ORDER OF THE SIXTH CIRCUIT (OCTOBER 4, 2017)

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

RICHARD L. LAMBERT,

Plaintiff–Appellant,

v.

JEFFERSON B. SESSIONS, III, Attorney General ET AL.,

Defendants–Appellees.

No. 17-5324

Before: KEITH, SILER, and STRANCH, Circuit Judges.

Richard L. Lambert, a pro se Tennessee plaintiff, appeals the district court's judgment dismissing his amended complaint pursuant to Rule 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure. This case has been referred to a panel of the court that, upon examination, unanimously agrees that oral argument is not needed. *See* Fed. R. App. P. 34(a).

Lambert was a special agent for the Federal Bureau of Investigation (FBI) for twenty-four years, retiring in March 2012 as the special-agent-in-charge (SAC) of the Knoxville, Tennessee Division. Immediately upon his retirement, UT-Battelle, LLC, a private corporation that manages the Oak Ridge National Laboratory for the federal government, hired Lambert as the senior counterintelligence officer for the Oak Ridge Field Office of the Department of Energy's (DOE) Office of Intelligence and Counterintelligence. Among other duties, Lambert was a liaison between UT-Battelle and the DOE, the FBI, and other intelligence agencies on counterintelligence and counterterrorism matters.

In November 2012, Patrick Kelley, the FBI's designated agency ethics official, in response to a question from the Knoxville SAC, sent an email to the FBI's Counterintelligence Division stating that direct communications between Lambert and any employee of the FBI were prohibited by 18 U.S.C. § 207(c). Section 207 prohibits certain former executive branch employees from communicating "with the intent to influence" their former agency for a period of one year following the termination of their federal employment and it imposes criminal penalties for a violation. *See* 18 U.S.C. § 216. Kelley also sent this email to the Department of Justice (DOJ) Office of Inspector General, other officials in the DOJ and the DOE, and the Knoxville SAC. The Knoxville SAC forwarded Kelley's email to UT-Battelle. Lambert informed Kelley that his opinion was wrong, but Kelley refused or failed to provide Lambert with detailed factual and legal support for his opinion. In June 2013, UT-Battelle terminated Lambert's employment and revoked his security clearance because of Kelley's email.

In June 2015, Lambert filed an amended complaint under the Federal Tort Claims Act (FTCA), 28 U.S.C. § 2674; the Privacy Act, 5 U.S.C. § 552a; and *Bivens* *v. Six Unknown Named Agents of the Federal Bureau of Investigation*, 403 U.S. 388 (1971), against Kelley; the Attorney General of the United States; Robert Mueller, the former Director of the FBI; unknown employees of the DOJ and FBI; and the DOJ and the FBI. Lambert alleged that Kelley is liable for legal malpractice under the FTCA for the allegedly erroneous legal opinion that led to his termination, that Mueller is liable under the FTCA for "professional nonfeasance" for failing to hire a suitable person to perform Kelley's position, and that the Attorney General is liable under the FTCA for failing to adequately train and supervise Mueller in the administration of the FBI's ethics program. Lambert alleged that the DOJ and the FBI violated the Privacy Act by disclosing Kelley's email to UT-Battelle. Finally, Lambert asserted a claim under *Bivens* against Kelley, alleging that the email damaged his good name and reputation, and his ability to practice his chosen profession, and therefore that Kelley violated his Fifth Amendment right to due process. The district court later substituted the United States for Kelley as party to Lambert's FTCA claims pursuant to 28 U.S.C. § 2679(d)(1).

On motion of the defendants, the district court dismissed Lambert's claims pursuant to Rule 12(b)(1) and 12(b)(6). The district court concluded that Lambert's FTCA legal malpractice claims are in essence defamation and misrepresentation claims that are barred by 28 U.S.C. § 2680(h), that Lambert's Privacy Act claim failed because he did not allege facts showing that an individual retrieved Kelley's email from a system of records, and that Lambert's *Bivens* claim is barred by Tennessee's one-year statute of limitations for filing personal tort actions.

Lambert filed a timely notice of appeal. Lambert argues that the district court erred in concluding that his FTCA claims are barred by § 2680(h). Lambert also argues that the District of Columbia's three-year statute of limitations, rather than Tennessee's one-year statute of limitations, applies to his *Bivens* claim. Lambert's appellate brief does not address the district court's dismissal of his Privacy Act claim. Lambert therefore has waived appellate review of that claim. *See Radvansky v. City of Olmsted Falls*, 395 F.3d 291, 310-11 (6th Cir. 2005).

We review de novo the district court's dismissal of a complaint under Rule 12(b)(1) and Rule 12(b)(6). *See Tackett v. M& G Polymers, USA, LLC*, 561 F.3d 478, 481 (6th Cir. 2009). A motion to dismiss under Rule 12(b)(1) should be denied if jurisdiction can be inferred from the facts pleaded in the complaint. *See Hamdi ex rel. Hamdi v. Napolitano*, 620 F.3d 615, 620 (6th Cir. 2010). A complaint is subject to dismissal under Rule 12(b)(6) if it fails to plead facts that plausibly state a claim for relief. *See Cataldo v. U.S. Steel Corp.*, 676 F.3d 542, 547 (6th Cir. 2012). Although the statute of limitations is an affirmative defense, a claim may be dismissed under Rule 12(b)(6) if the complaint affirmatively shows that the claim is time-barred. *See id.* Under both rules, the court must confine its analysis to the pleadings and accept all well-pleaded allegations as true. *See Tackett*, 561 F.3d at 481.

