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8 UNITED STATES DISTRICT COURT
 9 NORTHERN DISTRICT OF CALIFORNIA
 10 SAN FRANCISCO DIVISION

11 LONG HAUL, INC. AND EAST BAY)
 12 PRISONER SUPPORT,)
)
 13 Plaintiffs,)
)
 14 v.)
)
 15 REGENTS OF THE UNIVERSITY OF)
 CALIFORNIA; VICTORIA HARRISON;)
 16 KAREN ALBERTS; WILLIAM KASISKE;)
 WADE MACADAM; TIMOTHY J.)
 17 ZUNIGA; BRUCE BAUER; COUNTY OF)
 ALAMEDA; GREGORY J. AHERN; MIKE)
 18 HART; FEDERAL BUREAU OF)
 INVESTIGATION; LISA SHAFFER; AND)
 19 DOES 1-25.)
)
 20 Defendants.)
)
 21

No. C 09-0168 JSW

**MOTION TO DISMISS COMPLAINT
 FOR LACK OF JURISDICTION
 UNDER FED. R. CIV. P. 12(B)(1), FOR
 FAILURE TO STATE A CLAIM
 UNDER FED. R. CIV. P. 12(B)(6), OR IN
 THE ALTERNATIVE MOTION FOR
 MORE DEFINITE STATEMENT
 UNDER FED. R. CIV. P. 12(E)**

Date: June 19, 2009
Time: 9:00 a.m.
Place: Courtroom 11, 19th Floor
Judge: Hon. Jeffrey S. White

22
 23
 24
 25
 26
 27
 28

TABLE OF CONTENTS

1

2 TABLE OF AUTHORITIES. iii

3 INTRODUCTION. 1

4 FACTS. 2

5 I. The Operative Complaint. 2

6 II. The Warrant. 3

7 III. Plaintiffs’ Tort Claims. 3

8 ARGUMENT. 3

9 I. Applicable Legal Standards. 3

10 A. Rule 12(b)(1) Motion. 3

11 B. Rule 12(b)(6) Motion. 3

12 C. Rule 12(e) Motion. 4

13 II. Plaintiffs’ Constitutional Claims Seeking Monetary Damages. 5

14 A. Claims For Monetary Damages Against the FBI. 5

15 B. Claims for Monetary Damages Against Agent Shaffer. 5

16 1. Official Capacity Claims 5

17 2. Personal Capacity Claims 6

18 a. First Amendment Claim. 8

19 b. Fourth Amendment Claim. 9

20 i. Warrant claim. 10

21 ii. Search and seizure claim. 10

22 III. Plaintiffs’ Constitutional Claims Seeking Injunctive and Declaratory Relief. 11

23 A. Claims Against the FBI. 12

24 B. Claims Against Agent Shaffer. 12

25 IV. Claims Based on The Privacy Protection Act (“PPA Claims”). 13

26 A. PPA Legal Principles. 13

27 1. The Statute. 13

28 2. Case Law Regarding Computer Searches. 14

1 B. PPA Claims Against The FBI..... 16
2 C. PPA Claims Against Shaffer. 16
3 V. State Law Claims..... 16
4 A. Claims Against The FBI. 17
5 B. State Law Claims Against Agent Shaffer. 18
6 CONCLUSION. 19

7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF AUTHORITIES

FEDERAL CASES

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Acierno v. Cloutier,
40 F.3d 597 (3rd Cir. 1994) (en banc)..... 12

Armstrong v. Davis,
275 F.3d 849 (9th Cir. 2001). 11

Backmar v. Guerre,
342 U.S. 512 (1952)..... 5

Balistreri v. Pacifica Police Dept.,
901 F.2d 696 (9th Cir.1990). 4

Bell Atl. Corp. v. Twombly,
550 U.S. 544 (2007)..... 3, 4

Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics,
403 U.S. 388 (1971)..... 6, 12, 16

Brandon v. Holt,
469 U.S. 464 (1985)..... 5

Brown v. Li,
308 F.3d 939 (9th Cir. 2002), cert. denied, 538 U.S. 908 (2003). 7

Bunn v. Conley,
309 F.3d 1002 (7th Cir. 2002). 6

Burns v. United States,
764 F.2d 722 (9th Cir. 1985)..... 17

Clemente v. United States,
766 F.2d 1358 (9th Cir. 1985)..... 5

City of Los Angeles v. Lyons,
461 U.S. 95 (1983)..... 11, 12

City of Whittier v. United States Dep't of Justice,
598 F.2d 561 (9th Cir. 1979)..... 5

Correctional Services Corp. v. Malesko,
534 U.S. 61 (2001)..... 7

Cort v. Ash,
422 U.S. 66 (1975)..... 6

Crawford-El v. Britton,
523 U.S. 574 (1998)..... 4, 10

1 *Cruz v. Kauai County*,
279 F.3d 1064 (9th Cir.), cert. denied, 537 U.S. 1053 (2002)..... 7

2

3 *Davis v. Gracey*,
111 F.3d 1472 (10th Cir. 1997)..... 14

4 *Farmer v. Perrill*,
275 F.3d 958 (10th Cir. 2001)..... 6

5

6 *Federal Deposit Insurance Corp. v. Meyer*,
510 U.S. 471 (1994)..... 5

7 *Gerritson v. Consulado General de Mexico*,
989 F.2d 340 (9th Cir. 1993)..... 5

8

9 *Golden v. Zwickler*,
394 U.S. 103 (1969)..... 11, 12

10 *Gould v. U.S. Dept. of Health & Human Services*,
905 F.2d 738 (4th Cir. 1990)..... 17

11

12 *Guest v. Leis*,
255 F.3d 325 (6th Cir. 2001)..... 14, 15

13 *Hufford v. McEnaney*,
249 F.3d 1142 (9th Cir. 2001)..... 7, 10

14

15 *Inouye v. Kemna*,
504 F.3d 705 (9th Cir. 2007)..... 7

16 *Jerves v. U.S.*,
966 F.2d 517 (9th Cir. 1992)..... 17

17

18 *Kennedy v. United States Postal Service*,
145 F.3d 1077 (9th Cir. 1998) (*per curiam*)..... 17, 18

