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

10 JUAN ANTONIO NAVARRO
11 SANTIBANEZ; and JESUS MACIAS
12 KURI,

13 Plaintiffs,

14 v.

15 MICHAEL L. ALEXANDER; UNITED
16 STATES OF AMERICA;
17 DEPARTMENT OF HOMELAND
18 SECURITY; U.S. CUSTOMS AND
19 BORDER PROTECTION,

20 Defendants.

Case No.: 18cv1177-MMA (AGS)

**ORDER DENYING PETITION FOR
SUBSTITUTION AND
REPRESENTATION BY THE
UNITED STATES OF AMERICA;**

[Doc. No. 6]

**GRANTING THE UNITED STATES
OF AMERICA'S MOTION FOR
SUMMARY JUDGMENT**

[Doc. No. 7]

21 Plaintiffs Juan Antonio Navarro Santibanez and Jesus Macias Kuri (“Plaintiffs”)
22 commenced this action against Defendants Michael L. Alexander (“Alexander”), and
23 Holdings, LLC in the Superior Court of California, County of San Diego. *See* Doc. No.
24 1-2 at 6.¹ Plaintiffs later amended their complaint to add the United States of America,
25 Department of Homeland Security, and U.S. Customs and Border Protection as
26 defendants. *See id.* at 16. On June 6, 2018, Defendant the United States of America
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28 ¹ Citations to this document refer to the pagination assigned by the CM/ECF system.

1 removed the action to this Court pursuant to 28 U.S.C. § 1442(a)(1).² *See* Doc. No. 1.
2 On June 25, 2018, Plaintiffs filed a First Amended Complaint (“FAC”) against
3 Alexander, the United States of America, Department of Homeland Security, and U.S.
4 Customs and Border Protection (collectively, “Defendants”) alleging one cause of action
5 under the Federal Tort Claims Act (“FTCA”). *See* Doc. No. 5.

6 On September 7, 2018, Defendant Alexander filed a Petition for Substitution and
7 Representation by the United States of America, Department of Homeland Security, and
8 U.S. Customs and Border Protection (collectively, “United States”) in his place under the
9 FTCA. *See* Doc. No. 6. That same day, the United States filed a motion to dismiss for
10 lack of jurisdiction, or in the alternative, for summary judgment. *See* Doc. No. 7.
11 Alexander filed an opposition to the government’s motion. *See* Doc. No. 9. On October
12 5, 2018, Defendants filed a joint motion to consolidate the hearing date and briefing
13 schedule regarding the two pending motions, which the Court granted. *See* Doc. Nos. 10,
14 11. On October 15, 2018, the government filed a consolidated brief opposing
15 Alexander’s Petition for Substitution and Representation by the United States and
16 replying to its motion to dismiss for lack of jurisdiction, or, in the alternative, for
17 summary judgment. *See* Doc. No. 12.

18 The Court found the matters suitable for determination on the papers and without
19 oral argument pursuant to Civil Local Rule 7.1.d.1. *See* Doc. No. 13. For the reasons set
20 forth below, the Court **DENIES** Alexander’s Petition for Substitution and Representation
21 by the United States, **GRANTS** the United States’ motion for summary judgment, and
22 **REMANDS** this action back to state court.

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27 ² Section 1442(a)(1) permits the United States to remove an action commenced in state court to
28 the district court of the United States for the district embracing the place where it is pending where the
plaintiff brings suit against the “United States or any agency thereof or any officer (or any person acting
under that officer) of the United States or of any agency thereof, in an official or individual capacity”).

1 **FACTUAL BACKGROUND**

2 Plaintiffs Juan Antonio Navarro Santibanez and Jesus Macias Kuri are individuals
3 residing in San Diego County, California. FAC ¶¶ 4-5. Alexander is an individual
4 residing in the state of New York. *See id.* ¶ 6; *see also* Doc. No. 6-3 (hereinafter
5 “Alexander Decl.”) ¶ 3. Alexander is employed by U.S. Customs and Border Protection
6 (“CBP”), and was employed by CBP at the time of the accident. Alexander Decl. ¶ 2.

