwarder*, 974 F.2d at 1123 (citing 28 U.S.C. § 2674); see also *Fort*  
9 *Vancouver Plywood Co. v. U.S.*, 747 F.2d 547, 553 (9<sup>th</sup> Cir. 1984), *abrogated on other*  
10 *grounds by DaVinci Aircraft, Inc. v. U.S.*, \_\_\_ F.3d \_\_\_, 2019 WL2439691 (9<sup>th</sup> Cir. Jun. 12,  
11 2019).

## 12 2. Contract Interpretation

13 Plaintiff does not dispute that the contract, including the Release, was entered into  
14 pursuant to authority conferred by federal law. See 5 U.S.C. §301; Dep't of the Navy,  
15 OPNAV Instr. 1700.9E (Child and Youth Program).<sup>4</sup> Its interpretation is governed by  
16 federal common law "fashioned from general principles of contract interpretation."  
17 *Harrison W. Corp. v. U.S.*, 792 F.2d 1391, 1393 (9<sup>th</sup> Cir. 1986) (citations omitted).

18 A written contract must be read as a whole and every part interpreted with  
19 reference to the whole, with preference given to reasonable interpretations.  
20 Contract terms are to be given their ordinary meaning, and when the terms  
21 of a contract are clear, the intent of the parties must be ascertained from the  
22 contract itself. Whenever possible, the plain language of the contract should  
23 be considered first. The fact that the parties dispute a contract's meaning  
24 does not establish that the contract is ambiguous; it is only ambiguous if  
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26 <sup>3</sup> "The government may, of course assert a contractual defense in a tort action under  
27 the FTCA." *Kennewick Irrig. Dist. v. U.S.*, 880 F.2d 1018, 1032 (9<sup>th</sup> Cir. 1989) (as  
28 amended Aug. 28 and Oct. 23, 1989).

<sup>4</sup> See Gov't Exs. A, B (doc. no. 21-2).

1 reasonable people could find its terms susceptible to more than one  
2 interpretation.

3 *Klamath Water Users Protective Assoc. v. Patterson*, 204 F.3d 1206, 1210 (9<sup>th</sup> Cir. 2000).

4 The Release provides in relevant part:

5 I agree to release and hold harmless the United States, its officers, its agents,  
6 and its instrumentalities, against any claims . . . arising out of, claimed on  
7 account of, or in any manner predicated upon his/her participation in any  
8 [Children and Youth Program] activity, use of facilities and/or equipment  
9 including any . . . injury or death of any person, in any manner, caused or  
10 contributed to by the United States, its officers, its agents, or its  
11 instrumentalities.

12 (Gov't Ex. B at 13.) Plaintiff contends that the Release is ambiguous because it does not  
13 clearly define who it refers to. While Plaintiff is correct that the Release does not refer to  
14 Plaintiff by name, Plaintiff is identified by name elsewhere in the contract, and the fact  
15 that the Release refers to Plaintiff rather than "any person in the world" (Opp'n (doc.  
16 no.22) at 23) is apparent from the context of the contract as a whole. (*See* Gov't Ex. B at  
17 13.) Construed according to its plain meaning, the Release unambiguously states that the  
18 government is released from liability for Plaintiff's injuries.

### 19 **3. Release as Affirmative Defense**

20 Under the FTCA state law applies to the issue of liability. 28 U.S.C. §2674; *see*  
21 *also Schwarzer*, 974 F.2d at 1123, 1124; *Air Transp. Assoc.*, 221 F.2d at 471. Relying on  
22 *United States v. Kimbell Foods, Inc.*, 440 U.S. 715 (1979), and *Woodbury v. United*  
23 *States*, 313 F.2d 291 (9<sup>th</sup> Cir. 1963), the government counters by arguing that federal law  
24 applies because the Release should be uniformly enforced. (Mot. at 15; Reply at 8-9.)  
25 Neither case supports the government's position.

26 In *Woodbury* the Court found that the plaintiff's claim, although pled as a tort,  
27 depended entirely on proof of the government's breach of contract, and therefore did not  
28 fall under the FTCA. 313 F.2d at 295-96. In this regard, it distinguished claims which  
depend entirely on the breach of a government contract, which are adjudicated under the



1 Tucker Act, and tort claims where, as here, a government contract is asserted only as a  
2 defense, which are adjudicated under the FTCA. *Id.* at 296. The Court acknowledged  
3 that state law applies under the FTCA. *Id.* at 295. *Woodbury* supports Plaintiff's position  
4 that state law decides the government's liability in light of the Release.

5 *Kimbell Foods* did not involve the FTCA, but considered if, in the absence of a  
6 federal statute setting lien priorities, state or federal law should control priority between  
7 private liens and government liens. 440 U.S. at 718. The government liens at issue were  
8 created to secure loans guaranteed or extended by the federal Small Business  
9 Administration and the Farmers Home Administration, respectively. *Id.* at 718-26. The  
10 Court noted that the issue whether state or federal law should apply arises only "absent a  
11 congressional directive." *Id.* at 740; *see also id.* at 726 ("[i]n the absence of an applicable  
12 Act of Congress"), 727 ("Congress has not spoken"). Although no federal statute  
13 specified the appropriate rule of decision, and after considering the government's  
14 numerous arguments for uniformity in enforcement, the Court "decline[d] to override  
15 intricate state laws of general applicability." *Id.* at 729; *see also id.* at 740. Unlike in  
16 *Kimbell Foods*, here the Court need not engage in the weighing of the government's  
17 reasons for uniformity, as federal law provides the rule of decision. The FTCA directs  
18 federal courts to apply state law to determine government tort liability. 28 U.S.C. § 2674.

19 California law provides that child care center releases are unenforceable. *Gavin v.*  
20 *YMCA of Metropolitan Los Angeles*, 106 Cal. App. 4<sup>th</sup> 662 (2003). Accordingly, the  
21 government's summary judgment motion is denied.

22 **IT IS SO ORDERED.**

23  
24 Dated: June 20, 2019

25   
26 Hon. M. James Lorenz  
27 United States District Judge  
28