IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 23-cv-01951-CNS-MDB

JACQUELINE ARMENDARIZ and
CHINOOK CENTER,

Plaintiffs,

v.

CITY OF COLORADO SPRINGS,
DANIEL SUMMEY, a detective with the Colorado Springs Police Department, in his individual capacity,
B.K. STECKLER, a detective with the Colorado Springs Police Department, in his individual capacity,
JASON S. OTERO, a sergeant with the Colorado Springs Police Department, in his individual capacity,
ROY A. DITZLER, a police officer with the Colorado Springs Police Department, in his individual capacity, and
FEDERAL BUREAU OF INVESTIGATION,

Defendants.

REPLY IN SUPPORT OF MOTION TO SUBSTITUTE THE UNITED STATES FOR DANIEL SUMMEY AS DEFENDANT TO CLAIM 4 PURSUANT TO 28 U.S.C. § 2679(d)(1) (Doc. 39)

The United States submits this reply in response to "Plaintiff's Opposition to the United States' Motion to Substitute . . . ," Doc. 53 (filed 11/29/23), and in support of its motion to substitute, Doc. 39 (filed 11/3/23). The Court should grant the motion.

I. The "United States shall be substituted as the party defendant."

In the Westfall Act, Congress required courts to substitute the United States upon certification that a defendant was acting within the scope of his federal employment:

> Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action . . . *shall* be deemed an action against the United States . . . , and the United States *shall* be substituted as the party defendant.

28 U.S.C. § 2679(d)(1) (emphasis added); *see also* 28 U.S.C. § 2679(d)(4) ("Upon certification, any action . . . *shall* proceed in the same manner as any action against the United States") (emphasis added). "When the Attorney General has granted certification, if the case is already in federal court . . . the United States will be substituted as the party defendant." *Gutierrez de Martinez v. Lamagno*, 515 U.S. 417, 431 (1995) (citing § 2671(d)(1)).

Immediate substitution serves an important purpose of the Westfall Act: it protects the employee "from the cost and effort of defending the lawsuit, and place[s] those burdens on the Government's shoulders." *Osborn v. Haley*, 549 U.S. 225, 252-53 & n.18 (2007). Congress thus made substitution automatic; indeed, it may be accomplished by notice, not motion. *See Roman v. Townsend*, 224 F.3d 24, 28 (1st Cir. 2000) ("the United States became a party . . . when it filed a notice of substitution").

After substitution, a plaintiff may move to "resubstitute" the federal employee as

the defendant if evidence proves that the federal employee was not acting within the scope of employment. *See Lamagno*, 515 U.S. at 435 (discussing the federal employee being "*resubstituted* as defendant") (emphasis added); *Osborn*, 549 U.S. at 242 ("Section 2679(d)(2) does not preclude a district court from *resubstituting the federal official as defendant*" if the court determines that the certification of scope of employment was incorrect) (emphasis added).

The Court should grant substitution and deem the United States the defendant to Claim 4. If Plaintiff later files a motion to resubstitute Task Force Officer Summey as a defendant, the Court can consider that motion. But the Westfall Act provides that the burdens of litigation must now fall on the United States, not on Summey individually.

II. Plaintiff's allegations do not prevent substitution.

Plaintiff argues that substitution should be denied because she "alleged facts" to rebut the determination "that Summey was acting within the course and scope of his federal employment during the relevant events." Doc. 53 at 4. But Congress made substitution immediately effective upon certification, not dependent on allegations. *See Osborn*, 549 U.S. at 231 ("Substitution of the United States is not improper simply because the Attorney General's certification rests on an understanding of the facts that differs from the plaintiff's allegations").

Allegations are not evidence. If Plaintiff wishes to file a motion to resubstitute Summey, she bears the burden to prove with *evidence*—not mere allegations—that Summey was not acting within the scope of his employment. *See Williams v. United States*, 780 F. App'x 657, 661 (10th Cir. 2019) ("The plaintiff must produce evidence to

show the conduct was outside the scope of employment."); *Hockenberry v. United States*, 42 F.4th 1164, 1170 (10th Cir. 2022) ("The plaintiff then bears the burden of rebutting the scope-of-employment certification with specific facts."). Plaintiff's allegations—even if inconsistent with certification—cannot defeat substitution.