7 From January 12, 2016, through April 8, 2016, Alexander was on special
8 assignment from his permanent position in New York to the San Ysidro/Otay Mesa Port
9 of Entry in San Diego, California. *See id.* ¶ 3. While stationed in San Diego, CBP “paid
10 for and arranged use of a rental car” for Alexander. *Id.* ¶ 4. CBP rented this car “as a
11 pool car.” Doc. No. 9-1 (hereinafter “Supp. Alexander Decl.”) ¶ 4. Thus, if Alexander
12 was not using the rental car, “other agents staying at the same hotel would use the rental
13 car.” *Id.* CBP also paid for Alexander’s flight, accommodations, and incidentals while
14 he was in California. *See id.*

15 “On March 9, 2016, while driving to [his] shift in San Diego,” Alexander was
16 involved in a two-vehicle automobile accident in San Diego, California. *Id.* ¶ 5. At the
17 time of the accident, “Plaintiffs were riding a motorcycle and preparing to cross into
18 Mexico at the Otay Mesa international border crossing.” FAC ¶ 11. Alexander, driving a
19 rented vehicle, “crossed one or more lanes of traffic without first ensuring that he could
20 make a safe and legal lane change.” *Id.* ¶ 12. Plaintiffs allege that due to Alexander’s
21 negligent operation of the vehicle, Alexander “struck the side of Plaintiffs’ motorcycle,
22 knocking it over while in motion.” *Id.* ¶ 13. Plaintiffs sustained physical injuries, and
23 were transported by ambulance to Sharp Chula Vista Hospital where they received
24 emergency medical care. *Id.* ¶ 14. Plaintiffs’ motorcycle also sustained “significant
25 damage[.]” *Id.*

26 Plaintiffs allege, upon information and belief, that Alexander “was acting within
27 the course and scope of said employment when the incident occurred such that CBP is
28 liable for the injuries and damages sustained by Plaintiff[s] as herein alleged.” *Id.* ¶ 20.

1 **PROCEDURAL HISTORY**

2 Pursuant to Department of Justice policy, Alexander “sought representation by the
3 Attorney General under the Westfall Act.” Doc. No. 6-2 at 2; *see also* 28 U.S.C. §
4 2679(b)(1). On June 12, 2018, the Department of Justice issued a letter “which
5 determined [Alexander] was not in the scope of his employment during the time of [the]
6 accident.” Doc. No. 6-1 (hereinafter “Holnagel Decl.”) ¶ 3; *see also* Doc. No. 7-1 at 3
7 n.2. After the Department of Justice issued its letter, Plaintiffs amended their complaint
8 to add the United States of America, Department of Homeland Security, U.S. Customs
9 and Border Protection as defendants. *See* Doc. No. 1 at 2. The United States then
10 removed the action to this Court pursuant to 28 U.S.C. § 1442(a)(1). *See id.*

11 **ALEXANDER’S PETITION FOR SUBSTITUTION**

12 Alexander seeks review of the Attorney General’s decision refusing to certify that
13 he was acting within the scope of his employment at the time of the accident. *See* Doc.
14 No. 6-2 at 1. Alexander requests the Court grant his petition and substitute the United
15 States in his place in the litigation. *See id.* at 2. The United States, in opposition, asserts
16 Alexander was not acting within course and scope of his employment while commuting
17 to work on March 9, 2016. *See* Doc. No. 12 at 1. Therefore, the United States contends
18 it is not liable for the accident, and the Court “should dismiss the United States from this
19 case, or, in the alternative, grant summary judgment.” *Id.*

20 **A. Legal Standard**

21 “The Federal Employees Liability Reform and Tort Compensation Act of 1988,
22 commonly known as the Westfall Act, accords federal employees absolute immunity
23 from common-law tort claims arising out of acts they undertake in the course of their
24 official duties.” *Osborn v. Haley*, 549 U.S. 225, 229 (2007). “The immunity extends to
25 both ‘negligent’ and ‘wrongful’ ‘act[s] or omission[s] of any employee . . . acting within
26 the scope of his office or employment.’” *Saleh v. Bush*, 848 F.3d 880, 888 (9th Cir.

