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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

ANDRES E. CHAVEZ, JR.,

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant.

Case No.: 22-CV-1182 TWR (AHG)

**ORDER GRANTING DEFENDANT’S
MOTION TO DISMISS
PLAINTIFF’S COMPLAINT**

(ECF No. 5)

Presently before the Court is Defendant the United States of America’s Motion to Dismiss Plaintiff’s Complaint pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6) (ECF No. 5, “Mot.”), along with Plaintiff Andres E. Chavez, Jr.’s Opposition to (ECF No. 6, “Opp’n”) and Defendant’s Reply in Support of (ECF No. 8, “Reply”) the Motion. The Court took this matter under submission without oral argument pursuant to Civil Local Rule 7.1(d)(1). (See ECF No. 9.) Having carefully considered Plaintiff’s Complaint (ECF No. 1, “Compl.”), the Parties’ arguments, and the relevant law, the Court **GRANTS** Defendant’s Motion to Dismiss **WITHOUT PREJUDICE**.

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BACKGROUND

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2 Plaintiff is a service-disabled veteran of the United States Marine Corps who owned
3 and operated a business called StandBuy Distributors, Inc. (“SDI”). (Compl. at 10¹; Opp’n
4 at 13.) SDI contracted with the Defense Logistics Agency (“DLA”) to supply Bushnell
5 tactical range finders to the United States military. (See Compl. at 10–11; Opp’n at 13.)
6 Plaintiff’s contracts with DLA were part of the Service-Disabled Veteran-Owned Small
7 Business Program, which gives the United States Army the authority to give service-
8 disabled veteran-owned small businesses preference for contracting opportunities.
9 (Compl. at 6–10.)

10 Plaintiff had a good relationship with a former supervisor at DLA who mentored and
11 assisted Plaintiff and SDI with the DLA contracts. (*Id.* at 11–12.) But once that supervisor
12 retired in early 2020, Plaintiff ran into issues with DLA. (*Id.*) DLA revoked acceptance
13 of the range finders supplied by SDI and a contracting officer eventually issued a decision
14 explaining that SDI owed DLA over \$40,000 based on the officer’s determination that SDI
15 supplied the wrong type of range finder to DLA. (Compl. at 11; ECF 1-6 at 2.) DLA
16 demanded that Plaintiff pay the amount requested or risk being barred from federal
17 contracting. (Compl. at 11.)

18 Plaintiff appealed the contracting officer’s decision to the Armed Service Board of
19 Contract Appeals (“ASBCA”). (*Id.* at 14.) In July 2021, the ASBCA determined that
20 DLA’s revocation of its acceptance of the range finders was untimely, thereby reversing
21 the contracting officer’s decision. (ECF 1-6 at 2–8.)

22 In August 2022, Plaintiff filed a Complaint in this Court under the Federal Tort
23 Claims Act (“FTCA”), 28 U.S.C. §§ 2671 *et seq.*, and the Rehabilitation Act, 29 U.S.C.
24 § 794. (See Compl. at 2–3, 17–23.) In his Complaint, Plaintiff brings the following eight
25 causes of action against the United States: (1) intentional infliction of emotional distress
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28 ¹ Throughout this Order, pin citations refer to the CM/ECF pagination stamped at the top of each page.

1 (“IIED”); (2) breach of fiduciary duty; (3) negligence; (4) negligent supervision; (5) abuse
2 of process; (6) loss of consortium; (7) violation of the Rehabilitation Act; and (8) violation
3 of Defendant’s “mandatory statutes, regulations, and policies.” (*Id.* at 17–23.) The
4 allegations in Plaintiff’s Complaint are based on Plaintiff’s claim that DLA employees

5 falsely accused Plaintiff of fraud by supplying China[-]made tactical range
6 finders made by Bushnell under several awarded contracts and issued a
7 ‘contracting officer’s final decision’ . . . to Plaintiff, which in short explained
8 that Plaintiff and his company owed [DLA] tens of thousands of dollars (over
9 \$40k) and demanded Plaintiff pay the amount requested immediately or risk
being barred from federal contracting and/or prosecution.

10 (*Id.* at 11.) Plaintiff claims DLA’s employees negligently proceeded with an unjustified,
11 unlawful, and frivolous contracting officer’s decision that was based on false information
12 and that Plaintiff was not “mentally prepared to receive.” (*Id.* at 12–13.) This negligent
13 decision-making, Plaintiff claims, caused him to have a “severe mental breakdown.” (*Id.*
14 at 13.) He thus seeks monetary damages from the United States for causing him to become
15 increasingly disabled. (*Id.* at 13, 17, 24.)

