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10 **UNITED STATES DISTRICT COURT**
11 **SOUTHERN DISTRICT OF CALIFORNIA**
12

13 BORDER PATROL AGENT
14 ANONYMOUS,

15 Plaintiff,

16 v.

17 UNITED STATES OF AMERICA, JOHN
18 F. KELLY, ARMANDO GONZALEZ
19 AND DOES 1-25,

20 Defendants.

Case No.: 16-cv-0725 W (BLM)
[Related to 16-cv-0374, 16-cv-0750,
16cv0797]

**ORDER GRANTING IN PART AND
DENYING IN PART FEDERAL
DEFENDANTS' MOTION TO
DISMISS [DOC. 24]**

21 Pending before the Court is a motion to dismiss under Federal Rule of Civil
22 Procedure 12(b)(1) and 12(b)(6) filed by Defendants United States of America and John
23 F. Kelly, Secretary of the Department of Homeland Security (collectively, "Federal
24 Defendants"). Plaintiff opposes.

25 The Court decides the matter on the papers submitted and without oral argument.
26 See Civ. L.R. 7.1(d.1). For the reasons that follow, the Court grants in part and denies in
27 part Federal Defendants' motion to dismiss [Doc. 24].
28

1 **I. BACKGROUND**

2 From approximately December 2012 until December 2014, Plaintiff Agent
3 Anonymous worked as a member of the U.S. Border Patrol's Critical Incident
4 Investigative Team ("CIIT") in the Chula Vista, California station. (*First Amended*
5 *Compl.* ("FAC") [Doc. 23] ¶ 11.) Defendant Armando Gonzalez, also a U.S. Border
6 Patrol agent, directly supervised Plaintiff during those two years. (*Id.*)

7 Plaintiff alleges that the CIIT office had one women's restroom that doubled as a
8 changing room for female agents, which Plaintiff used every work day. (*FAC* ¶ 12.) On
9 January 9, 2015, a female Border Patrol agent discovered a video camera in a drain in the
10 restroom. (*Id.* ¶ 25.) Plaintiff alleges the video camera recorded private and sensitive
11 images of her and several other law enforcement officers using the restroom. (*Id.* ¶ 18.)

12 Shortly after the discovery of the video camera, Gonzalez told two Assistant Chief
13 Border Patrol Agents, who were his supervisors, that he hid the video camera in order to
14 conduct a drug investigation of his female subordinates. (*FAC* ¶ 25.) Gonzalez's
15 supervisors began an investigation into his conduct. (*Id.* ¶ 26.) Approximately three
16 weeks later, law enforcement officers searched Gonzalez's home and property to retrieve
17 the video images. (*Id.*) Gonzalez was eventually arrested, charged, and pled guilty to
18 making false statements to a federal officer in violation of 18 U.S.C. § 1001(a) and for
19 video voyeurism in violation of 18 U.S.C. § 1801. (*See Dismissal Order* [Doc. 22] 2:24–
20 26, citing *Fed. Defs. RJN* [Doc. 21-1] Ex. A.)

21 On March 27, 2016, Plaintiff filed this lawsuit alleging a variety of tort claims
22 under the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b)(1) & 2671, *et seq.* ("FTCA"),
23 and employment discrimination under federal and state laws. (*See Compl.*) On
24 December 14, 2016, this Court denied in part and granted in part Federal Defendants'
25 motion to dismiss the Complaint. (*See Dismissal Order.*)

26 On December 27, 2016, Plaintiff filed the First Amended Complaint. (*See FAC.*)
27 Federal Defendants now move to dismiss the Fourth cause of action for negligence, the
28 Eighth cause of action for violation of California Civil Code § 52.1, the Ninth cause of

1 action for violation of California Penal Code §§ 632 & 637.2, and Defendant John F.
 2 Kelly as secretary of the Department of Homeland Security. (*MTD* [Doc. 24] 1:9–2:2.)
 3 Plaintiff opposes the motion to dismiss the various causes of action, but does not oppose
 4 the motion to dismiss Secretary Kelly. (*See Opp’n* [Doc. 25] 2:2.)
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6 **II. LEGAL STANDARD**

7 **A. Motion to Dismiss Under Rule 12(b)(1)**

8 Rule 12(b)(1) provides a procedural mechanism for a defendant to challenge
 9 subject-matter jurisdiction. “A jurisdictional challenge under Rule 12(b)(1) may be made
 10 either on the face of the pleadings or by presenting extrinsic evidence. Where jurisdiction
 11 is intertwined with the merits, we must assume the truth of the allegations in a complaint
 12 unless controverted by undisputed facts in the record.” Warren v. Fox Family
 13 Worldwide, Inc., 328 F.3d 1136, 1139 (9th Cir. 2003) (internal quotation marks, brackets,
 14 ellipsis and citations omitted).