The FTCA is a limited waiver of sovereign immunity and subject matter jurisdiction that permits plaintiffs to pursue state law claims against the United States where state law would impose liability against a private individual. *See Milligan v. United States*, 670 F.3d 686, 692 (6th Cir. 2012). The FTCA excepts from the waiver of sovereign immunity "[ajny claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights." *See* 28 U.S.C. § 2680(h). Federal courts lack subject matter jurisdiction over any claim that falls within § 2680. *See Milligan*, 670 F.3d at 692.

We need not determine whether Lambert's legal malpractice claim is barred by § 2680(h) because it fails on its own terms—the complaint does not show that there was an attorney-client relationship between Kelley and Lambert. *See Westfield v. Fed. Republic of Ger.*, 633 F.3d 409, 413 (6th Cir. 201 I) (the court may affirm the district court's judgment on any basis supported by the record). In order to state a legal malpractice claim in Tennessee, where Lambert worked, or in the District of Columbia, where Kelley was based, a plaintiff must plead facts establishing an attorney-client relationship between the plaintiff and the defendant. *See Clark v. Feder Semo & Bard, P.C.*, 634 F.Supp.2d 99, 107 (D.D.C. 2009); *Akins v. Edmondson*, 207 S.W.3d 300, 306 & n.8 (Tenn. Ct. App. 2006). Kelley was employed by the FBI, and therefore the attorney-client relationship in this case was between Kelley and the FBI, and not between Kelley and Lambert. Although Kelley allegedly forwarded his legal opinion to other parties, including Lambert and UT-Battelle, the complaint is clear that Kelley gave legal advice to the FBI, not to Lambert. Lambert moreover admits that he "did not seek or initiate contact with Defendant Kelley to seek his opinion or counsel regarding the applicability of the section 207(c)" to his position.

Lambert's contention that he can sue for malpractice because he was an intended beneficiary of Kelley's legal advice is without merit. In the District of Columbia, only the intended beneficiary of a will can sue for legal malpractice in the absence of an attorney-client relationship. *See Clark*, 634 F.Supp.2d at 107; *Taylor v. Akin, Gump, Strauss, Hauer & Feld*, 859 A.2d 142, 147 & n.4 (D.C. Ct. App. 2004). Tennessee requires the consent of both parties to establish an attorney-client relationship, *see Akins*, 207 S.W.3d at 306, and nothing in the complaint suggests that Kelley and Lambert mutually consented to form an attorney-client relationship. Again, Lambert denied that he sought Kelley's legal advice, and he repeatedly complains that Kelley foisted his allegedly erroneous opinion upon him. Lambert therefore cannot claim that he was an intended beneficiary of Kelley's legal opinion.

Accordingly, we affirm the district court's dismissal of Lambert's legal malpractice claim. Because Lambert's professional nonfeasance and failure to train and supervise claims are derivative of his malpractice claim, we affirm the district court's dismissal of those claims as well.

Finally, Lambert argues that the district court erred in finding that his *Bivens* claim is barred by the Tennessee statute of limitations. Lambert argues that the District of Columbia's three-year limitations period applies to this claim. The local statute of limitations applies to *Bivens* claims. *See Zundel v. Holder*, 687 F.3d 271, 281 (6th Cir. 2012). Lambert filed his complaint in Tennessee; therefore, Tennessee's one-year statute of limitations for *Bivens* claims applies in this case. *See id.* Lambert's *Bivens* claim accrued no later than June 2013, when UT-Battelle fired him, and he did not raise it until June 2015, more than one year later. The district court therefore correctly concluded that Lambert's *Bivens* claim is barred by the statute of limitations.

Accordingly, we AFFIRM the district court's judgment.

Entered by Order of the Court

/s/ Deborah S. Hunt
Clerk

MEMORANDUM OPINION AND ORDER OF THE DISTRICT COURT (JANUARY 19, 2017)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
AT KNOXVILLE

RICHARD LAMBERT,

Plaintiff,

v.

PATRICK KELLEY,

Defendant.

No. 3:15-cv-00147
Reeves/Guyton

Before: Pamela L. REEVES,
United States District Judge.

Before the Court are two motions. First is Patrick Kelley's motion to dismiss Richard Lambert's claim against him. [D. 33]. Second is Lambert's motion to amend his complaint. [D. 45]. For the following reasons, the motion to dismiss is granted and the motion to amend is denied.

I

A

Richard Lambert was an FBI agent 1989-2012. In 2002, he was placed in charge of the FBI's investigation into the post-9/11 anthrax attacks. Lambert found his efforts marked by intransigence, apathy, and error from all sides. He summarized these problems in a July 2006 report that he sent to the FBI's Deputy Director. Lambert left the investigation around that time.

During the investigation, the Government named Steven Hatfill as a person of interest. He responded by suing the Government in D.C. federal court. During discovery, Hatfill's attorney acquired several emails written by Lambert detailing his complaints about the anthrax investigation. And when Hatfill's lawyer deposed Lambert, further complaints came out.