16 **MOTION TO DISMISS PURSUANT TO**
17 **FEDERAL RULE OF CIVIL PROCEDURE 12(b)(1)**

18 **I. Legal Standards**

19 **A. Federal Rule of Civil Procedure 12(b)(1)**

20 A party may challenge the Court’s subject-matter jurisdiction through a motion filed
21 pursuant to Federal Rule of Civil Procedure 12(b)(1). *See White v. Lee*, 227 F.3d 1214,
22 1242 (9th Cir. 2000). Because “[f]ederal courts are courts of limited jurisdiction,” “[i]t is
23 to be presumed that a cause lies outside this limited jurisdiction.” *Kokkonen v. Guardian*
24 *Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). Consequently, “the burden of establishing
25 the contrary rests upon the party asserting jurisdiction.” *Id.* “If the court determines at any
26 time that it lacks subject-matter jurisdiction, the court must dismiss the action.” Fed. R.
27 Civ. P. 12(h)(3).

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1 “Rule 12(b)(1) jurisdictional attacks can be either facial or factual.” *White*, 227 F.2d
2 at 1242. “A ‘facial’ attack accepts the truth of the plaintiff’s allegations but asserts that
3 they ‘are insufficient on their face to invoke federal jurisdiction.’” *Leite v. Crane Co.*, 749
4 F.3d 1117, 1121 (9th Cir. 2014) (quoting *Safe Air for Everyone v. Meyer*, 373 F.3d 1035,
5 1039 (9th Cir. 2004)). “A ‘factual’ attack, by contrast, contests the truth of the plaintiff’s
6 factual allegations, usually by introducing evidence outside the pleadings.” *Id.* (first citing
7 *Safe Air for Everyone*, 373 F.3d at 1039; and then citing *Thornhill Publ’g Co. v. Gen. Tel.*
8 *& Elec. Corp.*, 594 F.2d 730, 733 (9th Cir. 1979)).

9 Here, Defendant facially attacks Plaintiff’s Complaint—without disputing the facts
10 in Plaintiff’s Complaint, Defendant argues the Court lacks subject-matter jurisdiction over
11 Plaintiff’s claims. (*See* Mot. at 11–17.) “The district court resolves a facial attack as it
12 would a motion to dismiss under Rule 12(b)(6): Accepting the plaintiff’s allegations as
13 true and drawing all reasonable inferences in the plaintiff’s favor, the court determines
14 whether the allegations are sufficient as a legal matter to invoke the court’s jurisdiction.”
15 *Leite*, 749 F.3d at 1121 (citing *Pride v. Correa*, 719 F.3d 1130, 1133 (9th Cir. 2013)).

16 **B. Sovereign Immunity**

17 “Where the United States is a defendant, a mere showing of federal jurisdiction does
18 not suffice.” *United Aeronautical Corp. v. U.S. Air Force*, No. 2:20-CV-1955-ODW
19 (JDEx), 2021 WL 794500, at *3 (C.D. Cal. Mar. 2, 2021); *see N. Side Lumber Co. v. Block*,
20 753 F.2d 1482, 1484 (9th Cir. 1985). That is because the United States generally enjoys
21 sovereign immunity from civil suits. *See United States v. Sherwood*, 312 U.S. 584,
22 586–87 (1941). But Congress may explicitly waive the United States’ sovereign immunity
23 and consent to suit in federal court. *See United States v. King*, 395 U.S. 1, 4 (1969); *see*
24 *also FAA v. Cooper*, 566 U.S. 284, 290 (2012) (“We have said on many occasions that a
25 waiver of sovereign immunity must be ‘unequivocally expressed’ in statutory text.”
26 (citation omitted)). “The United States’ consent to suit is a prerequisite for jurisdiction. . . .
27 Without a waiver of sovereign immunity, federal courts lack subject matter jurisdiction
28 over cases against the government.” *Allianz Glob. Risks US Ins. Co. v. United States*, No.

