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7 UNITED STATES DISTRICT COURT  
8 SOUTHERN DISTRICT OF CALIFORNIA  
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10 JOHN O'DONNELL,

11 Plaintiff,

12 v.

13 UNITED STATES OF AMERICA,  
14 MICHAEL NEDD, Deputy Director of  
15 Operations of the Bureau of Land  
16 Management; WILLIAM PERRY  
17 PENDLEY, Deputy Director of Policy  
18 and Programs of the Bureau of Land  
19 Management; DAVID BERNHARDT,  
20 Secretary of the Interior; A. STEWART,  
21 Agent with the Bureau of Land  
22 Management; IMPERIAL COUNTY OF  
23 CALIFORNIA; IMPERIAL COUNTY  
24 SHERIFF'S OFFICE; RAYMOND  
25 LOERA, Sheriff of Imperial County,  
26 California; AND DOES 1 TO 100  
27 INCLUSIVE,

28 Defendants.

Case No.: 19cv1396-JAH (MDD)

**ORDER GRANTING DEFENDANTS'  
MOTION TO DISMISS [Doc. No. 11]**

**INTRODUCTION**

Pending before the Court is Defendant United States of America, *et al.*'s (collectively "Defendants") motion to dismiss Plaintiff John O'Donnell's ("Plaintiff")

1 *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics* (“*Bivens*”), Federal  
2 Torts Claim Act (“FTCA”), and 42 U.S.C. § 1983 (“§ 1983”) claims. *See generally* Doc.  
3 No. 11. Plaintiff filed a response to Defendants’ motion and Defendants filed a reply. *See*  
4 Docs. No. 13, 15. Having carefully considered the pleadings in this action, and for the  
5 reasons set forth below, the Court hereby **GRANTS** Defendants’ motion to dismiss with  
6 leave to amend.

### 7 **BACKGROUND**

8 Plaintiff alleges that sometime in November 2016, unidentified Bureau of Land  
9 Management (“BLM”) officers arrived at Plaintiff’s truck camper. Doc. No. 5 at 5. The  
10 truck camper was Plaintiff’s temporary residence and was located on federal land outside  
11 of Ocotillo Springs, California. *Id.* The BLM officers “falsely accus[ed] [Plaintiff] of  
12 various offenses, including drug use and littering.” *Id.* The BLM officers then conducted a  
13 “dog search” and entered Plaintiff’s residence. *Id.* During the search, Plaintiff alleges BLM  
14 officers detained him and did not allow him to enter his residence. *Id.* Plaintiff claims the  
15 BLM officers “stole bottles of his medication, cigarettes, and a plaque signed by celebrity  
16 skate boarder Tony Hawk.” *Id.*

17 Plaintiff alleges several days later, “BLM officers again arrived at [Plaintiff’s]  
18 campsite to harass him” and accuse him of littering. *Id.* Plaintiff then moved residences  
19 because of the continued harassment. *Id.* at 6. Soon after, Plaintiff “learned that BLM  
20 officers had been asking several people in the town of Ocotillo about his whereabouts.” *Id.*  
21 Then, “vehicles began to drive across [Plaintiff]’s property in the middle of the night and  
22 shined bright lights directly into his trailer.” *Id.* This continued until Plaintiff’s family hired  
23 private security for his residence. *Id.* Upon the departure of security, however, the  
24 harassment continued. *Id.* Plaintiff further contends BLM officers and Imperial County  
25 Sheriff’s (“ICS”) officers combined forces to harass and persecute him. *Id.*

26 On July 26, 2016, Plaintiff filed a complaint against Defendants alleging various  
27 causes of action. *See* Doc. No. 1. On November 7, 2019, Plaintiff filed a Second Amended  
28 Complaint (“SAC”) alleging: (1) *Bivens* claim for violation of 5th amendment rights

1 against Defendants; (2) *Bivens* claim for violation of 4th amendment rights against  
2 Defendants; (3) FTCA claim against Defendants Michael Nedd (“Nedd”), William Perry  
3 Pendley (“Pendley”), David Bernhardt (“Bernhardt”), A. Stewart (“Stewart”) and the  
4 United States of America (“United States”); and (4) § 1983 claim against Defendants. *Id.*  
5 On January 22, 2020, Defendant United States filed a motion to dismiss Plaintiff’s SAC  
6 for lack of subject matter jurisdiction and failure to state a claim. *See generally* Doc. No.  
7 11. On February 21, 2020, Defendants Imperial County, Imperial County Sheriff’s Office,  
8 and Sheriff Raymond Loera filed a notice of non-opposition to Defendant United States’  
9 motion to dismiss. *See* Doc. No. 13. Plaintiff filed a response in opposition to Defendants’  
10 motion and Defendants filed a reply. *See* Doc. Nos. 13, 15.