19 *Kentucky v. Graham*,
473 U.S. 159 (1985)..... 5

20

21 *Kokkonen v. Guardian Life Ins. Co.*,
511 U.S. 375 (1994)..... 3

22 *LaDuke v. Nelson*,
762 F.2d 1318 (9th Cir.1985)..... 11

23

24 *Lujan v. Defenders of Wildlife*,
504 U.S. 555 (1992)..... 3, 12

25 *MacKay v. Pfiel*,
827 F.2d 540 (9th Cir. 1987)..... 3

26

27 *McNeil v. United States*,
508 U.S. 106 (1983)..... 17

28

1 *Menotti v. City of Seattle*,
409 F.3d 1113 (9th Cir. 2005). 7

2

3 *Moreno v. Baca*,
431 F.3d 633 (9th Cir. 2005), cert. denied, 547 U.S. 1207 (2006). 7

4

5 *Osborn v. Haley*,
127 S. Ct 881 (2007). 18

6 *Pellegrino v. United States*,
73 F.3d 934 (9th Cir. 1996). 6, 10

7

8 *Rivera v. United States*,
924 F.2d 948 (9th Cir. 1991). 5

9

10 *Ruiz Rivera v. Riley*,
209 F.3d 24 (1st Cir. 2000). 6

11

12 *San Jose Charter of Hells Angels Motorcycle Club v. City of San Jose*,
402 F.3d 962 (9th Cir. 2005).. 7

13

14 *Schweiker v. Chilicky*,
487 U.S. 412 (1988).. 16

15

16 *Schwenk v. Hartford*,
204 F.3d 1187 (9th Cir. 2000). 6

17

18 *Smith v. United States*,
507 U.S. 197 (1993).. 17

19

20 *Sorreles v. McKee*,
290 F.3d 965 (9th Cir. 2002). 7

21

22 *Spawr v. United States*,
796 F.2d 279 (9th Cir. 1986). 18

23

24 *Sprewell v. Golden State Warriors*,
266 F.3d 979 (9th Cir. 2001). 4

25

26 *Stanley v. University of Southern California*,
13 F.3d 1313 (9th Cir. 1994). 11, 12

27

28 *Steve Jackson Games, Inc. v. Secret Service*,
816 F. Supp. 432 (W.D. Tex. 1993),. 15, 16
36 F.3d 457 (5th Cir. 1994). 15, 16

United States v. Adjani,
452 F.3d 1140 (9th Cir.2006). 9

United States v. Comprehensive Drug Testing, Inc.,
513 F.3d 1085 (9th Cir.2008). 9

United States v. Hay,
231 F.3d 630 (9th Cir. 2000). 10

1 *United States v. Mitchell*,
 2 445 U.S. 535 (1980)..... 16

3 *United States v. Ross*,
 4 456 U.S. 798 (1982)..... 9

5 *United States v. Sherwood*,
 6 312 U.S. 584 (1941)..... 17

7 *United States v. Smith*,
 8 499 U.S. 161 (1991).. 18

9 *United States v. Taketa*,
 10 923 F.2d 665 (9th Cir.1991). 10

11 *United States v. Testan*,
 12 424 U.S. 392 (1976)..... 17

13 *United States v. Wong*,
 14 334 F.3d 831 (9th Cir.2003). 9

15 *Warren v. Fox Family Worldwide, Inc.*,
 16 328 F.3d 1136 (9th Cir.2003). 4

17 *Wong v. United States*,
 18 373 F.3d 952 (9th Cir. 2004). 6, 7, 10

19 *Zurcher v. Stanford Daily*,
 20 436 U.S. 547 (1978)..... 8, 9

21 **FEDERAL STATUTES**

22 Title 28, United States Code,

23 Section 1346(b). 17, 18

24 Section 2671..... 18

25 Section 2674..... 18

26 Section 2675(a). 17, 18

27 Section 2679(a). 17, 18

28 Title 42, United States Code,

Section 2000aa..... 1, 13

Section 2000aa-6(d)..... 13, 16

1 Section 2000aa-7(a)..... 13

2 Section 2000aa(a)(1). 13

3 Section 2000aa(a)(2). 13

4 Section 2000aa(b). 13

5 Section 2000aa-7(b)(1). 13

6 Section 2000aa-7(b)(3). 13

7 Section 2000aa-6. 14

8 Section 2000aa-6(a)..... 16

9

FEDERAL RULES

10

11

12 Federal Rule of Civil Procedure 7(a)..... 4

13 Federal Rule of Civil Procedure 8(a)(2). 3

14 Federal Rule of Civil Procedure 12(b)(1). 0, 3

15 Federal Rule of Civil Procedure 12(b)(6). 0, 3

16 Federal Rule of Civil Procedure 12(e)..... 0, 4

17

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1 Defendants Federal Bureau of Investigation (“FBI”) and Lisa Shaffer (“Shaffer”) hereby
2 submit this memorandum of points and authorities in support of their motion to dismiss or in the
3 alternative for more definite statement:

4 **INTRODUCTION AND SUMMARY OF ARGUMENT**

5 Plaintiffs filed a civil action in this Court on January 14, 2009, naming the Regents of the
6 University of California; Victoria Harrison; Karen Alberts; William Kasiske; Wade Macadam;
7 Timothy J. Zuniga; Bruce Bauer; County of Alameda; Gregory J. Ahern; Mike Hart; Federal
8 Bureau of Investigation (“FBI”); and FBI Agent Lisa Shaffer (“Shaffer”). The complaint states
9 various claims against the FBI and Shaffer, including:

- 10 (1) First Amendment violation,
- 11 (2) Fourth Amendment violation,
- 12 (3) Privacy Protection Act (42 U.S.C. § 2000aa, et seq.) violation,
- 13 (4) several California state law claims, and
- 14 (5) claims for injunctive and declaratory relief.

15 The FBI is sued as the investigatory arm of the U.S. Department of Justice. Shaffer is sued for
16 conduct in the course of her employment as an FBI agent. She is sued in her official and
17 individual capacities.

18 As explained in this motion, the Court should dismiss the claims against the federal
19 defendants on the following grounds:

- 20 (1) Plaintiffs’ claims for monetary damages against the FBI for constitutional
21 violations should be dismissed with prejudice for lack of jurisdiction because
22 there is no waiver of sovereign immunity;
- 23 (2) Plaintiffs’ claims for monetary damages against Shaffer in her official capacity for
24 constitutional violations should be dismissed with prejudice for lack of
25 jurisdiction because there is no waiver of sovereign immunity;
- 26 (3) Plaintiffs’ claims for monetary damages against Shaffer in her individual capacity
27 for constitutional violations should be dismissed on qualified immunity grounds
28 or in the alternative the Court should grant the motion for more definite statement;

- 1 (4) Plaintiffs' claims for equitable relief against FBI should be dismissed with
2 prejudice for lack of standing and because of the availability of an adequate legal
3 remedy under the Privacy Protection Act;
- 4 (5) Plaintiffs' claims for equitable relief against Shaffer should be dismissed with
5 prejudice for lack of standing from lack of redressability;
- 6 (6) Plaintiffs' claims against the FBI for violations of the Privacy Protection Act
7 should be dismissed and the United States substituted as defendant, because only
8 the United States is a proper defendant;
- 9 (7) Plaintiffs' claims against Shaffer for violations of the Privacy Protection Act
10 should be dismissed with prejudice because only the United States is a proper
11 defendant and the Court should not imply a *Bivens* remedy;
- 12 (8) Plaintiffs' claims against the FBI for state law violations should be dismissed on
13 jurisdictional grounds, without prejudice, because the United States is the proper
14 defendant and plaintiffs have not exhausted required administrative remedies; and
- 15 (9) Plaintiffs' claims against Shaffer for state law violations should be dismissed on
16 jurisdictional grounds, with prejudice, because federal actors are immune from
17 such claims and plaintiffs' exclusive remedy is against the United States.