1 21-CV-1202-BAS-BGS, 2022 WL 1271140, at *5 (S.D. Cal. Apr. 28, 2022) (citation
2 omitted). And courts “constru[e] waivers of sovereign immunity narrowly in favor of the
3 sovereign.” *Lane v. Pena*, 518 U.S. 187, 195 (1996). Therefore, “[t]o sustain a claim that
4 the Government is liable for awards of monetary damages, the waiver of sovereign
5 immunity must extend unambiguously to such monetary claims.” *Id.* at 192.

6 “The FTCA provides a limited waiver of the sovereign immunity of the United
7 States for torts committed by federal employees acting within the scope of their
8 employment.” *Nurse v. United States*, 226 F.3d 996, 1000 (9th Cir. 2000); *see Millbrook*
9 *v. United States*, 569 U.S. 50, 52 (2013) (“The [FTCA] gives federal district courts
10 exclusive jurisdiction over claims against the United States for ‘injury or loss of property,
11 or personal injury or death caused by the negligent or wrongful act or omission’ of a federal
12 employee ‘acting within the scope of his office or employment.’” (quoting 28 U.S.C.
13 § 1346(b)(1))). “Under the FTCA, the United States may be held civilly liable for the torts
14 of its employees ‘in the same manner and to the same extent as a private individual under
15 like circumstances.’” *Nurse*, 226 F.3d at 1000 (quoting 28 U.S.C. § 2674). But the FTCA’s
16 waiver of immunity is limited by several statutory exceptions. *Id.*; *see* 28 U.S.C. § 2680.
17 And if the plaintiff’s causes of action “fall within one or more of these exceptions, then the
18 federal courts lack subject matter jurisdiction to hear [his] claims.” *Nurse*, 226 F.3d at
19 1000.

20 **II. Analysis**

21 Defendant moves to dismiss Plaintiff’s Complaint arguing the Court lacks subject-
22 matter jurisdiction over Plaintiff’s claims, *see* Fed. R. Civ. P. 12(b)(1), and, even if the
23 Court had jurisdiction, each of Plaintiff’s causes of action fails to state a claim, *see* Fed. R.
24 Civ. P. 12(b)(6). (*See* Mot. at 16–35.) Defendant contends (1) all of Plaintiff’s claims are
25 barred by the Contract Disputes Act (“CDA”); (2) Plaintiff’s FTCA claims are barred by
26 the intentional torts and the discretionary function exceptions to the FTCA’s limited waiver
27 of sovereign immunity; (3) Plaintiff’s Rehabilitation Act claim is barred because the United
28 States has not waived immunity against claims for monetary damages under that Act; and

1 (4) Plaintiff’s Complaint fails to plausibly allege any claim. (*Id.*) Plaintiff contends that
2 none of these jurisdictional bars apply to his claims and that each of his claims is
3 sufficiently pled. (*See Opp’n* at 16–35.)

4 **A. *The Contract Disputes Act***

5 The Tucker Act carves “out a limited waiver of the United States’ sovereign
6 immunity over ‘any claim against the United States . . . upon any express or implied
7 contract with the United States.’” *Allianz Glob. Risks US Ins. Co.*, 2022 WL 1271140, at
8 *6 (quoting *N. Side Lumber Co.*, 753 F.2d at 1484); *see also* 28 U.S.C. §1491(a)(1). And
9 when a claim is for more than \$10,000, the Tucker Act confers exclusive jurisdiction to the
10 Court of Federal Claims. *See Allianz Glob. Risks US Ins. Co.*, 2022 WL 1271140, at *6.
11 The Tucker Act also specifically provides the Court of Federal Claims “with jurisdiction
12 over ‘any claim by or against, or dispute with, a contractor arising under [the CDA].”
13 *Todd Const., L.P. v. United States*, 656 F.3d 1306, 1311 (Fed. Cir. 2011) (quoting 28
14 U.S.C. § 1491(a)(2)).

15 The CDA, in turn, waives sovereign “immunity for claims arising out of ‘any express
16 or implied contract . . . made by an executive agency for procurement of property or
17 services, other than real property.’” *Allianz Glob. Risks US Ins. Co.*, 2022 WL 1271140,
18 at *6 (quoting 41 U.S.C. § 7102(a)). “Under the CDA, ‘procurement’ means ‘the
19 acquisition by purchase, lease or barter, of property or services for the direct benefit or use
20 of the Federal Government.’” *Sunbelt Rentals, Inc. v. United States*, No. 1:17-CV-00325-
21 CWD, 2018 WL 5621859, at *3 (D. Idaho Oct. 30, 2018) (quoting *New Era Constr. v.*
22 *United States*, 890 F.2d 1152, 1157 (Fed. Cir. 1989)). The CDA “grants exclusive
23 jurisdiction to claims covered under its provisions to the Court of Federal Claims.” *Allianz*
24 *Glob. Risks US Ins. Co.*, 2022 WL 1271140, at *6; *see also United States v. Suntip Co.*, 82
25 F.3d 1468, 1471, 1474 (9th Cir. 1996). “Thus, federal district courts lack jurisdiction over
26 a contractor’s claim against the government which is subject to the CDA.” *Sunbelt Rentals,*
27 *Inc.*, 2018 WL 5621859, at *3.

