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UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

GUSTAVO ESCAMILLA, et al.,

Plaintiffs,

v.

DEPARTMENT OF HOMELAND SECURITY, et al.,

Defendants.

No. CV 17-7748 ODW (MRWx)

NOTICE OF MOTION AND MOTION TO DISMISS COMPLAINT WITHOUT LEAVE TO AMEND

Hearing Date: March 5, 2018
Hearing Time: 1:30 p.m.
Location: First Street Courthouse
350 W. 1st Street
Courtroom 5D, 5th Floor

Hon. Otis D. Wright II

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NOTICE OF MOTION AND MOTION TO DISMISS

PLEASE TAKE NOTICE that, on March 5, 2018, at 1:30 p.m., or as soon thereafter as they may be heard, defendants the United States of America ("United States"), and the Department of Homeland Security ("DHS") (collectively, "defendants") will, and hereby do, move this court for an order dismissing the action in its entirety, without leave to amend. This motion will be made in the United States Courthouse before the Honorable Otis D. Wright II, United States District Judge, located at 350 W. 1st Street, Los Angeles, California, 90012, Courtroom 5D, 5th Floor.

Defendants bring this motion pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure on the grounds that the court lacks subject matter jurisdiction, and plaintiff fails to state a claim for relief.

This motion is made upon this notice, the attached memorandum of points and authorities, the declarations of Robert A. Ramey and Grace Y. Park, and all pleadings, records, and other documents on file with the court in this action, and upon such oral argument as may be presented at the hearing of this motion.

This motion is made following the conference of counsel pursuant to Local Rule 7-3, which was held on January 22, 2018.

Dated: January 29, 2018

Respectfully submitted,

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

On August 17, 2015, the District Court of Colorado dismissed without prejudice a trademark infringement suit between plaintiff Greenway Nutrients, Inc. ("Greenway") and a subset of Greenway's investors for Greenway's failure to prosecute that action. As a result of that dismissal, the United States Attorney's Office for the Western District of Missouri ("USAO-MO") declined to continue its ongoing criminal investigation of infringement against the Greenway investors.

Rather than refile the complaint in the District Court of Colorado, Greenway and its principal, plaintiff Gustavo Escamilla ("Escamilla," and with Greenway, "plaintiffs"), filed this action against the Department of Homeland Security ("DHS") and the United States of America ("United States") (collectively "defendants"), asserting the following claims: (1) federal violations of 42 U.S.C. § 1983 under the Fifth and Fourteenth Amendments, (see Dkt. 1, Complaint at ¶¶ 76-96); and (2) state law claims for (a) violation of the Bane Act, Cal. Civ. Code § 52.1; (b) negligent and intentional infliction of emotional distress; and (c) declaratory and injunctive relief. (See id. at ¶¶ 97-112).

The Complaint is not a model of clarity, but it appears that plaintiffs make two principal allegations. First, plaintiffs appear to contend that defendants declined to resume their criminal investigation by refusing to consider purportedly newly discovered evidence of ongoing infringement by the Greenway investor defendants in the Colorado action.[1] (See, e.g., Dkt. 1, Complaint at ¶¶ 84, 98, 103, 107). Second, plaintiffs contend that defendants "acted in a discriminatory manner, with the intent to discriminate, in that plaintiff Escamilla is a Mexican-American small businessman and was not represented by private legal counsel." (Id. at ¶ 92). For the reasons below, the court lacks subject matter jurisdiction over this action, and, even if it did have jurisdiction, the action should be dismissed, without leave to amend, for failure to plausibly allege any entitlement to relief.

[1] The allegations in the Complaint are taken as true solely for the purposes of this motion. See Saleh v. Bush, 848 F.3d 880, 892 (9th Cir. 2017).

A. Colorado Action

On April 23, 2013, Greenway filed a civil action in the District of Colorado, Greenway Nutrients, Inc. v. Blackburn, et al., CV 13-1088 MSK (KMTx) (D. Colo.) ("Colorado action"), alleging trademark infringement and other claims against multiple defendants, including a subset of Greenway's investors. (See Declaration of Grace Y. Park ("Park Decl."), Exh. 3 at Dkts. 22, 36).[2] Shortly after an answer to the operative complaint was filed, (see id. at Dkt. 131), Greenway's counsel filed a motion to withdraw as counsel, (see id. at Dkt. 137), which the court granted. (See id. at Dkt. 143). On July 21, 2015, the magistrate judge issued a report and recommendation dismissing the action, pursuant to Rule 41(b) of the Federal Rules of Civil Procedure, in light of Greenway's failure to retain new counsel, noting that "[i]t has been the law for the better part of two centuries [] that a corporation may appear in the federal courts only through counsel." (Id., Dkt. 146 at 1-2) (citing Rowland v. Cal. Men's Colony, Unit II Men's Advisory Council, 506 U.S. 194, 201-02, 113 S.Ct. 716, 721 (1993)). On August 14, 2015, the district court judge adopted the report and recommendation, dismissed the action without prejudice, (see id. at Dkt. 147), and entered judgment on August 17, 2015. (See id. at Dkt. 148). Because Greenway's action was dismissed without prejudice, Greenway remains free to refile its complaint or assert similar claims for infringement occurring after August 17, 2015.[3] See Nasious v. Two Unknown B.I.C.E. Agents, at Arapahoe Cty. Justice Ctr., 492 F.3d 1158, 1162 (10th Cir. 2007) ("Employing Rule 41(b) to dismiss a case without prejudice [] allows the plaintiff another go."); Gonzales v. Bernalillo Cty. Dist. Ct., 640 Fed. App'x 759, 763 (10th Cir. 2016) ("[A] Rule 41(b) dismissal without prejudice is not an extreme sanction because the remedy is simply to cure the defect and refile the