III. Plaintiff's requests for discovery and a hearing should be denied.

Plaintiff argues that the Court should grant her "limited discovery and an evidentiary hearing." Doc. 53 at 6. These requests should be denied.

A. Plaintiff's requests are premature.

As an initial matter, Plaintiff's requests should be denied as premature because the rules require Plaintiff to seek relief by motion. *See* D.C.COLO.CivR 7.1(d)("A motion shall not be included in a response . . . . A motion shall be filed as a separate document."); CNS Civ. Practice Standard 7.1A(a)(6) ("A request for the Court to take action shall NOT be included in a response or reply to the original motion.").

B. Regardless, Plaintiff's allegations fail to satisfy the threshold standards for obtaining scope-of-employment discovery.

The Westfall Act, like the doctrine of qualified immunity, is designed "to immunize covered federal employees not simply from liability, but from suit." *Osborn*, 549 U.S. at 238. "[T]he purposes of the Westfall Act counsel *against* early discovery under normal circumstances." *Stout v. Okla. ex rel. Okla. Highway Patrol*, Nos. 13-cv-753 & 12-cv-427, 2015 WL 127820, at *6 (W.D. Okla. Jan. 6, 2015). Here, Plaintiff fails to meet the threshold requirement to obtain early scope-of-employment discovery.

Discovery is "permitted in a Westfall Act case *only* when a plaintiff 'allege[s] sufficient facts that, taken as true, would establish that the defendant['s] actions

exceeded the scope of [his] employment." *Wuterich v. Murtha*, 562 F.3d 375, 378 (D.C. Cir. 2009) (emphasis added); *Bolton v. United States*, 946 F.3d 256, 261 (5th Cir. 2019) (explaining that a plaintiff has "no right to even limited discovery" on scope of employment unless the plaintiff has made allegations plausibly showing that the defendants acted outside the scope of employment).[1]

Plaintiff has not shown she is entitled to discovery on substitution. Plaintiff's allegations, even if proven, would not establish that Summey exceeded the scope of his federal employment. The relevant law on scope of employment, discussed below, shows why Plaintiff's allegations at this stage do not entitle her to discovery.

1. As a Task Force Officer, Summey was a federal employee.

Plaintiff is incorrect in suggesting that Summey may not be a federal employee. Plaintiff argues, mistakenly, that the Court must look to Colorado law to determine whether Summey was a "loaned employee" to, or a "servant" of, the FBI. Doc. 53 at 3-4. But the question "whether one is an employee of the United States is to be determined by federal law," not state law. *Lurch v. United States*, 719 F.2d 333, 337 (10th Cir. 1983) (describing that proposition as "well settled"); *see also Ezekiel v. Michel*, 66 F.3d 894, 899 (7th Cir. 1995) (whether a person is a federal employee "for purposes of the FTCA is a question of federal law").

[1] Plaintiff asserts that in *Wilson v. Jones*, 902 F. Supp. 673, 680 (E.D. Va. 1995), the district court "allow[ed] limited additional discovery on scope of employment." Doc. 53 at 7. But in *Wilson*, the court stated that it would decide "whether an evidentiary hearing and limited discovery are necessary" only *after* the plaintiff submitted "verified evidence that Defendant was acting outside the scope of her employment." 902 F. Supp. at 680. "Plaintiff is advised that if she does not present such evidence, the motion will be decided in favor of the Government based upon the . . . certification." *Id.*

Federal law deems Summey a federal employee for purposes of this litigation: "During the period of assignment, a State or local government employee on detail to a Federal agency . . . is deemed an employee of the agency for the purpose of . . . the Federal Tort Claims Act and any other Federal tort liability statute." 5 U.S.C. § 3374(c)(2); *see also* 28 U.S.C. § 2671 (defining an "[e]mployee of the government" to include "persons acting on behalf of a federal agency in an official capacity, temporarily or permanently in the service of the [U.S.], whether with or without compensation").

