UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

UNITED STATES OF AMERICA,

Plaintiff,

v.

ANGEL DILLARD,

Defendant.

CIVIL ACTION

No. 6:11-cv-1098-JTM-KGG

MOTION OF THE UNITED STATES OF AMERICA TO DISMISS DEFENDANT'S COUNTERCLAIMS PURSUANT TO FEDERAL RULES OF CIVIL PROCEDURE 12(b)(1) AND 12(b)(6)

Pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure, the United States moves to dismiss Defendant's counterclaims for lack of subject matter jurisdiction and failure to state a cause of action.

In support hereof, the United States incorporates herein the attached memorandum of law.

Respectfully submitted,

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UNITED STATES OF AMERICA,	:	CIVIL ACTION
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Plaintiff,	:	
	:	
v.	:	
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ANGEL DILLARD,	:	No. 6:11-cv-1098-JTM-KGG
	:	
Defendant.	:	

CERTIFICATE OF SERVICE

I hereby certify that on May 1, 2012, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF, which will provide notice of such filing to all registered parties.

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MEMORANDUM IN SUPPORT OF THE UNITED STATES' MOTION TO DISMISS DEFENDANT'S COUNTERCLAIMS

The United States of America, pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure, moves to dismiss Defendant's counterclaims for lack of subject matter jurisdiction and failure to state a cause of action. Defendant has asserted, first, that by bringing this lawsuit the United States has interfered with her access to a religious institution in violation of the Freedom of Access to Clinic Entrances Act ("FACE"), 18 U.S.C. § 248; second, that this lawsuit violates her rights under the First Amendment because her church is within the 250-foot exclusion zone sought by the United States as relief in this case; and third, that the filing of this case violates, for unexplained reasons, the Fourth, Fifth, and Fourteenth Amendments to the United States Constitution and various provisions of the Constitution of the State of Kansas.

Defendant has not provided a valid jurisdictional basis for this Court to hear her claims. Moreover, even if Defendant had pled a proper jurisdictional basis, her counterclaims are without merit and fail to state a cause of action upon which relief can be granted. Therefore, Defendant's counterclaims should be dismissed.

NATURE OF THE CASE

Defendant Angel Dillard sent a sent a letter to Dr. Mila Means, a physician training to provide abortions in Wichita, Kansas. The letter contained threatening statements, including: "Thousands of people are already looking into your background, not just in Wichita, but from all over the US. They will know your habits and routines. They will know where you shop, who your friends are, what you drive, where you live. You will be checking under your car everyday-because maybe today is the day someone places an explosive under it." Am. Compl., ECF No. 19-1. The letter went on to reference Dr. George Tiller, who was murdered by an anti-abortion activist: "Maybe you don't realize the consequences of killing the innocent. If Tiller could speak from hell, he would tell you what a soulless existence you are purposefully considering, all in the name of greed." Id. Defendant's letter associates herself with the threats: "**We** will not let this abomination continue without doing everything **we** can to stop it." Id. (emphasis added). The United States filed this action under FACE to obtain civil remedies to address this threat. Defendant moved to dismiss and the Court denied Defendant's motion to dismiss on December 21, 2011. Mem. and Order, ECF No. 30.

Defendant has now brought counterclaims against the United States. Defendant's claims are not clearly articulated. A generous reading of her pleading suggests that she is claiming that by filing suit against her, the United States has violated her rights under the United States Constitution and the Kansas state constitution, as well as FACE itself. Not only are Defendant's allegations baseless, but they are improperly pled, as they fail to establish that this Court has jurisdiction to hear her claims.

ARGUMENT

1. Defendant has not Pled Sufficient Facts to Support her Counterclaims

Defendant provides no facts that would or could support her counterclaims. In order to survive a Rule 12(b)(6) motion, a claim must contain "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007). A pleading must state facts that are sufficient to "state a claim to relief that is plausible on its face." Id. at 570. "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Ashcroft v. Iqbal, 129 S.Ct. 1937, 1949 (2009). Defendant's counterclaims do not contain the necessary factual content to reasonably infer that the United States violated any of Defendant's rights. In fact, Defendant has not even offered "a formulaic recitation of the elements" of a cause of action. The only fact one can infer from the Defendant's pleading is the fact that the United States has filed a Complaint against the Defendant alleging a violation of FACE. This fact alone does not, in any way, give rise to a cause of action against the United States. Defendant's counterclaims thus fall far short of the pleading standards set forth in Twombly and Iqbal. As such, Defendant's counterclaims cannot survive a Rule 12(b)(6) motion and must be dismissed by this Court.

