

United States District Court
Northern District of California

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
San Francisco Division

DONALD LOEBER, et al.,
Plaintiffs,
v.
UNITED STATES OF AMERICA,
Defendant.

Case No. 21-cv-03866-LB

**ORDER GRANTING DEFENDANT’S
MOTIONS TO DISMISS**

Re: ECF No. 124

MARC GOLICK and M.G. by and through
her guardian ad litem MARC GOLICK,
Plaintiffs,
v.
UNITED STATES OF AMERICA,
Defendant.

Case No. 21-cv-03870-LB

Re: ECF No. 137

INTRODUCTION

In March 2018, Albert Wong, a combat veteran with severe mental-health issues, killed therapists Jennifer Golick, Ph.D., and Christine Loeber at The Pathway Home, a state residential-treatment program for veterans in Yountville, California. Their families sued the United States under the Federal Tort Claims Act (FTCA) for negligence and failure to report, warn, or protect, and settled a separate lawsuit against California. The United States moved to dismiss under Rule

1 12(b)(1), arguing sovereign immunity under the FTCA’s discretionary-function, misrepresentation,
 2 and due-care exceptions and preemption by HIPAA and VHA Directive 1605.01. The court grants
 3 the motion: (1) the discretionary-function and misrepresentation exceptions bar jurisdiction, and (2)
 4 federal law preempts the state claims.

5 STATEMENT

6 Albert Wong, an Army veteran with PTSD, joined Pathway, a state veterans’ treatment center in
 7 Yountville, California, in April 2017. In December 2017, while hospitalized at the San Francisco
 8 VA Medical Center, he reportedly told VA staff that he owned firearms and expressed homicidal
 9 thoughts towards his treatment providers in Yountville, Dr. Jennifer Golick and Christine Loeber,
 10 Pathways’ Clinical and Executive Directors, respectively. The VA did not inform Dr. Golick, Ms.
 11 Loeber, or law enforcement of these threats and instead said that Mr. Wong posed no immediate
 12 danger. Discharged from Pathway in February 2018 for policy violations and threats to Dr. Golick,
 13 Ms. Loeber, psychologist Jennifer Gonzales Shushereba (another treatment provider), and others,
 14 Mr. Wong returned on March 9, 2018, and shot and killed Dr. Golick, Ms. Loeber, and Dr.
 15 Gonzales Shushereba, and then committed suicide.¹

16 The plaintiffs — Ms. Loeber’s father and sister, and Dr. Golick’s spouse and daughter — claim
 17 that the VA’s negligence under California law caused the deaths.² The plaintiffs settled their
 18 separate state lawsuit against the State of California, which ran Pathway and was responsible for
 19 security there.³

20 The court has subject-matter jurisdiction under 28 U.S.C. § 1346(b)(1). The parties consented
 21 to magistrate-judge jurisdiction under 28 U.S.C. § 636(c)(1).⁴

22
 23 ¹ *Loeber* First Am. Compl. (FAC), No. 21-cv-03866-LB – ECF No. 46 at 3–6 (¶¶ 6–14) & *Golick*
 24 FAC, No. 21-cv-03870-LB – ECF No. 52 at 2–4 (¶¶ 3, 10–15) (recounting timeline); State Third Am.
 25 Compl., Ex. G to Johns Decl. – ECF No. 124-4 at 3 (¶ 2) (state ran the facility). The victims knew that
 26 Mr. Wong had homicidal ideation directed at them. *Rekdahl* Dep., Ex. N to Johns Decl. – ECF No.
 124-4 at 180–84 (pp. 28:18–32:8). Citations refer to the material in the Electronic Case File (ECF);
 pinpoint citations are to the ECF-generated page numbers at the top of documents. Except for citations
 to the FAC, this order does not double cite declarations and evidence filed in both cases.

27 ² *Loeber* FAC – ECF No. 46 at 6–12 (¶¶ 15–40); *Golick* FAC – ECF No. 52 at 4–8 (¶¶ 16–34).

³ *Loeber* Stipulation – ECF No. 43 at 2.

28 ⁴ *Loeber* Consents – ECF Nos. 6, 13, 22, 56; *Golick* Consents – ECF Nos. 10, 21.