[2] "[I]t is well established that [the court] may take judicial notice of judicial proceedings in other courts." Goncalves by & through Goncalves v. Rady Children's Hosp. San Diego, 865 F.3d 1237, 1257 n. 6 (9th Cir. 2017).

[3] Notably, plaintiffs' counsel in this action, Mainak D'Attaray, served as counsel for Greenway in the Colorado action. (See Park Decl., Exh. 3 at p. 2 & Dkt. 143). If Mr. D'Attaray can represent plaintiffs in this action, it is unclear why he cannot represent plaintiffs in a renewed trademark infringement action in the District of Colorado.

complaint.") (internal quotation marks omitted); see also Montes v. United States, 37 F.3d 1347, 1350 (9th Cir. 1994) ("the effect of a dismissal without prejudice may be to end the litigation in the court involved, but not to act as an adjudication on the merits or to bar the filing of a similar action in another court.") (internal quotation marks omitted).

B. U.S. Immigration and Customs Enforcement's Investigation

On March 3, 2015, plaintiffs met in Burbank, California with Shawn Gibson, Operations Manager for the United States Immigration and Customs Enforcement ("ICE"), an agency under the jurisdiction of defendant DHS. (See Dkt. 1, Complaint at ¶¶ 6, 14). At that meeting, Gibson explained that ICE and USAO-MO had been investigating the Greenway investor defendants in the Colorado action for criminal trademark infringement. At that meeting, Gibson explained that ICE and USAO-MO had already recovered $26 million from the Greenway investors for infringing other companies' products, (see id. at ¶ 18), and informed plaintiffs that they may be able to recover as well. (See id. at ¶ 20). Plaintiffs communicated with Gibson again in June 2015, August 2015, and October 2016, (see id. at ¶¶ 22, 24-27), but on October 28, 2016, Gibson told plaintiffs that ICE and USAO-MO would no longer investigate the Greenway investors' infringement of plaintiffs' products because plaintiffs did not prevail in the Colorado action. (See id. at ¶ 27).

On April 11, 2017,[4] plaintiffs notified Gibson of "just discovered new and compelling evidence" regarding Greenway's former attorney, Michael J. Ryan, and his "unlawfully divulging, sharing, as well as disclosing Greenway'[s] confidential business information as well as trade secrets." (Dkt. 1, Complaint at ¶ 32; see id. at ¶¶ 52, 63-70). When Gibson stated that ICE and USAO-MO would decline to resume their investigation in light of the evidence regarding Ryan, on July 27, 2017, plaintiffs raised their concerns with Russell Simons, Resident Agent in Charge at ICE's Office of Professional Responsibility, at a meeting in Los Angeles, California. (See id. at ¶¶ 7, 38-39). After

[4] The Complaint states "April 11, 2016," (see Dkt. 1, Complaint at ¶ 32), but read in context, it appears that plaintiffs mean April 11, 2017.

multiple exchanges between plaintiffs and Simons on August 3, 2017, and August 4, 2017, Simons explained to plaintiffs that in light of the dismissal in the Colorado action, ICE and USAO-MO would not resume their investigation because the dismissal without prejudice in the Colorado action leaves plaintiffs' valid ownership of Greenway's trademarks in doubt. (See id. at ¶¶ 40-42, 44-46). In other words, ICE and USAO-MO determined that the Greenway investors could assert that they are not criminally liable for infringement because Greenway could not conclusively establish that they were civilly liable for infringement in the Colorado action.