18 **FACTS**

19 **I. The Operative Complaint**

20 Plaintiffs' complaint alleges that a search warrant issued on August 26, 2008 by Alameda
21 County and executed on August 27, 2008 by the University of California Berkeley Police
22 Department was "facially invalid" because of lack of probable cause and that the magistrate had
23 not been informed that Long Haul and East Bay Prisoner Support (EBPS) "are distributors of
24 information to the public and that, accordingly, federal and state law protects its computers from
25 seizure except under special conditions not present, and that EBPS was unaffiliated with Long
26 Haul but maintained office space in the building."

27 The plaintiffs allege that the search team (including FBI Special Agent Lisa Shaffer) "looked
28 through the list of people who had borrowed books from the library...seized all of the public

1 access computers from a space on the second floor of Long Haul..., took the computers and
2 digital storage media used for the publication of that newspaper, ...and took the computer used by
3 EBPS for the publication of prisoner-rights information." The plaintiffs further allege that "the
4 Defendants have copied the data on the computers...and have searched, are searching, and
5 continue to search them." Amended Complaint ¶ 18.

6 **II. The Warrant**

7 Plaintiffs' complaint describes and discusses the search warrant giving rise to this case. A
8 copy of the warrant is attached to the accompanying declaration of Jonathan U. Lee as Exhibit A.

9 **III. Plaintiffs' Tort Claims**

10 On March 13, 2009, plaintiffs presented tort claims to the FBI. Copies of the tort claims are
11 attached to the accompanying declaration of Jonathan U. Lee as Exhibit B.

12 **ARGUMENT**

13 **I. Applicable Legal Standards**

14 **A. Rule 12(b)(1) Motion**

15 Where subject matter jurisdiction is lacking, dismissal under Rule 12(b)(1) is appropriate.
16 *MacKay v. Pfiel*, 827 F.2d 540, 543 (9th Cir. 1987). Once the defendant objects to a lack of
17 subject matter jurisdiction, plaintiff bears the burden of establishing that the court has subject
18 matter jurisdiction. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). To survive a
19 motion to dismiss under Rule 12(b)(1), plaintiff must prove that the Court has jurisdiction to hear
20 the case. *Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375, 377 (1994) ("Federal courts are of
21 limited jurisdiction...It is to be presumed that a cause lies outside this limited jurisdiction, and the
22 burden of establishing the contrary rests on the party asserting jurisdiction.").

23 **B. Rule 12(b)(6) Motion**

24 "Federal Rule of Civil Procedure 8(a)(2) requires only 'a short and plain statement of the
25 claim showing that the pleader is entitled to relief,' in order to 'give the defendant fair notice of
26 what the ... claim is and the grounds upon which it rests.' " *Bell Atl. Corp. v. Twombly*, 550 U.S.
27 544, 555 (2007) (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957)) (citation omitted) (alteration
28 in original). In deciding a Rule 12(b)(6) motion to dismiss for failure to state a claim upon which

1 relief can be granted, the Court must accept the well-pleaded allegations of fact in the complaint
2 as true and construe them in the light most favorable to the plaintiff. *Warren v. Fox Family*
3 *Worldwide, Inc.*, 328 F.3d 1136, 1139 (9th Cir. 2003). The Court need not accept “allegations
4 that are merely conclusory, unwarranted deductions of fact, or unreasonable inference,” or
5 “allegations that contradict matters properly subject to judicial notice or by exhibit.” *Sprewell v.*
6 *Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001). “While a complaint attacked by a Rule
7 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff’s obligation to
8 provide the ‘grounds’ of his ‘entitle[ment] to relief requires more than labels and conclusion, and
9 a formulaic recitation of the elements of a cause of action will not do.” *Twombly*, 550 U.S. at 555
10 (quoting Fed.R.Civ.P. 8(a)(2)) (citations omitted) (alteration in original). Claims should be
11 dismissed only when there is either a “lack of a cognizable legal theory or the absence of
12 sufficient facts alleged under a cognizable legal theory.” *Balistreri v. Pacifica Police Dept.*, 901
13 F.2d 696, 699 (9th Cir. 1990).

14 C. Rule 12(e) Motion

15 The Supreme Court has suggested that where complaints alleging constitutional torts are non-
16 specific, in some cases reliance on other Rules of Civil Procedure may be in order, instead of
17 granting a motion to dismiss. *Crawford-El v. Britton*, 523 U.S. 574 (1998).

18 In *Crawford-El*, the Court directed that trial courts to,

19 [E]xercise [their] discretion in a way that protects the substance of the qualified
20 immunity defense. [Courts] must exercise [their] discretion so that officials are
21 not subjected to burdensome or unnecessary and burdensome discovery and trial
22 proceedings.

23 523 U.S. at 597. First, the Court suggested requiring a reply to an answer pursuant to Federal
24 Rule of Civil Procedure 7(a); second, the Court suggested granting a defendant’s motion for a
25 more definite statement under Federal Rule of Civil Procedure 12(e). *Id.* In either event, the
26 Supreme Court directed trial courts to “insist that the plaintiff put forward specific, non
27 conclusory factual allegations.” *Id.* at 598.