Both statutes apply to deputized Task Force Officers ("TFOs"). *See West v. City of Mesa*, 708 F. App'x 288, 290 (9th Cir. 2017) (citing § 2671 for the conclusion that a local officer "assigned to the FBI's Joint Terrorism Task Force" was a federal employee); *Robertson v. Lucas*, 753 F.3d 606, 614 n.3 (6th Cir. 2014) (local officers "were considered federal defendants by virtue of their designations" to a task force, citing § 3374(c)(2)); *Deavers v. Martin*, 629 F. Supp. 3d 389, 398 (S.D.W. Va. 2022) (Section 3374(c)(2) deems a local officer "an employee of the agency for the purpose of ... the [FTCA]"). Even the case cited by Plaintiff subscribes to this view. *See Laible v. Lanter*, No. 21-cv-102, 2022 WL 1913420, at *15 (E.D. Ky. June 3, 2022) ("by nature of Sgt. Scalf's deputization by the ATF, he is considered to be a federal employee for FTCA purposes"); Doc. 53 at 6 (citing *Laible*).[2]

[2] In general, Plaintiff's reliance on *Laible* is unavailing. In *Laible*, the United States *declined* to certify that local officers were acting within the scope of their federal employment. 2022 WL 1913420, at *3. *Laible* therefore did not address the quantum of evidence needed to rebut certification—the issue in this case. Additionally, the court's decision in *Laible* turned on issues of "control" under Kentucky law, not whether the officer was performing work assigned to him under Colorado law. *Laible* is inapposite.

It is undisputed that Summey was an FBI TFO at the time in question. *See* Doc. 39-1 ¶ 2 (certifying that Summey was a full-time FBI TFO). Summey signed the affidavits as a TFO, noting that he was "currently assigned to the FBI Joint Terrorism Task Force." Doc. 49-1 at 3, 17; Doc. 49-2 at 5, 28. Thus, he is a federal employee for purposes of the FTCA. *See* 5 U.S.C. § 3374(c)(2); 28 U.S.C. § 2671.

The proper state-law question is not *whether* Summey was an FBI employee for purposes of the FTCA, but whether he was acting *within the scope* of his federal employment. *See Hockenberry*, 42 F.4th at 1170 ("*[S]cope of employment* is defined by the respondeat superior law of the state where the incident occurred.") (emphasis added).

2. The scope-of-employment inquiry asks whether Summey was performing work assigned to him by the FBI.

Under Colorado law, the scope-of-employment inquiry focuses on the *assignment*—whether the individual was "doing the work assigned to him by his employer, or what is necessarily incidental to that work, or customary in the employer's business." *Moses v. Diocese of Colo.*, 863 P.2d 310, 330 (Colo. 1993); Colo. Jury Instr., Civil 8:8 (an "employee is acting within the scope of [his] employment when the employee is doing work that is: 1. Assigned by [his] employer; or 2. Proper, usual, and necessary to accomplish the assigned work; or 3. Customary in the particular trade or business . . . ."); *see also First Nat'l Bank of Durango v. Lyons*, 2015 COA 19, ¶ 47.

Thus, the relevant question is whether Summey was "doing the work assigned to him by" the FBI when he sought the warrants. *Moses*, 863 P.2d at 330. The certification, *see* Doc. 39-1, is prima facie evidence that he was. *Hockenberry*, 42 F.4th at 1170.

None of Plaintiff's allegations, even if proven, suggests that Summey—a full-time FBI TFO, Doc. 39-1 ¶ 2—received his assignment from the Colorado Springs Police Department ("CSPD"). Because Plaintiff's allegations do not speak to the relevant state-law issue, they do not show he was acting outside the scope of his federal employment.

