

1 HONORABLE RONALD B. LEIGHTON

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6 UNITED STATES DISTRICT COURT
7 WESTERN DISTRICT OF WASHINGTON
8 AT TACOMA

9 VENUS FLYNN, et al.,

10 Plaintiffs,

11 v.

12 RENTAL INSURANCE SERVICES
13 INC, et al.,

14 Defendants.

CASE NO. C18-5084 RBL

ORDER ON DEFENDANT RENTAL
INSURANCE SERVICES, INC.'S
MOTION TO DISMISS AMENDED
COMPLAINT PURSUANT TO FRCP
12(B)(6) AND 9(B)

15 THIS MATTER comes before the Court on Defendant Rental Insurance Services, Inc.'s
16 Motion to Dismiss Amended Complaint Pursuant to Fed. R. Civ. P. 12(b)(6) and 9(b). Dkt. 28.
17 Initiated on January 31, 2018, this tort case arises out of a February 12, 2015 auto accident
18 allegedly caused by a federal employee. RIS insured Enterprise, the car rental company used by
19 the federal employee, and allegedly made a misrepresentation to the plaintiffs about the
20 applicable statute of limitations. As discussed below, RIS' motion to dismiss should be granted
21 in part, on two grounds: (1) FTCA claims alleged against RIS which should be dismissed, and
22 (2) claims that sound in fraud should be dismissed for failure to state a claim under the
23 heightened pleading standard of Fed. R. Civ. P. 9(b). RIS' motion should be denied in part as to
24 the claim for negligent misrepresentation.

ORDER ON DEFENDANT RENTAL INSURANCE
SERVICES, INC.'S MOTION TO DISMISS
AMENDED COMPLAINT PURSUANT TO FRCP
12(B)(6) AND 9(B) - 1

1 **I. BACKGROUND**

2 **A. Procedural History.**

3 On April 25, 2017, Plaintiff Venus Flynn filed a negligence action in Pierce County
4 Superior Court for damages arising out a February 12, 2015 auto accident, naming as defendants
5 Beatrice and “John Doe” Ashburn¹. W.D.Wash. Cause No. 3:17-cv-05316-RBL, Dkt. 1-2. Ms.
6 Ashburn removed the case on April 28, 2017, averring that at the time of the incident she was an
7 employee of the Federal Deposit Insurance Corporation (FDIC), a federal agency, acting within
8 the course and scope of her employment. *Id.* at Dkt. 1 at 2. The United States substituted itself as
9 a party for Ms. Ashburn and John Doe Ashburn pursuant to 28 U.S.C. § 2679(d)(4). *Id.* at Dkt. 5.
10 On June 14, 2017, the Court dismissed the United States from the case for Ms. Flynn’s failure to
11 exhaust administrative remedies under the Federal Tort Claims Act. *Id.* at Dkt. 12, citing 28
12 U.S.C. § 2675(a).

13 On May 4, 2017, Ms. Flynn, along with two family members, Autumn Flynn and G.F.
14 (collectively, “the Flynns”) filed administrative claims with the FDIC, which denied the Flynns’
15 administrative claims on November 6, 2017. Dkt. 18 at ¶¶7, 8. The Flynns filed this case on
16 January 31, 2018. Dkt. 1.

17 **B. Amended Complaint.**

18 1. Factual Allegations.

19 For purposes of this motion, the following facts alleged in or incorporated by the
20 Amended Complaint are taken as true.

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23 ¹ The complaint also names Jessica Dennis and Eric Ortiz as defendants for damages caused by
24 an unrelated auto accident on May 9, 2014 under the theory that both accidents caused the
plaintiff a sustained back/neck injury.

1 The Flynnns sustained harm in a three car chain-reaction accident on February 12, 2015,
2 caused by two other drivers, Ms. Ashburn and Defendant Lorraine Craig. Dkt. 18 at ¶¶10, 12, 13,
3 14. Ms. Ashburn, then-employed by a federal agency and acting within the scope of her
4 employment, was not wearing anything to indicate that she was a federal employee, and she
5 made no representations about her federal employment to the Flynnns. *Id.* at ¶¶15, 16. Ms.
6 Ashburn was driving an Enterprise rental car. Dkt. 5 at 2.