Hatfill's attorney then approached CBS about bringing to light the problems with the anthrax investigation. In April 2008, 60 Minutes aired an episode that used Lambert's emails and deposition testimony to reveal those problems. It led to public and congressional backlash against the FBI.

Lambert kept working for the FBI until he retired in 2012. He soon took a job as Senior Counterintelligence Officer for the Department of Energy Oak Ridge Counterintelligence Field Office. In this role, Lambert acted as the go-between for the FBI and UT-Battelle, the company that runs Oak Ridge National Laboratory. A staggering tangle of laws, regulations, and presidential decrees governed the public-private nature of Lambert's new job.

On November 8, 2012, Lambert received an email from Patrick Kelley, an FBI attorney and ethics official. The email accused Lambert of violating 18 U.S.C. § 207(c), which bars some former federal employees from contacting current ones for a year after leaving their jobs. The email found its way into the hands of the FBI and UT-Battelle. On June 10, 2013, UT-Battelle fired Lambert and his security clearance was revoked. Lambert alleges that the email was retaliation for his role in shedding light on the troubled anthrax investigation.

On April 2, 2015, Lambert filed a four-count complaint against the Attorney General, the FBI Director, the Department of Justice, the FBI, unnamed DOJ and FBI officials, and Patrick Kelley. A five-count amended complaint followed on June 2. This Court dismissed the first four counts in February 2016, leaving only Lambert's *Bivens*[1] action against Kelley.

In November 2015, Kelley filed his motion to dismiss under Rule 12(b)(6). After fully briefing that motion, Lambert moved to amend his complaint.

II

A

To survive a motion to dismiss under Rule 12(b)(6), the complaint must state a facially plausible claim for relief. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). To determine whether the complaint states a facially plausible claim, the Court takes a two-step approach.

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1 *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971) (allowing suits for damages against federal officials in their personal capacities).

Id. at 679. First, it separates the complaint's factual allegations from its legal conclusions. All factual allegations, and only the factual allegations, are taken as true. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555-56 (2007).

Second, the Court asks whether these factual allegations amount to a plausible claim for relief. *Id.* at 555. The allegations do not need to be highly detailed, but they must do more than simply recite the elements of the offense. *Id.* Specifically, the complaint must plead facts permitting a reasonable inference that the defendant is liable for the alleged conduct. *Id.* If this is not done, the claim will be dismissed. *Id.* at 570.

B

The Court will not dismiss the claim, however, if the opposing party offers amended pleadings that state a facially plausible claim. *See Foman v. Davis*, 371 U.S. 178, 182 (1962). If this occurs, the court will allow the other party to amend his complaint. *Id.* Conversely, amendment will not be allowed if doing so would be futile. *Id.* So the Court will allow all of Lambert's amendments that withstand Kelley's motion to dismiss. *See Williams v. City of Cleveland*, 771 F.3d 945, 949 (6th Cir. 2014).

III

A

Kelley levels five arguments against Lambert's complaint. He first contends that Lambert's *Bivens* claim is barred by the statute of limitations. Kelley argues that Tennessee's one-year statute of limitations applies, and that Lambert filed his suit after that time. Lambert maintains that the District of Columbia's three-year time limit applies, and that he sued within that time.

The Court agrees with Kelley. The statute of limitations for *Bivens* actions comes from state law. *Wallace v. Kato*, 549 U.S. 384, 387 (2007).[2] But there is a dispute over which state's law applies. Lambert, citing Sixth Circuit caselaw, contends that what matters is where the events occurred that underpin the suit. He argues that most of the events underpinning his suit happened in D.C., where Kelley had his office. Kelley counters that Tennessee law applies because that's where the Court sits.

The Court need not resolve this dispute, because the result is the same either way: Tennessee law provides the statute of limitations for Lambert's *Bivens* claim. This follows under Lambert's approach. He relies on *Baker v. Mukasey*, 287 F. App'x 422 (6th Cir. 2008). In Baker, the Sixth Circuit stated that the statute of limitations came from "the state where the events giving rise to the claim occurred." *Id.* at 424. Kelley wrote his email from D.C. and emailed it from there. Thus, Lambert concludes, the events giving rise to his *Bivens* claim occurred in D.C.

The analysis, however, actually points the other way. According to *Baker*, Tennessee law applies. There are two elements to any *Bivens* claim: the plaintiff suffers a constitutional deprivation; and the deprivation was caused by someone acting under federal authority.

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2 *Wallace* concerned a claim not under *Bivens* but rather under 42 U.S.C. § 1983. *See Wallace*, 549 U.S. at 387. The two, however, are subject to the same statute of limitations. *Harris v. United States*, 422 F.3d 322, 331 (6th Cir. 2005).

See, e.g., *Robertson v. Lucas*, 753 F.3d 606, 614 (6th Cir. 2014). Kelley may have written his email in D.C. and sent it from there. But that goes only to the second *Bivens* element. By contrast, Lambert suffered his constitutional deprivation in Tennessee. Lambert also sued in Tennessee. Thus, under *Baker*, Tennessee provides the statute of limitations for Lambert's *Bivens* action.

