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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

MARCO A. REYES,

Plaintiff,

v.

UNITED STATES OF
AMERICA; DOE CBP
OFFICERS 1-30,
INDIVIDUALLY AND IN THEIR
OFFICIAL CAPACITIES,
inclusive,

Defendants.

Case No.: 3:20-cv-01752-WQH-LL
ORDER

HAYES, Judge:

The matter pending before the Court is the Motion to Dismiss filed by Defendant United States of America. (ECF No. 4).

I. PROCEDURAL BACKGROUND

On September 8, 2020, Plaintiff Marco A. Reyes initiated this action by filing a Complaint against Defendants United States of America (“United States”) and DOE Customs and Border Protection (“CBP”) officers. (ECF No. 1). Plaintiff alleges that CBP “[o]fficers at the Otay Mesa Port of Entry severely beat, injured, and arrested Plaintiff” *Id.* at 2. Plaintiff brings the following nine causes of action: (1) Bivens action for

1 excessive force against Defendants DOE CBP officers; (2) Bivens action for illegal arrest
2 against Defendants DOE CBP officers; (3) Bivens action for falsification of evidence
3 against Defendants DOE CBP officers; (4) violation of the Rehabilitation Act (29 U.S.C.
4 § 701 et seq.) against Defendant United States; (5) violation of the Federal Tort Claims Act
5 (“FTCA”) for false imprisonment against all Defendants; (6) violation of the FTCA for
6 assault against all Defendants; (7) violation of the FTCA for battery against all Defendants;
7 (8) violation of the FTCA for negligence against all Defendants; (9) violation of the Bane
8 Act (California Civil Code § 52.1) against all Defendants; and (10) violation of the FTCA
9 for intentional infliction of emotional distress against all Defendants. *See id.* at 7-14.
10 Plaintiff seeks general, compensatory, and punitive damages; civil penalties; attorneys’
11 fees and costs; legal interest; and “[a]nd for such other and further relief as the Court may
12 deem proper.” *Id.* at 15.

13 On November 5, 2020, Defendant United States filed a Motion to Dismiss some of
14 Plaintiff’s claims for lack of subject matter jurisdiction pursuant to Federal Rule of Civil
15 Procedure 12(b)(1) and failure to state a claim pursuant to Federal Rule of Civil Procedure
16 12(b)(6). (ECF No. 4). Defendant United States moves to dismiss Plaintiff’s ninth claim
17 in its entirety for lack of subject matter jurisdiction and failure to state a claim; Plaintiff’s
18 fourth claim in its entirety for failure to state a claim; and Plaintiff’s fifth, sixth, seventh,
19 eighth, and tenth claims as to Defendants DOE CBP officers for failure to state a claim.
20 *See id.* On November 30, 2020, Plaintiff filed a Response in opposition. (ECF No. 6). On
21 December 7, 2020, Defendant United States filed a Reply. (ECF No. 7).

22 **II. ALLEGATIONS OF THE COMPLAINT**

23 “On August 2, 2018, at approximately 4:00 p.m., Plaintiff was in his car in one of
24 the vehicle lanes at the Otay Mesa Port of Entry, waiting to cross into the United States.”¹
25

26
27 ¹ The Supreme Court has held that “the FTCA bars ‘[a]ny claim arising in a foreign country’” and “that
28 the FTCA does not permit claims for torts committed abroad” *Hernandez v. Mesa*, 140 S. Ct. 735,
748 & n.10 (2020) (first alteration in original) (citing 28 U.S.C. § 2680).

1 (ECF No. 1 at 3). “Due to an incident in a nearby vehicle lane, an unknown CBP officer
2 asked Plaintiff to step out of his car.” *Id.* “Plaintiff has significant hearing loss from his
3 days of military service and did not hear the command.” *Id.* at 4. “The unknown CBP
4 officer proceeded to knock on Plaintiff’s driver’s side window and vaguely told him to
5 stand “over there.” *Id.* “Plaintiff immediately complied, stepping out of his car and
6 standing behind his vehicle.” *Id.*