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1 To determine whether the CDA applies to Plaintiff’s claims, the Court must decide
2 whether the claims “relate to” a government contract, meaning they “must have some
3 relationship to the terms or performance of a government contract.” *Todd Const., L.P.*, 656
4 F.3d at 1312–13. “A contractor’s claim need not be based on the contract itself (or a
5 regulation that can be read into the contract) as long as it relates to its performance under
6 the contract.” *Id.* at 1314. To determine whether a claim is “founded upon a contract for
7 the purposes of the Tucker Act [, and by extension, the CDA],” courts consider “the source
8 of the rights upon which the plaintiff bases its claims, and . . . the type of relief sought (or
9 appropriate).” *United Aeronautical Corp.*, 2021 WL 794500, at *5 (citation omitted); *see*
10 *also Megapulse, Inc. v. Lewis*, 672 F.2d 959, 968 (D.C. Cir. 1982). “Thus, where a
11 plaintiff’s claim is ‘concerned solely with rights created within the contractual relationship
12 and has nothing to do with duties arising independently of the contract[,] the claim is
13 founded upon a contract with the United States and is therefore within the Tucker Act and
14 subject to its restrictions on relief.’” *United Aeronautical Corp.*, 2021 WL 794500, at *5
15 (quoting *N. Star Alaska v. United States*, 14 F.3d 36, 37 (9th Cir. 1994)); *cf. id.* at *7 (where
16 source of rights underlying the claim arises independently from any contract, a claim is not
17 contractually-based under the Tucker Act).

18 Furthermore, “[i]t is well-established that disguised contract actions may not escape
19 the CDA.” *Am. Ground Transp., Inc. v. U.S. Marine Corps. Cmty. Servs.*, No. 19-CV-539-
20 CAB-AHG, 2019 WL 5191678, at *2 (S.D. Cal. Oct. 15, 2019). “Neither contractors nor
21 the government may bring a contract action in federal district court simply by recasting
22 claims in tort language or as some statutory or regulatory violation.” *Id.* And courts “do
23 not allow a plaintiff’s artful pleading to dictate whether a claim is tortious or contractual in
24 nature for the purpose of determining if the FTCA or the Tucker Act and CDA apply.”
25 *Allianz Glob. Risks US Ins. Co.*, 2022 WL 1271140, at *9; *see Am. Ground Transp., Inc.*,
26 2019 WL 5191678, at *2 (“Effective enforcement of the jurisdictional limits of the CDA
27 mandates that courts recognize contract actions that are dressed in tort clothing.”). For
28 example, “[i]f an action arises ‘primarily from a contractual undertaking,’ jurisdiction lies

1 in the Claims Court ‘regardless of the fact that the loss resulted from the negligent manner
2 in which defendant performed its contract.’” *Wood v. United States*, 961 F.2d 195, 198
3 (Fed. Cir. 1992) (citation omitted); *Blanchard v. St. Paul Fire & Marine Ins. Co.*, 341 F.2d
4 351, 358 (5th Cir. 1965) (“It is settled that claims . . . [that] are founded upon an alleged
5 failure to perform explicit or implicit contractual obligations[] are not deemed ‘tort’ claims
6 for the purposes of the division between Tort Claims Act and Tucker Act jurisdiction. This
7 is so irrespective of whether the plaintiff chooses to characterize the failure in terms of
8 ‘negligence’ upon the part of the contracting officer or other government officials.”).