STANDARD OF REVIEW

A complaint must contain a short and plain statement of the grounds for the court's jurisdiction. Fed. R. Civ. P. 8(a)(1). The party asserting jurisdiction has the burden of establishing jurisdiction. *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). A Rule 12(b)(1) motion may attack a jurisdiction facially (the allegations are insufficient) or factually (the allegations are untrue). *White v. Lee*, 227 F.3d 1214, 1242 (9th Cir. 2000). In a factual attack, the court may consider evidence beyond the complaint without converting the motion to dismiss into a motion for summary judgment, and the plaintiff must provide evidence to establish jurisdiction. *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004). Dismissal of a complaint without leave to amend is proper only if the jurisdictional defect cannot be cured. *Eminence Cap., LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1052 (9th Cir. 2003).

ANALYSIS

The United States cannot be sued without its consent, a prerequisite for jurisdiction. *Jachetta v. United States*, 653 F.3d 898, 903 (9th Cir. 2011) (quoting *United States v. Mitchell*, 463 U.S. 206, 212 (1983)). The FTCA waives the United States' sovereign immunity for torts by federal employees acting within their employment scope, but only where a private person would be liable under local law. 28 U.S.C. § 1346(b)(1); *Gonzalez v. United States*, 814 F.3d 1022, 1026 (9th Cir. 2016). Plaintiffs must exhaust their administrative remedies before suing. 28 U.S.C. § 2675(a); *McNeil v. United States*, 508 U.S. 106, 107 (1993). Exceptions to this waiver include the discretionary-function, misrepresentation, and due-care exceptions. 28 U.S.C. § 2680(a), (h). The plaintiff must show jurisdiction under the FTCA, while the United States must prove that an exception applies. *Valdez v. United States*, 56 F.3d 1177, 1179 (9th Cir. 1995).

The court lacks subject-matter jurisdiction because the FTCA's discretionary-function and misrepresentation exceptions apply: VA employees had discretion not to report the alleged threats, and a negligent failure to report or warn is barred by the misrepresentation exception. The due-care exception does not apply because the federal scheme does not mandate a specific action. Federal law also preempts the state mandatory reporting requirements.

1 **1. Discretionary-Function Exception**

2 The VA employees reportedly did not warn Dr. Golick and Ms. Loeber about Mr. Wong’s
 3 threats or report them to law enforcement.⁵ The discretionary-function exception bars claims
 4 involving judgment subject to policy analysis. 28 U.S.C. § 2680(a); *Berkovitz v. United States*, 486
 5 U.S. 531, 536–37 (1988) (the exception requires (1) an action involving choice and (2)
 6 susceptibility to policy analysis); *Whisnant v. United States*, 400 F.3d 1177, 1181 (9th Cir. 2005)
 7 (discretion must be “susceptible to social, economic, or political policy analysis”). The VA
 8 employees’ decisions meet this test.

9 First, VHA Directive 1605.01 states that employees “may” disclose a patient’s threats, thereby
 10 giving discretion:

11 (1) VHA may disclose individually-identifiable information, excluding health
 12 information, to law enforcement agencies . . . for reporting a serious and imminent
 13 threat to the health and safety of an individual or the public without a standing written
 14 request letter or written request if, upon such disclosure, notification is transmitted
 15 to the last known address of the individual to whom the information pertains.

16 (2) VHA may disclose individually-identifiable health information . . . to law
 17 enforcement agencies . . . for reporting a serious and imminent threat to the health
 18 and safety of an individual or the public without a standing written request letter or
 19 written request if:

20 (a) The law enforcement agency is reasonably able to prevent or lessen the threat;
 21 and

22 (b) Notification is transmitted to the last known address of the individual to
 23 whom the information pertains.

24 . . .

25 (4) VHA may disclose individually-identifiable information to a family member or
 26 individual when necessary to prevent or lessen a serious and imminent threat to the
 27 health or safety of that individual.⁶

28 Because the VHA employees “may,” but are not required to, report a threat, their actions
 involve judgment. *Berkowitz*, 486 U.S. at 536.

⁵ *Loeber* FAC – ECF No. 46 at 4–11 (¶¶ 8, 13–14, 17–22, 28–30); *Golick* FAC – ECF No. 52 at 4–8 (¶¶ 14–15, 17–18, 21, 23–26, 30–32).

⁶ Ex. C to Griffin Decl., *Loeber* Mot. – ECF No. 124-2 at 118–19.