The same result follows if one looks at the content of Lambert's claim. He's asserting not just a *Bivens* claim, but a claim that Kelley violated his Fifth Amendment right to procedural due process.[3] To prove his case, Lambert must show that (1) he had an interest protected by the Due Process Clause; (2) Kelley interfered with that interest; and (3) proper procedural protections did not precede Kelley's interference. *See, e.g.*, *Ky. Dep't of Corr. v. Thompson*, 490 U.S. 454, 460 (1989). Lambert's interest in his job was located in Tennessee. And the process that Lambert demands has no geographic aspect. Finally, Kelley's interference with Lambert's job happened in both D.C. and Tennessee: Kelley acted in D.C, but the interference happened in Tennessee. Under *Baker*, Tennessee law provides the statute of limitations for Lambert's *Baker* claim.

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[3] In various places, Lambert asserts that his *Bivens* claim invokes procedural due process, substantive due process, equal protection, and free expression. The complaint, however, alleges only violations of procedural due process. Some of the other constitutional rights are discussed in Lambert's pleadings, while others are expressly cited in his proposed amended complaint. As explained below, however, the amended complaint will not be allowed. Lambert has therefore actually alleged only a violation of his right to procedural due process.

Lambert cites two other cases, but neither changes the outcome. First is *Haggard v. Stevens*, No. 2:09-cv-1144, 2010 WL 3658809 (S.D. Ohio Sept. 14, 2010). In *Haggard*, two plaintiffs owned a bank together. *Id.* at *7. They brought a Bivens action against John Stevens, a former attorney with the Federal Deposit Insurance Corporation. *Id.* at *1. They claimed that Stevens retaliated against them for suing him in another case. *Id.* When Stevens died, the plaintiffs moved to substitute his estate as defendant. *Id.*

The court denied the motion. *Id.* at *11. To reach this holding, the court had to decide whether Illinois, Michigan, or Ohio law supplied the statute of limitations. *Id.* at *7-8. It applied Baker and ruled that the Ohio statute of limitations governed. *Id.* at *7. The court noted that the bank's principal place of business was in Ohio; that one plaintiff was its sole shareholder and the other was its chairman; and that the prior suit had been brought in Ohio. *Id.* On these facts, Ohio law controlled.

This case is different from *Haggard*. In *Haggard*, all the events giving rise to the plaintiffs' *Bivens* action happened in Ohio. By contrast, the facts here are split between D.C. and Tennessee. And on balance, Tennessee law supplies the statute of limitations.

Lambert also cites *Steen v. Murray*, 919 F.Supp.2d 993 (S.D. Iowa 2013). But *Steen* was concerned with venue. *See id.* at 996. As Lambert recognized in his response, which venue is proper is distinct from which state's law fills the gaps in *Bivens* suits. *Steen* has no bearing on this case. Under *Baker*, Tennessee law provides the statute of limitations for Lambert's suit.

Kelley, for his part, cites no on-point binding caselaw. But binding law does support his argument. The Supreme Court has noted that, with several aspects of § 1983 and *Bivens* suits, "federal law looks to the law of the State in which the cause of action arose. This is so for the length of the statute of limitations." *Wallace v. Kato*, 549 U.S. 384,387 (2007). This suit was filed in Tennessee, and so arose in Tennessee. *See id.* Its statute of limitations applies to Lambert's *Bivens* claim.

B

In Tennessee, a plaintiff must file his *Bivens* claim within one year after the action accrues. Tenn. Code Ann. 28-3-104(a)(1)(B). But it is unclear what "accrue" means. Lambert contends that an action accrues when the plaintiff knows or should know of his injury and who did it. Kelley argues that the plaintiff need only know of his injury; he need not know who did it.

Kelley's argument convinces the Court. Lambert's argument turns wholly on *Estate of Abdullah ex rel. Carswell v. Arena*, 601 F. App'x 389 (6th Cir. 2015). In *Abdullah*, the Sixth Circuit stated that when the plaintiff knows "'he has been hurt and who has inflicted the injury,' the claim accrues." *Id.* at 393 (quoting *United States v. Kubrick*, 444 U.S. 111, 122 (1979)). *Abdullah*, however, has since been expressly rejected by the Sixth Circuit. *See Ruiz-Bueno v. Maxim Healthcare Servs., Inc.*, ___ F. App'x ___, 2016 WL 4473238, at *3 (6th Cir. Aug. 25, 2016). The Court will likewise reject it.

What's more, the *Abdullah* rule would upturn the law of suing unnamed defendants. If a claim did not accrue until the plaintiff knew the defendant's identity, then statutes of limitations could never run against unnamed defendants. But, in fact, they do run against them. *See Cox v. Treadway*, 75 F.3d 230, 240 (6th Cir. 1996). Because the Sixth Circuit has rejected *Abdullah* and because it contradicts well-settled law, the Court will not apply it.

Kelley argues that a plaintiff need not know a defendant's identity for a claim to accrue. Instead, it accrues once the plaintiff knows or should know of his injury. This position has the backing of many Sixth Circuit opinions. *See Cooey v. Strickland*, 479 F.3d 412, 416 (6th Cir. 2007) (collecting cases). And it's consistent with the law of suing unnamed defendants. A *Bivens* cause of action accrues when the plaintiff knows or should know that he has been hurt. Lambert had one year from this point to sue.