2. This Court Cannot Properly Consider Defendant's Counterclaims Because Defendant has not Provided the Court with a Basis for Subject Matter Jurisdiction Over the Counterclaims

A. Defendant has not Identified a Valid Waiver of Sovereign Immunity That Would Allow This Court to Consider the Counterclaims.

Even if Defendant's counterclaims were adequately pled, Defendant's counterclaims are not legally sufficient as they fail to identify or allege a valid waiver of sovereign immunity,

without which Defendant has no jurisdictional basis to sue the United States. Under the principle of sovereign immunity, the United States can be sued only where it has expressly consented to such suit by statute. See Fed. Deposit Ins. Corp. v. Meyer, 510 U.S. 471, 475 (1994). Without an applicable statutory waiver of sovereign immunity, a court is without jurisdiction over a suit against the United States. As the Supreme Court has explained, "it is elementary that 'the United States, as a sovereign, is immune from suit save as it consents to be sued, and the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit.'" United States v. Mitchell, 445 U.S. 535, 538 (1980) (ellipses omitted) (quoting United States v. Sherwood, 312 U.S. 584, 586 (1941)). See also Wyoming v. United States, 279 F.3d 1214, 1225 (10th Cir. 2002) ("[s]overeign immunity generally shields the United States, its agencies, and officers acting in their official capacity from suit").

Because a waiver of sovereign immunity is a prerequisite to a court's subject matter jurisdiction, Defendant must identify it in her pleading. See United States v. Bustillos, 31 F.3d 931, 933 (10th Cir. 1994) ("The party seeking to invoke the jurisdiction of a federal court must demonstrate that the case is within the court's jurisdiction."). In fact, failure to identify a valid waiver of sovereign immunity in a claim against the United States constitutes a failure to allege subject matter jurisdiction. See Weaver v. United States, 98 F.3d 518, 520 (10th Cir. 1996) ("[Plaintiff's] pleadings offer no grounds for finding an express waiver of immunity over any of the claims in question and, therefore, no proper grounds for jurisdiction in federal court.").

Here, as best the United States can make out, Defendant claims that the United States, simply by filing a lawsuit against her under FACE, has actually violated FACE, various provisions of the Bill of Rights of the Constitution of the United States, and a number of

provisions of the Bill of Rights of the Constitution of Kansas. Nowhere does Defendant, however, reference any statute that allows her to sue the United States on any of these grounds.

B. The Federal Tort Claims Act is Inapplicable to the Counterclaims Defendant Seeks to Assert.

Defendant purports to assert a cause of action under the Federal Tort Claims Act ("FTCA"), 28 U.S.C. §§ 1346(b)(1); 2671-2680 (2006), for the violation of her Federal and State constitutional rights. This is plainly without merit. The FTCA is a limited waiver of the United States' sovereign immunity for certain kinds of tort claims. Importantly, the Act vests the district courts with jurisdiction over FTCA suits only to the extent the claimant seeks damages "for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant *in accordance with the law of the place where the act or omission occurred*." 28 U.S.C. 1346(b)(1) (emphasis added). The Supreme Court has "consistently held that § 1346(b)[(1)]'s reference to 'law of the place' means law of the State – the source of substantive liability under the FTCA." Fed. Deposit Ins. Corp. v. Meyer, 510 U.S. 471, 478 (1994) (citations omitted). And "[b]y definition, federal law, not state law, provides the source of liability for a claim alleging the deprivation of a federal constitutional right." Id. Consequently, Defendant's supposed federal constitutional claims are not cognizable under the FTCA. "[T]he United States simply has not rendered itself liable under § 1346(b) for constitutional tort claims." Id.

Defendant's invocation of the Kansas Bill of Rights fares no better. State constitutional provisions cannot qualify as "law of the place" for FTCA purposes. See Franklin Sav. Corp. v. United States, 180 F.3d 1124, 1139 (10th Cir. 1999) ("The FTCA's purpose, by contrast, is to

remove sovereign immunity as a bar to compensating people hurt by federal employees' garden-variety common-law torts" (citations omitted)).

In addition, Defendant's FTCA counterclaim fails because it is well established that government decisions to enforce the law and to initiate and prosecute legal proceedings are ones well within, and protected from liability by, the FTCA's "discretionary function" exception, 28 U.S.C. § 2680(a). See, e.g., Johnson v. United States Dep't of Interior, 949 F.2d 332, 340 (10th Cir. 1992); Liverman v. Bush, 213 Fed. Appx. 675, 677 n.1 (10th Cir. 2007) ("the executive authority to investigate and prosecute illegal activity 'has long been regarded as a classic discretionary function' in Federal Tort Claims Act case law" (citations omitted)).