1 2017) (quoting 28 U.S.C. § 2679(b)(1)).³

2 “When a federal employee is sued for wrongful or negligent conduct, the Act
3 empowers the Attorney General to certify that the employee ‘was acting within the scope
4 of his office or employment at the time of the incident out of which the claim arose.’”
5 *Osborn*, 549 U.S. at 229-30 (quoting 28 U.S.C. § 2679(d)(1), (2)). If the Attorney
6 General certifies that a federal employee was acting within the scope of employment at
7 the time the tort occurred, the Westfall Act provides that the United States “shall be
8 substituted as the defendant in a tort suit against the employee.” *Kashin v. Kent*, 457 F.3d
9 1033, 1036 (9th Cir. 2006) (citing 28 U.S.C. § 2679(d)). “Upon certification, the
10 government employee is dismissed from the suit, and is immune from other civil actions
11 arising from the alleged tort.” *Id.* at 1036-37 (citing 28 U.S.C. § 2679(b)(1)). “If the
12 Attorney General refuses to certify, the employee may petition the district court to certify
13 that he was acting within the scope of employment.” *Id.* at 1037 (citing 28 U.S.C. §
14 2679(d)(3)).

15 The Attorney General’s decision “is conclusive unless challenged.” *Saleh*, 848
16 F.3d at 889 (quoting *Green v. Hall*, 8 F.3d 695, 698 (9th Cir. 1993)). “[T]he party
17 seeking review bears the burden of presenting evidence and disproving the Attorney
18 General’s decision to grant or deny scope of employment certification by a
19 preponderance of the evidence.” *Green*, 8 F.3d at 698.

20 The Westfall Act does not set forth a test to determine whether someone was
21 “‘acting within the scope of his office or employment’; rather, Congress intended that
22 courts would apply ‘the principles of *respondeat superior* of the state in which the
23 alleged tort occurred’ in analyzing the scope-of-employment issue.” *Saleh*, 848 F.3d at
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26 ³ The Westfall Act amended the FTCA to provide complete statutory immunity to federal
27 employees from liability for torts arising from acts within the scope of their employment. *See* 28 U.S.C.
28 § 2679(b)(1). “The same analysis was employed before passage of the Westfall Act to determine
whether the United States could be liable for an employee’s torts under the FTCA.” *Saleh*, 848 F.3d at
888.

1 888 (quoting *Pelletier v. Fed. Home Loan Bank of S.F.*, 968 F.2d 865, 876 (9th Cir.
2 1992)). Under the Westfall Act, the exclusive remedy for anyone injured by the
3 negligent or wrongful act of a federal employee acting in the scope of employment is a
4 lawsuit against the United States under the Federal Tort Claims Act. *See* 28 U.S.C. §
5 2679(b)(1).

6 **B. Analysis**

7 Alexander argues that he was acting within the scope of his employment at the
8 time of the accident because he was on a special errand for his employer. *See* Doc. No.
9 6-2 at 6. The government, in opposition, asserts that the special errand exception is
10 inapplicable to this case because Alexander was not running an errand at his employer’s
11 request, but rather commuting to work for his regularly scheduled shift. *See* Doc. No. 12
12 at 2-3.

13 Under California⁴ law, “an employer may be held vicariously liable for torts
14 committed by an employee within the scope of employment.” *Mary M. v. City of L.A.*,
15 814 P.2d 1341, 1343 (Cal. 1991). “[W]here the question is one of vicarious liability, the
16 inquiry should be whether the risk was one that may fairly be regarded as typical of or
17 broadly incidental to the enterprise undertaken by the employer.” *Perez v. Van*
18 *Groningen & Sons, Inc.*, 719 P.2d 676, 678 (Cal. 1986) (internal quotation marks and
19 citation omitted).