C

Lambert did not meet this deadline. He contends that his claim accrued in January 2014, while Kelley maintains that it accrued when Lambert was fired on June 10, 2013. But Lambert brought his suit on April 2, 2015—more than a year after either date. Lambert's *Bivens* claim is barred by Tennessee's statute of limitations.

IV

That leaves Lambert's motion to amend his complaint. The new complaint would include all five Counts that were in the original one. Counts 1-4, however, were already dismissed. And the fifth one is time barred. Because of this, the motion is denied.

Lambert cannot amend his complaint to include Counts 1-4. Amendments will be rejected if they would be futile. *Foman*, 371 U.S. at 182. The Court has ruled that it lacked jurisdiction to hear the three claims brought under the Federal Tort Claims Act. Lambert had sued under the FTCA for defamation and misrepresentation. These torts, though, are expressly not covered by the FTCA. 28 U.S.C. § 2680(h). And Lambert's new complaint does not fix these flaws.

The Court also dismissed the fourth Count, ruling that Lambert failed to state a claim. The amended complaint does not fix this. As a result, it would be futile for Lambert to amend Counts 1-4. *See Zundel v. Mukasey*, No. 3:03-cv-105, 2009 WL 3785093 (E.D. Tenn. Nov. 10, 2009) (Varian, C.J.) (denying motion to amend because it did not fix errors with subject-matter jurisdiction and with failure to state a claim).

Count 5 is Lambert's *Bivens* claim against Kelley. Because the statute of limitations bars this claim, it cannot be amended. *See Brown v. Owens Corning Inv. Review Comm.*, 622 F.3d 564, 574 (6th Cir. 2010). It would thus be futile for Lambert to amend any of the Counts in his complaint. His motion to amend is denied.

V

Lambert's *Bivens* claim is time barred and amendment would be futile. As a result, the Court must dismiss it. Lambert asks the Court to dismiss his claim without prejudice, so that he can refile in D.C. federal court. Kelley asserts that the claim is meritless and should be dismissed with prejudice.

Lambert's *Bivens* claim must be dismissed with prejudice, but not for the reasons Kelley offers.

Instead, it must be dismissed because it is also time barred in D.C. If a suit is dismissed without prejudice in D.C. federal court, the statute of limitations is treated as if the suit had never been filed. *Ciralsky v. CIA*, 355 F.3d 661, 672 (D.C. Cir. 2004). The District's statute of limitations for *Bivens* claims is three years. D.C. Code § 12-301(8); *Sykes v. U.S. Attorney*, 770 F.Supp.2d 152, 155 (D.D.C. 2011). Lambert would thus have to refile his claim in D.C. federal court within three years after his claim accrued.

Lambert would be unable to do so. As explained above in Part III.B, Lambert's action accrued once he knew of his injury. He was injured by being fired on June 10, 2013. More than three years has passed since then. There would be no point in dismissing Lambert's claim without prejudice.

VI

For these reasons, Kelley's motion to dismiss is GRANTED and Lambert's motion to amend is DENIED. Count 5 of the complaint is DISMISSED with prejudice. Because Count 5 was the last remaining Count, this case is DISMISSED.

IT IS SO ORDERED.

/s/ Pamela L. Reeves
United States District Judge

MEMORANDUM OPINION AND ORDER OF THE DISTRICT COURT (FEBRUARY 17, 2016)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
AT KNOXVILLE

RICHARD L. LAMBERT,

Plaintiff,

v.

UNITED STATES OF AMERICA, ET AL.,

Defendants.

Case No. 3:15-CV-147-PLR-HBG

Before: Pamela L. REEVES,
United States District Judge

This matter comes before the Court on the United States' motion to dismiss for lack of subject matter jurisdiction or, alternatively, failure to state a claim. [R. 14]. Mr. Lambert has responded in opposition, and the matter is ripe for consideration.[1] For the

[1] After briefing closed on the United States' motion to dismiss, Mr. Lambert moved for leave to file a sur-reply. [R. 24]. According to Mr. Lambert, the United States made new arguments in its reply, but he fails to identify what those new arguments are. With no extraordinary circumstances shown by Mr. Lambert to support filing a sur-reply, his motion will be denied.

reasons discussed below, the United States' motion will be granted. Counts I-IV of Mr. Lambert's complaint will be dismissed.

I.

Richard L. Lambert served as a Special Agent in the FBI for 24 years, eventually being named the Special Agent in Charge of the Knoxville Division. In March 2012, Mr. Lambert retired and took a position at UT-Battelle, a private government contractor, as the Senior Counterintelligence Officer for their Oak Ridge Field Office. A major part of Mr. Lambert's new job was to "[e]stablish and maintain liaison relationships with the Federal Bureau of Investigation and other appropriate intelligence community and law enforcement agencies." Mr. Lambert was therefore in frequent communication with FBI Counterintelligence Agents embedded in his office.