15 A facial attack challenges the complaint on its face. Safe Air for Everyone v.
 16 Meyer, 373 F.3d 1035, 1039 (9th Cir. 2004). But when the moving party raises a factual
 17 challenge to jurisdiction, the court may look beyond the complaint and consider extrinsic
 18 evidence, and “need not presume the truthfulness of the plaintiff’s allegations.” See id.
 19 Once the defendant has presented a factual challenge under Rule 12(b)(1), the burden of
 20 proof shifts to the plaintiff to “furnish affidavits or other evidence necessary to satisfy its
 21 burden of establishing subject matter jurisdiction.” Id.
 22

23 **B. Motion to Dismiss Under Rule 12(b)(6)**

24 The Court must dismiss a cause of action for failure to state a claim upon which
 25 relief can be granted. Fed. R. Civ. P. 12(b)(6). A motion to dismiss under Rule 12(b)(6)
 26 tests the legal sufficiency of the complaint. See Parks Sch. of Bus., Inc. v. Symington, 51
 27 F.3d 1480, 1484 (9th Cir. 1995). A complaint may be dismissed as a matter of law either
 28 for lack of a cognizable legal theory or for insufficient facts under a cognizable theory.

1 Balisteri v. Pacifica Police Dep't., 901 F.2d 696, 699 (9th Cir. 1990). In ruling on the
 2 motion, a court must “accept all material allegations of fact as true and construe the
 3 complaint in a light most favorable to the non-moving party.” Vasquez v. L.A. Cnty.,
 4 487 F.3d 1246, 1249 (9th Cir. 2007).

5 A complaint must contain “a short and plain statement of the claim showing that
 6 the pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2). The Supreme Court has
 7 interpreted this rule to mean that “[f]actual allegations must be enough to raise a right to
 8 relief above the speculative level.” Bell Atl. Corp. v. Twombly, 550 U.S. 554, 555
 9 (2007). The allegations in the complaint must “contain sufficient factual matter, accepted
 10 as true, to ‘state a claim to relief that is plausible on its face.’” Ashcroft v. Iqbal, 556
 11 U.S. 662, 678 (2009) (quoting Twombly, 550 U.S. at 570).

12 Well-pled allegations in the complaint are assumed true, but a court is not required
 13 to accept legal conclusions couched as facts, unwarranted deductions, or unreasonable
 14 inferences. See Papasan v. Allain, 478 U.S. 265, 286 (1986); Sprewell v. Golden State
 15 Warriors, 266 F.3d 979, 988 (9th Cir. 2001).

17 **III. DISCUSSION**

18 **A. The FAC fails to plead a negligence cause of action.**

19 Federal Defendants argue Plaintiff’s fourth cause of action for negligence fails to
 20 set forth sufficient facts to state a claim. Specifically, they argue the FAC “does not
 21 allege any supposed negligent acts by Gonzalez that would be imputed to the United
 22 States under the scope of employment doctrine since Plaintiff repeatedly alleges the
 23 intentional nature of Gonzalez’s conduct in installing and concealing the video camera.”
 24 (P&A [24-1] 6:6–9.) Plaintiff raises two arguments in opposition.

25 First, Plaintiff contends the Federal Defendants’ challenge is precluded by the law-
 26 of-the-case doctrine because the Dismissal Order “stated that dismissal of the negligence
 27 cause of action was ‘not appropriate’ because it ‘appears based, at least in part, on
 28 Gonzalez’s conduct....’” (*Opp’n* [Doc. 25] 2:14–15.) As an initial matter, Plaintiff fails

1 to support this argument with any discussion or explanation of the doctrine, much less
2 any analysis applying the doctrine to this case. Because Plaintiff has failed to explain
3 how or why the doctrine applies, the Court rejects Plaintiff's attempt to invoke the law-
4 of-the-case doctrine.