7 “The unknown CBP officer began yelling profanities at Plaintiff, accusing him of
8 not following directions.” *Id.* “Plaintiff replied that there was no reason to treat him
9 disrespectfully and stated that he was following directions.” *Id.* “The unknown CBP
10 officer continued to use profanities against Plaintiff.” *Id.* “While using these profanities,
11 the unknown CBP officer approached Plaintiff and bumped into him with his chest.” *Id.*
12 “As Plaintiff raised his hand to gesture the unknown CBP officer to stop bumping into him,
13 the officer bumped Plaintiff’s hand.” *Id.* “The unknown CBP officer immediately accused
14 Plaintiff of assaulting him” and “called for backup assistance at that point.” *Id.*

15 “A group of unknown CBP officers soon arrived at the area where Plaintiff and the
16 officer were located.” *Id.* “The officers immediately grabbed Plaintiff and pushed him to
17 the ground.” *Id.* at 5. “While holding Plaintiff to the ground, the officers grabbed
18 Plaintiff’s arms and tried to force him to put his hands behind his back.” *Id.* “Plaintiff
19 informed the officers about his disability and explained that he could not move his hands
20 behind his back due to the impairment.” *Id.* “The officers ignored Plaintiff’s pleas and
21 instead began to beat him as he lay defenseless on the ground.” *Id.* “The officers severely
22 beat Plaintiff until they managed to force his hands behind his back, causing a severe injury
23 to his left arm and shoulder.” *Id.* “Plaintiff also suffered broken ribs and other serious
24 injuries to his body from the officers’ beating.” *Id.* “After beating Plaintiff and forcing his
25 hands behind his back, the officers handcuffed him and took him into custody at the Port
26 of Entry.” *Id.*

27 “After the incident, other federal law-enforcement officials responded to interview
28 Plaintiff, and the involved CBP officials, about this use-of-force incident at the border.”

1 *Id.* at 6. “[A]fter Plaintiff was taken into custody, the United States Attorney’s Office for
2 the Southern District of California received a prosecution referral for Plaintiff, seeking to
3 charge him with assault on a federal officer.” “Plaintiff was ultimately released from
4 custody without explanation” and “was not charged with assaulting an officer or any other
5 crime.” *Id.* “Plaintiff’s injuries, particularly to his left shoulder, have required and
6 continue to require repeated medical attention and surgical intervention” and “Plaintiff has
7 been in constant pain and suffering since the beating, and his treatment remains ongoing at
8 the Veteran’s Administration.” *Id.* at 7.

9 **III. STANDARDS OF REVIEW**

10 **a. Lack of Subject Matter Jurisdiction**

11 Federal Rule of Civil Procedure 12(b)(1) permits dismissal for “lack of subject-
12 matter jurisdiction” Fed. R. Civ. P. 12(b)(1). “Federal courts are courts of limited
13 jurisdiction. They possess only that power authorized by Constitution and statute, which
14 is not to be expanded by judicial decree. It is to be presumed that a cause lies outside this
15 limited jurisdiction and the burden of establishing the contrary rests upon the party
16 asserting jurisdiction.” *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377
17 (1994) (citations omitted). “A plaintiff suing in a federal court must show in his pleading,
18 affirmatively and distinctly, the existence of whatever is essential to federal jurisdiction,
19 and, if he does not do so, the court, on having the defect called to its attention or on
20 discovering the same, must dismiss the case, unless the defect be corrected by amendment.”
21 *Tosco Corp. v. Communities for a Better Env’t*, 236 F.3d 495, 499 (9th Cir. 2001),
22 *abrogated on other grounds by Hertz Corp. v. Friend*, 559 U.S. 77 (2010).

23 “A jurisdictional challenge under Rule 12(b)(1) may be made either on the face of
24 the pleadings or by presenting extrinsic evidence.” *Warren v. Fox Family Worldwide, Inc.*,
25 328 F.3d 1136, 1139 (9th Cir. 2003). “In a facial attack, the challenger asserts that the
26 allegations contained in a complaint are insufficient on their face to invoke federal
27 jurisdiction.” *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004). In a
28 facial attack on subject matter jurisdiction, the court assumes the factual allegations of the

1 complaint to be true and draws all reasonable inferences in favor of the plaintiff. *See Doe*
2 *v. Holy See*, 557 F.3d 1066, 1073 (9th Cir. 2009).