### 11 **LEGAL STANDARD**

12 Defendants seek dismissal pursuant to Rule 12(b)(1) and 12(b)(6). Under Rule  
13 12(b)(1), a defendant may seek to dismiss a complaint for “lack of jurisdiction over the  
14 subject matter.” Fed. R. Civ. P. 12(b)(1). Federal courts are presumptively without  
15 jurisdiction over civil actions and the burden of establishing the contrary rests upon the  
16 party asserting jurisdiction. *See Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S.  
17 375, 377 (1994); *see also Stock West, Inc. v. Confederated Tribes of the Colville*  
18 *Reservation*, 873 F.2d 1221, 1225 (9th Cir. 1989). Further, Rule 12(b)(6) tests the  
19 sufficiency of the complaint. *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001).  
20 Dismissal is warranted under Rule 12(b)(6) where the complaint lacks a cognizable legal  
21 theory. *Robertson v. Dean Witter Reynolds, Inc.*, 749 F.2d 530, 534 (9th Cir. 1984); *see*  
22 *Neitzke v. Williams*, 490 U.S. 319, 326 (1989) (“Rule 12(b)(6) authorizes a court to dismiss  
23 a claim on the basis of a dispositive issue of law”).

24 To survive a motion to dismiss, “a complaint must contain sufficient factual matter,  
25 accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*,  
26 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 547). A claim is facially plausible  
27 when the factual allegations permit “the court to draw the reasonable inference that the  
28 defendant is liable for the misconduct alleged.” *Id.* In other words, “the non-conclusory

1 ‘factual content’ and reasonable inferences from that content, must be plausibly suggestive  
2 of a claim entitling the plaintiff to relief.” *Moss v. U.S. Secret Service*, 572 F.3d 962, 969  
3 (9th Cir. 2009) (quoting *Iqbal*, 556 U.S. at 678). “Determining whether a complaint states  
4 a plausible claim for relief will be a context-specific task that requires the reviewing court  
5 to draw on its judicial experience and common sense.” *Iqbal*, 556 U.S. at 679.

6 A motion to dismiss for lack of subject matter jurisdiction may be “facial” or  
7 “factual.” See *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004). In a  
8 facial attack, the challenger asserts that the allegations contained in a complaint are  
9 insufficient on their face to invoke federal jurisdiction, whereas in a factual attack, the  
10 challenger disputes the truth of the allegations that, by themselves, would otherwise invoke  
11 federal jurisdiction. See *Id.* If the defendant brings a facial attack, a district court must  
12 assume that the factual allegations in the complaint are true and construe them in the light  
13 most favorable to the plaintiff. See *United States v. One 1997 Mercedes E420*, 175 F.3d  
14 1129, 1130-31 & n.1 (9th Cir. 1999); see also *Warren v. Fox Family Worldwide, Inc.*, 328  
15 F.3d 1136, 1139 (9th Cir. 2003). A Rule 12(b)(1) motion will be granted if, on its face, the  
16 complaint fails to allege grounds for federal subject matter jurisdiction as required by Rule  
17 8(a) of the Federal Rules of Civil Procedure. See *Warren v. Fox Family Worldwide, Inc.*  
18 328 F.3d 1136, 1139 (9th Cir. 2003); see also *Morrison v. Amway Corp.* 323 F.3d 920, 924  
19 n. 5 (11th Cir. 2003).