20 The “going and coming rule” provides that an employee is not considered to be
21 acting within the scope of his employment while he is going to or coming from his place
22 of work. *Ducey v. Argo Sales Co.*, 25 Cal. 3d 707, 722 (1979). The rationale underlying
23 this rule is that the employment relationship “is suspended from the time the employee
24 leaves work until he or she returns, since the employee is not ordinarily rendering
25 services to the employer while traveling.” *Jeewarat v. Warner Bros. Entm’t Inc.*, 98 Cal.
26 Rptr. 3d 837, 844 (Ct. App. 2009) (internal quotation marks and citation omitted).

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28 ⁴ The parties agree California law applies, as the accident occurred in California.

1 Pursuant to the special errand exception, however, an employer can be held liable
2 “where a negligent act was committed while the employee was engaged in a special
3 errand for the employer.” *Ducey*, 25 Cal. 3d at 722. As one court has explained,

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5 [i]f the employee is not simply on his way from his home to his normal place
6 of work or returning from said place to his home for his own purpose, but is
7 coming from his home or returning to it on a special errand either as part of
8 his regular duties or at a specific order or request of his employer, the
9 employee is considered to be in the scope of his employment from the time
10 that he starts on the errand until he has returned or until he deviates
11 therefrom for personal reasons.

12 *Felix v. Asai*, 192 Cal. App. 3d 926, 931 (Ct. App. 1987). Examples of the special errand
13 exception include situations where: (1) an employee goes on a business errand for his
14 employer leaving from his workplace and returning to his workplace; (2) an employee is
15 called to perform a special task for the employer at an irregular time; and (3) the
16 employer asks an employee to perform a special errand after the employee leaves works
17 but before going home. *See id.* at 931-32. In such situations, the employee is generally
18 acting within the scope of his employment. *See id.* at 932.

19 “Generally, the issue of scope of employment is a question of fact. However, the
20 issue becomes a question of law when the facts are undisputed and no conflicting
21 inferences are possible.” *Perez*, 719 P.2d at 679 (internal citation omitted).

22 In support of his Petition for Substitution, Alexander largely relies on *Jeewarat*,
23 where an employee attended a three-day business conference. 98 Cal. Rptr. 3d at 840.
24 The employer paid for the employee’s airfare, hotel, and airport parking. *See id.* at 841.
25 When the employee returned from his trip and arrived at the airport, he retrieved his car
26 from the parking lot. *See id.* The employee did not intend to go to his office, but planned
27 to return to his home. *See id.* On the drive to his home, the employee was involved in a
28 car accident that injured several pedestrians. *See id.* The California Court of Appeal
reversed the trial court order granting summary judgment in favor of the employer

1 pursuant to the going and coming rule, holding that “a special errand may include
2 commercial travel such as the business trip in this case.” *Id.* at 845.

3 The government relies on *Clamor v. United States*, where the employee, a civilian
4 engineer working for the United States Navy in Washington, D.C., received a temporary
5 assignment for a few weeks to work on the USS Los Angeles, which was moored at the
6 Pearl Harbor Naval Base in Hawaii. 240 F.3d 1215, 1216 (9th Cir. 2001). The Navy
7 reimbursed the employee for his rental car and hotel while working in Hawaii. *See id.*
8 On his way to his hotel after work one day, the employee rear-ended a car, injuring the
9 other driver. *See id.* Applying Hawaii law, the Ninth Circuit reversed the district court’s
10 order finding that the employee was acting in the scope of his employment at the time of
11 the accident. *See id.* at 1217. The Ninth Circuit explained that the employee “was not
12 working the entire time he was in Hawaii, and was, in fact, off duty when the accident
13 occurred.” *Id.* The employee “was not engaged in any errand for his employer, but was
14 leaving work and free to do whatever he wished.” *Id.* Moreover, the Ninth Circuit
15 indicated that the fact that the Navy reimbursed the cost of the employee’s rental car “is
16 more indicative of the inconvenience of working on an island in the middle of the Pacific
17 Ocean . . . than an indication that the employer considered all actions taken while driving
18 that car to be within the scope of employment.” *Id.*