3. Plaintiff's allegations are not inconsistent with Summey acting within the scope of his federal employment.

Plaintiff's allegations are not inconsistent with Summey carrying out an FBI assignment. Plaintiff highlights the unremarkable facts that Summey remained employed by the CSPD, Doc. 12 ¶¶ 111-12; that he obtained warrants from a state court for a criminal case handled by a district attorney charging a state-law crime, *id.* ¶¶ 88, 92, 111, 116-18, 157; that a CSPD officer supervised and initialed the warrant submission, *id.* ¶¶ 113-14; and that the CSPD searched Plaintiff's residence and took her into custody, *id.* ¶¶ 89-90. *See* Doc. 53 at 4-5. None of these facts, even if true, shows that Summey exceeded the scope of his federal duties.[3]

One of the primary purposes of a joint task force is to coordinate the resources of local and federal agencies to combat crime. Merely asserting that a TFO used local resources during the investigation does not show that the officer was acting outside the scope of his federal assignment. Recognizing this principle, courts have rejected challenges to Westfall Act certifications even where the plaintiff argued, for example,

[3] Plaintiff fails to acknowledge that the warrants state that Summey "regularly works joint investigations with CSPD and the FBI" and specifically sought authorization for the FBI to "participate in the search." Doc. 49-1 at 17; Doc. 49-2 at 28. She herself alleges that the FBI was investigating activists and individuals associated with the Chinook Center and that Plaintiff's devices were sent to "an FBI-run forensic computer laboratory," Doc. 12 ¶¶ 19, 25, 28, which plausibly suggests that the FBI was investigating Plaintiff.

that: (1) the defendant was employed by a local police department; (2) the warrants were obtained from a state court; (3) the criminal defendant was prosecuted in state court; (4) the FBI was not authorized to investigate the plaintiff's state-law criminal activity; or (5) the local police department maintained some supervision or control over the officer. *See Hunter v. City of Vancouver*, No. 22-cv-5234, 2022 WL 3716836, at *4-5 (W.D. Wash. Aug. 29, 2022); *Martinez v. City of W. Sacramento*, No. 16-cv-2566, 2019 WL 448282, at *4-8 (E.D. Cal. Feb. 5, 2019); *Amoakohene v. Bobko*, 792 F. Supp. 605, 608 (N.D. Ill. 1992).[4] These courts recognize that none of the above circumstances is inconsistent with a TFO carrying out a federal assignment from a federal agency.

In *Martinez*, for example, the district court held that a plaintiff failed to allege facts showing that an FBI TFO acted outside the scope of his employment when he stated that: (1) the FBI task force, which investigated gang violence, was not authorized to investigate the shooting at issue, where there was no evidence that the shooting was gang-related; (2) the plaintiff was prosecuted for the shooting in state court; (3) the TFO told prosecutors he was employed by the local police department; (4) a police informant who provided information about the plaintiff/criminal suspect was an informant for, and was paid by, the local police department, not the FBI; and (5) the TFO said he was not investigating the shooting. 2019 WL 448282, at *4. The court determined that these allegations did not establish, under California law, that the TFO was acting outside the scope of his federal employment. *Id.* at *7. The court also rejected the plaintiff's request

[4] *Cf. Challenger v. Bassolino*, No. 18-cv-15240, 2023 WL 4287204, at *4-5 (D.N.J. June 30, 2023) (rejecting the argument that a deputized law enforcement officer acted under color of state law when he executed a state warrant, and collecting cases).

for an evidentiary hearing, because the factual allegations, "even if proven, would be insufficient to overcome the presumption afforded the certification . . . ." *Id.* at *8.