7 In February of 2015, counsel to the Flynnns contacted Enterprise, and Enterprise directed
8 counsel to RIS for its claims handling. Dkt. 5 at 2. RIS, which accepted tender of the Flynnns’
9 insurance claims, negotiated the claims on behalf of Ms. Ashburn and the United States. *Id.*; Dkt.
10 18 at ¶17. On March 18, 2015, RIS sent a letter the Flynnns acknowledging its investigation of
11 their claims. Dkt. 1-2 at 2. The letter warns the Flynnns: “Under Washington state law, you have
12 three years from the date of the accident to file a lawsuit for bodily injury . . . This means you
13 must settle your claim or file a lawsuit by that date or you will be barred from recovery.” *Id.* The
14 Flynnns’ counsel first learned of Ms. Ashburn’s federal employee status on April 16, 2017. *Id.* at
15 ¶21.

16 2. Parties and claims.

17 The Amended Complaint names as defendants the United States, liable for its employee,
18 Ms. Ashburn, who is not separately named; Ms. Craig; and RIS. Dkt. 18 at ¶¶2, 3. According to
19 the “Claims” portion of the Amended Complaint, RIS is liable for damages “under RCW 46.61
20 and/or Washington common law.” *Id.* at ¶26. The Prayer for Relief requests: (1) judgment
21 against the defendants for damages from the February 12, 2015 collision, and (2) “application of
22 the doctrine of equitable tolling to allow plaintiffs’ claims to proceed against the United
23 States[.]” *Id.* at p. 5.

1 According to the Flynn's, the Amended Complaint alleges three common law causes of
2 action against RIS: fraud, fraudulent concealment, and negligent misrepresentation. Dkt. 30 at 3.
3 In support of these three claims, the Amended Complaint alleges that the United States and RIS
4 "fraudulently concealed that [Ms.] Ashburn was a federal employee . . . and induced or tricked
5 plaintiffs into believing that claims . . . fell under Washington State law and its three-year statute
6 of limitations." Dkt. 18 at ¶¶22, 24. Particular to RIS, it is also alleged that RIS "negligently
7 represented to plaintiffs that their claims against [Ms.] Ashburn were subject to Washington law
8 and that they had three years . . . to settle or file a lawsuit[.]" *Id.* at ¶23. The factual basis for
9 these allegations appears to be the March 18, 2015 letter. *See* Dkt. 1-2.

10 II. LEGAL STANDARD

11 Fed. R. Civ. P. 12(b)(6) motions to dismiss may be based on either the lack of a
12 cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory.
13 *Balistreri v. Pacifica Police Department*, 901 F.2d 696, 699 (9th Cir. 1990). Under Fed. R. Civ.
14 P. 8(a), the plaintiff need only provide a "short and plain statement . . . showing that the pleader
15 is entitled to relief." Material allegations are taken as admitted and the claim is construed in the
16 plaintiff's favor. *Keniston v. Roberts*, 717 F.2d 1295 (9th Cir. 1983). However, "[w]hile a
17 complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual
18 allegations, a plaintiff's obligation to provide the grounds of his entitlement to relief requires
19 more than labels and conclusions, and a formulaic recitation of the elements of a cause of action
20 will not do." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 554-55 (2007) (internal citations
21 omitted). "Factual allegations must be enough to raise a right to relief above the speculative
22 level, on the assumption that all the allegations in the complaint are true (even if doubtful in
23

1 fact).” *Id.* at 555. The complaint must allege “enough facts to state a claim to relief that is
2 plausible on its face.” *Id.* at 547.