9 Here, Defendant is correct that all of Plaintiff’s claims relate to the procurement
10 contract between DLA and SDI. (*See* Mot. at 16.) Each of Plaintiff’s claims is based on
11 Plaintiff’s allegation that DLA employees “falsely accused Plaintiff of fraud by supplying
12 China[-]made tactical range finders made by Bushnell under several awarded contracts and
13 issued a ‘contracting officer’s final decision’ . . . to Plaintiff, which in short explained that
14 Plaintiff and his company owed [DLA] tens of thousands of dollars (over \$40k).” (Compl.
15 at 11.) Throughout Plaintiff’s Complaint and his Opposition to Defendant’s Motion,
16 Plaintiff summarizes his claims as stemming from an “unlawful,” “unjustified,” and
17 “frivolous” contracting officer’s final decision relating to SDI’s supply of particular range
18 finders. (Compl. at 12–14, 17; Opp’n at 14, 20.) He alleges this decision, and DLA’s
19 attempt to enforce this decision, caused him severe emotional distress and further disabled
20 him.² (Compl. at 13, 17, 24.) At their core, each of Plaintiff’s claims is founded upon

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24 ² To be sure,

25 [u]nder the CDA, claims by a government contractor against the United States [and vice
26 versa] must first be the subject of a decision by the contracting officer, defined as ‘any
27 person who . . . has the authority to enter into and administer contracts and make
28 determinations and findings with respect thereto.’ The decision by the contracting officer
may be appealed to an agency board of contract appeals or to the United States Court of
Federal Claims. Further appeals from these bodies must be filed with the United States
Court of Appeals for the Federal Circuit.

1 SDI’s contract with DLA and would require the Court to make a determination about SDI’s
2 and DLA’s performance obligations under the contract and whether either party breached
3 the contract. *See Allianz Glob. Risks US Ins. Co.*, 2022 WL 1271140, at *11 (finding
4 plaintiffs’ negligence claim “contractually based because it require[d] the [c]ourt to decide
5 what [the plaintiffs’] rights were pursuant to the Contract . . . in order to determine whether
6 [the p]laintiffs establish[ed] duty, breach, and even damages”); *Performance Contracting,*
7 *Inc. v. United States*, No. 2:11-CV-02920-MCE, 2012 WL 3234210, at *3 (E.D. Cal. Aug.
8 6, 2012) (“Each of [the p]laintiff’s causes of action is essentially one for breach of contract
9 because each claim depends on the interpretation of the Government’s contractual
10 obligations under the . . . Contract.”).

11 While Plaintiff argues his claims are classic tort claims, nothing in his pleading or
12 motion papers shows that his claims have anything “to do with duties arising independently
13 of the contract.” *United Aeronautical Corp.*, 2021 WL 794500, at *5; *see Awad v. United*
14 *States*, 301 F.3d 1367, 1372 (Fed. Cir. 2002) (“It is well established that where a tort claim
15 stems from a breach of contract, the cause of action is ultimately one arising in contract,
16 and thus is properly within the exclusive jurisdiction of the Court of Federal Claims.”);
17 *Allianz Glob. Risks US Ins. Co.*, 2022 WL 1271140, at *11 (finding plaintiffs’ negligence
18 theory did nothing to render defendant liable for any independent state tort that did not
19 depend on defendant’s purported breach of contract); *Dourandish v. Fitzgerald*, No. 13-
20 CV-05984-VC, 2014 WL 12605471, at *1 (N.D. Cal. June 20, 2014) (“Because [the
21 plaintiff’s] allegations do not exist independently of [the] contract dispute, and because
22 they arise directly from the contract, the allegations are appropriately classified as contract,
23 not tort, claims.”). The Court finds that Plaintiff’s action arises primarily from a
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26 *Sunbelt Rentals, Inc.*, 2018 WL 5621859, at *3 (citations omitted); *see* 41 U.S.C. §§ 7101(6), 7103(a),
27 7104, 7107(a). Here, Plaintiff already appealed the contracting officer’s decision to the ASBCA, which
28 determined that DLA’s revocation of its acceptance of the range finders was untimely, thereby reversing
the contracting officer’s decision. (Compl. at 14; ECF 1-6 at 2–8.) Plaintiff now seeks to bring claims in
this Court based on the same contracting officer’s decision.

1 contractual undertaking such that jurisdiction lies in the Court of Federal Claims, even
2 assuming Plaintiff's alleged loss resulted from DLA negligently performing under the
3 contract. *See Wood*, 961 F.2d at 198. Accordingly, the Court lacks jurisdiction over
4 Plaintiff's claims.