3 In a federal court, subject matter jurisdiction may arise from either federal question
4 jurisdiction or diversity jurisdiction. *See Caterpillar Inc. v. Williams*, 482 U.S. 386, 392
5 (1987); *see also* 28 U.S.C. §§ 1331-32. To invoke federal question jurisdiction, the
6 complaint must allege that the “action[] aris[es] under the Constitution, laws, or treaties of
7 the United States.” 28 U.S.C. § 1331. “The presence or absence of federal-question
8 jurisdiction is governed by the well-pleaded complaint rule, which provides that federal
9 jurisdiction exists only when a federal question is presented on the face of the plaintiff’s
10 properly pleaded complaint.” *Wayne v. DHL Worldwide Express*, 294 F.3d 1179, 1183
11 (9th Cir. 2002) (quoting *Caterpillar*, 482 U.S. at 392).

12 **b. Failure to State a Claim**

13 Federal Rule of Civil Procedure 12(b)(6) permits dismissal for “failure to state a
14 claim upon which relief can be granted” Fed. R. Civ. P. 12(b)(6). Federal Rule of
15 Civil Procedure 8(a) provides that “[a] pleading that states a claim for relief must contain .
16 . . a short and plain statement of the claim showing that the pleader is entitled to relief . . .
17 .” Fed. R. Civ. P. 8(a)(2). “A district court’s dismissal for failure to state a claim under
18 Federal Rule of Civil Procedure 12(b)(6) is proper if there is a lack of a cognizable legal
19 theory or the absence of sufficient facts alleged under a cognizable legal theory.”
20 *Conservation Force v. Salazar*, 646 F.3d 1240, 1242 (9th Cir. 2011). “All allegations of
21 material fact are taken as true and construed in the light most favorable to the nonmoving
22 party.” *Thompson v. Davis*, 295 F.3d 890, 895 (9th Cir. 2002) (citing *Sprewell v. Golden*
23 *State Warriors*, 266 F.3d 979, 988 (9th Cir.), *opinion amended on denial of reh’g*, 275 F.3d
24 1187 (9th Cir. 2001)).

25 “[A] plaintiff’s obligation to provide the grounds of his entitle[ment] to relief
26 requires more than labels and conclusions, and a formulaic recitation of the elements of a
27 cause of action will not do” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)
28 (second alteration in original) (citation omitted). When considering a motion to dismiss, a

1 court must accept as true all “well-pleaded factual allegations” *Ashcroft v. Iqbal*, 556
2 U.S. 662, 679 (2009). However, a court is not “required to accept as true allegations that
3 are merely conclusory, unwarranted deductions of fact, or unreasonable inferences.”
4 *Sprewell*, 266 F.3d at 988. “In sum, for a complaint to survive a motion to dismiss, the
5 non-conclusory ‘factual content,’ and reasonable inferences from that content, must be
6 plausibly suggestive of a claim entitling the plaintiff to relief.” *Moss v. U.S. Secret Serv.*,
7 572 F.3d 962, 969 (9th Cir. 2009) (quoting *Iqbal*, 556 U.S. at 678).

8 **IV. DISCUSSION**

9 **a. Violation of the Bane Act (California Civil Code § 52.1) Against All** 10 **Defendants (claim 9)**

11 Defendant United States contends that the Court lacks subject matter jurisdiction
12 over Plaintiff’s Bane Act claim because the United States has not waived sovereign
13 immunity to the extent the claim is based on an alleged violation of the United States
14 Constitution. Defendant United States contends that Plaintiff’s Bane Act claim fails to
15 allege that Defendants DOE CBP officers used threats, coercion, or intimidation to
16 interfere with a constitutionally protected right and that those threats caused Plaintiff to
17 reasonably believe that the exercise of a federal right would result in violence against
18 Plaintiff. Defendant United States contends that Plaintiff’s Complaint makes conclusory
19 statements about the Defendants DOE CBP officers’ alleged conduct without factual
20 support to demonstrate that their actions were “deliberate or spiteful” or an “egregious
21 interference” with Plaintiff’s constitutional rights.