28 II. Plaintiffs’ Constitutional Claims Seeking Monetary Damages

1 **A. Claims For Monetary Damages Against the FBI**

2 Plaintiffs' complaint requests monetary damages from the federal government for alleged
3 constitutional violations. Plaintiffs have named the Federal Bureau of Investigation as a
4 defendant. There is no jurisdiction over such damages claims. The Supreme Court has held that
5 the United States has not waived its sovereign immunity from suits for damages based on
6 assertions that its employees' conduct violated the Constitution. *Federal Deposit Insurance*
7 *Corp. v. Meyer*, 510 U.S. 471, 483-86 (1994); *Clemente v. United States*, 766 F.2d 1358, 1363
8 (9th Cir. 1985) ("We consider the issue foreclosed against plaintiff..by a long line of Supreme
9 Court Cases..."); *Rivera v. United States*, 924 F.2d 948, 951 (9th Cir. 1991) ("The courts lack
10 subject matter jurisdiction to hear constitutional damage claims against the United States,
11 because the United States has not waived sovereign immunity with respect to such claims.").
12 Furthermore, sovereign immunity extends to suits against a federal agency *eo nomine*. *Backmar*
13 *v. Guerre*, 342 U.S. 512, 515 (1952); *Gerritson v. Consulado General de Mexico*, 989 F.2d 340,
14 343 (9th Cir. 1993) (dismissing FBI); *City of Whittier v. United States Dep't of Justice*, 598 F.2d
15 561, 562 (9th Cir. 1979). Thus, the plaintiff cannot avoid sovereign immunity simply by naming
16 as defendant an agency or bureau of the United States. These claims must be dismissed with
17 prejudice.

18 **B. Claims for Monetary Damages Against Agent Shaffer**

19 Plaintiffs allege claims against Agent Shaffer in her official and individual capacities.

20 **1. Official Capacity Claims**

21 When a plaintiff sues a federal official in her official capacity, in reality the complaint seeks
22 to impose liability on the United States. *See Brandon v. Holt*, 469 U.S. 464, 471 (1985). "The
23 only immunities that can be claimed in an official-capacity action are forms of sovereign
24 immunity that the entity, *qua entity*, may possess." *Kentucky v. Graham*, 473 U.S. 159, 167
25 (1985). Relief in "official capacity" suits, when granted, affects the government entity rather
26 than the officer's personal assets. *See id.* at 166. As one court explained:

27 There is no such animal as a *Bivens* suit against a public official tortfeasor in his
28 or her official capacity. Instead, any action that charges such an official with
wrongdoing while operating in his or her official capacity as a United States agent

1 operates as a claim against the United States. Because a *Bivens* claim may not be
2 brought directly against the United States as such, an “official capacity *Bivens*
suit” would be an oxymoron.

3 *Farmer v. Perrill*, 275 F.3d 958, 963 (10th Cir. 2001) (internal citations omitted); *accord Bunn v.*
4 *Conley*, 309 F.3d 1002, 1009 (7th Cir. 2002); *Ruiz Rivera v. Riley*, 209 F.3d 24, 28 (1st Cir.
5 2000) (“A *Bivens* action only may be brought against federal officials in their individual
6 capacities.”). Because of sovereign immunity, these claims must be dismissed with prejudice.

7 2. Personal Capacity Claims

8 The complaint alleges damages claims for violations of the First and Fourth Amendment
9 against Agent Shaffer in her personal capacity. It is well-established that a plaintiff may seek
10 damages against a federal employee in her individual capacity to vindicate violation of a federal
11 “right.” *Cort v. Ash*, 422 U.S. 66 (1975) (identifying the factors to consider in determining
12 whether a statute authorizes civil suit for damages, despite the absence of a right to sue
13 provision); *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S.
14 388 (1971) (recognizing an implied right of action in damages to enforce the provisions of the
15 Fourth Amendment of the Constitution). These are frequently referred to as “*Bivens* claims.”

16 In *Bivens* claims, damages claims against government officials alleged to arise from
17 constitutional violations cannot be founded upon conclusory, vague, or general allegations. *See,*
18 *e.g., Pellegrino v. United States*, 73 F.3d 934, 936 (9th Cir. 1996) (requiring “[d]irect personal
19 responsibility”). In addition, the complaint must identify what role, if any, each individual
20 defendant had in causing the alleged constitutional violations. *Wong v. United States*, 373 F.3d
21 952, 966-67 (9th Cir. 2004) (affirming dismissal of complaint with sparse factual allegations).
22 To establish an individual’s liability for a constitutional violation, plaintiff must allege either
23 direct, personal participation in the violation or by “setting in motion a series of acts by others
24 which the actor knows or reasonably should know would cause others to inflict the constitutional
25 injury.” *Wong*, 373 F.3d at 966 (citations omitted).

26 *Bivens* defendants may assert qualified immunity. The Ninth Circuit “has variously
27 characterized the inquiry into qualified immunity as either two-part or three-part.” *Schwenk v.*
28 *Hartford*, 204 F.3d 1187, 1196 n.5 (9th Cir. 2000). When using the two-part test, the Ninth

1 Circuit first determines whether the defendant violated the plaintiff's constitutional right, then
2 asks whether the right was clearly established such that it would be clear to a reasonable officer
3 that his conduct was unlawful in the situation he confronted. *See Inouye v. Kemna*, 504 F.3d 705,
4 712 n.6 (9th Cir. 2007) (noting three-part test but adhering to two-part analysis); *Menotti v. City*
5 *of Seattle*, 409 F.3d 1113, 1152 (9th Cir. 2005); *San Jose Charter of Hells Angels Motorcycle*
6 *Club v. City of San Jose*, 402 F.3d 962, 971 (9th Cir. 2005). When using the three-part test, the
7 Ninth Circuit asks whether the facts alleged show the defendant's conduct violated a
8 constitutional right, whether the right was clearly established at the time of the alleged violation,
9 and then whether it would be clear to a reasonable official that her conduct was unlawful in the
10 situation she confronted. *See Brown v. Li*, 308 F.3d 939, 946-47 (9th Cir. 2002), *cert. denied*, 538
11 U.S. 908 (2003).

12 In any case, the plaintiff bears the burden of showing that a right is clearly established. *See*
13 *Sorrels v. McKee*, 290 F.3d 965, 969 (9th Cir. 2002); *Cruz v. Kauai County*, 279 F.3d 1064, 1069
14 (9th Cir.), *cert. denied*, 537 U.S. 1053 (2002). *But see Moreno v. Baca*, 431 F.3d 633, 638 (9th
15 Cir. 2005) (“[T]he moving defendant bears the burden of proof on the issue of qualified
16 immunity.”), *cert. denied*, 547 U.S. 1207 (2006). Moreover, plaintiff must also establish “a
17 particular, rather than abstract, right.” *Hufford v. McEnaney*, 249 F.3d 1142, 1148 (9th Cir.
18 2001).