In October or November of 2012, Ken Moore, the FBI's Special Agent in Charge in Knoxville, approached Patrick Kelley, an attorney with the FBI and "designated agency ethics official," at a conference with questions about the one-year post-employment restrictions in 18 U.S.C. § 207(c). That section generally prohibits certain former senior executive branch personnel from communicating with their former department or agency with the intent to influence official action within one year of separation from government service. Mr. Moore was concerned that § 207(c) might apply to Mr. Lambert, meaning that Mr. Moore would not be allowed to speak with him. Mr. Kelley agreed that it might apply, and told Mr. Moore he would "dig into it."

After consulting with DOE and DOJ ethics offices, Mr. Kelley concluded that § 207(c) applied to Mr. Lambert's situation. In a November 8, 2012, email explaining the situation, Mr. Kelly stated that his conclusion meant that Mr. Lambert "cannot talk directly to any FBI employee." He acknowledged that this would be disruptive, but saw "no way around it"—the statute is a criminal prohibition that could not well be ignored. Mr. Kelley sent his email to Mr. Lambert, to executive managers in the FBI's Counterintelligence Division, and to Mr. Moore. Mr. Kelley also referred his opinion to the DOJ Office of the Inspector General and "other unknown, unnamed officials" at the DOE, DOJ, and UT-Battelle.

When Mr. Lambert received the email, he informed Mr. Kelley that his legal opinion was wrong and "provided him with the controlling law and operative facts." When asked to provide a legal or factual basis for his conclusion that Mr. Lambert was violating § 207(c), Mr. Kelley refused and otherwise declined to provide Mr. Lambert with any citations to support his conclusion other than the survey of his colleagues at the DOE and DOJ.

Mr. Lambert states that he self-reported Mr. Kelley's conflict-of-interest allegations to the United States Attorney for the Eastern District of Tennessee and to the FBI's Office of Professional Responsibility. According to him, "[b]oth entities deemed [Mr.] Kelley's legal opinion to be meritless."

Seven months after Mr. Kelley sent his email, and three months after the one-year cooling off period ended, UT-Battelle terminated Mr. Lambert's employment. According to Mr. Lambert, his termination was a "direct and proximate result" of Mr. Kelley's erroneous legal opinion. Additionally, the DOJ's Inspector General and the DOJ's Public Integrity Section "launched and sensationalized massive criminal probes, which included the dispatch of teams of OIG Special Agents and PIS attorneys to East Tennessee who raided and searched [Mr. Lambert's] office . . . seized and analyzed [his] personal documents and effects, and interrogated dozens of [Mr. Lambert's coworkers.]"

In the end Mr. Lambert asserts that, because of the stigmatizing publicity and notoriety surrounding Mr. Kelley's legal opinion and the subsequent investigation, he "has been blackballed with the specter of illegal conduct and ethics violations, unable to gain reemployment despite his submission of more than 70 job applications to various employers."

Mr. Lambert filed suit on April 2, 2015. His amended complaint, filed June 20, 2015, contains five counts. The first three, brought under the Federal Tort Claims Act, are for: (I) legal malpractice against Mr. Kelley; (II) professional nonfeasance against former FBI Director Robert Mueller (for failing to ensure that Mr. Kelley was suitable for his position); and (III) negligent failure to train, supervise, and advise against former Attorney General Eric Holder. In Count IV, Mr. Lambert asserts that the FBI and DOJ violated the Privacy Act. Finally, Count V asserts a *Bivens* claim against Mr. Kelley for violation of Mr. Lambert's due process rights.

II.

When a defendant challenges subject-matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1), the plaintiff bears the burden of proving that the court has jurisdiction. *Madison-Hughes v.*

Shalala, 80 F.3d 1121, 1130 (6th Cir. 1996). A Rule 12(b)(1) motion may challenge the sufficiency of the complaint itself, in what is known as a facial attack, or it may challenge the factual existence of subject-matter jurisdiction, which is known as a factual attack. *United States v. Ritchie*, 15 F.3d 592, 598 (6th Cir. 1994). In ruling on a facial attack, the court accepts as true the allegations of the complaint and construes them in a light most favorable to the plaintiff. *DLX v. Kentucky*, 381 F.3d 511, 516 (6th. Cir. 2004). On the other hand, when faced with a factual attack, the court does not presume that the complaint's allegations are true, and may resolve factual disputes when necessary. *Madison-Hughes v. Shalala*, 80 F.3d at 1130.

As for a Rule 12(b)(6) motion, Rules 8(a) and 12(b)(6) of the Federal Rules of Civil Procedure require the complaint to articulate a plausible claim for relief. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). This requirement is met when "the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 556 (2007)). A motion to dismiss under Rule 12(b)(6) requires the court to construe the complaint in the light most favorable to the plaintiff, accept all the complaint's factual allegations as true, and determine whether the plaintiff can prove no set of facts in support of the plaintiff's claims that would entitle the plaintiff to relief. *Meador v. Cabinet for Human Resources*, 902 F.2d 474, 475 (6th Cir. 1990).