II. LEGAL STANDARD

A. Subject Matter Jurisdiction

A defendant may seek to dismiss a complaint for lack of subject-matter jurisdiction under Rule 12(b)(1) of the Federal Rules of Civil Procedure. "Rule 12(b)(1) jurisdictional attacks can be either facial or factual." White v. Lee, 227 F.3d 1214, 1242 (9th Cir. 2000). "In a facial attack, the challenger asserts that the allegations contained in a complaint are insufficient on their face to invoke federal jurisdiction." Safe Air for Everyone v. Meyer, 373 F.3d 1035, 1039 (9th Cir. 2004), cert. denied, 544 U.S. 1018 (2005). "By contrast, in a factual attack, the challenger disputes the truth of the allegations that, by themselves, would otherwise invoke federal jurisdiction." Id. "In resolving a factual attack on jurisdiction, the district court may review evidence beyond the complaint without converting the motion to dismiss into a motion for summary judgment." Id. "[The court] also need not presume the truthfulness of the plaintiffs' allegations." White, 227 F.3d at 1242. "Once the moving party has converted the motion to dismiss into a factual motion by presenting affidavits or other evidence properly brought before the court, the party opposing the motion must furnish affidavits or other evidence necessary to satisfy its burden of establishing subject matter jurisdiction." Savage v. Glendale Union High Sch., Dist. No. 205, Maricopa Cnty., 343 F.3d 1036, 1039 n. 2 (9th Cir. 2003), cert. denied, 541 U.S. 1009 (2004).

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B. Failure to State a Claim

Evaluating a complaint pursuant to Rule 12(b)(6) involves a two-step process. See Levitt v. Yelp! Inc., 765 F.3d 1123, 1135 (9th Cir. 2014) ("While recognizing some tension" among the Supreme Court cases, Bell Atl. Corp. v. Twombly, 550 U.S. 544, 127 S.Ct. 1955 (2007), Ashcroft v. Iqbal, 556 U.S. 662, 129 S.Ct. 1937 (2009), Erickson v. Pardus, 551 U.S. 89, 127 S.Ct. 2197 (2007), and Swierkiewicz v. Sorema, N.A., 534 U.S. 506, 122 S.Ct. 992 (2002), the Ninth Circuit has "settled on a two-step process for evaluating pleadings.").

First, "[t]o be entitled to the presumption of truth, allegations in a complaint or counterclaim may not simply recite the elements of a cause of action, but must contain sufficient allegations of underlying facts to give fair notice and to enable the opposing party to defend itself effectively." Levitt, 765 F.3d at 1135. A complaint must set forth "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action[.]" Twombly, 550 U.S. at 555, 127 S.Ct. at 1964-65; see Iqbal, 556 U.S. at 678, 129 S.Ct. at 1949 ("the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions.").

Second, "the factual allegations that are taken as true must plausibly suggest an entitlement to relief, such that it is not unfair to require the opposing party to be subjected to the expense of discovery and continued litigation." Levitt, 765 F.3d at 1135. "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Iqbal, 556 U.S. at 678, 129 S.Ct. at 1949. In determining whether the complaint states a plausible claim for relief, the court must "draw on its judicial experience and common sense[,]" Iqbal, 556 U.S. at 679, 129 S.Ct. at 1950, and consider "obvious alternative explanation[s]." Id. at 682, 129 S.Ct. at 1951. "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." United States v. Corinthian Colls., 655 F.3d 984, 991 (9th Cir. 2011).

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III. ARGUMENT

A. Plaintiffs Fail to Comply with Rule 8 of the Federal Rules of Civil Procedure

Under Rule 8(a) of the Federal Rules of Civil Procedure, a complaint must contain "a short and plain statement of the claim showing that the pleader is entitled to relief," see Iqbal, 556 U.S. at 677-78, 129 S.Ct. at 1949; Twombly, 550 U.S. at 555, 127 S.Ct. at 1964, in order to "give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." Updike v. Multnomah Cty., 870 F.3d 939, 952 (9th Cir. 2017). "If plaintiff fails [] to provide defendants with notice of which defendant is being sued on which theory and what relief is being sought against them, the complaint fails to comply with Rule 8." Wash. v. Cty. of Los Angeles, No. CV 03-5921-DSF (PLA), 2003 WL 27377620, at *4 (C.D. Cal. Dec. 15, 2003).

The Complaint fails to meet the Rule 8 standard in multiple ways. First, with respect to the defendants in this action, plaintiffs do not identify whether each of their claims is against the United States, DHS, or both. (See Dkt. 1, Complaint at pp. 17-18, 20-22).