5 Moreover, Plaintiff's argument takes the cited language from the Dismissal Order
6 out of context. The language was in a footnote at the end of a section addressing Federal
7 Defendants' argument that the Court lacked subject-matter jurisdiction over certain
8 claims. (*Dismissal Order* 8:19–12:4.) Specifically, Federal Defendants argued certain
9 causes of action should be dismissed because Gonzalez's supervisors/co-workers'
10 negligence "in hiring, supervising, and/or retaining Defendant Gonzalez" and their
11 "response to the discovery of the video camera" involved discretionary acts for which the
12 United States did not waive sovereign immunity. (*Id.* 819–24.) Although the Court
13 generally agreed with Federal Defendants' argument, in a footnote the Dismissal Order
14 pointed out that because some of the challenged causes of action "appear[ed]" to be
15 based, "at least in part, on Gonzalez's conduct"—as opposed to his supervisors/co-
16 workers' discretionary acts—dismissal under the discretionary-function doctrine was not
17 appropriate. (*Id.* at 12, n 3.) In short, the Dismissal Order did not find that the
18 negligence cause of action was sufficiently pled. Accordingly, the law-of-the-case
19 doctrine does not apply.

20 Second, Plaintiff argues the negligence cause of action is sufficiently pled and
21 points to paragraph 23–25 of the FAC as support. These paragraphs allege:

22 23. Plaintiff is informed and believes, and based thereon alleges, that
23 Does 1-25, or some of them, participated in Defendant Gonzalez's unlawful
24 and illicit making, viewing, saving, publishing, and/or distributing of the
25 videos files discussed above.

26 24. Plaintiff is informed and believes, and based thereon alleges, that prior
27 to January 9, 2015: (1) Defendant Gonzalez distributed the video files to his
28 co-workers and superiors, including some or all of Doe Defendants 1-25,
and that when Gonzalez did so those individuals were acting within the
course and scope of their employment; (2) those individuals knew that the

1 video files came from Defendant Gonzalez's secretly recording Plaintiff and
 2 other victims as they used the women's restroom; and (3) those individuals
 3 participated in watching and/or distributing the video files.

4 25. On or about January 9, 2015, a female Border Patrol Agent discovered
 5 the video camera while she was using the women's restroom. Shortly
 6 thereafter, Defendant Gonzalez spoke to Kathleen Scudder and Rodney
 7 Scott, who were both Assistant Chief Border Patrol Agents and were
 8 Gonzalez's superiors in the Border Patrol. Defendant Gonzalez admitted to
 9 Agents Scudder and Scott that he hid the video camera in the drain, and he
 said that he had done so to conduct a drug investigation of his female
 subordinates on the CIIT, to determine, among other things, whether they
 were engaged in on-the-job drug use.

10 (FAC ¶¶ 23–25.) Plaintiff then asserts that based on these allegations, the “Court could
 11 conclude that this supports liability under a negligence standard but not under a more
 12 stringent standard.” (*Opp’n* 3:19–20.)

13 But none of the facts alleged in the cited paragraphs remotely support a negligence
 14 cause of action against Gonzalez or his co-workers/superiors. Paragraph 24 explicitly
 15 alleges Gonzalez's co-workers/supervisors *knew* the videos were from Gonzalez's *secret*
 16 recordings of the female agents, and they nevertheless watched and/or distributed the
 17 videos. Such conduct is intentional, not negligent. Moreover, other allegations in the
 18 FAC confirm Gonzalez acted intentionally. For example, Plaintiff specifically alleges
 19 Gonzalez placed the camera in the drain “*intending* to capture video of the women Border
 20 Patrol Agents....” (FAC ¶ 14, emphasis added.) Later, Plaintiff alleges “Gonzalez
 21 ordered Plaintiff to do things, such as change into her Border Patrol uniform or to leave
 22 the station for work assignments, so that he had the unencumbered opportunity to place
 23 the video camera in the drain, capture video images of Plaintiff, retrieve the video camera
 24 from the drain, or view and distribute the captured video images.” (*Id.* ¶ 16.) These
 25 allegations only support an inference that Gonzalez acted intentionally, not negligently.