22 Plaintiff contends that the source of substantive liability pursuant to the Bane Act is
23 California law. Plaintiff contends that California law provides that private individuals may
24 be liable for tortious interference with constitutional rights. Plaintiff contends that his
25 claims for tortious interference with federal constitutional rights are not constitutional torts
26 subject to sovereign immunity and are distinct torts governed by California statute that are
27 related to federal constitutional rights. Plaintiff contends that his Bane Act claim
28 sufficiently alleges a claim for tortious interference with his rights because Plaintiff alleges

1 that Defendants DOE CBP officers committed acts out of spite, doubled down on
2 Plaintiff's wrongful arrest, and intentionally deprived Plaintiff of his freedom of movement
3 by force, threats of force, menace, and duress.

4 The Bane Act "was adopted to stem a tide of hate crimes" but is not "limited to such
5 crimes" *Venegas v. Cty. of Los Angeles*, 32 Cal. 4th 820, 843 (2004). The Bane Act
6 creates a cause of action "[i]f a person or persons, whether or not acting under color of law,
7 interferes by threat, intimidation, or coercion, or attempts to interfere by threat,
8 intimidation, or coercion, with the exercise or enjoyment by any individual or individuals
9 of rights secured by the Constitution or laws of the United States, or of the rights secured
10 by the Constitution or laws of" California. Cal. Civ. Code § 52.1(b). "Civil Code section
11 52.1 does not extend to all ordinary tort actions because its provisions are limited to threats,
12 intimidation, or coercion that interferes with a constitutional or statutory right." *Venegas*,
13 32 Cal. 4th at 843.

14 In *Xue Lu*, asylum applicants filed an FTCA lawsuit against the United States and a
15 federal immigration officer. *See Xue Lu v. Powell*, 621 F.3d 944, 945-47 (9th Cir. 2010).
16 The Court of Appeals found that "[i]n order for the United States to be vicariously liable
17 for Powell's actions, Powell must have intentionally inflicted emotional distress on Lu or
18 deprived her of rights secured by the Constitution or the laws of the United States while
19 acting within the scope of his office or employment as an asylum officer under
20 circumstances where the United States, if a private person, would be liable to the claimant
21 in accordance with the law of the place where the act or omission occurred." *Id.* at 952
22 (footnote omitted) (citation omitted). "The majority h[e]ld[] that the United States, if it
23 were a California employer, would be liable for Powell's actions." *Id.*

24 However, in *Lewis v. Mossbrooks*, 788 F. App'x 455 (9th Cir. 2019), the Court of
25 Appeals clarified that "[a]lthough *Xue Lu* . . . concluded that the FTCA allows Bane Act
26 claims predicated on a violation of a federal statute, it did not suggest that the FTCA waiver
27 extends to Bane Act claims deriving from constitutional violations." *Id.* at 460 (citations
28 omitted). The Court of Appeals stated that "[t]he FTCA waives sovereign immunity only

1 where the United States, if a private person, would be liable . . . in accordance with the law
2 of the place where the act or omission occurred” and that “[b]ased on the terms of that
3 waiver, *F.D.I.C. v. Meyer*, 510 U.S. 471 . . . (1994) established that the United States simply
4 has not rendered itself liable under § 1346(b) for constitutional tort claims.” *Lewis*, 788 F.
5 App’x at 460 (second alteration in original). The Court of Appeals concluded that “[t]he
6 district court lacked subject matter jurisdiction over Lewis’ Bane Act claim” because
7 “Lewis’ Bane Act claim imports a constitutional violation—the use of excessive force—
8 that could not otherwise be the basis for a claim against a private person.” *Id.*

9 In this case, the Complaint alleges, in relevant part,

10 Defendants, by their violent conduct, interfered by threats, intimidation,
11 or coercion, or attempted to interfere by threats, intimidation, or coercion,
12 with the exercise or enjoyment of Plaintiffs’ rights as secured by the Fourth
13 Amendment to the United States Constitution, the Fifth Amendment to the
14 United States Constitution, and Article I, Section 13 of the California
15 Constitution.

16 Defendants intended to deprive Plaintiff of his enjoyment of the rights
17 and interests protected by the United States and California Constitutions.

18 (ECF No. 1 at 13).