The court may not grant a motion to dismiss based upon a disbelief of a complaint's factual allegations. *Lawler v. Marshall*, 898 F.2d 1196, 1198 (6th Cir. 1990); *Miller v. Currie*, 50 F.3d 373, 377 (6th Cir. 1995) (noting that courts should not weigh evidence or evaluate the credibility of witnesses). The court must liberally construe the complaint in favor of the party opposing the motion. *Id.* However, the complaint must articulate more than a bare assertion of legal conclusions. *Scheid v. Fanny Farmer Candy Shops, Inc.*, 859 F.2d 434 (6th Cir. 1988). "[The] complaint must contain either direct or inferential allegations respecting all the material elements to sustain a recovery under some viable legal theory." *Id.* (citations omitted).

III.

A. Motion to Substitute

As an initial matter, the United States has moved to substitute itself for Mr. Kelley in Count I. For non-constitutional torts, "[w]hen a claim of wrongful conduct is brought against a government official in his individual capacity . . . the Attorney General's certification that the defendant was acting within the scope of his employment requires substitution of the United States as a defendant." *Sobitan v. Glud*, 589 F.3d 379, 383 (7th Cir. 2009); *see* 28 U.S.C. § 2679(d)(1). On May 12, 2016, James G. Touhey, a Torts Branch Director in the Department of Justice certified that Mr. Kelley was acting within the scope of his employment when Mr. Lambert's claims arose. Accordingly, and without opposition from the plaintiff, the United States shall be substituted for Mr. Kelley in his individual capacity as to Count I.

B. Malpractice, Failure to Train, and Professional Nonfeasance

Because Mr. Lambert's three claims brought under the FTCA arise out of defamation or misrepresentation, this Court lacks subject matter jurisdiction and must dismiss them. The United States generally enjoys sovereign immunity, but "[t]he FTCA provides a limited sovereign immunity waiver and subject matter jurisdiction for plaintiffs to pursue state law tort claims against the United States." *Milligan v. United States*, 670 F.3d 686, 692 (6th Cir. 2012). Under the FTCA, a plaintiff's suit can proceed against the government "in the same manner and to the same extent as a private individual under the circumstances." 28 U.S.C. § 2674. And the government's tort liability is "determined in accordance with the law of the state where the event giving rise to liability occurred." *Milligan*, 670 F.3d at 692 (quoting *Young v. United States*, 71 F.3d 1238, 1242 (6th Cir. 1995)).

There are exceptions to the FTCA though. Under § 2680, sovereign immunity is not waived for intentional torts, including claims "arising out of . . . libel, slander, [or] misrepresentation." 28 U.S.C. § 2680(h). "If a case falls within the statutory exceptions of 28 U.S.C. § 2680, the court lacks subject matter jurisdiction," and the case must be dismissed. *Feyers v. United States*, 749 F.2d 1222, 1225 (6th Cir. 1984). Furthermore, waivers of the United States' sovereign immunity "must be construed strictly in favor of the sovereign and must not be enlarged beyond what the language requires." *Estate of Smith ex rel. Richardson v. United States*, 509 F. App'x 436, 440 (6th Cir. 2012).

Section 2680(h) "thus relieves the Government of tort liability for pecuniary injuries which are wholly attributable to reliance on the Government's negligent misstatements." *Block v. Neal*, 460 U.S. 289, 297 (1983). According to the *Neal* court, "the essence of an action for misrepresentation, whether negligent or intentional, is the communication of misinformation on which the recipient relies." *Id.* at 296. Section 2680 therefore bars actions where the Government's misstatements are an "essential to the plaintiff's negligence claim." *Id*; *see also Dragoiu v. United States*, 2013 WL 119995, at *7 (E.D. Mich. Jan 9, 2013) ("Following *Neustadt* and *Neal*, circuit courts have held that section 2680(h) bars any claim in which the government's misstatements, either negligently or intentionally made, were 'essential' to the plaintiff's claims.") (collecting cases).

Mr. Lambert specifically disavows any "causes of action for libel, slander, misrepresentation, defamation, deceit, tortious interference with contract or any other intentional tort." [R. 12, Amended Complaint, ¶ 94]. Likely knowing that this Court lacks jurisdiction to hear such claims, Mr. Lambert asserts that "[t]hose torts are not alleged in this complaint nor should they be inferred or implied as causes of action." *Id.* But a plaintiff cannot "use semantics to recast the substance of the claim so as to avoid a statutory exception." *Milligan*, 670 F.3d at 695. In deciding whether a plaintiff's claim falls within a particular exception, a court "must look to the substance of the claim and not limit . . . review to how the plaintiff pleaded the cause of action." *Id.*

The essence of Mr. Lambert's complaint is not Mr. Kelley's alleged malpractice, but his communication of misinformation on which the recipient (UT-Battelle and others) relied. Had Mr. Kelley simply delivered his advice to Mr. Lambert and dropped the matter without forwarding his conclusions to others, there would have been no harm. Mr. Lambert made that point clear when he expressly states that he "makes no claim whatsoever of detrimental reliance on Defendant's erroneous legal opinion." [R. 19, Page ID 719]. Mr. Lambert's damages stem from the defendants' "publication, dissemination, and proclamation of this erroneous legal opinion" that "decimated [Mr. Lambert's] professional reputation, disparaged [his] integrity, and falsely branded [him] a federal criminal." [R. 12, Amended Complaint, ¶ 4].