Second, with respect to the theory of relief, although plaintiffs allege that defendant United States "is sued under the Federal Tort Claims Act on behalf of" Shawn Gibson and Russell Simons, (see Dkt. 1, Complaint at ¶¶ 6, 7), plaintiffs do not assert any claims pursuant to the Federal Tort Claims Act ("FTCA"), 28 U.S.C. §§ 1346, 1671, et seq.[5] (See id. at pp. 17-23). Third, it is unclear whether some or all of plaintiffs' state tort claims are barred by the applicable statute of limitations. See 28 U.S.C. § 2401(b) ("A tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues or unless action is begun within six months after the date of mailing"). Although plaintiffs contend that their

[5] To the extent plaintiffs assert FTCA claims against defendant the United States, plaintiffs' allegations are insufficiently clear to exhaustively ascertain whether certain defenses apply, such as the independent contractor or discretionary function exceptions. See 28 U.S.C. § 2671 (independent contractor exception); 28 U.S.C. § 2680(a) (discretionary function exception).

emotional distress claims arise from conduct from "July 27, 2017, through August 4, 2017," (see Dkt. 1, Complaint at ¶¶ 103, 107), plaintiffs first communicated with DHS employees in March 2015, (see id. at ¶ 13), which is more than two years before the Complaint was filed on October 24, 2017. (See id.).

Third, with respect to the relief sought against any defendant, to the extent plaintiffs seek "exemplary and punitive damages," a "declaration that Defendants' obvious and inadequate respect for following proper law enforcement protocols are unconstitutional,"[6] and "an injunction requiring Defendants to remedy immediately the Constitutional violations," (Dkt. 1, Complaint at Prayer for Relief), these are not available under the FTCA. See Scott v. United States, 884 F.2d 1280, 1285 (9th Cir. 1989) (under the FTCA, "if the local law provides for punitive damages, [] then only the compensatory damages may be awarded"); Westbay Steel, Inc. v. United States, 970 F.2d 648, 651 (9th Cir. 1992) ("the only relief provided for in the FTCA is money damages") (internal alteration and quotation marks omitted); Moon v. Takisaki, 501 F.2d 389, 390 (9th Cir. 1974) (the FTCA "does not submit the United States to injunctive relief"); Thompson v. U.S. Postal Serv., No. C 12-0301 PJH, 2012 WL 3583134, at *3 (N.D. Cal. Aug. 20, 2012) ("the FTCA waives sovereign immunity only as to claims for 'money damages,' and not for declaratory or injunctive relief"); Nhia Kao Vang v. Decker, No. 2:12-CV-01226-MCE, 2012 WL 5020491, at *11 (E.D. Cal. Oct. 17, 2012) (similar).[7] Because defendants do not have sufficient notice of the claims asserted and the relief sought against them to adequately defend against this action, plaintiffs' Complaint should be dismissed.

B. Plaintiffs' State Tort Claims Fail

Plaintiffs attempt to assert state law claims for violation of the Bane Act, Cal. Civ.

[6] Somewhat contradictorily, plaintiffs assert that defendants exhibited an "obvious and inadequate respect for following proper law enforcement reporting protocols," (Dkt. 1, Complaint at ¶ 111), but nevertheless demand that "those policies and practices are enjoined by the Court." (Id. at ¶ 112).

[7] For these reasons, plaintiffs' claims seeking declaratory and injunctive relief regarding defendants' "standards," "mechanisms," "custom[s], polic[ies], and/or practice[s]," (see Dkt. 1, Complaint at ¶¶ 79, 85, 87, 110-12), should be dismissed.

Code § 52.1, negligent and intentional infliction of emotional distress, and declaratory and injunctive relief. (See Dkt. 1, Complaint at ¶¶ 97-112). These state law claims may be maintained, if at all, only pursuant to the FTCA. See F.D.I.C. v. Craft, 157 F.3d 697, 706 (9th Cir. 1998) ("The FTCA is the exclusive remedy for tortious conduct by the United States, and it only allows claims against the United States.").[8] The FTCA is a limited waiver of sovereign immunity for tort actions against the United States "under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U.S.C. § 1346(b)(1); see Foster v. United States, 522 F.3d 1071, 1074 (9th Cir. 2008) (it is a "well-established principle that waivers of sovereign immunity must be construed strictly in favor of the sovereign").

1. Plaintiffs Failed to Exhaust Their Administrative Remedies

Under 28 U.S.C. § 2675(a),[9] "[s]uit against the Government under the [FTCA] is not permitted unless a claim has first been filed with the agency." Avery v. United States, 680 F.2d 608, 609 (9th Cir. 1982). The content of that claim to the agency does not have to be detailed; rather, "a skeletal claim form, containing only the bare elements of notice of accident and injury and a sum certain representing damages, suffices to overcome an argument that jurisdiction is lacking." Id. at 610; see Shipek v. United States, 752 F.2d 1352, 1354 (9th Cir. 1985) (same). A tort claim may be filed in district court only after "receiving a conclusive denial of the claim from the agency or waiting for six months to elapse without a final disposition of the claim being made." Jerves v. United States, 966 F.2d 517, 519 (9th Cir. 1992); see 28 U.S.C. § 2675(a). "The FTCA's exhaustion

[8] Additionally, the action should be dismissed because the court lacks subject matter jurisdiction over DHS as "the United States is the only proper party defendant in an FTCA action." Kennedy v. U.S. Postal Serv., 145 F.3d 1077, 1078 (9th Cir. 1998). "A claim against [DHS] in its own name is not a claim against the United States." Id. (affirming dismissal of action against USPS and USPS employee because they were not properly named defendants pursuant to 28 U.S.C. § 2679(a)).

