

1
2
3
4
5
6
7
8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA
10

11 CARLOS E. LOUREIRO,

12 Plaintiff,

Case No.: 17cv2176-WQH-JMA

13 v.

ORDER

14 UNITED STATES POST
15 OFFICE,

16
17 Defendant.

18 HAYES, Judge:

19 The matters before the Court are the motions to dismiss the complaint filed by
20 Defendant United States Postal Service.¹ (ECF Nos. 3, 4).

21 **I. Background**

22 On September 22, 2017, Plaintiff Carlos E. Loureiro, proceeding pro se, filed a
23 “Plaintiff’s Claim and ORDER to go to Small Claims Court” in the Superior Court of
24 California for the County of San Diego. (ECF No. 1-2). Plaintiff alleges that Defendant
25 “never sent my package back” and owes Plaintiff \$344.40. *Id.* at 2.

26
27
28 ¹ The United States Postal Service was erroneously sued as the United States Post Office. (*See* ECF No. 1).

1 On October 24, 2017, Defendant filed a notice of removal to this court. (ECF No. 1).

2 On October 26, 2017, Defendant filed a “Certificate of Service of Notice to Adverse
3 Parties of Removal of a Civil Action to Federal Court.” (ECF No. 2).

4 On October 30, 2017, Defendant filed a motion to dismiss for lack of subject matter
5 jurisdiction. (ECF No. 3). On November 15, 2017, Defendant filed an amended motion
6 to dismiss. (ECF No. 4). The motions are identical in relevant part.

7 The record reflects that Plaintiff has not filed a response to either motion.

8 **II. Legal Standards**

9 Pursuant to Federal Rule of Civil Procedure 8(a), a complaint must contain a short
10 and plain statement of the grounds for the court’s jurisdiction. Fed .R. Civ. P. 8(a). A
11 motion to dismiss filed pursuant to Rule 12(b)(1) is a challenge to the court’s subject matter
12 jurisdiction. *See* Fed. R. Civ. P. 12(b)(1). “Federal courts are courts of limited jurisdiction.
13 They possess only that power authorized by Constitution and statute, which is not to be
14 expanded by judicial decree. It is to be presumed that a cause lies outside this limited
15 jurisdiction, and the burden of establishing the contrary rests upon the party asserting
16 jurisdiction.” *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994)
17 (citations omitted). “A plaintiff suing in a federal court must show in his pleading,
18 affirmatively and distinctly, the existence of whatever is essential to federal jurisdiction,
19 and, if he does not do so, the court, on having the defect called to its attention or on
20 discovering the same, must dismiss the case, unless the defect be corrected by amendment.”
21 *Tosco Corp. v. Communities for a Better Env’t*, 236 F.3d 495, 499 (9th Cir. 2001) (quoting
22 *Smith v. McCullough*, 270 U.S. 456, 459 (1926)) *abrogated on other grounds by Hertz*
23 *Corp. v. Friend*, 559 U.S. 77 (2010). The Court liberally construes pleadings by pro se
24 litigants. *Eldridge v. Block*, 832 F.2d 1132, 1137 (9th Cir. 1987). A jurisdictional attack
25 pursuant to Rule 12(b)(1) may be facial or factual. *White v. Lee*, 227 F.3d 1214, 1242 (9th
26 Cir. 2000). “In a facial attack, the challenger asserts that the allegations contained in the
27 complaint are insufficient on their face to invoke federal jurisdiction.” *Safe Air for*
28 *Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004).