5 ***B. Exceptions to the Federal Tort Claims Act's Limited Waiver of Sovereign***
6 ***Immunity***

7 In addition to Plaintiff's claims being generally barred by the CDA, some of
8 Plaintiff's claims are also barred by exceptions to the FTCA's waiver of sovereign
9 immunity.

10 ***1. Intentional Torts Exception***

11 The intentional torts exception specifically preserves sovereign immunity from suit
12 for "[a]ny claim arising out of assault, battery, false imprisonment, false arrest, malicious
13 prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with
14 contract rights," unless committed by a law enforcement officer. 28 U.S.C. § 2680(h); *see*
15 *Millbrook*, 569 U.S. at 52. "The phrase 'arising out of' is interpreted broadly to include all
16 injuries that are dependent upon one of the enumerated torts having been committed."
17 *Lyndon v. United States*, No. CV 20-00034 JMS-RT, 2020 WL 3405530, at *4 (D. Haw.
18 June 19, 2020).

19 Here, Plaintiff's fifth cause of action for abuse of process is explicitly barred by the
20 intentional torts exception, which expressly exempts any claim for abuse of process from
21 the FTCA's waiver of sovereign immunity. *See* 28 U.S.C. § 2680(h); *see also Stanford v.*
22 *Clayton*, No. 1:17-CV-02335 (APM), 2018 WL 8963448, at *2 (D.D.C. July 5, 2018),
23 *aff'd*, 771 F. App'x 2 (D.C. Cir. 2019).

24 Further, although Plaintiff's second cause of action is titled "breach of fiduciary
25 duty" and his third cause of action is titled "negligence," courts "looks beyond the labels
26 used to determine whether a proposed claim is barred [under § 2680(h)]." *Snow-Erlin v.*
27 *United States*, 470 F.3d 804, 808 (9th Cir. 2006) (citation omitted). "If the gravamen of
28 Plaintiff's complaint is a claim for an excluded tort under § 2680(h), then the claim is

1 barred.” *Id.*; see *DaVinci Aircraft, Inc. v. United States*, 926 F.3d 1117, 1123 (9th Cir.
 2 2019) (“[I]f the governmental conduct underlying a claim falls within an exception outlined
 3 in section 2680, the claim is barred, no matter how the tort is characterized.”). Plaintiff’s
 4 breach of fiduciary duty and negligence claims are based on Plaintiff’s allegation that DLA
 5 employees negligently, unjustifiably, and frivolously issued a contracting officer’s
 6 decision finding Plaintiff and his company owed DLA thousands of dollars, which resulted
 7 in Plaintiff’s inability to continue as part of the Service-Disabled Veteran-Owned Small
 8 Business Program. (Compl. at 11–13; Opp’n at 14, 20, 35–37.) While labeled as other
 9 torts, these claims are best described as arising out of a claim for malicious prosecution
 10 and are therefore barred by § 2680(h). See *Lyndon*, 2020 WL 3405530, at *4 (claims
 11 arising from one of the enumerated torts, like malicious prosecution, are barred by
 12 §2860(h)); *Stanford*, 2018 WL 8963448, at *2.

13 The same is also true for Plaintiff’s IIED claim. If the conduct upon which Plaintiff
 14 rests his claim for IIED constitutes one of the enumerated torts barred by § 2680(h), his
 15 IIED claim is barred even though the conduct may also constitute a tort other than the ones
 16 enumerated in § 2680(h). See *Sheehan v. United States*, 896 F.2d 1168, 1171 (9th Cir.),
 17 amended by 917 F.2d 424 (9th Cir. 1990); see *Michel v. United States*, No. 16-CV-277-
 18 GPC (AGS), 2017 WL 5067608, at *17 (S.D. Cal. Oct. 31, 2017). Like his negligence
 19 claims, Plaintiff’s IIED claim is based on conduct best described as constituting a claim
 20 for malicious prosecution and is therefore barred by § 2680(h).