20 In reviewing a motion to dismiss under Rule 12(b)(6), the court must assume the  
21 truth of all factual allegations and must construe all inferences from them in the light most  
22 favorable to the nonmoving party. *Thompson v. Davis*, 295 F.3d 890, 895 (9th Cir. 2002);  
23 *Cahill v. Liberty Mut. Ins. Co.*, 80 F.3d 336, 337-38 (9th Cir. 1996). However, legal  
24 conclusions need not be taken as true merely because they are cast in the form of factual  
25 allegations. *Ileto v. Glock, Inc.*, 349 F.3d 1191, 1200 (9th Cir. 2003); *Western Mining*  
26 *Council v. Watt*, 643 F.2d 618, 624 (9th Cir. 1981). When ruling on a motion to dismiss,  
27 the court may consider the facts alleged in the complaint, documents attached to the  
28 complaint, documents relied upon but not attached to the complaint when authenticity is

1 not contested and matters of which the court takes judicial notice. *Lee v. City of Los*  
2 *Angeles*, 250 F.3d 668, 688-89 (9th Cir. 2001). If a court determines that a complaint fails  
3 to state a claim, the court should grant leave to amend unless it determines that the pleading  
4 could not possibly be cured by the allegation of other facts. *See Doe v. United States*, 58  
5 F.3d 494, 497 (9th Cir. 1995); *Knappenberger v. City of Phoenix*, 566 F.3d 936, 942 (9th  
6 Cir. 2009).

## 7 DISCUSSION

### 8 **A. *Bivens* Claims Against Defendant United States**

9 Defendants argue that the United States enjoys immunity from suit unless immunity  
10 is expressly waived. Doc. No. 11 at 10. Defendants allege the court lacks subject matter  
11 jurisdiction because the United States has made no such waiver for Plaintiff's *Bivens* claims  
12 against the United States. *Id.* Plaintiff concedes the United States is not a proper Defendant.  
13 Doc. No. 14 at 3. Accordingly, the Court **GRANTS** Defendants' motion to dismiss  
14 Plaintiff's first and second causes of action against the United States.

### 15 **B. *Bivens* Claims Against Defendants Nedd, Pendley, and Bernhardt**

16 Defendants argue that Plaintiff failed to properly state *Bivens* claims against  
17 Defendants Nedd, Pendley and Bernhardt. Doc. No. 11 at 11. Defendants state Plaintiff's  
18 claims are improperly based on Defendants' official capacity, or in the alternative, rely on  
19 a theory of *respondeat superior*. *Id.* at 12. Further, Defendants allege that without specific  
20 claims regarding Defendants conduct in their individual capacity, the Court should dismiss  
21 the *Bivens* claims. *Id.* Plaintiff argues the *Bivens* claims have been brought against  
22 Defendants Nedd, Pendley and Bernhardt in their individual capacity. Doc. No. 14 at 6.  
23 Plaintiff acknowledges *respondeat superior* liability has not been recognized in *Bivens*  
24 actions, but states "[Plaintiff] has no other way to obtain [the needed] discovery" to  
25 substantiate the claims. *Id.* This needed discovery includes: "(1) the number of officers that  
26 were involved in [Plaintiff's alleged] harassment; (2) the names of the officers involved in  
27 [Plaintiff's alleged] harassment; (3) reports relat[ed] to [Plaintiff's alleged] harassment, or  
28 (4) video/audio files related to [Plaintiff's alleged] harassment." *Id.* Plaintiff then alleges,

1 the BLM and the Department of the Interior are in possession of this evidence. *Id.* As such,  
2 Plaintiff has alleged *Bivens* claims against Defendants Nedd and Pendley because they are  
3 heads of the BLM. *Id.* Plaintiff also has alleged *Bivens* claims against Bernhardt because  
4 he is the Secretary of the Interior. *Id.*

5 In a *Bivens* action, the plaintiff “must plead that each Government-official  
6 defendant, through his own individual actions, has violated the Constitution.” *Iqbal*, 556  
7 U.S. at 676 (citing *Personnel Administrator of Mass. v. Feeney*, 442 U.S. 256, 279 (1979)).  
8 *Bivens* actions are “not designed to hold officers responsible for acts of their subordinates.”  
9 *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1849 (2017). As such, “vicarious liability is inapplicable  
10 to *Bivens*” actions. *Iqbal*, 556 U.S. at 676. Further, “[g]overnment officials may not be held  
11 liable for the unconstitutional conduct of their subordinates under a theory of *respondeat*  
12 *superior*.” *Id.* at 676. Rather, a plaintiff must “plead and prove that the defendant acted  
13 with discriminatory purpose.” *Starr v. Baca*, 652 F.3d 1202, 1206 (9th Cir. 2011) (quoting  
14 *Iqbal*, 556 U.S. at 676).