19 Two additional California Court of Appeal cases, cited by the United States, shed
20 light on the case at bar. For example, in *Sunderland v. Lockheed Martin Aeronautical*
21 *Systems Support Company*, 29 Cal. Rptr. 3d 665, 667 (Ct. App. 2005), an employee
22 injured the plaintiff in a rear-end collision at a fast food restaurant. The plaintiff argued
23 that because the employee who hit her car was in California pursuant to his employer’s
24 temporary work assignment for several months, and because the corporation paid for the
25 employee’s travel costs, the corporation should be held vicariously liable for its
26 employee’s alleged tort. *See id.* at 668. The court held that the employer was not
27 vicariously liable for the accident, and explained that “[t]he payment of a travel
28 allowance, however, ‘does not reflect a sufficient benefit to defendant [employer] so that

1 it should bear responsibility for [a] plaintiff’s injuries.” *Id.* at 672-73 (quoting *Caldwell*
2 *v. A.R.B., Inc.*, 222 Cal. Rptr. 494, 503-04 (Ct. App. 1986)). Moreover, the employee
3 “performed no services for [the corporation] after leaving the workplace about mid-day,
4 and drove to the fast-food restaurant for his own benefit.” *Id.* at 673.⁵

5 Additionally, in *Pierson v. Helmerich & Payne International Drilling Company*,
6 209 Cal. Rptr. 3d 222, 225-28 (Ct. App. 2016), the court considered whether the special
7 errand exception applied when an employee was involved in a traffic accident while
8 driving two co-workers to a hotel (paid for by the employer) after their shift ended. The
9 court rejected application of the special errand exception, noting that the employees were
10 acting on their “own behalf” at the time of the accident; thus, the employer could not be
11 held liable. *Id.* at 242.

12 Here, Alexander asserts that he was on a special errand for his employer “from the
13 time he started to travel to San Diego in January 2016 until he returned to New York in
14 April 2016, or until he deviated therefrom for personal reasons.” Doc. No. 6-2 at 6. As
15 the government points out, Alexander does not cite to, nor is the Court aware of, any case
16 law supporting application of the special errand exception in the context of a temporary
17 assignment spanning a period of several months. Unlike the employee in *Jeewarat*, who
18 attended a business conference for three days, Alexander was temporarily stationed in
19 San Diego on a special assignment for *three months*. As such, *Jeewarat* is inapposite to
20 the case at bar.

21 Additionally, the fact that the United States paid for and arranged Alexander’s
22 rental car does not except this case from the traditional going and coming rule. *See*
23 *Caldwell*, 222 Cal. Rptr. at 502 (“While in certain circumstances payment of travel
24 expenses may be an exception under workers’ compensation laws . . . , the same

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27 ⁵ The court did not discuss the special errand exception to the going and coming rule in reaching
28 its conclusion. However, the court did note that the employee was engaged in a purely personal activity
at the time of the accident; thus, it is clear that the employer could not be held liable under the special
errand exception. *See id.*

1 conclusion has not been reached under the respondeat superior doctrine.”) (internal
2 citation omitted). The Court finds the Ninth Circuit’s reasoning in *Clamor* on this issue
3 persuasive.⁶ The government’s payment and arrangement of a rental car for Alexander’s
4 use during his time in San Diego is more indicative of the inconvenience of working
5 across the county for a period of three months “than an indication that the employer
6 considered all actions taken while driving that car to be within the scope of employment.”
7 *Clamor*, 240 F.3d at 1217; *see also Sunderland*, 29 Cal. Rptr. 3d at 672-73.