26 Finally, Plaintiff requests leave to amend the negligence cause of action based on
 27 the fact that she has only been given leave to amend once before. (*Opp’n* 4:8–11.) But
 28

as addressed above, the FAC's allegations are inconsistent with a theory that Gonzalez or his supervisor's conduct in the surreptitious recording, viewing and/or disseminating the videos was the result of negligence. Nor has Plaintiff provided any hint in the opposition as to the basis for a negligence cause of action given those allegations. Moreover, Plaintiff was warned in the Dismissal Order about the lack of clarity regarding the negligence cause of action. The order remarked that the Complaint was "not clear" regarding the basis for the negligence causes of action, and further that Plaintiff's opposition to the motion to dismiss was "less than candid" in clarifying the basis for the claims. (*Dismissal Order* at 12, n 3.) Despite that warning, Plaintiff's FAC and current opposition fail to offer any clarity as to the basis for a negligence claim. Accordingly, leave to amend is not warranted.

B. The FTCA constitutes a waiver of sovereign immunity for Plaintiff's causes of action premised on California statutory violations.

Federal Defendants seek to dismiss Plaintiffs' causes of action for violation of California Civil Code § 52.1 (the Bane Act) and California Penal Code §§ 632 & 637.2. Federal Defendants argue the United States' sovereign immunity waiver in the FTCA only applies to torts claims, and does not encompass those statutory violations:

As its name indicates, however, the Federal Tort Claims Act waives the United States sovereign immunity for "*tort claims*." 28 U.S.C. § 2674 (emphasis added); *F.D.I.C. v. Meyer*, 510 U.S. at 477; *Colony First Fed. Sav. & Loan Ass'n v. Fed. Sav. & Loan Ins. Corp.*, 643 F. Supp. 410, 416 (C.D. Cal. 1986) ("The FTCA is a limited waiver of sovereign immunity with respect to claims sounding in tort"). Conversely, claims not "sounding in tort," such as civil rights claims, are not cognizable under the FTCA.

(*P&A* 7:25–8:5.) Although not entirely clear, this argument appears to be premised on the notion that the FTCA does not encompass statutory violations. The Court disagrees for several reasons.

1 First, Federal Defendants’ argument is inconsistent with Ninth Circuit authority.
 2 In Lu v. Powell, 621 F.3d 944 (9th Cir. 2010), the Ninth Circuit explicitly characterized a
 3 Bane Act claim as a type of “tort” and allowed plaintiff to pursue the violation under the
 4 FTCA. Id. at 950. Similarly, in Santillo v. United States, 2011 WL 2729243, plaintiff
 5 filed an FTCA claim predicated on a Bane Act violation, among others. However,
 6 plaintiff failed to comply with the FTCA’s two year statute of limitations. In direct
 7 contrast to its position now, the United States argued that the Bane Act claim “falls
 8 within the scope of the FTCA and thus is untimely under the FTCA’s two year statute of
 9 limitations.” Id. at *3. The court agreed and dismissed the case. Id.; see also Lincoln v.
 10 Tuso, 1996 W 708592 (N.D. Cal. 1996) (dismissing claim for violation of California
 11 Civil Code §§ 51.7, 52 & 52.1 for failure to comply with FTCA’s administrative claim
 12 requirement). These cases not only support a finding that the FTCA constitutes a
 13 sovereign immunity waiver for Bane Act claims, but also that the FTCA encompasses
 14 state-statutory violations. See also Jones v. United States, 773 F.2d 1002, 1003 (9th Cir.
 15 1985) (“[S]tatutory and decisional law governs the determination of the United States’
 16 liability under the FTCA.”).

17 Second, the language of the FTCA is sufficiently broad to encompass Plaintiff’s
 18 statutory claims. In F.D.I.C. v Meyer, 510 U.S. 471, 477 (1994), the Supreme Court
 19 explained that in order to fall within the scope of the FTCA, plaintiff’s claim must satisfy
 20 six conditions. The claim must be,

21 [1] against the United States, [2] for money damages, . . . [3] for injury or
 22 loss of property, or personal injury or death [4] caused by the negligent or
 23 wrongful act or omission of any employee of the Government [5] while
 24 acting within the scope of his office or employment, [6] under circumstances
 25 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.

26 Id. (citing 28 U.S.C. 1346(b)) (brackets in original). Courts have interpreted the
 27 “negligent or wrongful act or omission” language to “encompass both negligent and
 28 intentional torts.” Waters v. United States, 812 F.Supp. 166, 169 (N.D. Cal. 1993) (citing

1 Hatahley v. United States, 351 U.S. 173, 181 (1956)). The “FTCA has also been
 2 interpreted to encompass both statutory and common law torts.” Id. (citing Jones v.
 3 United States 773 F.2d 1002, 1003 (9th Cir. 1985)).