19 In addition, to establish an individual's liability for a constitutional violation, as noted above,
20 plaintiff must allege either direct, personal participation in the violation or by “setting in motion
21 a series of acts by others which the actor knows or reasonably should know would cause others to
22 inflict the constitutional injury.” *Wong*, 373 F.3d at 966 (citations omitted).

23 Finally, because the complaint seeks prospective or injunctive relief against the United
24 States, the United States is the “real party in interest,” regardless of the defendants actually
25 identified in the Complaint. In fact, where the action challenged is actually that of the
26 “government,” the Supreme Court refuses to recognize a *Bivens* remedy at all. *Correctional*
27 *Services Corp. v. Malesko*, 534 U.S. 61, 73 (2001) (no *Bivens* action where plaintiff had other
28 avenues to challenge the allegedly unconstitutional conduct “including suits in federal court for

1 injunctive relief”).

2 **a. First Amendment Claim**

3 Plaintiffs state no First Amendment allegations against Agent Shaffer, but in general the
4 complaint alleges that the search of plaintiffs’ premises violated the First and Fourth
5 Amendment. *See* ¶¶ Complaint 29-67.

6 In *Zurcher v. Stanford Daily*, 436 U.S. 547 (1978), the Supreme Court rejected similar claims
7 by a campus newspaper. *Zurcher* arose from a search by the District Attorney's Office in Santa
8 Clara County, after obtaining a search warrant, of the offices of The Stanford Daily, a Stanford
9 University student newspaper. The DA's office was investigating a violent clash between the
10 police and demonstrators that had occurred at the Stanford University Hospital three days earlier.
11 The Stanford Daily had covered the incident, and published a special edition featuring
12 photographs of the clash. Believing that the newspaper probably had more photographs of the
13 clash that could help the police identify the demonstrators, the police obtained a warrant and sent
14 four police officers to search the newspaper's office for further evidence that could assist the
15 investigation. The officers found nothing. A month later, however, the Stanford Daily and its
16 editors brought a civil suit against the police claiming that the search had violated their First and
17 Fourth Amendment rights. The Supreme Court rejected the newspaper's claims, holding that
18 neither the First nor the Fourth Amendment prohibited police from undertaking searches and
19 seizures of documentary evidence held by innocent third parties, such as the newspaper whose
20 records were searched in the case. *Id.* at 566-68. Noting that "the Fourth Amendment does not
21 prevent or advise against legislative or executive efforts to establish nonconstitutional
22 protections" for searches of the press, it held that neither the Fourth nor First Amendment
23 prohibited such searches. *Id.* at 567.

24 Alleged PPA violations, by definition, do not state a First Amendment violation. In passing
25 the PPA in 1980, in response to *Zurcher*, Congress noted that the PPA protected "the press and
26 certain other persons not suspected of committing a crime with protections not provided currently
27 by the Fourth Amendment." S. Rep. No. 96-874, at 4 (1980), rep'd in 1980 U.S.C.C.A.N. 3950.

28 Therefore, for failure to state a claim, the First Amendment *Bivens* claims should be

1 dismissed.

2 **b. Fourth Amendment Claim**

3 The complaint alleges Fourth Amendment violations arising from the obtaining of the search
4 warrant as well as from the execution of the warrant in the August 27, 2008 search of plaintiffs'
5 premises and seizure of plaintiffs' computers and related property.

6 Computer searches present difficult questions under the Fourth Amendment. *See United*
7 *States v. Comprehensive Drug Testing, Inc.*, 513 F.3d 1085, 1108 (9th Cir. 2008); *United States*
8 *v. Adjani*, 452 F.3d 1140, 1152 (9th Cir. 2006)). "Computers are simultaneously file cabinets
9 (with millions of files) and locked desk drawers; they can be repositories of innocent and deeply
10 personal information, but also of evidence of crimes. The former must be protected, the latter
11 discovered. As society grows ever more reliant on computers as a means of storing data and
12 communicating, courts will be called upon to analyze novel legal issues and develop new rules
13 within our well established Fourth Amendment jurisprudence." *Adjani*, 452 F.3d at 1152
14 (footnote omitted).

15 "Probable cause exists if 'it would be reasonable to seek the evidence in the place indicated
16 in the affidavit.'" *United States v. Wong*, 334 F.3d 831, 836 (9th Cir. 2003) (quoting *United*
17 *States v. Peacock*, 761 F.2d 1313, 1315 (9th Cir. 1985)). Probable cause is not limited by
18 ownership or possession of the materials. "The critical element in a reasonable search is not that
19 the owner of the property is suspected of crime but that there is reasonable cause to believe that
20 the specific 'things' to be searched for and seized are located on the property to which entry is
21 sought." *Zurcher v. Stanford Daily*, 436 U.S. 547, 556 (1978); *cf. United States v. Ross*, 456 U.S.
22 798, 820-21 (1982) ("A lawful search of fixed premises generally extends to the entire area in
23 which the object of the search may be found and is not limited by the possibility that separate
24 acts of entry or opening may be required to complete the search."). In *Adjani*, the Court affirmed
25 an order denying defendant's motion to suppress on the ground that there was probable cause to
26 permit a search of all computers at Adjani's residence "accessible" to Adjani, even if not owned
27 by him. 452 F.3d at 1147.

28 Similarly, the Ninth Circuit has rejected the argument that in obtaining and executing

1 warrants to search computers, officers' probable cause is limited by whether there is probable
2 cause to arrest the search target. *United States v. Hay*, 231 F.3d 630, 635 (9th Cir. 2000) (“[i]t is
3 well established that a location can be searched for evidence of a crime even if there is no
4 probable cause to arrest the person at the location”); *see also United States v. Taketa*, 923 F.2d
5 665, 674 (9th Cir.1991) (“[T]he correct inquiry is whether there was reasonable cause to believe
6 that evidence of ... misconduct was located on the property that was searched.”).

7 **i. Warrant claim**

8 The complaint makes detailed allegations about the warrant application. *See* Complaint ¶¶ 4,
9 39-42. According to these allegations, individual defendant Kasiske applied for the warrant. ¶¶
10 39, 41-42. The warrant was improperly obtained because of omitted information. ¶¶ 41-42.
11 None of these allegations are directed at Agent Shaffer.

12 The Fourth Amendment claims for obtaining the allegedly invalid warrant should be
13 dismissed as to Agent Shaffer on qualified immunity grounds. Plaintiff must allege and prove
14 Shaffer's direct, personal participation in the violation of an established constitutional right, or
15 that Shaffer set “in motion a series of acts by others which the actor knows or reasonably should
16 know would cause others to inflict the constitutional injury.” *Wong*, 373 F.3d at 966 (citations
17 omitted); *Hufford*, 249 F.3d at 1148. None of the facts alleged against Agent Shaffer establish or
18 could establish her participation in obtaining the allegedly invalid warrant. This claim should be
19 dismissed.