8 Moreover, the Ninth Circuit in *Clamor* expressly considered whether the employee
9 was on an errand for the Navy at the time of the accident, and concluded that he was not.
10 *See Clamor*, 240 F.3d at 1217 (“[The employee] was not engaged in any errand for his
11 employer, but was leaving work and free to do whatever he wished.”). Similarly here,
12 aside from summarily claiming he was on a special errand for the *entirety* of his three-
13 month assignment in San Diego, Alexander does not claim that on the day of the
14 accident, he was on a specific errand for his employer. In fact, it is undisputed that the
15 accident occurred while Alexander was “driving to” his scheduled shift. Alexander Decl.
16 ¶ 5.

17 Alexander was not engaged in any CPB business at the time of the accident, but
18 was commuting to work. *See id.*; *see also* Doc. No. 7-2 (hereinafter “Aki Decl.”) ¶ 10.
19 Alexander argues that he was not commuting to “his *normal* place of work (exempt under
20 the coming and going rule), [but] was traveling to his temporary workplace across the
21 country at the special request of his employer.” Doc. No. 6-2 at 6 (emphasis in original).
22 However, the Otay Mesa Port of Entry was Alexander’s normal place of work at the time
23 of the accident. *See* Aki Decl. ¶¶ 4, 10. Further, Alexander does not cite to any authority
24 in support of his argument that a temporary workplace for an extended period of time is
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27 ⁶ The Court is mindful that the Ninth Circuit in *Clamor* applied Hawaii law in concluding that
28 the employee was not acting within the scope of his employment at the time of the accident. However,
the facts of *Clamor* are sufficiently analogous to the case at bar to guide the Court’s analysis.

1 analyzed differently than a normal workplace for purposes of the going and coming rule.

2 Accordingly, the Court finds that Alexander has not met his burden of
3 “disproving” the Attorney General’s decision to deny scope of employment certification
4 “by a preponderance of the evidence.” *Green*, 8 F.3d at 698. Therefore, the Court
5 **DENIES** Alexander’s Petition for Substitution and Representation by the United States.

6 **C. Evidentiary Hearing**

7 Alexander claims that “triable issues of material fact [exist] as to whether [his]
8 business trip was a special assignment as in *Jeerwarat*.” Doc. No. 9 at 7. Specifically,
9 Alexander disputes: (1) that the rental car was for personal use; (2) that Alexander and all
10 CBP Officers were not required to wear uniforms while commuting to and from the
11 worksite; and (3) that Alexander was not required to intervene to prevent crime outside of
12 his duty station and work shift. *See id.* at 8.

13 The Ninth Circuit has explained that “when a district court is reviewing a
14 certification question under the Westfall Act, it must identify and resolve disputed issues
15 of fact necessary to its decision before entering its order.” *Arthur v. United States*, 45
16 F.3d 292, 296 (9th Cir. 1995). In doing so, a district court “should hold such hearings as
17 appropriate (including an evidentiary hearing if necessary), and make the findings
18 necessary to bind the parties by its decision and enable them to appeal the certification
19 decision if they deem an appeal necessary.” *Id.*

20 Here, Alexander fails to explain how any of these disputed facts are “necessary” to
21 the Court’s scope of employment determination. *Id.* Alexander does not cite to any
22 authority supporting application of the special errand exception where an employer pays
23 for an employee’s rental car in the context of a temporary assignment. Nor does
24 Alexander cite to any case law, or provide any argument, in support of the proposition
25 that an officer commuting to work in uniform is somehow on a special errand for his
26 employer. Finally, Alexander fails to cite authority supporting the proposition that even
27 if an off-duty officer is required to intervene to prevent crime outside of his duty station,
28 he is somehow on a special errand for his employer when commuting to work in uniform.