[9] Section 2675(a) provides: An FTCA claim "shall not be instituted . . . against the United States . . . unless the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency [or t]he failure of an agency to make final disposition of a claim within six months after it is filed."

requirement is jurisdictional and may not be waived." D.L. by & through Junio v. Vassilev, 858 F.3d 1242, 1244 (9th Cir. 2017). "[P]laintiff bears the initial burden of proving subject matter jurisdiction under the FTCA." Sabow v. United States, 93 F.3d 1445, 1451 (9th Cir.), as amended, (Sept. 26, 1996).

Here, plaintiffs make no attempt to allege that they satisfied the jurisdictional requirement by filing any administrative claim. (See, generally, Dkt. 1, Complaint). Nor does ICE have any record indicating that any administrative claim was filed by either Greenway or Escamilla. (See Declaration of Robert A. Ramey at ¶¶ 2, 3). Accordingly, the action should be dismissed with respect to the state law claims for lack of subject matter jurisdiction.

2. The Discretionary Function Exception Applies to Plaintiffs' State Tort Claims

Even if plaintiffs fully exhausted their administrative FTCA claims, the court would nevertheless lack subject matter jurisdiction. Under the FTCA, the United States allows a limited waiver of its sovereign immunity only with respect to certain injuries caused by government employees who are acting within the scope of their employment. See 28 U.S.C. § 1346(b). However, there is no waiver of immunity for claims "based upon the exercise or performance or the failure to exercise or perform a discretionary function." 28 U.S.C. § 2680(a).[10] "This exception prevents judicial 'second-guessing' of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort." Gonzalez v. United States, 814 F.3d 1022, 1027 (9th Cir. 2016) (internal quotation and alteration marks omitted). As such, "[the court] lack[s] jurisdiction over any claim to which the discretionary-function exception applies." Alfrey v. United States, 276 F.3d 557, 561 (9th Cir. 2002); see Sabow, 93 F.3d at 1451 ("Where the discretionary function exception to the FTCA applies, no federal subject matter

[10] 28 U.S.C. § 2680(a) provides that the FTCA does not apply to: "Any claim . . . based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused."

jurisdiction exists.").

"The Supreme Court has created a two-step test for courts that governs the applicability of this exception." Bailey v. United States, 623 F.3d 855, 860 (9th Cir. 2010), cert. denied, 565 U.S. 1079 (2011). First, "[a]n agency does not retain discretion whether to act where a statute or policy directs mandatory and specific action and the agency has no lawful option but to adhere to the directive." Id. Second, "[o]nly discretionary decisions that are susceptible to public policy analysis confer immunity on the government under the FTCA; [t]he challenged decision need not be actually grounded in policy considerations." Id. at 861 (internal quotation marks omitted).

With respect to the first prong, "[t]he decision whether or not to prosecute a given individual is a discretionary function for which the United States is immune from liability." Gen. Dynamics Corp. v. United States, 139 F.3d 1280, 1283 (9th Cir. 1998); Gonzalez, 814 F.3d at 1028 ("[t]he investigation and prosecution of crime has long been a core responsibility of the executive branch.") (citation omitted); Dichter-Mad Family Partners, LLP v. United States, 707 F.Supp.2d 1016, 1037 (C.D. Cal. 2010), aff'd, 709 F.3d 749 (9th Cir. 2013) ("[r]efusal to prosecute is a classic illustration of a decision committed to agency discretion"). Indeed, even "[o]utside of the FTCA context, the Court has recognized on several occasions over many years that an agency's decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency's absolute discretion." Gonzalez, 814 F.3d at 1028 (citation and internal quotation marks omitted). Moreover, plaintiffs cannot evade the absolute discretion afforded to prosecutors by asserting negligence claims against the investigating agencies. See Gen. Dynamics, 139 F.3d at 1283 (discretionary function exception applies to investigating agency's negligent preparation of report, because "the persons who actually caused the damage [were] the prosecutors[], who were pushing a criminal (and civil) attack upon General Dynamics and its employees.").