20 **ii. Search and seizure claim**

21 The complaint generally alleges that Agent Shaffer was a member of the “raid team” that
22 searched plaintiff's premises. *See* Complaint ¶¶ 25, 43-57. None of the allegations describe any
23 individual defendant's conduct with particularity.

24 Plaintiff's complaint fails to state a claim involving the execution of the warrant or search of
25 the premises against Agent Shaffer that meets Ninth Circuit standards. *Wong, supra*, 373 F.3d at
26 966-67; *Pellegrino, supra*, 73 F.3d at 936. As a result, these claims are subject to dismissal.

27 In the alternative, the Court should grant federal defendants' Rule 12(e) motion for more
28 definite statement, consistent with the Supreme Court's instructions in *Crawford-El v. Britton*,

1 523 U.S. 574, 597-98 (1998) (directing trial courts to “insist that the plaintiff put forward
2 specific, non conclusory factual allegations”). Plaintiff’s complaint lacks specific, non-
3 conclusory allegations against defendant Shaffer. Without a more definite statement of the
4 claims against Shaffer, the parties and the Court will be unable to analyze qualified immunity,
5 thwarting the policy and purpose behind the doctrine. The motion for more definite statement
6 should be granted.

7 **III. Plaintiffs’ Constitutional Claims Seeking Injunctive and Declaratory Relief**

8 In order to invoke the equitable jurisdiction of the Court, plaintiffs must meet “the basic
9 requisites of the issuance of equitable relief in these circumstances-the likelihood of substantial
10 and immediate irreparable injury, and the inadequacy of remedies at law.” *City of Los Angeles v.*
11 *Lyons*, 461 U.S. 95, 103 (1983); *Stanley v. University of Southern California*, 13 F.3d 1313,
12 1320 (9th Cir. 1994).

13 To establish standing to seek an injunction, a plaintiff must demonstrate "a sufficient
14 likelihood that he will again be wronged in a similar way." *City of Los Angeles*, 461 U.S. at 111.
15 To do so, a plaintiff must allege a "real and immediate" threat of repeated harm that is not merely
16 conjectural or hypothetical. *Id.* at 102. Past exposure to illegal conduct does not alone show that
17 threat if unaccompanied by any continuing, present adverse effects. *Id.* A plaintiff can show that
18 future harm is likely to recur in two ways. First, plaintiff can demonstrate that "the defendant
19 had, at the time of the injury, a written policy, and that the injury 'stems from' that policy."
20 *Armstrong v. Davis*, 275 F.3d 849, 861 (9th Cir. 2001). That is, when the harm alleged is directly
21 traceable to a written policy, there is an implicit likelihood of its repetition in the immediate
22 future. *Id.* Second, a plaintiff may also establish a likelihood of harm by demonstrating that the
23 harm is part of a "pattern of officially sanctioned behavior" violative of the plaintiffs' federal
24 rights. *Id.* (quoting *LaDuke v. Nelson*, 762 F.2d 1318, 1323 (9th Cir.1985)). Abstract injury is
25 not enough. The plaintiff must show that he “has sustained or is immediately in danger of
26 sustaining some direct injury” as the result of the challenged official conduct and the injury or
27 threat of injury must be both “real and immediate,” not “conjectural” or “hypothetical.” *See, e.g.,*
28 *Golden v. Zwickler*, 394 U.S. 103, 109-110 (1969).

1 **A. Claims Against the FBI**

2 Plaintiff has not satisfied the standing requirements for seeking injunctive relief against the
3 FBI. In addition to a judicial declaration that the past conduct of the FBI and other defendants
4 was unconstitutional, plaintiffs allege that they “fear that they are now and will again be
5 subjected to such unlawful and unconstitutional actions.” Complaint, ¶ 83, p. 17, l. 2-3.
6 Accordingly, they seek injunctive relief prohibiting defendants from “making use of data
7 seized...or information derived from such data” and requiring defendants “delete, destroy and/or
8 expunge any data seized.” *Id.* p. 17, l. 11-18.

9 The alleged injury is too “speculative” to be redressable by equitable relief. *City of Los*
10 *Angeles v. Lyons*, 461 U.S. 95, 103 (1983). In the alternative, because plaintiffs have an
11 alternative adequate legal remedy under the PPA, they cannot meet the “basic requisites” for
12 stating a claim for equitable relief. *Stanley v. University of Southern California*, 13 F.3d 1313,
13 1320 (9th Cir.1994). These claims should be dismissed as to the United States.

14 **B. Claims Against Agent Shaffer**

15 Suits seeking equitable relief from federal officials are impermissible under *Bivens* analysis
16 for two reasons. First, if plaintiff seeks relief by means of an injunction requiring a defendant to
17 take or refrain from some official action, a plaintiff has no standing to sue a defendant in his
18 individual capacity because the plaintiffs’ injury is not redressable by the defendant in his
19 individual capacity. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992) (requiring, for
20 purposes of Article III standing, that the asserted injury will be redressed by a favorable
21 decision); *see also Acierno v. Cloutier*, 40 F.3d 597, 608 (3rd Cir. 1994) (en banc) (“[A]
22 defendant who loses a claim for injunctive relief is simply ordered to refrain from taking certain
23 action in his or her official capacity.”). Suits for equitable relief against federal government
24 officials, therefore, are official-capacity suits. Second, permitting a suit for equitable relief
25 directly under the Constitution against an individual officer would be inconsistent with one
26 justification for recognizing a *Bivens* remedy in the first instance – that “[f]or people in *Bivens*’
27 shoes, it is damages or nothing.” *Bivens*, 403 U.S. at 410 (Harlan, J. concurring). Therefore, this
28 claim should be dismissed.

1 **IV. Claims Based on The Privacy Protection Act (“PPA Claims”)**

2 **A. PPA Legal Principles**

3 **1. The Statute**

4 Congress passed the Privacy Protection Act ("PPA"), 42 U.S.C. § 2000aa, in 1980. Subject
5 to certain exceptions, the PPA makes it unlawful for a government officer "to search for or seize"
6 materials intended for publication. The statute defines these materials as follows:

7 (a) the materials are "work product materials" prepared, produced, authored, or
8 created "in anticipation of communicating such materials to the public," 42 U.S.C.
§ 2000aa-7(b)(1);

9 (b) the materials include "mental impressions, conclusions, or theories" of its creator,
42 U.S.C. § 2000aa-7(b)(3); and

10 (c) the materials are possessed for the purpose of communicating the material to the
11 public by a person "reasonably believed to have a purpose to disseminate to the
12 public" some form of "public communication," 42 U.S.C. §§ 2000aa-7(b)(3),
2000aa(a);
13 or

14 (a) the materials are "documentary materials" that contain "information," 42
U.S.C. § 2000aa-7(a); and

15 (b) the materials are possessed by a person "in connection with a purpose to
disseminate to the public" some form of "public communication." 42 U.S.C. §§
2000aa(b), 2000aa-7(a).