15 Here, Plaintiff has not plausibly pled Defendants Nedd, Pendley, or Bernhardt,  
16 through their own actions, violated Plaintiff’s constitutional rights. Plaintiff’s SAC  
17 contains no allegations that Defendants Nedd, Pendley, or Bernhardt were involved or  
18 knew of Plaintiff’s alleged harassment. Additionally, as Plaintiff concedes, there is no  
19 precedent for *respondeat superior* liability in a *Bivens* action. Doc. No. 14 at 6. Instead,  
20 Plaintiff asserts the BLM and Department of the Interior hold evidence of Plaintiff’s  
21 harassment. As such, Plaintiff argues these entities’ respective heads are proper defendants.  
22 However, Plaintiff’s need for discovery does not allow him to circumvent stating a  
23 plausible claim. *Keates v. Koile*, 883 F.3d 1228, 1242 n.3 (9th Cir. 2018) (citing *Iqbal*, 556  
24 U.S. at 678–79).

25 Accordingly, the Court **GRANTS** Defendants’ motion to dismiss Plaintiff’s first and  
26 second causes of action against Defendants Nedd, Pendley, and Bernhardt, with leave to  
27 amend.

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1           **C. FTCA Claim Against Defendants Nedd, Pendley, Bernhardt, and Stewart**

2           Next, Defendants argue the United States is the only proper defendant in Plaintiff’s  
3 FTCA claim. Doc. No. 11 at 13. Defendants state the FTCA allows for a “suit against the  
4 United States [as] the exclusive remedy for torts committed by federal agencies and federal  
5 employees....” *Id.* (citing 28 U.S.C. § 2679 (b)(1)). Plaintiff concedes the United States is  
6 the only proper defendant under the FTCA. Doc. No. 14 at 3. Accordingly, the Court  
7 **GRANTS** Defendants’ motion to dismiss Plaintiff’s third cause of action against  
8 Defendants Nedd, Pendley, Bernhardt, and Stewart.

9           **D. Section 1983 Claim Against Defendants Nedd, Pendley, Bernhardt, Stewart,**  
10           **and the United States**

11           Finally, Defendants argue Plaintiff’s §1983 claim cannot be brought against  
12 Defendants Nedd, Pendley, Bernhardt, Stewart, or the United States because of their  
13 positions as federal government actors. *See* Doc. No. 11 at 14. Defendants contend that  
14 “[f]ederal officials can be liable under § 1983 only where there is a sufficiently close nexus  
15 between their challenged actions and State conduct.” *Id.* Defendants allege that “no such  
16 nexus exists here” and the Court should accordingly dismiss the federal government actors  
17 from the claim. *Id.* Plaintiff concedes that the § 1983 claim cannot stand against Defendants  
18 Nedd, Pendley, Bernhardt, Stewart, and the United States. *See* Doc. No. 14 at 7.  
19 Accordingly, the Court **GRANTS** Defendants’ motion to dismiss Plaintiff’s fourth cause  
20 of action against Defendants Nedd, Pendley, Bernhardt, Stewart, and the United States.

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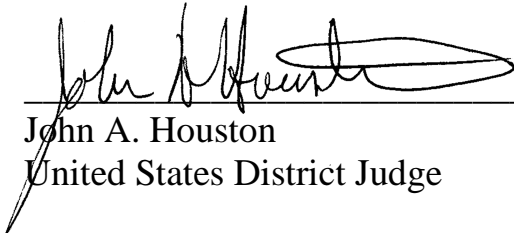
1 **CONCLUSION**

2 For the reasons set forth above, IT IS HEREBY ORDERED:

- 3 • Plaintiff's first and second causes of action against Defendant United States  
4 are **DISMISSED with prejudice**.
- 5 • Plaintiff's first and second causes of action against Defendants Nedd,  
6 Pendley, and Bernhardt are **DISMISSED with leave to amend**.
- 7 • Plaintiff's third cause of action against Defendants Nedd, Pendley, Bernhardt,  
8 and Stewart is **DISMISSED with prejudice**.
- 9 • Plaintiff's fourth cause of action against Defendants Nedd, Pendley,  
10 Bernhardt, Stewart, and the United States is **DISMISSED with prejudice**.
- 11 • Plaintiff may file an amended Complaint on or before December 10, 2020.

12 **IT IS SO ORDERED.**

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15 DATED: November 10, 2020

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19 John A. Houston  
20 United States District Judge  
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