1 Second, balancing patient privacy, resource allocation, and public safety is a policy-driven
2 choice.⁷ *Lam v. United States*, 979 F.3d 665, 682 (9th Cir. 2020) (“Competing interests and policy
3 concerns require balancing and weighing; balancing and weighing involve discretion; and policy
4 discretion invokes the [discretionary-function exception].”).

5 The plaintiffs cite other, broader regulations, but none mandates disclosing threats, leaving VA
6 Directive 1605.01 as the controlling policy. *See* VHA Directive 2012-026 (Sept. 27, 2012)
7 (“establishes a unified policy describing the management of all individuals in VHA facilities whose
8 behavior has, or could, jeopardize the health or safety of others”);⁸ OSHA Directive CPL 02-01-058
9 (“policy guidance and procedures to be followed when conducting inspections and issuing citations
10 related to occupational exposure to workplace violence”);⁹ 29 C.F.R. § 1960.8(a) (workplace must
11 be “free from recognized hazards that are causing or are likely to cause death or serious physical
12 harm”); 38 C.F.R. §§ 1.200–03 (reporting requirements for criminal violations involving VA
13 programs and VA employees); 38 U.S.C. § 1709 (requirement to develop and implement a policy to
14 report and track sexual assaults and safety incidents at VA medical facilities); VA Guidebook
15 (violence-prevention strategies, violence-containment strategies, and aftermath strategies);¹⁰ VHA
16 Directives 7700–01 (policies for the VA’s “Occupational Safety and Health program”).¹¹

17 The discretionary-function exception bars the claims.

18 19 **2. Misrepresentation Exception**

20 The misrepresentation exception excludes claims based on the government’s communication of
21 false information, whether intentional or negligent. 28 U.S.C. § 2680(h); *Block v. Neal*, 460 U.S.
22 289, 296 (1983); *Kim v. United States*, 940 F.3d 484, 493 (9th Cir. 2019) (applies “even to claims of
23 personal injury resulting from non-fraudulent failures to warn”) (collecting cases). “The intent of
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25 ⁷ Griffin Decl., *Loeber* Mot. – ECF No. 124-1 at 14 (¶ 74).

26 ⁸ Ex. N to Righthand Decl., *Loeber* Opp’n – ECF No. 136-1 at 266.

27 ⁹ Ex. 6 to Req. for Judicial Notice, *Loeber* Opp’n – ECF No. 136-4 at 188.

28 ¹⁰ Ex. 11 to *id.* – ECF No. 136-4 at 320.

¹¹ Ex. 2 to *id.* – ECF No. 136-4 at 19; Ex. 7 to *id.* – ECF No. 136-4 at 245.

1 the section is to except from the [FTCA] cases where mere ‘talk’ or failure to ‘talk’ on the part of a
2 government employee is asserted as a proximate cause of the damage sought to be recovered from
3 the United States.” *City and County of San Francisco v. United States*, 615 F.2d 498, 505 (9th Cir.
4 1980); *Lawrence v. United States*, 340 F.3d 952, 958 (9th Cir. 2003) (“The misrepresentation
5 exception shields government employees from tort liability for failure to communicate information,
6 whether negligent, or intentional.”). The court looks to the “gravamen or essence” of the plaintiffs’
7 claims to prevent plaintiffs from “creatively plead[ing] around the FTCA’s misrepresentation
8 exception.” *Abbey v. United States*, 112 F.4th 1141, 1147 (9th Cir. 2024), *petition for cert. filed*,
9 No. 24-510 (Nov. 5, 2024).

10 This exception applies because the plaintiffs’ claims hinge on the VA’s failure to communicate
11 Mr. Wong’s threats. The core issue — or gravamen — is whether the government negligently
12 withheld information (as opposed to a separate duty such as physical protection). *Id.* This includes
13 failure-to-warn claims causing personal injury. *Kim*, 940 F.3d at 493. Plaintiffs argue *Ramirez v.*
14 *United States*, 567 F.2d 854 (9th Cir. 1977) (en banc), allows negligence claims. The more recent
15 precedent discussed in the last paragraph confirms that this exception covers failure to
16 communicate information. The claims are barred.

17 18 **3. Due-Care Exception**

19 This exception bars claims if an employee exercises due care in following a statute or regulation
20 proscribing a specific course of conduct. 28 U.S.C. § 2680(a); *Welch v. United States*, 409 F.3d 646,
21 652 (4th Cir. 2005). The exception does not apply because the VHA Directive 1605.01 and HIPAA
22 do not mandate specific action and instead use the word “may,” giving VA employees discretion to
23 disclose threats. 45 C.F.R. § 164.512(j)(1)(i); VHA Directive 1605.01 § 21(g). The exception
24 requires a proscribed course of action, which is absent here. *Welch*, 409 F.3d at 652.