16 Although the language of the PPA is broad, the statute contains several exceptions. Searches
17 will not violate the PPA when:

18 1) the only materials searched for or seized are contraband, instrumentalities, or
19 fruits of crime, *see* 42 U.S.C. § 2000aa-7(a),(b);

20 2) there is reason to believe that the immediate seizure of such materials is
21 necessary to prevent death or serious bodily injury, *see* 42 U.S.C. §§ 2000aa(a)(2),
2000aa(b)(2);

22 3) there is probable cause to believe that the person possessing such materials has
23 committed or is committing the criminal offense to which the materials relate (an
exception which is itself subject to several exceptions), *see* 42 U.S.C. §§
2000aa(a)(1), 2000aa(b)(1); and

24 4) in a search for or seizure of "documentary materials" as defined by § 2000aa-
25 7(a), a subpoena has proven inadequate or there is reason to believe that a
26 subpoena would not result in the production of the materials, *see* 42 U.S.C. §
2000aa(b)(3)-(4).

27 Violations of the PPA may result in civil damages against the sovereign whose officers or
28 employees execute the search. *See* § 2000aa-6(a), (e); *Davis v. Gracey*, 111 F.3d 1472, 1482 (10th

1 Cir. 1997) (dismissing PPA suit against municipal officers in their personal capacities because
2 such suits must be filed only against the "government entity"). The statute permits a claim
3 against the United States only, which is the exclusive statutory remedy.

4 *(a) Right of action*

5 A person aggrieved by a search for or seizure of materials in violation of this
6 chapter shall have a civil cause of action for damages for such search or seizure ...

7 (1) against the United States, against a State which has waived its sovereign
8 immunity under the Constitution to a claim for damages resulting from a violation
9 of this chapter, or against any other governmental unit, all of which shall be liable
10 for violations of this chapter by their officers or employees while acting within the
11 scope or under color of their office or employment...

12 *(b) Good faith defense*

13 It shall be a complete defense to a civil action brought under paragraph (2) of
14 subsection (a) of this section that the officer or employee had a reasonable good
15 faith belief in the lawfulness of his conduct.

16 *(d) Exclusive nature of remedy*

17 The remedy provided by subsection (a)(1) of this section against the United
18 States, a State, or any other governmental unit is exclusive of any other civil
19 action or proceeding for conduct constituting a violation of this chapter, against
20 the officer or employee whose violation gave rise to the claim, or against the
21 estate of such officer or employee.

22 42 U.S.C.A. § 2000aa-6.

23 **2. Case Law Regarding Computer Searches**

24 There are few published decisions discussing PPA claims, and ever fewer involving computer
25 searches. The Sixth Circuit explicitly ruled that the incidental seizure of PPA-protected material
26 commingled on a suspect's computer with evidence of a crime does not give rise to PPA liability.
27 *Guest v. Leis*, 255 F.3d 325 (6th Cir. 2001), involved two lawsuits brought against the Sheriff's
28 Department in Hamilton County, Ohio. The suits arose from the seizures of two servers that had
been used to host bulletin board systems suspected of housing evidence and contraband relating
to obscenity, phone tapping, child pornography, credit card theft, and software piracy. The Sixth
Circuit noted that "when police execute a search warrant for documents on a computer, it will
often be difficult or impossible (particularly without the cooperation of the owner) to separate the
offending materials from other 'innocent' material on the computer" at the site of the search. *Id.* at

1 341-42. Given these pragmatic concerns, the court refused to find PPA-liability for incidental
2 seizures; to construe the PPA otherwise would "prevent police in many cases from seizing
3 evidence located on a computer." *Id.* at 342. Instead, the court held that "when protected
4 materials are commingled on a criminal suspect's computer with criminal evidence that is
5 unprotected by the act, we will not find liability under the PPA for seizure of the PPA-protected
6 materials." *Id.*

7 The Sixth Circuit's decision in *Guest* does not address the commingling issue when the owner
8 of the seized computer is not a suspect. In the only published decision to date directly addressing
9 this issue, a district court held the United States Secret Service liable for the inadvertent seizure
10 of PPA-protected materials. *See Steve Jackson Games, Inc. v. Secret Service*, 816 F. Supp. 432
11 (W.D. Tex. 1993), *aff'd on other grounds*, 36 F.3d 457 (5th Cir. 1994). Steve Jackson Games,
12 Inc. ("SJG") was primarily a publisher of role-playing games, but it also operated a network of
13 thirteen computers that provided its customers with e-mail, published information about SJG
14 products, and stored drafts of upcoming publications. Believing that the system administrator of
15 SJG's computers had stored evidence of crimes, the Secret Service obtained a warrant and seized
16 two of the thirteen computers connected to SJG's network, in addition to other materials. The
17 Secret Service did not know that SJG's computers contained publishing materials until the day
18 after the search. However, the Secret Service did not return the computers it seized until months
19 later.

20 The district court in *Steve Jackson Games* ruled that the Secret Service violated the PPA;
21 unfortunately, the exact contours of the court's reasoning are difficult to discern. For example,
22 the court did not explain which of the materials the Secret Service seized were covered by the
23 PPA; instead, the court merely recited the property that had been seized, and concluded that some
24 PPA-protected materials "were obtained" during the search. *Id.* at 440. Similarly, the court
25 indicated that the search of SJG and the initial seizure of its property did not violate the PPA, but
26 that the Secret Service's continued retention of SJG's property after it learned of SJG's publisher
27 status, and despite a request by SJG for return of the property, was the true source of the PPA
28

1 violation - something that the statute itself does not appear to contemplate. *See id.* at 441. The
2 court also suggested that it might have ruled differently if the Secret Service had made "copies of
3 all information seized" and returned the hardware as soon as possible, but did not answer whether
4 in fact it would have reached a different result in such case. *Id.*

5 **B. PPA Claims Against The FBI.**

6 The United States is the sole proper party defendant to any PPA action by plaintiffs and
7 should be substituted in place of the FBI. The United States, as sovereign, is immune from suit
8 unless it consents to be sued. *United States v. Mitchell*, 445 U.S. 535, 538 (1980). The PPA is a
9 limited waiver of sovereign immunity by the United States as sovereign, authorizing suit against
10 the "United States." 42 U.S.C.A. § 2000aa-6(a). The statute describes this potential claim as the
11 exclusive remedy available to plaintiffs. 42 U.S.C.A. § 2000aa-6(d). Plaintiffs cannot maintain
12 this claim against the FBI, because the FBI is not the sovereign and neither is any FBI agent.