3 A heightened pleading standard applies to fraud claims. Fed. R. Civ. P. 9(b). *Compare to*
4 Fed. R. Civ. P. 8(a). Under Rule 9(b), the plaintiff alleging fraud “must state with particularity
5 the circumstances constituting fraud[.]” The defendant’s knowledge or other state of mind “may
6 be alleged generally,” Fed. R. Civ. P. 9(b), but allegations must include “an account of the time,
7 place, and specific content of the false representations as well as the identities of the parties to
8 the misrepresentation.” *Swartz v. KPMG LLP*, 476 F.3d 756, 764 (9th Cir. 2007) (internal
9 quotations omitted).

10 III. DISCUSSION

11 A. Whether the FTCA claims against RIS should be dismissed.

12 The Amended Complaint alleges that RIS acted “as agent of [Ms.] Ashburn and her
13 employer FDIC.” Dkt. 18 at ¶17. Because the FDIC is a federal agency, the Amended Complaint
14 has in essence alleged that RIS acted on behalf of the United States. This should be construed as
15 a claim against the United States. However, the FTCA only waives the United States’ sovereign
16 immunity as to harm caused “by the negligent or wrongful act . . . of any employee . . . while
17 acting within the scope of his office or employment[.]” 28 U.S.C. § 1346(b)(1) (emphasis
18 added). The FTCA waives sovereign immunity based on an employment relationship, not an
19 agency relationship. The Amended Complaint does not allege that RIS is an employee of the
20 United States. The FTCA is inapplicable to RIS.

21 In their Response, the Flynns argue that they are “not making FTCA claims against RIS
22 individually or as an agency of the federal government.” Dkt. 30 at 2. It is unclear what kind of
23 FTCA claim could otherwise be alleged. If the Flynns characterize RIS’ agency relationship with

1 the United States as that of an independent contractor, such a claim could not typically be
2 brought under the FTCA. 28 U.S.C. § 2680. If the Flynns name RIS solely as a means of
3 bootstrapping the doctrine of equitable tolling in claims against the United States, RIS need not
4 be named as a party.

5 In sum, there is no plausible FTCA claim to be sustained against RIS. RIS is not an
6 employee of the United States, and if RIS is an independent contractor, its conduct does not
7 waive the United States' sovereign immunity, but if it did, the United States, not RIS, would be
8 liable. To the extent the Amended Complaint alleges FTCA claims against RIS, the claims
9 should be dismissed for failure to state a claim.

10 **B. Whether the claims that sound in fraud should be dismissed for failure to state a claim
11 and plead with particularity under Fed. R. Civ. P. 9(b).**

12 RIS has challenged the factual sufficiency of the Flynns' fraud and fraudulent
13 concealment claims. Dkt. 28 at 10; Dkt. 31 at 3. In response, the Flynns make no clear attempt to
14 point to their fraud claims' particularity, defending only their claim for negligent
15 misrepresentation. *See* Dkt. 30 at 3-5. The Flynns' (lack of) response supports RIS' assertion that
16 fraud was alleged only to support a theory for equitable tolling, not stand-alone claims. *See* Dkt.
17 18 at ¶¶22, 24, p. 5. The Court agrees, and need not belabor analysis of all nine fraud elements.
18 Additional facts about the circumstances of RIS' fraud need to be alleged to satisfy the
19 heightened pleading standard of Fed. R. Civ. P. 9(b). The Amended Complaint does not state a
20 claim sounding in fraud against RIS for fraud or fraudulent concealment, and the claims should
21 be dismissed for failure to state a claim.
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1 **C. Whether the claim for negligent misrepresentation should be dismissed for failure to**
2 **state a claim.**

3 Washington has adopted the definition of negligent misrepresentation set forth in the §
4 552 in the *Restatement (Second) of Torts*, which reads:

5 One who, in the course of his business, profession or employment, or in any other
6 transaction in which he has a pecuniary interest, supplies false information for the
7 guidance of others in their business transactions, is subject to liability for pecuniary
8 loss caused to them by their justifiable reliance upon the information, if he fails to
9 exercise reasonable care or competence in obtaining or communicating the
10 information.