19 Plaintiff cannot maintain a Bane Act claim pursuant to the FTCA that is premised
20 on federal constitutional violations. *See Meyer*, 510 U.S. at 477 (holding that constitutional
21 tort claims are “not actionable under § 1346(b)” because “§ 1346(b) does not provide a
22 cause of action for such a claim”); *Lewis*, 788 Fed. Appx. at 460 (affirming the dismissal a
23 Bane Act claim because there is no indication that the “FTCA waiver extends to Bane Act
24 claims deriving from constitutional violations”); *see e.g., Peralta v. United States*, No. CV
25 19-08912-CJC(MRWx), 2020 WL 5769079, at *7 (C.D. Cal. July 28, 2020) (“The
26 Government is correct—and Plaintiff appears to concede—that Plaintiff cannot maintain a
27 Bane Act claim under the FTCA if it is solely premised on federal constitutional
28 violations.”); *Plascencia v. United States*, No. EDCV 17-02515 JGB (SPx), 2018 WL
6133713, at *13 (C.D. Cal. May 25, 2018) (“Plaintiff cannot predicate a Bane Act claim

1 against the United States on solely a constitutional violation because the United States has
2 immunity and has not waived its immunity pursuant to the FTCA.”). The Court concludes
3 that there is no subject matter jurisdiction pursuant to Federal Rule of Civil Procedure
4 12(b)(1) over Plaintiff’s Bane Act claim to the extent that the claim is premised on
5 interferences with Plaintiff’s federal constitutional rights. Plaintiff’s ninth claim is
6 dismissed with prejudice and without leave to amend to the extent that it is premised on
7 violations of Plaintiff’s federal constitutional rights. *See Lopez v. Smith*, 203 F.3d 1122,
8 1127 (9th Cir. 2000) (holding that if a Rule 12(b)(6) motion is granted, “a district court
9 should grant leave to amend even if no request to amend the pleading was made, unless it
10 determines that the pleading could not possibly be cured by the allegation of other facts.”);
11 *see e.g., Peralta*, 2020 WL 5769079, at *7 (citing *Lopez*, 203 F.3d at 1127) (same).

12 A plaintiff alleging a negligent violation of constitutional rights must allege
13 “coercion independent from the coercion inherent in the Fourth Amendment violation
14 itself.” *Sandoval v. Cty. of Sonoma*, 912 F.3d 509, 519 (9th Cir. 2018) (The “independent
15 coercion rule only applies when the plaintiff shows that the defendant negligently violated
16 the plaintiff’s constitutional rights”). However, a plaintiff relying on “the coercion
17 inherent in a Fourth Amendment violation”, must allege that “the coercion occurred with
18 specific intent to violate the [plaintiff]’s right to freedom from unreasonable seizure.” *Id.*
19 at 519-20. In this case, “[t]here are two distinct elements for a section 52.1 cause of action.
20 [The] plaintiff must show (1) intentional interference or attempted interference with a state
21 or federal constitutional or legal right, and (2) the interference or attempted interference
22 was by threats, intimidation or coercion.” *Allen v. City of Sacramento*, 234 Cal. App. 4th
23 41, 67 (2015), *as modified on denial of reh’g* (Mar. 6, 2015). The word interferes as used
24 in section 52.1 means violates. *See e.g., Barsamian v. City of Kingsburg*, 597 F. Supp. 2d
25 1054, 1064 (E.D. Cal. 2009) (same). “Under California law, public entities are liable for
26 actions of their employees within the scope of employment, but public entities are immune
27 from liability to the extent their employees are immune from liability.” *Gant v. Cty. of Los*
28

1 *Angeles*, 772 F.3d 608, 623 (9th Cir. 2014) (citations omitted) (citing Cal. Gov’t Code §
2 815.2).

3 The Court of Appeals has stated that “[t]he FTCA incorporates the law of the state
4 in which the tort is alleged to have occurred, in this case California” *Xue Lu*, 621 F.3d
5 at 945-46. Article I, Section 13 of the California Constitution states, in relevant part, “[t]he
6 right of the people to be secure in their persons, houses, papers, and effects against
7 unreasonable seizures and searches may not be violated” Cal. Const. art. I, § 13.
8 California courts have treated section 13 as “substantially equivalent” to the Supreme
9 Court’s construction of the Fourth Amendment. *See Blair v. Pitchess*, 5 Cal. 3d 258, 270
10 n.6 (1971) (“[S]ection[] . . . 13 of article I of the California Constitution [is] substantially
11 equivalent to the Fourth Amendment”).