1 Accordingly, the Court finds that there are no triable issues of fact necessary to the
2 Court's scope of employment determination. Moreover, to the extent the parties request
3 an evidentiary hearing, the Court, in its discretion, **DENIES** such a request as an
4 evidentiary hearing is not appropriate or necessary to the Court's *de novo* determination
5 of scope of employment under the applicable legal standard. *See Saleh*, 848 F.3d at 892
6 (noting that the district court did not abuse its discretion in denying an evidentiary
7 hearing to challenge the scope certification because the allegations, taken as true, "do not
8 establish that Defendants acted outside the scope of their employment"); *Mansfield v.*
9 *Pfaff*, 719 F. App'x 583, 585 (9th Cir. 2017) ("The district court correctly understood
10 than an evidentiary hearing to review the Attorney General's Westfall Act certification is
11 discretionary.").

12 UNITED STATES' MOTION FOR SUMMARY JUDGMENT⁷

13 The United States contends that under the applicable state law, an employer is not
14 liable for torts committed by its employees while commuting to and from work. *See* Doc.
15 No. 7-1 at 1-2. Thus, the United States requests the Court "dismiss the United States
16 from this case for lack of subject matter jurisdiction, or, in the alternative, grant summary
17 judgment." *Id.* at 2. In opposition, Alexander asserts that he was acting within the scope
18 of his employment at the time of the accident, reiterating the same arguments made in his
19 Petition for Substitution. *See* Doc. No. 9 at 2. Alexander argues that genuine issues of
20 material fact exist and thus "requir[e] this Court [to] deny the United States' Motion to
21 Dismiss, or, in the alternative, for Summary Judgment." *Id.*

22 **A. Legal Standard**

23 "A party may move for summary judgment, identifying each claim or defense—or
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26 ⁷ Because the Court considers evidentiary materials that go "beyond the face of the pleadings" in
27 ruling on Alexander's Petition for Substitution, and such materials are relevant to the Court's ruling on
28 the government's motion, "the Court finds the government's motion appropriate for decision on
summary judgment." *Vallier v. Jet Propulsion Lab.*, 120 F. Supp. 2d 887, 891 (C.D. Cal. 2000).

1 the part of each claim or defense—on which summary judgment is sought. The court
2 shall grant summary judgment if the movant shows that there is no genuine dispute as to
3 any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ.
4 P. 56(a). The party seeking summary judgment bears the initial burden of establishing
5 the basis of its motion and of identifying the portions of the declarations, pleadings, and
6 discovery that demonstrate absence of a genuine issue of material fact. *Celotex Corp. v.*
7 *Catrett*, 477 U.S. 317, 323 (1986). The moving party has “the burden of showing the
8 absence of a genuine issue as to any material fact, and for these purposes the material it
9 lodged must be viewed in the light most favorable to the opposing party.” *Adickes v. S.*
10 *H. Kress & Co.*, 398 U.S. 144, 157 (1970). A fact is material if it could affect the
11 outcome of the suit under applicable law. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S.
12 242, 248-49 (1986). A dispute about a material fact is genuine if there is sufficient
13 evidence for a reasonable jury to return a verdict for the non-moving party. *Id.* at 248.

14 The party opposing summary judgment cannot “rest upon the mere allegations or
15 denials of [its] pleading’ but must instead produce evidence that ‘sets forth specific facts
16 showing that there is a genuine issue for trial.’” *Estate of Tucker v. Interscope Records,*
17 *Inc.*, 515 F.3d 1019, 1030 (9th Cir. 2008) (quoting Fed. R. Civ. P. 56(e)).

18 **B. Analysis**

19 The Westfall Act provides that if a federal employee is sued for a covered tort for
20 actions taken within the scope of his or her employment, the United States will be
21 substituted as the defendant, the case will proceed under the FTCA, and the individual
22 will be dismissed from the action. *See* 28 U.S.C. § 2679. For the reasons set forth above,
23 the Court finds that Alexander was not acting within the scope of his employment at the
24 time of the accident. Moreover, the Court finds that there is no genuine issue of *material*
25 fact with respect to the Court’s scope of employment determination. *See* Fed. R. Civ. P.
26 56(a). Thus, the United States cannot be sued for the alleged tortious acts of an employee
27 who was not acting within the scope of his employment under the FTCA.