Because the FTCA does not provide a valid jurisdictional basis for Defendant's FACE and state constitutional claims, those claims must fail, as there is no other basis on which Defendant can assert those causes of action against the United States.

C. Neither the FACE Statute, nor any Other Statutes Defendant Refers to, Provide a Basis for Defendant to Sue the United States.

Defendant cites FACE itself, but that statute does not contain any waiver of the United State's sovereign immunity, and therefore the United States has not consented to suit under FACE. Defendant also cites 28 U.S.C. §§ 1331 and 2201-02, but none of those statutes establish this Court's jurisdiction over a claim against the United States. 28 U.S.C. § 1331 establishes federal question jurisdiction, but it contains no waiver of sovereign immunity. Delgado v. Gonzales, 428 F.3d 916, 919 (10th Cir. 2005) ("28 U.S.C. § 1331 grants the district courts original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States, but does not waive the government's sovereign immunity. Consequently, district court jurisdiction cannot be based on § 1331 unless some other statute waives sovereign

immunity") (quotation and citation omitted). Similarly, 28 U.S.C. §§ 2201-02 allow for declaratory judgments; they do not confer jurisdiction, nor do they contain a waiver of sovereign immunity. Amalgamated Sugar Co. v. Bergland, 664 F.2d 818, 822 (10th Cir. 1981) ("It is settled that 28 U.S.C. § 2201 does not itself confer jurisdiction on a federal court where none otherwise exists.").

D. A Malicious Prosecution Claim Would Not be Ripe at this Time.

At their essence, Defendant's counterclaims seem to imply some sort of malicious prosecution by the United States. But even if Defendant had pled malicious prosecution, such a claim would be improper, for that cause of action requires, among other things, termination of the suit in Defendant's favor. Thus, a malicious prosecution claim can never arise as a counterclaim to the underlying suit, because it never accrues until the underlying suit is resolved.

3. Defendant has Failed to State Claims Upon Which Relief Can be Granted

The only allegations Defendant makes that this Court could theoretically have jurisdiction over are certain of her federal constitutional claims, but she does not invoke any statute that allows her to sue the United States for such alleged violations. Certainly the Fourteenth Amendment is inapplicable, in any event, because "[a]ctions of the Federal Government and its officers are beyond the purview of the [Fourteenth] Amendment." D.C. v. Carter, 409 U.S. 418, 424 (1973). As for Defendant's other federal constitutional counterclaims, they are improperly pled, because Defendant has not referenced a statute that waives the United States' sovereign immunity for such suits. Nevertheless, the United States here acknowledges that there is a statute – 5 U.S.C. § 702 – that could possibly provide, in certain circumstances, a waiver for declaratory and injunctive relief only. Even if Defendant had pled 5 U.S.C. § 702

here, and her claims were therefore not subject to dismissal on jurisdictional grounds, they would be baseless and must still fail, for Defendant has not stated claims upon which relief can be granted.

A. FACE

Defendant alleges that the United States, by filing suit against her under FACE, has itself violated two provisions of that very Act. First, Defendant claims that the United States has violated 18 U.S.C. § 248(d)(1), which states: "Nothing in this section shall be construed to prohibit any expressive conduct (including peaceful picketing or other peaceful demonstration) protected from legal prohibition by the First Amendment to the Constitution." This section is merely a rule of construction – a tool for interpreting the operative text, not a stand-alone provisions giving rise to a cause of action. This claim must fail.

Next, Defendant alleges that the United States has violated 18 U.S.C. § 248(a)(2) by seeking to enforce 18 U.S.C. § 248(a)(1). This allegation defies logic. 18 U.S.C. § 248(a)(2) prohibits, through "force or threat of force or by physical obstruction," the intentional injury, intimidation, or interference with, or attempts to do the same to, "any person lawfully exercising or seeking to exercise the First Amendment right of religious freedom at a place of religious worship." Here, the United States has merely sought injunctive relief pursuant to 18 U.S.C. § 248(c)(2)(B), and the Court will award or deny the requested relief based on the merits of the claim. Defendant has not pled – and cannot so plead - that the United States has used force against, made threats of force to, or physically obstructed Defendant in any way. This claim must fail.