12 The Court of Appeals has found that a plaintiff can maintain a Bane Act claim
13 pursuant to the FTCA as long as it is not solely premised on federal constitutional
14 violations. *See e.g., Xue Lu*, 621 F.3d at 950 (finding that Plaintiff had adequately stated a
15 Bane Act claim in an FTCA action premised on the interference with their right to asylum).
16 A plaintiff can maintain a Bane Act claim pursuant to the FTCA that is premised on state
17 constitutional and statutory violations. *See e.g., Plascencia*, 2018 WL 6133713, at *13-14
18 (finding that Plaintiff adequately stated a Bane Act claim in an FTCA action premised on
19 violations of Article 1 Sections 3 and 7 of the California Constitution); *Anonymous v.*
20 *United States*, No. 16-cv-0725 W (BLM), 2017 WL 1479233, at *4 (S.D. Cal. Apr. 25,
21 2017) (“These cases not only support a finding that the FTCA constitutes a sovereign
22 immunity waiver for Bane Act claims, but also that the FTCA encompasses state-statutory
23 violations.”). In this case, the Bane Act claim pursuant to the FTCA is premised on a
24 violation of Article I, Section 13 of the California Constitution.

25 Where a claim arises from an unlawful arrest, “the egregiousness required by Section
26 52.1 is tested by whether the circumstances indicate the arresting officer had a specific
27 intent to violate the arrestee’s right to freedom from unreasonable seizure, not by whether
28 the evidence shows something beyond the coercion inherent in the wrongful detention.”

1 *Cornell v. City & Cty. of San Francisco*, 17 Cal. App. 5th 766, 801-02 (2017), as modified
2 (Nov. 17, 2017). The specific intent element is met when (1) “the . . . right at issue [is]
3 clearly delineated and plainly applicable under the circumstances of the case” and (2) “the
4 defendant commit[ted] the act in question with the particular purpose of depriving the
5 citizen victim of his enjoyment of the interests protected by that . . . right[.]” *Id.* at 803
6 (first and fourth alterations in original). “If both requirements are met, even if the
7 defendant did not in fact recognize the [unlawfulness] of his act, he will be adjudged as a
8 matter of law to have acted [with the requisite specific intent]—*i.e.*, in reckless disregard
9 of constitutional [or statutory] prohibitions or guarantees.” *Id.* (alterations in original).

10 In this case, Plaintiff fails to plead the actions of each Defendant individually
11 pursuant to the Bane Act. Plaintiff groups all Defendants together in alleging that his rights
12 pursuant to Civil Code section 52.1 and Article I, Section 13 of the California Constitution
13 were violated. However, group pleading does not provide Defendants fair notice of the
14 claims against them because “the egregiousness required by Section 52.1 is tested by
15 whether the circumstances indicate the arresting officer had a specific intent to violate the
16 arrestee’s right to freedom from unreasonable seizure” *Cornell*, 17 Cal. App. 5th at
17 801-02. The Court concludes that Plaintiff fails to state a Bane Act claim pursuant to
18 Federal Rule of Civil Procedure 12(b)(6) to the extent that the claim is premised on an
19 interference with Plaintiff’s rights pursuant to Article I, Section 13 of the California
20 Constitution. Plaintiff’s ninth claim is dismissed without prejudice and with leave to
21 amend to the extent that it is premised on a violation of Plaintiff’s California constitutional
22 rights. *See e.g., Victoria v. City of San Diego*, 326 F. Supp. 3d 1003, 1019 (S.D. Cal. 2018)
23 (citations omitted) (“[F]ailure to plead the actions of each Defendant individually . . . does
24 not provide Defendants fair notice of the claims against them.”); *Gen-Probe, Inc. v. Amoco*
25 *Corp.*, 926 F. Supp. 948, 961 (S.D. Cal. 1996) (collecting cases in which “th[e] confusion
26 of which claims apply to which defendants would require that the complaint be dismissed
27 with leave to file an amended complaint.”).