Here, plaintiffs do not point to any statute, regulation, rule, or policy that prescribes or mandates any specific course of conduct by defendants. (See, generally, Dkt. 1,

Complaint). Nothing required that defendants consider purportedly newly[11] discovered evidence of ongoing infringement and compel resumption of their criminal investigation. (See, generally, id.). Rather, plaintiffs allege that ICE and USAO-MO decided not to resume their investigation because the dismissal without prejudice in the Colorado action left plaintiffs' valid ownership of Greenway's trademarks in doubt with respect to the Greenway investors' past or continuing infringement. (See id. at ¶¶ 40-42, 44-46). This is precisely the kind of decision that falls within the executive branch's absolute discretion. See Gonzalez, 814 F.3d at 1028 ("an agency's decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency's absolute discretion") (citation and internal quotation marks omitted). Plaintiffs cannot circumvent USAO-MO's absolute discretion by asserting claims against the investigating agency, ICE, instead. See Gen. Dynamics, 139 F.3d at 1283 (discretionary function exception applies to investigating agency's purported negligence).

With respect to the second prong, defendants' decision to not resume their investigation or review plaintiffs' "new" evidence "clearly require investigative officers to consider relevant political and social circumstances in making decisions about the nature and scope of a criminal investigation." Sabow, 93 F.3d at 1453. Indeed, "[d]oing nothing may be the most constructive use of [DHS's and USAO-MO's] resources," because "Congress gives the[se agencies] a budget, setting a cap on its personnel." Dichter-Mad Family Partners, 707 F.Supp.2d at 1037-38. "Agencies must compare the value of pursuing one case against the value of pursuing another," id. at 1038, and even "may find it worthwhile to give short shrift to a particular claim if the aggrieved party can file its own suit [], for turning the subject over to private litigation frees up time without

[11] Plaintiffs' purportedly "new" evidence that Greenway's former attorney, Michael J. Ryan, "unlawfully divulge[ed], shar[ed], as well as disclos[ed] Greenway'[s] confidential business information as well as trade secrets," (Dkt. 1, Complaint at ¶ 32; see id. at ¶¶ 52, 63-70), is actually rather old. As far back as June 11, 2013, Escamilla sent threatening and profanity-laced communications to Ryan, his ex-wife, and daughter accusing Ryan of misappropriation of trade secrets, wire fraud, and mail fraud, among other charges. (See, e.g., Park Decl., Exh. 4 at 4, 11).

necessarily diminishing the enforcement of [a particular] statute." Id.

Here, ICE and USAO-MO had to consider the relevant political and social implications of using scarce resources to resume a criminal investigation where plaintiffs did not prevail on the same claims in civil proceedings. See Dichter-Mad Family Partners, 707 F.Supp.2d at 1038 (and agency may "find it worthwhile to give short shrift to a particular claim if the aggrieved party can file its own suit"). Defendants had to balance plaintiffs' ability to refile (or abandon) claims against the Greenway investors in Colorado against the risk that other victims lack the resources to file their own civil claims. See id. ("Agencies must compare the value of pursuing one case against the value of pursuing another"). ICE and USAO-MO further had to consider their likelihood of prevailing against the Greenway investors under a higher criminal "beyond reasonable doubt" standard when Greenway determined that it could not prevail against the Greenway investors under a more lenient "preponderance of the evidence" civil standard. In other words, defendants' decisions constituted discretionary judgments that are "at the core of the executive branch." Gonzalez, 814 F.3d at 1033.

Ultimately, plaintiffs' demand that the court direct USAO-MO and ICE to resume their investigation, (see Dkt. 1, Complaint at ¶¶ 84, 98, 103, 107), would involve precisely the type of judicial second-guessing the discretionary function exception is designed to prevent. See Gonzalez, 814 F.3d at 1027 ("This exception prevents judicial 'second-guessing' of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort."). Courts are not well-suited for that role, because courts and agencies function differently and courts have little visibility into an agency's inner workings. "Judges compare the case at hand against a rule of law or an abstract standard of diligence and do not see the opportunity costs of reallocations within the agency." Dichter-Mad Family Partners, 707 F.Supp.2d at 1038. As such, "[c]ourts cannot intelligently supervise the [agency's] allocation of its staff's time, because although judges see clearly the claim the [agency] has declined to redress, they do not see at all the tasks the staff may accomplish with the time released." Id. "That

fundamental difference in the perspectives of the two bodies is why agencies (and other prosecutors) rather than courts must make the decisions on pursuing or dropping claims." Id. Because the discretionary function exception applies, the court should dismiss the state court claims for lack of subject matter jurisdiction, without leave to amend.