25 The order excerpts VHA Directive 1605.01 § 21(g), above: it provides that employees may
26 disclose threats. HIPAA similarly says that employees “may” disclose a patient’s threats:

1 A covered entity¹² may, consistent with applicable law and standards of ethical
2 conduct, use or disclose protected health information, if the covered entity, in good
3 faith, believes the use or disclosure:

3 (i)(A) is necessary to prevent or lessen a serious and imminent threat to the health
4 or safety of a person or the public; and

4 (B) Is to a person or persons reasonably able to prevent or lessen the threat,
5 including the target of the threat

6 45 C.F.R. § 164.512(j)(1)(i)(A)–(B).

7 The exception requires a proscribed course of conduct, which is absent here. *Welch*, 409 F.3d
8 at 652.

9 10 **4. Preemption**

11 Under the Supremacy Clause, U.S. Const., Art. VI, cl. 2, federal law preempts state law in
12 three circumstances: when Congress specifically intends it, when federal regulation occupies a
13 field, or when state law conflicts with federal law by making compliance impossible or obstructing
14 federal objectives. *English v. Gen. Elec. Co.*, 496 U.S. 72, 78 (1990).

15 Federal law gives VA employees discretion not to report threats. 45 C.F.R. § 164.512(j); VHA
16 Directive 1605.01 § 21(g).¹³ In contrast, California mandates reporting to potential victims and
17 law enforcement. Cal. Civ. Code § 43.92 (psychotherapists must communicate “a serious threat of
18 physical violence against a reasonably identifiable victim or victims” to the victim and law
19 enforcement); Cal. Welf. & Inst. Code §§ 8100(b)(1), 8105(c) (psychotherapists must report to
20 local law enforcement within twenty-four hours the identity of a person who made “a serious
21 threat of physical violence against a reasonably identifiable victim or victims”).

22 A VA employee who decides not to report necessarily has violated California’s requirement,
23 creating an impossible conflict. *English*, 496 U.S. at 79. The state claims are preempted.

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26 ¹² The VHA is a covered entity. VHA Directive 1605.01 § 3(ee), Ex. C to Griffin Decl., *Loeber* Mot. –
ECF No. 124-2 at 55.

27 ¹³ Congress intended to preserve this discretion notwithstanding state law. HIPAA says, “[a] standard,
28 requirement, or implementation specification adopted under [subchapter C] that is contrary to a
provision of State law preempts the provision of State law.” 45 C.F.R. § 160.203.

1 **5. Leave to Amend**

2 The Ninth Circuit has held that “a district court should grant leave to amend even if no request
3 to amend the pleading was made, unless it determines that the pleading could not possibly be
4 cured by the allegation of other facts.” *Doe v. United States*, 58 F.3d 494, 497 (9th Cir. 1995).
5 There are five factors to consider in determining whether to grant leave: the relevant factor here is
6 whether amendment is futile. *Nunes v. Ashcroft*, 375 F.3d 805, 808–09 (9th Cir. 2004). It is
7 because jurisdictional defects — FTCA exceptions and preemption — cannot be cured by
8 additional facts. *Doe*, 58 F.3d at 497. The plaintiffs’ prior amendments and focus on the VA
9 employees’ failure to report threats confirm this.¹⁴ The dismissal is with prejudice.

10
11 **6. Other Motions**

12 This result moots the other motions: the government’s summary-judgment and expert motions,
13 the *Loeber* plaintiffs’ motions to substitute an expert and a party, and the *Golick* plaintiffs’ motion
14 to exclude an expert.

15 **CONCLUSION**

16 The court grants the motions to dismiss with prejudice. This resolves ECF Nos. 124, 155, 159,
17 161, and 170 (*Loeber*, No. 21-cv-03866-LB) and 137, 178, 180, and 181 (*Golick*, No. 21-cv-
18 03870-LB).

19 **IT IS SO ORDERED.**

20 Dated: March 7, 2025

21 

22 LAUREL BEELER
23 United States Magistrate Judge

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28 ¹⁴ *Loeber* Admin. Claim – ECF No. 113-2 at 11–13; *Golick* Admin. Claim – ECF No. 124-2 at 7–9.