11 *Lawyers Title Ins. Corp. v. Baik*, 147 Wn. 2d 536, 545 (2002), quoting *Restatement (Second) of*
12 *Torts* § 552(1) (1977). Applied here, the Amended Complaint states a prima facie negligent
13 misrepresentation claim: The March 18, 2015 letter was issued by RIS on its letterhead and
14 supplied to the Flynns for their guidance, where it states, “you have three years . . . to file a
15 lawsuit . . . This means you must settle your claim or file a lawsuit . . . or you will be barred from
16 recovery.” The Flynns relied on that letter, to their detriment, by filing suit less than three years,
17 but more than two years, from the date of the auto accident, under circumstances where RIS
18 knew or should have known that Ms. Ashburn was a federal employee.

19 RIS argues that the Amended Complaint cannot state a cognizable theory for negligent
20 misrepresentation because RIS had no duty to the Flynns, the recipients of the March 18, 2015
21 letter wrongly informing them that a three-year statute of limitations applied. Dkt. 28 at 8-10;
22 Dkt. 31 at 4, 5. According to RIS, which administered insurance claims on behalf of Enterprise,
23 neither a fiduciary insurer-insured relationship nor any other type of special relationship applies,
24 so RIS owed no affirmative duty to the Flynns. *Id.* This argument is unpersuasive, because it
lacks authority at law. As a starting point, RIS’ argument is not supported by *Baik*, the

1 Washington State Supreme Court case adopting § 552 and discussing its discrete elements at
2 length. *See discussion, Baik*, 147 Wn. 2d at 548-550.

3 Furthermore, in support of its argument that a fiduciary duty or special relationship must
4 exist, RIS relies on inapplicable authority. RIS leans mostly heavily on *Tank v. State Farm Fire*
5 *& Cas. Co.*, 105 Wn. 2d 381 (1996). *See* Dkt. 28 at 9; Dkt. 31 at 4. In *Tank*, the court addressed
6 the issue of whether a “third party claimant who was injured by the insured [may] bring a cause
7 of action against the insurer[.]” answering the question in the negative. *Id.* at 391. Although the
8 court framed its issue broadly, the express holding of the case is far narrower, where the court
9 held: “We hold that third party claimants may not sue an insurance company directly for alleged
10 breach of duty of good faith under a liability policy.” *Id.* *Tank* is easily distinguished, because
11 this case does not arise out of an alleged breach of a liability policy, and the Amended Complaint
12 alleges a common law claim for negligent misrepresentation, not breach of any owed duty of
13 good faith.

14 RIS makes a second argument, that “Plaintiffs cannot establish . . . that their reliance on
15 the information supplied by RIS was justified, that is, that reliance was reasonable[.]” Dkt. 31 at
16 5. RIS also argues that RIS was not in a position to know whether Ms. Ashburn was operating
17 within the scope of her employment at the time of the accident. Dkt. 28 at 10. Neither argument
18 addresses the sufficiency of the pleadings, the issue before the Court.

19 The Amended Complaint states a claim for negligent misrepresentation, which should not
20 be dismissed.

21 IV. CONCLUSION

22 Defendant Rental Insurance Services, Inc.’s Motion to Dismiss Amended Complaint
23 Pursuant to Fed. R. Civ. P. 12(b)(6) and 9(b) (Dkt. 28) is **GRANTED IN PART** as to (1) any

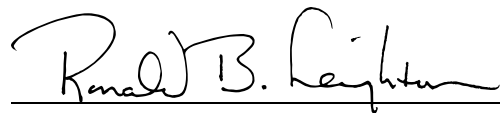
1 FTCA claims alleged against RIS, which are **HEREBY DISMISSED** for failure to state a claim,
2 and (2) claims against RIS that sound in fraud, which are **HEREBY DISMISSED** for failure to
3 state a claim.

4 The motion is **DENIED IN PART** as to the claim for negligent misrepresentation.

5 The Clerk is directed to send uncertified copies of this Order to all counsel of record and
6 to any party appearing *pro se* at said party's last known address.

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8 IT IS SO ORDERED.

9 Dated this 28th day of June, 2018.

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12 Ronald B. Leighton
13 United States District Judge
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