28 Accordingly, Plaintiff’s FTCA claim against the United States fails, and the Court

1 **GRANTS** the United States’ motion for summary judgment. *See Vallier*, 120 F. Supp.
2 2d at 910 (noting that because the court finds that the employee was not acting within the
3 scope of his employment, “[t]he United States is thus entitled to summary judgment of
4 those claims.”).

5 **SUBJECT MATTER JURISDICTION**

6 Alexander is the sole remaining defendant in this action. Thus, it is within the
7 Court’s discretion to remand the action. *See Watkins v. Grover*, 508 F.2d 920, 921 (9th
8 Cir. 1974) (noting that where an action is removed pursuant to 28 U.S.C. § 1442, and the
9 federal defendants are later dismissed, “the district court should decide whether to hear
10 the suit on its merits or, in its discretion, to remand the suit to the state court from which
11 it was removed.”).

12 Given the early stage of the litigation, and because Plaintiffs’ tort claim against
13 Alexander arises under California law, the Court, in its discretion, declines to hear the
14 suit on the merits and **REMANDS** this action to state court.⁸ *See Murphy v. Kodz*, 351
15 F.2d 163, 167-68 (9th Cir. 1965) (“Where the federal head of jurisdiction has vanished
16 from the case, and there has been no substantial commitment of judicial resources to the
17 nonfederal claims it is, . . . akin to ‘making the tail wag the dog’ for the District Court to
18 retain jurisdiction.”) (quoting *Moynahan v. Pari-Mutuel Emps. Guild of Cal. Local 280*,
19 317 F.2d 209, 212 (9th Cir. 1963)); *Vallier*, 120 F. Supp. 2d at 916 (remanding the
20 plaintiffs’ state law claims after denying the petition for substitution and granting the
21 United States’ motion for summary judgment in FTCA case); *Mellis v. Asbestos Corp.*
22 *Ltd.*, No. 13-CV-3449 SBA, 2013 WL 4805746, at *2 (N.D. Cal. Sept. 9, 2013)

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25 ⁸ The mandatory remand provision set forth in 28 U.S.C. § 2679(d)(3) is inapplicable because
26 Alexander originally filed the instant Petition for Substitution in this Court—and not state court. *See* 28
27 U.S.C. § 2679(d)(3) (providing that where the Attorney General concludes that the standards for
28 substitution have not been met, and “the petition [for substitution] is filed in a civil action or proceeding
pending in a State court,” the action may be removed to the district court. If, in considering the petition,
the district court determines that the employee was not acting within the scope of employment, “the
action or proceeding shall be remanded to the State court.”) (emphasis added).

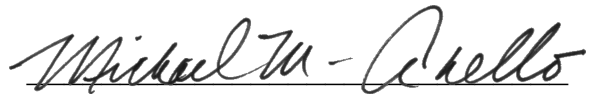
1 (remanding action where case was removed pursuant to § 1442(a)(1), but the plaintiff
2 later dismissed the removing defendant from the action).

3 **CONCLUSION**

4 Based on the foregoing, the Court **DENIES** Alexander's Petition for Substitution
5 and Representation by the United States, and **GRANTS** the United States' motion for
6 summary judgment. The Clerk of Court is instructed to terminate this action as to
7 Defendants the United States, Department of Homeland Security, and U.S. Customs and
8 Border Protection. Further, the Court, in its discretion, declines to retain jurisdiction and
9 **REMANDS** this action back to state court. *See Watkins*, 508 F.2d at 921.

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11 **IT IS SO ORDERED.**

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13 Dated: November 2, 2018

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15 HON. MICHAEL M. ANELLO
16 United States District Judge
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