28

1 **b. Violation of the Rehabilitation Act (29 U.S.C. § 701 et seq.) Against**
2 **Defendant United States (claim 4)**

3 Defendant United States contends that Plaintiff fails to allege that he is disabled
4 within the meaning of the Rehabilitation Act. Defendant United States contends that
5 Plaintiff fails to allege that he is a qualified individual with a disability; that he was
6 excluded from participation in or denied the benefits of a public entity's services, programs,
7 or activities, or was otherwise discriminated against by the public entity; and that such
8 exclusion, denial of benefits, or discrimination was by reason of his disability. Defendant
9 United States contends that Plaintiff fails to allege that his ailments substantially limit a
10 major life activity, that he has a record of such impairment, or that anyone regarded him as
11 having an impairment at the time of the alleged incident. Defendant United States contends
12 that Plaintiff fails to allege that his known disability was a motivating factor in the non-
13 accommodation of his arrest. Defendant United States asserts that Plaintiff alleges that his
14 arrest was motivated by Defendants DOE CBP officers' belief that Plaintiff was not
15 following directions and that Plaintiff had assaulted an officer. Plaintiff contends that the
16 Complaint sufficiently alleges that Plaintiff is disabled because Plaintiff alleges that he is
17 impaired in the performance of manual tasks. Plaintiff contends that the Complaint
18 sufficiently provides Defendants with notice of a plausible disability.

19 Section 504 of the Rehabilitation Act states that “[n]o otherwise qualified individual
20 with a disability in the United States, as defined in section 705(20) of this title, shall, solely
21 by reason of her or his disability, be excluded from the participation in, be denied the
22 benefits of, or be subjected to discrimination under any program or activity receiving
23 Federal financial assistance or under any program or activity conducted by any Executive
24 agency or by the United States Postal Service.” 29 U.S.C. § 794(a). “[T]o state a claim
25 under the Rehabilitation Act, a plaintiff must allege (1) he is an individual with a disability;
26 (2) he is otherwise qualified to receive the benefit; (3) he was denied the benefits of the
27 program solely by reason of his disability; and (4) the program receives federal financial
28 assistance.” *O’Guinn v. Lovelock Corr. Ctr.*, 502 F.3d 1056, 1060 (9th Cir. 2007).

1 Courts “examine cases construing claims under the [Americans with Disabilities
2 Act] [(“]ADA[”)], as well as section 504 of the Rehabilitation Act, because there is no
3 significant difference in the analysis of rights and obligations created by the two Acts.”
4 *Vinson v. Thomas*, 288 F.3d 1145, 1152 n.7 (9th Cir. 2002). The ADA defines the term
5 “disability” as “a physical or mental impairment that substantially limits one or more major
6 life activities of such individual” 42 U.S.C. § 12102(1)(A). The ADA defines “life
7 activities” as “caring for oneself, performing manual tasks, seeing, hearing, eating,
8 sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading,
9 concentrating, thinking, communicating, and working.” 42 U.S.C. § 12102(2)(A). A
10 plaintiff may establish he was discriminated against “by reason of” his disability pursuant
11 to the ADA by establishing his disability was a “motivating factor” in the official’s decision
12 to exclude the plaintiff from a service or program. *Simmons v. Navajo Cty., Ariz.*, 609 F.3d
13 1011, 1021-22 (9th Cir. 2010).

14 The ADA “applies to arrests” because the ADA “applies broadly to police services,
15 programs, or activities.” *Sheehan v. City & Cty. of San Francisco*, 743 F.3d 1211, 1232
16 (9th Cir. 2014), *rev’d in part, cert. dismissed in part sub nom. City & Cty. of San Francisco,*
17 *Calif. v. Sheehan*, 575 U.S. 600 (2015). “Courts have recognized at least two types of
18 [ADA] claims applicable to arrests: (1) wrongful arrest, where police wrongly arrest
19 someone with a disability because they misperceive the effects of that disability as criminal
20 activity; and (2) reasonable accommodation, where, although police properly investigate
21 and arrest a person with a disability for a crime unrelated to that disability, they fail to
22 reasonably accommodate the person’s disability in the course of investigation or arrest,
23 causing the person to suffer greater injury or indignity in that process than other arrestees.”
24 *Id.*

25 In this case, the Complaint alleges that the unknown CBP officers “grabbed Plaintiff
26 and pushed him to the ground” and “grabbed Plaintiff’s arms and tried to force him to put
27 his hands behind his back.” (ECF No. 1 at 5). The Complaint alleges that “Plaintiff
28 informed the officers about his disability and explained that he could not move his hands