13 **C. PPA Claims Against Shaffer**

14 The PPA authorizes suit against the United States, not its employees. 42 U.S.C.A. § 2000aa-
15 6(a). This is the exclusive remedy available to plaintiffs. 42 U.S.C.A. § 2000aa-6(d). In light of
16 the PPA explicit limitations, the Court should not imply any any *Bivens* remedy. *See Schweiker*
17 *v. Chilicky*, 487 U.S. 412, 421 (1988) (noting that, in *Bivens*, *Davis v. Passman*, and *Carlson v.*
18 *Green*, there was "no explicit statutory prohibition against the relief sought, and no exclusive
19 statutory alternative remedy"). Agent Shaffer is not a proper defendant in the PPA claim and
20 should be dismissed.

21 **V. State Law Claims**

22 It is not clear if the complaint alleges state law causes of action against the federal
23 defendants. On the one hand, the state law causes of action are titled as though they are brought
24 only against non-federal defendants. On the other hand, each of the state law claims incorporates
25 by reference all of the preceding allegations, including those describing the federal defendants'
26 conduct. In addition, plaintiffs recently presented written claims for damages, which are based
27
28

1 on state law. Lee Decl., Exh. B. For purposes of this motion, the federal defendants will proceed
2 as if plaintiff has plead the state law claims against the federal defendants.

3 **A. Claims Against The FBI**

4 The sovereign cannot be sued without its consent. *United States v. Sherwood*, 312 U.S. 584
5 (1941); *Gould v. U.S. Dept. of Health & Human Services*, 905 F.2d 738, 741 (4th Cir. 1990).
6 Moreover, the terms of that consent define a federal court's jurisdiction to entertain such suit.
7 *United States v. Testan*, 424 U.S. 392 (1976). The Federal Tort Claims Act (FTCA) is the
8 exclusive waiver of sovereign immunity for actions sounding in tort against the United States, its
9 agencies and/or employees acting within the scope of their employment. *Smith v. United States*,
10 507 U.S. 197 (1993) *citing* 28 U.S.C. §1346(b). All limits and conditions within the FTCA are to
11 be strictly construed in favor of the sovereign. *McNeil v. United States*, 508 U.S. 106 (1983).
12

13 One limit under the FTCA involves the persons who can be named as defendants.
14 Specifically, the only appropriate defendant in an FTCA case is the United States. *See* 28 U.S.C.
15 § 2679(a) (1998); *Kennedy v. United States Postal Service*, 145 F.3d 1077 (9th Cir. 1998) (*per*
16 *curiam*) (the United States is the only proper party defendant in an FTCA action).

17 An action under the Federal Tort Claims Act requires that the plaintiff first exhaust his
18 administrative remedies. 28 U.S.C. § 2675(a) provides in pertinent part:

19 (a) An action shall not be instituted upon a claim against the United States for money
20 damages for injury or loss of property or personal injury or death caused by the negligent
21 or wrongful act or omission of any employee of the Government while acting within the
22 scope of his office or employment, 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 in writing and sent by certified or registered mail.

23 28 U.S.C. § 2675(a). "The claim requirement of section 2675 is jurisdictional in nature and may
24 not be waived." *Burns v. United States*, 764 F.2d 722 , 723 (9th Cir. 1985).

25 "Section 2675(a) establishes explicit prerequisites to the filing of suit against the Government
26 in district court. It admits of no exceptions." *Jerves v. U.S.*, 966 F.2d 517, 521 (9th Cir. 1992).
27 Where a plaintiff has not exhausted the administrative claims procedure required under the
28 FTCA, plaintiff's complaint must be dismissed for lack of subject matter jurisdiction. *McNeil v.*

1 *United States*, 508 U.S. 106 (1993). "28 U.S.C. § 2675(a) specifies that a suit may not be
2 instituted against the United States unless it is first presented to the appropriate federal agency
3 and either finally denied or permitted to languish for six months without resolution. This claim
4 requirement is jurisdictional in nature and may not be waived." *Spawr v. United States*, 796 F.2d
5 279, 280 (9th Cir. 1986).

6 The FBI received plaintiff's written claims under the FTCA for monetary damages on March
7 13, 2009. Lee Decl., Exh. B. Under the limited waiver of sovereign immunity in the FTCA,
8 plaintiff cannot institute this action until six months have passed after the filing of the FTCA
9 claim. As a result, the state law claims against the United States must be dismissed without
10 prejudice for lack of subject matter jurisdiction.

11 **B. State Law Claims Against Agent Shaffer**

12 Under the Federal Employees Liability Reform and Tort Compensation Act of 1988, Pub. L.
13 No. 100694, 102 Stat. 4563 (1988) (codified in part in various subsections of 28 U.S.C. §§ 2671,
14 2674, 2679 and known as "the Westfall Act"), Congress amended the Federal Tort Claims Act,
15 28 U.S.C. §§ 1346(b); 2671-2680 (1988), for the express purpose of "protect[ing] Federal
16 employees from personal liability for common law torts committed within the scope of their
17 employment. . . ." Westfall Act § 2(b), 102 Stat. at 4564. *See also Osborn v. Haley*, 127 S. Ct
18 881, 901 (2007) (the Act's "purpose is to relieve covered employees from the cost and effort of
19 defending the lawsuit, and to place those burdens on the Government's shoulders.") The
20 Supreme Court has construed the Westfall Act as providing federal employees with a broad
21 immunity from suit under state tort law. *See United States v. Smith*, 499 U.S. 161, 163 (1991).
22 The Ninth Circuit follows this rule and enforces the exclusive remedy provisions of the FTCA,
23 which mandate that the only appropriate defendant in an FTCA case is the United States. *See* 28
24 U.S.C. § 2679(a) (1998); *Kennedy v. United States Postal Service*, 145 F.3d 1077 (9th Cir. 1998)
25 (per curiam) (the United States is the only proper party defendant in an FTCA action).

26 These claims must be dismissed with prejudice.
27
28

CONCLUSION

For the foregoing reasons, the complaint should be dismissed with prejudice.

DATED: April 10, 2009

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/s/
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