Mr. Lambert's efforts to recast his intentional tort defamation or misrepresentation claims into a negligence action not barred by § 2680(h) are particularly apparent where he asserts that the defendants "were highly motivated to be grossly negligent in their rendering of a legal opinion to Plaintiff based on their animus stemming from Plaintiff's prior whistleblower reports."[2] [R. 19, Page ID 726]. Mr. Lambert's malpractice theory merely obfuscates the fact that he is really asserting a defamation or misrepresentation claim. "Because plaintiff's complaint set[s] forth an intentional tort claim merely sounding in negligence, such claim falls within the exception embodied in § 2680(h)," and should be dismissed. *Satterfield v. United States*, 788 F.2d 395 (6th Cir. 1986).

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[2] The accuracy of Mr. Kelley's opinion or his motives behind it are not relevant at this stage, where the Court accepts the plaintiff's facts pled as true. Only relevant here is the idea that the defendants were intentionally negligent—a strange allegation that only makes sense in light of the fact that intentional torts like defamation, libel, or misrepresentation are barred by § 2680(h).

C. Privacy Act

In his final claim against the United States, Mr. Lambert contends that the defendants violated the Privacy Act, which generally prohibits disclosure without an individual's consent of "any record which is contained in a system of records." 5 U.S.C. § 552a (b). To state a Privacy Act disclosure claim, a plaintiff must show that: (1) the disclosed information is a record contained within a system of records; (2) the agency improperly disclosed the information; (3) the disclosure was willful or intentional; and (4) the disclosure adversely affected the plaintiff. *Doe v. United States Dep't of Justice*, 660 F.Supp.2d 31, 44-45 (D. D.C. 2009).

A "system of records" for the purposes of the privacy act is "a group of any records under the control of any agency from which information is retrieved by the name of the individual or by some identifying number, symbol, or other identifying particular assigned to the individual." 5 U.S.C. § 552a(a)(5). "A system of records exists only if the information contained within the body of material is both retrievable by personal identifier and actually *retrieved* by personal identifier." *Paige v. DEA*, 665 F.3d 1355, 1359 (D.C. Cir. 2012) (quoting *Maydak v. United States*, 630 F.3d 166, 178 (D.C. Cir. 2010)) (emphasis in original). Thus, to violate § 552a(b), an individual generally must actually retrieve the information in question from the system of records in which it is contained. *Id.* (quoting *Armstrong v. Geithner*, 608 F.3d 854, 857 (D.C. Cir. 2010)).

In his complaint, Mr. Lambert identifies two pieces of disclosed information that he believes meet the "record contained within a system of records" requirement: (1) Mr. Kelley's legal opinion and (2) the "allegations and investigative results" of the FBI and DOJ's inquiry into whether Mr. Lambert violated § 207(c). While he has no actual evidence that Mr. Kelley's legal opinion is stored within a system of records, Mr. Lambert concludes that "it is highly probable" that the opinion is memorialized in the FBI and DOJ records system because the Code of Federal Regulations requires designated ethics officials to keep records on advice rendered. 5 C.F.R. § 2638.203(b)(8). Mr. Lambert also assumes that the DOJ and FBI must have kept some sort of records on their investigation into his purported § 207(c) violation because the DOJ and FBI generally keep such records.

Even giving Mr. Lambert the benefit of the doubt, and not requiring he allege facts in support of these assumptions, his Privacy Act claim still lacks any allegation of actual retrieval of those records. As mentioned above, a Privacy Act claim must allege that an individual actually retrieved the information in question from the system of records in which it was contained. The disclosure of information "acquired from non-record sources—such as observation, office emails, discussions with co-workers and the 'rumor mill'—does not violate the Privacy Act . . . , even if the information disclosed is also contained in agency records." *Cloonan v. Holder*, 768 F.Supp.2d 154, 164 (D. D.C. 2011). There is no allegation that Mr. Kelley retrieved his email from a system of records before disclosing it to others at the FBI, DOJ, and UT-Battelle. Likewise, there is no allegation of anyone retrieving a record by personal identifier relating to the FBI and DOJ's investigation into Mr. Lambert. With no facts supporting the allegation that the disclosed information was indexed and later retrieved by name or personal identifier, Mr. Lambert's Privacy Act claim cannot survive a motion to dismiss.

IV.

For the foregoing reasons, the United States' motion to dismiss [R. 14] is Granted. Counts I-IV of the plaintiff's amended complaint are dismissed. The plaintiff's motion for leave to file a supplemental brief or sur-reply [R. 24] is Denied.

IT IS SO ORDERED.

/s/ Pamela L. Reeves
United States District Judge

ORDER OF THE SIXTH CIRCUIT DENYING PETITION FOR REHEARING EN BANC (JANUARY 4, 2018)

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RICHARD L. LAMBERT,

Plaintiff–Appellant,

v.

JEFFERSON B. SESSIONS, III,
Attorney General, ET AL.,

Defendants–Appellees.

No. 17-5324

Before: KEITH, SILER, and STRANCH, Circuit Judges.

The court received a petition for rehearing *en banc*. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. The petition then was circulated to the full court. No judge has requested a vote on the suggestion for rehearing *en banc*.

Therefore, the petition is denied.

Entered by Order of the Court

/s/ Deborah S. Hunt

Clerk

Additional material from this filing is available in the Clerk's Office.