Defendant not only fails to state a claim under FACE, but also requests relief that cannot be granted. Defendant "seeks punitive damages" against the United States, Def.'s Am. Answer,

14 at ¶ 3. ECF No. 46, which are barred by sovereign immunity. See Kasprik v. United States, 87 F.3d 462, 465 (11th Cir. 1996) ("The United States cannot be sued for punitive damages unless Congress explicitly authorizes such liability.") (citation omitted).

B. First Amendment

Defendant further claims that by seeking to enforce FACE, the United States has violated her "First Amendment rights of free expression, freedom of religion and religious expression, and freedom of association." Def.'s Am. Answer, 14 at ¶ 4. ECF No. 46. This claim, too, is without merit. Presumably, Defendant's claim concerns the United States' proposed remedy. But merely filing a lawsuit that seeks injunctive relief does not substantially burden a defendant's ability to exercise her religion, even if the relief sought in the lawsuit might conceivably do so. Before any of Defendant's First Amendment rights could even conceivably be burdened, the United States will have to prevail in this lawsuit and the Court will have to order the specific remedy sought by the United States. The Court, of course, may impose a remedy that differs from the exact remedy sought, so Defendant's claim is too attenuated and premature at this juncture.

Furthermore, to the extent Defendant's claim is that the United States has violated her First Amendment rights by seeking to hold her liable for threatening force against Dr. Means, that claim cannot possibly stand. Conduct that violates FACE is neither protected free speech nor free exercise of religion. See Planned Parenthood of Columbia/Williamette, Inc. v. Am. Coalition of Life Activists, 290 F.3d 1058, 1077 (9th Cir. 2002) ("a threatening statement that violates FACE is unprotected under the First Amendment"); United States v. Bird, 124 F.3d 667, 683 (5th Cir. 1997) ("[b]y its terms, [FACE] prohibits only specified uses of 'force,' 'threat[s] of force,' and 'physical obstruction'; none of which are protected by the First

Amendment") (citations omitted).

Any alleged "chilling effect" on Defendant's First Amendment rights arise from Defendant's own decision to engage in the conduct that forms the basis for the United States' suit – conduct that crosses the line between protected and proscribed speech. See Adult Video Ass'n v. United States Dep't of Justice, 71 F.3d 563, 568 (6th Cir. 1995) ("Individuals who choose to conduct their affairs along the boundaries of the criminal law will necessarily incur some risks concerning the legality of their conduct") (citing Polykoff v. Collins, 816 F.2d 1326, 1340 (9th Cir. 1987) ("Whatever chill may arise from Arizona's [criminal obscenity statute] is attributable to the state's legitimate deterrent goal . . . . Those who conduct their affairs close to the boundary of proscribed activity necessarily incur some risks.")).

To the extent Defendant's reference to a "chilling effect" on her First Amendment rights relates to the fact that Defendant might attend a church within the requested buffer zone sought by the government, that is a question of remedy, and thus not properly the basis for a counterclaim. If Defendant is found liable, the Court will, of course, craft an appropriate remedy, and may take into account any evidence of Defendant's church-going, should such activity be relevant.

C. Other Federal and State Constitutional Claims

In addition to her FACE and First Amendment claims, Defendant lists an assortment of counterclaims in paragraph 4, but provides no context that would allow the United States or the Court to evaluate such claims. Defendant cites supposed violations of the "Fourth, Fifth, and Fourteenth Amendments of the Constitution of the United States." Def.'s Am. Answer, 14 at ¶ 4. ECF No. 46. In addition, Defendant alleges, in this puzzling order, violations of the following sections of the Bill of Rights of the Constitution of the State of Kansas: Section 1

("equal rights"); Section 18 ("justice without delay"); Section 10 ("trial; defense of accused"); Section 15 ("search and seizure"); Section 5 ("trial by jury"); Section 6 ("slavery prohibited"); and Section 9 ("bail"). KAN. CONST. Bill of Rts. §§ 1, 5, 6, 9, 10, 15, 18. Defendant provides no facts that would or could support any of these federal or state constitutional claims, all of which appear wholly unrelated to the circumstances of this case. Therefore, Defendant's counterclaims do not approach the minimum pleading standards necessary to survive a Rule 12(b)(6) motion, and must be dismissed.

CONCLUSION

Defendant has provided this Court with no valid jurisdictional basis that would allow it to hear her counterclaims, and indeed cannot do so, because there is no such basis for most of those counterclaims. Even if Defendant had properly pled subject matter jurisdiction over those few counterclaims that this Court could conceivably consider, those counterclaims must fail, for Defendant has failed to state a claim upon which relief can be granted. For the foregoing reasons, the United States' motion to dismiss Defendant's counterclaims should be granted.

Respectfully submitted,

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