4 Here, Plaintiff’s statutory violation claims satisfy each of the six elements. Her
 5 claims are against the United States, and seek money damages for personal injuries.
 6 Additionally, Plaintiff’s injuries were allegedly caused by conduct deemed wrongful
 7 under California law (i.e., the Bane Act and Penal Code), by a government employee
 8 allegedly acting in the scope of employment, and under circumstances where the United
 9 States, if a private person, would be liable.

10 Third, the cases cited by Federal Defendants do not support their position that the
 11 FTCA does not apply to Plaintiff’s Bane Act and Penal Code claims. Neither Meyer, 510
 12 U.S. 471, nor Colony First Federal Saving & Loan Association v. Federal Saving and
 13 Loan Insurance Corporation, 643 F. Supp. 410 (C.D. Cal. 1986), support the proposition
 14 that state-statutory violations are outside the scope of the FTCA. Meyer involved a
 15 federal constitutional violation (not a state statutory violation), and the Supreme Court
 16 held the FTCA’s phrase, “in accordance with the law of the place where the act or
 17 omission occurred,” means the “law of the State—the source of substantive liability
 18 under the FTCA.” Id. 510 U.S. at 477. Colony First Federal Saving & Loan Association,
 19 held plaintiff could not proceed on its tort claims because of the discretionary-function
 20 exception to the FTCA, not because the claims were based on state statutes. Id. 643 F.
 21 Supp. at 416–417.

22 Federal Defendants reliance on Stringer v. White, 2008 WL 344215 (N.D. Cal.
 23 2008), is misplaced because the case involved a disability-discrimination claim *under*
 24 *federal law* (i.e., the ADA) and, therefore, under Meyer does not fall within the FTCA’s
 25 scope. Moreover, assuming the district court is correct that a disability-discrimination
 26 claim is not a tort, Plaintiff is not alleging violation of a state disability discrimination
 27 statute, and Lu and Santillo are, therefore, more analogous to this case.

1 Finally, to the extent Williams v. Federal Deposit Insurance Corp., 2009 WL
 2 1209029 (N.D. Ill. 2009) and Munyua v. United States, 2005 WL 43960 (N.D. Cal.
 3 2005), stand for the proposition that the FTCA does not apply to claims premised on state
 4 civil rights statutes, the district court cases are contrary to the Ninth Circuit's decision in
 5 Lu. Moreover, in Munyua, the court's dismissal of the Bane Act claim was based on its
 6 concern "of allowing Plaintiff to make what amounts to a claim based on *federal*
 7 *constitutional violations* that cannot be a basis of liability under the FTCA." Id. at 2005
 8 WL 43960, *12 (emphasis added) (citing Meyer, 510 U.S. 471 at 477–478).

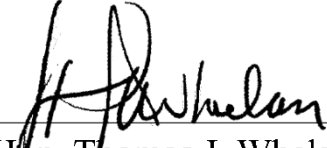
9 For these reasons, the Court finds the United States' waiver of sovereign immunity
 10 in the FTCA encompasses Plaintiff's causes of action for violation of the Bane Act and
 11 California Penal Code §§ 632 & 637.2.¹

12 13 **IV. SUMMARY & CONCLUSION**

14 For the foregoing reasons, the Court **GRANTS** Federal Defendants' motion to
 15 dismiss [Doc. 24] Secretary Kelly and the negligence cause of action without leave to
 16 amend, and **DENIES** the motion as to the remaining causes of action.

17 **IT IS SO ORDERED.**

18 Dated: April 25, 2017

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20 
 21 Hon. Thomas J. Whelan
 22 United States District Judge
 23
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25 ¹ Federal Defendants also seek to dismiss the causes of action as duplicative of other claims. (*P&A* 8:6–
 26 9.) The only purported legal support for the argument, McAuliffe v. U.S. Dept. of Veterans Affairs,
 27 2007 WL 2123690 (N.D. Cal. 2007), was cited in Federal Defendants' reply brief. (*Reply* 5:2–3.)
 28 McAuliffe's application to this case is far from clear, and Federal Defendants offer no meaningful
 discussion of how McAuliffe assists them. For this reason, the Court is not persuaded that Plaintiff's
 Bane Act and Penal Code claims should be dismissed as duplicative.