1 behind his back due to the impairment” but that the unknown CBP officers “ignored
2 Plaintiff’s pleas and instead began to beat him as he lay defenseless on the ground.” *Id.*
3 The Complaint alleges that the unknown CBP officers “severely beat Plaintiff until they
4 managed to force his hands behind his back, causing a severe injury to his left arm and
5 shoulder.” *Id.* The Complaint alleges that “Plaintiff has a physical disability in his left
6 hand, arm, and shoulder from a previous injury which limits the functioning of those joints,
7 including the range of motion.” *Id.* The Complaint alleges that “[t]he disability
8 substantially limits Plaintiff’s use of that arm” because “Plaintiff cannot perform many
9 manual tasks with the arm and has trouble reaching, bending, and moving the hand, arm,
10 and shoulder.” *Id.*

11 Plaintiff fails to allege sufficient facts to demonstrate that the conduct of Defendants
12 DOE CBP officers was influenced “solely by reason of [Plaintiff’s] disability” 29
13 U.S.C. § 794(a). The Court concludes that Plaintiff fails to state a Rehabilitation Act claim
14 pursuant to Federal Rule of Civil Procedure 12(b)(6). Plaintiff’s fourth claim is dismissed
15 without prejudice and with leave to amend. *See e.g., Thomas v. Sacramento Cty.*, No. 2:15-
16 cv-01952-TLN-EFB, 2017 WL 550052, at *5 (E.D. Cal. Feb. 10, 2017) (dismissing
17 plaintiff’s Rehabilitation Act claim because there was no proof that the arrest procedure
18 was influenced solely by reason of Plaintiff’s disability).

19 **c. Violations of the FTCA Against Defendants DOE CBP Officers (claims**
20 **5-8, 10)**

21 Defendant United States contends that the United States is the only proper defendant
22 for claims pursuant to the FTCA. Defendant United States contends that when an FTCA
23 claim is brought against the United States and additional defendants, the additional
24 defendants should be dismissed with prejudice even if they are unnamed defendants.
25 Defendant United States contends that Plaintiff improperly names unknown CBP Officers
26 as defendants to his FTCA claims and that the unknown CBP Officers must be dismissed
27 from those causes of action. Plaintiff states that “Defendant [United States] is correct that
28 FTCA claims can only be brought against the United States. The FTCA claims against ‘all

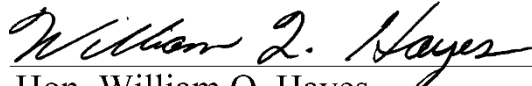
1 defendants' in the Complaint was a scrivener's error. The Court should dismiss the FTCA
2 claims against the Doe defendants." (ECF No. 6 at 14).

3 Courts will grant a motion to dismiss when the non-moving party files a notice of
4 non-opposition. *See* CivLR 7.1(f)(3)(a); *see e.g., Palomares v. Bear Stearns Residential*
5 *Mortg. Corp.*, No. 07cv01899 WQH (BLM), 2008 WL 686683, at *3 (S.D. Cal. Mar. 13,
6 2008) (same). The Court will grant Defendant United States' Motion to Dismiss Plaintiff's
7 fifth, sixth, seventh, eighth, and tenth causes of action for violations of the FTCA as to
8 Defendants DOE CBP officers because Plaintiff has made a clear statement of non-
9 opposition to dismissal of these claims as to Defendants DOE CBP officers. *See* ECF No.
10 6 at 14; *see e.g., Palomares*, 2008 WL 686683, at *3 ("The Court will grant the Motion to
11 Dismiss the causes of action against Bear Stearns for violation of California Civil Code
12 sections 1920 and 1921, concealment, negligent misrepresentation, negligence and breach
13 of the implied covenant of good faith and fair dealing because Plaintiffs have made a clear
14 statement of non-opposition to dismissal of these claims.").

15 **V. CONCLUSION**

16 IT IS HEREBY ORDERED that the Motion to Dismiss filed by Defendant United
17 States of America (ECF No. 4) is GRANTED.

18 Dated: February 16, 2021

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20 Hon. William Q. Hayes
21 United States District Court
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