Other courts reached similar conclusions. *See Hunter*, 2022 WL 3716836, at *4-5 (the fact that the plaintiff was investigated for a state-law crime "does not mean that [the officers] were acting outside the scope of their federal appointments on the FBI's" task force); *Amoakohene*, 792 F. Supp. at 608 (the district court was "not persuaded by plaintiffs' argument that because they were arrested for violating a municipal ordinance, CPD [Chicago Police Department] arrest reports were completed, and they were placed in CPD cells, the individual defendants were not acting within the scope of their federal employment"). The Sixth Circuit rejected a related argument by a plaintiff in *King v. United States*, 917 F.3d 409 (6th Cir. 2019), *rev'd on other grounds*, *Brownback v. King*, 141 S. Ct. 740 (2021). The court held that although the FBI TFO was employed by the state and sought to enforce a state-court arrest warrant against a state fugitive who had committed no federal crime, the TFO was acting under color of federal law. *Id.* at 433. "[T]he nature and character of a cooperative federal-state program is determined by the source and implementation of authority for the *program*, not for the particular work that the agency chooses, in the exercise of its authority, to perform on a given day." *Id.*

Here, Plaintiff's allegations, *even if proven*, would not establish that Summey was acting outside the scope of his federal employment. She is not entitled to discovery.

C. Any limited discovery would have to be narrowly tailored to whether Summey was doing the work assigned to him by the FBI.

These principles show that, even if the Court grants Plaintiff's premature and unsupported request for discovery, such discovery should be tailored to the relevant

scope-of-employment question. *See Goldstein v. Moatz*, 364 F.3d 205, 220 (4th Cir. 2004) ("any discovery that is authorized should be narrowly circumscribed").

That question here is: was Plaintiff doing the work assigned to him by the FBI? The broad discovery Plaintiff seeks—regarding "the relationship and arrangement between CSPD and the FBI," "whether the FBI had the authority to direct CSPD to apply for a warrant," whether the FBI "advised and/or supervised Summey," "whether the FBI approved the applications and affidavits," Doc. 53 at 6-7—relates to the wrong state-law question, *see supra*, Part III.B.1, and does not bear on the narrow factual issue necessary to resolve the scope-of-employment inquiry under state law. Discovery must be limited to whether Summey was doing the work assigned to him by the FBI.

Finally, Plaintiff has not established a basis for an evidentiary hearing.[5] A court should hold an evidentiary hearing on substitution only where there are genuinely disputed issues of material fact. *Hockenberry*, 42 F.4th at 1170. To determine whether a disputed issue of fact exists related to scope of employment, the Tenth Circuit employs a "genuine-issue-of-material-fact standard" that is "akin to summary judgment." *Id.* at 1172. On summary judgment, the nonmoving party must present evidence and "can no longer rest on the pleadings." *Behrens v. Pelletier*, 516 U.S. 299, 309 (1996). Plaintiff has not presented any specific evidence to warrant an evidentiary hearing.

[5] Plaintiff suggests that the government must provide "evidence and analysis to support its conclusion" in a scope-of-employment certification, Doc. 53 at 3, but her cited authority states that such evidence is only needed "[i]f the plaintiff presents persuasive evidence refuting the certification." *Maron v. United States*, 126 F.3d 317, 323 (4th Cir. 1997). Plaintiff has not done so here.

Respectfully submitted on December 13, 2023.

COLE FINEGAN
United States Attorney

s/ Thomas A. Isler
Thomas A. Isler
Assistant United States Attorney
1801 California Street, Ste. 1600
Denver, Colorado 80202
Tel. (303) 454-0336
thomas.isler@usdoj.gov
Counsel for the United States of America, the Federal Bureau of Investigation, and Daniel Summey

CERTIFICATE OF SERVICE

I certify that December 13, 2023, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will serve all parties and counsel of record.

Mark Silverstein
Timothy R. Macdonald
Sara R. Neel
Theresa W. Benz
Jacqueline V. Roeder
Anna I. Kurtz
Laura B. Moraff
Kylie L. Ngu
Attorneys for Plaintiff Jacqueline Armendariz

Anne H. Turner
Attorney for Defendant City of Colorado Springs and Defendants Steckler, Otero, and Ditzler

s/ Thomas A. Isler
Thomas A. Isler
Assistant United States Attorney