1 A district court may properly grant an unopposed motion pursuant to a local rule
2 where the local rule permits, but does not require, the granting of a motion for failure to
3 respond. *See Ghazali v. Moran*, 46 F.3d 52, 53-54 (9th Cir. 1995) (affirming dismissal for
4 failing to oppose a motion to dismiss, based on a local rule providing that “[t]he failure of
5 the opposing party to file a memorandum of points and authorities in opposition to any
6 motion shall constitute consent to the granting of the motion”). Civil Local Rule 7.1
7 provides, “If an opposing party fails to file the papers in the manner required by Civil Local
8 Rule 7.1.e.2, that failure may constitute a consent to the granting of a motion or other
9 request for ruling by the court.” CivLR 7.1(f)(3)(c). “Although there is ... a [public] policy
10 favoring disposition on the merits, it is the responsibility of the moving party to move
11 towards that disposition at a reasonable pace, and to refrain from dilatory and evasive
12 tactics.” *In re Eisen*, 31 F.3d 1447, 1454 (9th Cir. 1994) (quoting *Morris v. Morgan Stanley*
13 *& Co.*, 942 F.2d 648, 652 (9th Cir. 1991)) (affirming dismissal for failure to prosecute).

14 III. Discussion

15 Defendant moves the Court for an order dismissing this action for lack of subject
16 matter jurisdiction. (ECF Nos. 3, 4). Defendant contends that the complaint should be
17 dismissed because the United States has not waived its sovereign immunity for claims
18 arising out of the Postal Service’s negligent transmission of mail. (ECF No. 3-1).

19 “The Postal Service enjoys federal sovereign immunity absent a waiver.” *Dolan v.*
20 *U.S. Postal Service*, 546 U.S. 481, 484 (2006). “The Federal Tort Claims Act grants a
21 waiver of sovereign immunity in certain cases.” *Anderson v. U.S. Postal Service*, 761 F.2d
22 527, 528 (1985) (citing 28 U.S.C. § 1346(b)). The Postal Reorganization Act of 1971
23 waives the immunity of the Postal Service and “provides that the FTCA ‘shall apply to tort
24 claims arising out of the activities of the Postal Service.’” *MB Fin. Grp., Inc. v. U.S. Postal*
25 *Serv.*, 545 F.3d 814, 816 (9th Cir. 2008) (citing 39 U.S.C. § 409(c)). “The FTCA qualifies
26 its waiver of sovereign immunity for certain categories of claims If one of the
27 exceptions applies, the bar of sovereign immunity remains.” *Dolan*, 546 U.S. at 485. “[B]y
28 28 U.S.C. § 2680(b), the United States retains sovereign immunity for tort claims against

1 it for ‘loss, miscarriage, or negligent transmission’ of the mail[.]” *Anderson*, 761 F.2d at
2 528.


3 In this case, Plaintiff’s claim is premised on the allegation that Plaintiff did not
4 receive a package from the Postal Service. (ECF No. 1-2). As alleged, Plaintiff attempts
5 to bring a tort claim for “loss, miscarriage, or negligent transmission” of the mail. 28
6 U.S.C. § 2680(b). This tort claim is barred by sovereign immunity. *See Anderson*, 761
7 F.2d at 528 (holding that a tort claim against the Postal Service for loss of a package stolen
8 from a postal carrier prior to delivery was barred by sovereign immunity). Accordingly,
9 Plaintiff fails to establish that the Court properly has subject matter jurisdiction over this
10 action.

11 Further, the docket reflects that the motion to dismiss was served on Plaintiff on
12 October 30, 2017 and the amended motion to dismiss was served on Plaintiff on November
13 15, 2017. (ECF Nos. 3-2, 4-2). Pursuant to the local rules, Plaintiff was to file any response
14 to the motions to dismiss no later than fourteen days prior to the hearing dates. The docket
15 reflects that Plaintiff has failed to file any responses to the motions to dismiss as required
16 by Civil Local Rule 7.1.e.2. The Court construes Plaintiff’s failure to oppose the motions
17 to dismiss as “a consent to the granting of” the motions. CivLR 7.1(f)(3)(c).

18 **IV. Conclusion**

19 IT IS HEREBY ORDERED that the motions to dismiss the complaint for lack of
20 jurisdiction are granted. (ECF Nos. 3, 4). The Complaint is dismissed.

21 Dated: January 17, 2018

22 
23 Hon. William Q. Hayes
24 United States District Court
25
26
27
28