3. Plaintiffs Fail to State any State Tort Claim

a. *Plaintiffs' Claim for Violation of the Bane Act, Cal. Civ. Code § 52.1, Fails*

Even if plaintiffs properly exhausted their administrative FTCA claims, and even if the discretionary function exception did not apply to bar their claims, plaintiffs' claim for violation of the Bane Act ("Bane Act"), Cal. Civ. Code § 52.1, nevertheless fails. The Bane Act imposes liability against individuals who interfere or attempt to interfere by threats, intimidation, or coercion the exercise or enjoyment of rights secured by the Federal or California Constitutions. See Cal. Civ. Code § 52.1(a)-(b). "The statute requires a showing of coercion independent from the coercion inherent in the [constitutional violation]." Shoyoye v. Cnty. of Los Angeles, 203 Cal.App.4th 947, 959 (2012); see Jones v. Kmart Corp., 17 Cal.4th 329, 334 (1998) (section 52.1 "require[s] an attempted or completed act of interference with a legal right, accompanied by a form of coercion"). "The act of interference with a constitutional right must itself be deliberate or spiteful." Shoyoye, 203 Cal.App.4th at 959. "Speech alone is not sufficient to support [a Bane Act violation], except upon a showing that the speech itself threatens violence." Cal. Civ. Code § 52.1(j).

To the extent plaintiffs' Bane Act claim is based on interference with plaintiffs' Fifth and Fourteenth[12] Amendment rights, (see Dkt. 1, Complaint at ¶ 98), the court lacks

[12] Because plaintiffs allege claims against federal entities, the United States and DHS, plaintiffs' Fourteenth Amendment Bane Act claim arises, if at all, under the Due Process Clause of the Fifth, rather that the Fourteenth, Amendment. See Davis v. Passman, 442 U.S. 228, 230, 99 S.Ct. 2264, 2269-70 (1979) (discussing equal protection claims under the Fifth Amendment); Consejo de Desarrollo Economico De Mexicali, A.C. v. United States, 482 F.3d 1157, 1170 n.4 (9th Cir. 2007) (holding Fifth Amendment "subjects the federal government to constitutional limitations that are the equivalent of those imposed on the states by the Equal Protection Clause of the Fourteenth

subject matter jurisdiction because the United States has not waived its sovereign immunity with respect to constitutional tort claims. Pursuant to 28 U.S.C. § 1346, the United States waives its sovereign immunity "where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." "By definition, [then, plaintiffs] cannot allege as to [the United States] that state law, the requisite 'law of the place where the act or omission occurred,' was the source of liability for a claim alleging the deprivation of a federal constitutional right." Mendoza v. United States, No. 15CV1528-JAH (BGS), 2017 WL 4286907, at *7 (S.D. Cal. Sept. 27, 2017) (citing F.D.I.C. v. Meyer, 510 U.S. 471, 477-78, 114 S.Ct. 996, 1001 (1994)).

To the extent plaintiffs' Bane Act claim is premised on interference with plaintiffs' rights under the California Constitution, (see Dkt. 1, Complaint at ¶ 98), it also fails for failure to state a claim. Plaintiffs' Complaint is bereft of any allegation, conclusory or otherwise, that defendants intentionally used any threats, intimidation, or coercion, see Cal. Civ. Code § 52.1(a)-(b), separate and apart from any alleged constitutional violation. (See, generally, Dkt. 1, Complaint); see also Shoyoye, 203 Cal.App.4th at 959 ("The act of interference with a constitutional right must itself be deliberate or spiteful."); Jones, 17 Cal.4th at 334 (section 52.1 "require[s] an attempted or completed act of interference with a legal right, accompanied by a form of coercion"). At most, plaintiffs allege defendants admonished them, (see, e.g., Dkt. 1, Complaint at ¶ 24) ("Gibson scolded Plaintiffs for inquiring about DHS' ongoing criminal investigation"), but absent an actual threat, "[s]peech alone is not sufficient to support [a Bane Act violation]." Cal. Civ. Code § 52.1(j). Accordingly, plaintiffs' Bane Act claim fails.

b. *Plaintiffs' Intentional and Negligent Infliction of Emotional Distress Claims Fail*

Even if plaintiffs properly exhausted their administrative FTCA claims, and even if

Amendment.") (citing Bolling v. Sharpe, 347 U.S. 497, 74 S.Ct. 693 (1954)). This is yet another reason why plaintiffs' Bane Act claims should be dismissed.

the discretionary function exception did not apply, plaintiffs' intentional and negligent infliction of emotion distress claims fail. "A cause of action for intentional infliction of emotional distress exists when there is (1) extreme and outrageous conduct by the defendant with the intention of causing, or reckless disregard of the probability of causing, emotional distress; (2) the plaintiff's suffering severe or extreme emotional distress; and (3) actual and proximate causation of the emotional distress by the defendant's outrageous conduct." Hughes v. Pair, 46 Cal.4th 1035, 1050 (2009) (internal quotation marks omitted). "A defendant's conduct is 'outrageous' when it is so extreme as to exceed all bounds of that usually tolerated in a civilized community." Id. at 1050-51 (internal quotation marks omitted). "Liability for intentional infliction of emotional distress does not extend to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities." Id. at 1051. "Negligent infliction of emotional distress is a form of the tort of negligence, to which the elements of duty, breach of duty, causation and damages apply." Huggins v. Longs Drug Stores Cal., Inc., 6 Cal.4th 124, 129 (1993).