21 The Court therefore lacks jurisdiction over Plaintiff’s first, second, third, and fifth
 22 causes of action under the intentional torts exception to the FTCA.³

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 25 ³ As for Plaintiff’s eighth cause of action alleging the United States violated its “mandatory statutes,
 26 regulations, and policies,” (Compl. at 23), Plaintiff seems to suggest this alleged violation falls under the
 27 United States’ waiver of sovereign immunity under the FTCA. (Opp’n at 33–37.) Plaintiff, however,
 28 does not explain how this alleged violation is a tort for which the United States has waived its sovereign
 immunity. (See *id.*); see also *Holloman v. Watt*, 708 F.2d 1399, 1401 (9th Cir. 1983) (“The party who
 sues the United States bears the burden of pointing to such an unequivocal waiver of immunity.”). The

1 2. *Discretionary Function Exception*

2 The discretionary function exception precludes claims against the United States that
3 are “based upon the exercise or performance or the failure to exercise or perform a
4 discretionary function or duty on the part of a federal agency or an employee of the
5 Government, whether or not the discretion was abused.” 28 U.S.C. § 2680(a). To
6 determine whether the discretionary function exception applies, courts engage in a two-
7 step inquiry: (1) “the court must determine whether the challenged conduct involves an
8 element of judgment or choice” and (2) “if the conduct involves some element of choice,
9 the court must determine whether the conduct implements social, economic or political
10 policy considerations.” *Nurse*, 226 F.3d at 1001. “[D]ecisions relating to the hiring,
11 training, and supervision of employees usually involve policy judgments of the type
12 Congress intended the discretionary function exception to shield.” *Vickers v. United States*,
13 228 F.3d 944, 950 (9th Cir. 2000); *see also Dovenberg v. U.S. ex rel. U.S. Forest Serv.*,
14 407 F. App’x 149, 149 (9th Cir. 2010) (“Decisions regarding the training and supervision
15 of government employees ‘fall squarely within the discretionary function exception’ to the
16 Federal Tort Claims Act.” (citation omitted)); *Nurse*, 226 F.3d at 1001.

17 Plaintiff’s fourth cause of action for negligent supervision is barred by the
18 discretionary function exception to the FTCA. Plaintiff’s claim for negligent supervision
19 is essentially a claim that the United States failed to properly supervise and prevent its
20 employees from negligently and unjustifiably issuing a contracting officer’s decision that
21 demanded Plaintiff pay DLA thousands of dollars for an alleged breach of contract.
22 (Compl. at 11–12.) Plaintiff also claims that through its alleged negligent supervision, the
23 United States failed to abide by the DLA’s policies and regulations related to working in
24 collaboration with service-disabled veteran-owned small businesses. (*Id.* at 12; Opp’n at
25 14–15.) But as noted above, “[d]ecisions regarding the training and supervision of
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28 Court also notes that because a regulation is not an act of Congress, it cannot waive the Federal
Government’s sovereign immunity. *See Plaskett v. Wormuth*, 18 F.4th 1072, 1086 (9th Cir. 2021).

1 government employees ‘fall squarely within the discretionary function exception’ to the
2 Federal Tort Claims Act.” *Dovenberg*, 407 F. App’x at 149 (citation omitted); *see Nurse*,
3 226 F.3d at 1001. More specifically, under the discretionary function exception’s two-part
4 framework, (1) this challenged conduct involves elements of judgment or choice—DLA
5 supervisors’ chosen methods of overseeing a contracting officer’s decision resolving a
6 contract dispute and of overseeing other DLA employees’ enforcement of that decision—
7 and (2) implements social and economic considerations—it involves oversight of the
8 interpretation and enforcement of the terms of a contract between the Federal Government
9 and a service-disabled veteran-owned small business. *See Nurse*, 226 F.3d at 1001.

10 Plaintiff’s argument that this cause of action falls outside the discretionary function
11 exception is unavailing. He cites to cases, (*see Opp’n* at 30), that found negligent
12 supervision claims fell outside the exception because in those cases the plaintiffs were able
13 to show the federal employee’s discretion was limited by a specific federal statute,
14 regulation, or policy. *See, e.g., Doe v. United States*, No. 16-2162, 2017 WL 1908591, at
15 * 6 (D. Kan. May 10, 2017). Unlike those cases where the supervisors had to follow a
16 mandatory federal directive regarding regular reviews of their employees, here, Plaintiff
17 has pointed to no specific mandatory directive that DLA supervisors failed to follow. (*See*
18 *Compl.* at 4–8.) Instead, Plaintiff’s discussion of the Veterans Benefits Act of 2003 and
19 the general policy goals of the United States Army and DLA only highlight the
20 government’s goal to support service-disabled veteran-owned small businesses. *See, e.g.,*
21 15 U.S.C. § 657f(c) (“[A] contracting officer *may* award a sole source contract to any small
22 business concern owned and controlled by service-disabled veterans if” (emphasis
23 added)); 15 U.S.C. § 644(g)(1)(A)(ii) (“The Governmentwide *goal* for participation by
24 small business concerns owned and controlled by service-disabled veterans shall be
25 established at not less than 3 percent of the total value of all prime contract and subcontract
26 awards for each fiscal year.” (emphasis added)). Nothing in Plaintiff’s discussion points
27 to any specific mandatory directive that DLA supervisors must follow without discretion.