Plaintiffs fail to allege any conduct by defendants that approaches negligence, much less outrageous conduct. Rather, plaintiffs contend that, from July 27, 2017 through August 4, 2017, defendants "were aware Plaintiffs were in possession of new evidence that was critical to a successful resolution to Plaintiffs' criminal allegations," (Dkt. 1, Complaint at ¶¶ 103, 107), but that defendants refused to consider plaintiffs' purportedly new evidence, causing plaintiffs "severe emotional distress and mental suffering." (Id. at ¶¶ 105, 109). As previously explained, ICE and USAO-MO, in their discretion, made the reasoned decision that they would not resume their investigation because the dismissal without prejudice in the Colorado action leaves plaintiffs' valid ownership of Greenway's trademarks in doubt.[13] (See id. at ¶¶ 40-42, 44-46). Moreover, plaintiffs' purportedly "new" evidence regarding Greenway's former attorney, Michael J. Ryan, is not new. (See

[13] Moreover, as all of plaintiffs' claims arise, if at all, out of litigation or incidents surrounding litigation, defendants are immune from suit under Cal. Civ. Code § 47(b). See Rubin v. Green, 4 Cal.4th 1187, 1195 (1993) (litigation privilege pursuant to Cal. Civ. Code § 47(b) applies to pre-litigation communications).

Dkt. 1, Complaint at ¶¶ 32, 52, 63-70). As far back as June 11, 2013, Escamilla sent threatening and profanity-laced communications to Ryan, his ex-wife, and daughter accusing Ryan of misappropriation of trade secrets, wire fraud, and mail fraud, among other charges. (See, e.g., Park Decl., Exh. 4 at 4, 11). In other words, defendants made reasoned, evidence-based decisions that do not remotely approach negligence or outrageous conduct, and plaintiffs' negligent and intentional infliction of emotional distress claims should be dismissed.

C. Plaintiffs' Claims for Violations of 42 U.S.C. § 1983 Fail

With respect to their § 1983 claims, plaintiffs take issue with defendants' purported "refusal to review, admit, or allow Greenway's new evidence [] that clearly demonstrated that Greenway was in fact, the victim of an ongoing federal crime," (Dkt. 1, Complaint at ¶ 84), and purportedly discriminatory acts "with the intent to discriminate, in that plaintiff Escamilla is a Mexican-American small businessman and was not represented by private legal counsel."[14] (Id. at ¶ 92; see id. at ¶ 30). However, "[f]ederal officers acting under federal authority are immune from suit under section 1983." Gibson v. United States, 781 F.2d 1334, 1343 (9th Cir. 1986), cert. denied, 479 U.S. 1054 (1987); Russell v. U.S. Dep't of the Army, 191 F.3d 1016, 1019 (9th Cir. 1999) (Section 1983 "provides no right of action against federal (rather than state) officials"). Accordingly, these claims should be dismissed for lack of subject matter jurisdiction.

D. Plaintiffs' Claims are Futile

Rule 15 of the Federal Rules of Civil Procedure provides that the court "should freely give leave [to amend] when justice so requires." Fed. R. Civ. P. 15(a)(2). However, "[c]ourts are not required to grant leave to amend if a complaint lacks merit entirely." Lopez v. Smith, 203 F.3d 1122, 1129 (9th Cir. 2000) (en banc). Whether to grant leave to amend is guided by several factors, including: (1) whether the amendment causes the

[14] Other than plaintiffs' conclusory allegations that defendants acted in a racially discriminatory manner, (see Dkt. 1, Complaint at ¶¶ 30, 92), the Complaint does not contain any facts supporting that contention. (See, generally, id.).

opposing party prejudice; (2) whether the amendment is sought in bad faith; (3) whether the amendment causes undue delay; (4) whether the amendment constitutes an exercise in futility; and (5) whether the plaintiff has previously amended his or her complaint. See DCD Programs, Ltd. v. Leighton, 833 F.2d 183, 186 & n. 3 (9th Cir. 1987).

Liberally construing the allegations in the Complaint, it is clear that giving another opportunity to amend would be futile. Even if plaintiffs administratively exhausted their FTCA claims, the discretionary function exception applies to defendants' investigative and prosecutorial decision not to resume their criminal investigation based on purportedly newly discovered evidence. And as previously explained, see supra at § III.C, plaintiffs § 1983 claims must fail because they cannot be asserted against federal officers or agencies. Accordingly, plaintiffs' Complaint should be dismissed without leave to amend.

IV. CONCLUSION

For the foregoing reasons, defendants respectfully request that the court grant their motion to dismiss and dismiss the action in its entirety without leave to amend.

Dated: January 29, 2018

Respectfully submitted,

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