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1 (See Compl. at 4–8.) Plaintiff’s negligent supervision claim is therefore barred under
2 § 2680(a).

3 **C. Rehabilitation Act**

4 Section 504(a) of the Rehabilitation Act “prohibits, among other things,
5 discrimination on the basis of disability ‘under any program or activity conducted by an
6 Executive Agency.’” *Lane*, 518 U.S. at 189 (quoting 29 U.S.C. § 794(a)). Congress,
7 however, has not “waived the Federal Government’s immunity against monetary damages
8 awards beyond the narrow category of § 504(a) violations committed by federal funding
9 agencies acting as such—that is, by ‘Federal provider[s].’” *Id.* at 193. In other words, “the
10 United States has not waived immunity for monetary damages for alleged violations of
11 Section 504(a) of the Rehabilitation Act committed by programs or activities conducted by
12 a federal Executive agency.” *G.B. v. United States*, No. CV 21-8071-GW-ASX, 2022 WL
13 2903135, at *1 (C.D. Cal. Mar. 29, 2022).

14 Plaintiff’s seventh cause of action against the United States for an alleged violation
15 of the Rehabilitation Act seeks only monetary damages. (Compl. at 24.) The Court thus
16 lacks subject-matter jurisdiction to adjudicate Plaintiff’s seventh cause of action.

17 **MOTION TO DISMISS PURSUANT TO**
18 **FEDERAL RULE OF CIVIL PROCEDURE 12(b)(6)**

19 Because the Court lacks subject-matter jurisdiction over all the claims in Plaintiff’s
20 Complaint as discussed above, the Court need not address Defendant’s argument that
21 Plaintiff fails to plausibly state any claim against it under Federal Rule of Civil Procedure
22 12(b)(6).

23 **CONCLUSION**

24 For the foregoing reasons, the Court lacks subject-matter jurisdiction over Plaintiff’s
25 claims. The Court thus **GRANTS** Defendant’s Motion to Dismiss Plaintiff’s Complaint
26 and **DISMISSES WITHOUT PREJUDICE** Plaintiff’s Complaint. *See Missouri ex rel.*
27 *Koster v. Harris*, 847 F.3d 646, 656 (9th Cir. 2017) (“In general, dismissal for lack of
28 subject matter jurisdiction is without prejudice.”); *see also Hernandez v. Conriv Realty*

1 *Assocs.*, 182 F.3d 121, 123 (2d Cir. 1999) (“Article III deprives federal courts of the power
2 to dismiss a case with prejudice where federal subject matter jurisdiction does not exist.”).
3 Plaintiff’s claims relating to the contracting officer’s decision and its impact on Plaintiff
4 must be brought, if anywhere, in the Court of Federal Claims.⁴ But Plaintiff may file an
5 amended complaint within sixty (60) days of the date of this Order alleging relevant claims
6 that are completely independent of the contracting officer’s decision and include facts to
7 that effect. In any amended complaint, Plaintiff must also address whether he filed an
8 administrative claim with the appropriate federal agency prior to bringing an FTCA claim.
9 *See* 28 U.S.C. § 2675; *Holloman*, 708 F.2d at 1402 (“As a prerequisite to suit under the
10 [FTCA], the claimant must file an administrative claim with the appropriate federal
11 agency.”); *Jerves v. United States*, 966 F.2d 517, 518 (9th Cir. 1992) (“[C]laim requirement
12 of section 2675 is jurisdictional in nature and may not be waived.” (citation omitted)).

13 *Should Plaintiff elect not to file a timely amended complaint, this action will remain*
14 *dismissed without prejudice.*

15 **IT IS SO ORDERED.**

16 Dated: March 9, 2023

17 

18 Honorable Todd W. Robinson
19 United States District Judge
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28 ⁴ This Order has no bearing on whether Plaintiff would be permitted to file his claims with the Court of Federal Claims given his previous appeal to the ASBCA. (*See* Compl. at 14; ECF 1-6 at 2–8.)