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8 UNITED STATES DISTRICT COURT
9 EASTERN DISTRICT OF WASHINGTON

10 ANDRES SOSA SEGURA,
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12 Plaintiff,
13 v.
14 UNITED STATES OF AMERICA,
15 Defendant.
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Case No. 2:19-CV-00219-SAB
MOTION TO DISMISS
10/31/2019
Without Oral Argument

17 COMES NOW Defendant, United States of America, by and through William
18 D. Hyslop, United States Attorney, and Vanessa R. Waldref and John T. Drake,
19 Assistant United States Attorneys, and moves for partial dismissal of Plaintiff's
20 Complaint pursuant to Federal Rule of Civil Procedure 12(b)(1). This motion is
21 supported by the Declaration of Thomas D. Watts, filed herewith.
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24 **INTRODUCTION**

25 In his third cause of action, Plaintiff alleges that Customs and Border Protection
26 agents violated the Washington Law Against Discrimination (WLAD) when they
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1 detained him for questioning at the Spokane Intermodal Center. Plaintiff seeks to
2 hold the United States vicariously liable for that alleged wrong under the Federal Tort
3 Claims Act.

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5 This claim must be dismissed for two independent reasons. First, the United
6 States has not waived sovereign immunity for state civil rights torts under the FTCA.
7 Accordingly, the Court lacks subject matter jurisdiction over the claim. Second, even
8 if the Court could theoretically exercise jurisdiction over the claim, jurisdiction is still
9 lacking because Plaintiff fails to state a claim for relief under the WLAD. Because the
10 United States does not own, operate or exercise control over the Spokane Intermodal
11 Center, the United States cannot be liable under the WLAD as a matter of law. The
12 Court should dismiss this claim for lack of subject matter jurisdiction.
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15 **FACTUAL BACKGROUND**

16 **A. Plaintiff's Allegations**

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18 Plaintiff alleges that he was unlawfully detained by two CBP agents at the
19 Spokane Intermodal Center in July 2017. ECF No. 1 at ¶ 1. Plaintiff contends that he
20 was singled out for questioning about his immigration status based upon his Latino
21 appearance. ECF No. 1 at ¶ 1. Plaintiff alleges that the CBP agents lacked reasonable
22 suspicion or probable cause to initiate the questioning, and to subsequently detain him
23 pending further investigation of his immigration status. ECF No. 1 at ¶ 2.
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1 Plaintiff asserts three claims against the United States under the Federal Tort
2 Claims Act (FTCA): (1) false arrest; (2) false imprisonment; and (3) a “state civil
3 rights tort.” ECF No. 1 at ¶¶ 52-76. With regard to the “state civil rights tort,”
4 Plaintiff’s claim is that the United States is liable for discrimination in a place of
5 public accommodation under the Washington Law Against Discrimination (WLAD),
6 Chapter 49.60 RCW. ECF No. 1 at ¶¶ 67-69.
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8 Plaintiff has not asserted claims against the CBP agents individually.
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10 **B. Spokane Intermodal Center**

11 The Spokane Intermodal Center is not a federal facility. Watts Decl. ¶ 4. The
12 federal government does not own, operate or exercise control over the facility in any
13 respect. Watts Decl. ¶ 4. To the best of the United States understanding, the Spokane
14 Intermodal Center is owned by the City of Spokane. Watts Decl. ¶ 5. The facility is
15 leased to various tenants, including Greyhound Lines, Inc. (Greyhound). Watts Decl.
16 ¶ 5.
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18 The CBP agents referenced in Plaintiff’s Complaint have no affiliation with the
19 City of Spokane or Greyhound. Watts Decl. ¶¶ 6-7. The agents were present at the
20 Spokane Intermodal Center performing routine transportation checks as employees of
21 the federal government. Watts Decl. ¶ 7. The area in which the agents approached
22 Plaintiff was open to the general public. Watts Decl. ¶ 7.
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LAW & ARGUMENT

A. Rule 12(b)(1) Dismissal Standard

A motion to dismiss under Federal Rule of Civil Procedure 12(b)(1) is addressed to the court's subject matter jurisdiction. A Rule 12(b)(1) motion may be classified as either facial, in which case the court's inquiry is limited to the allegations in the complaint, or factual, in which case the court may look beyond the complaint and consider extrinsic evidence. *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004). The Court may consider declarations or other evidence to resolve factual questions bearing on the jurisdictional issue without converting the motion into one for summary judgment. *Robinson v. United States*, 586 F.3d 683, 685 (9th Cir. 2009). In either a facial or factual challenge, the burden of proof rests with the party asserting jurisdiction. *Prescott v. United States*, 973 F.2d 696, 701 (9th Cir. 1992).

B. Subject Matter Jurisdiction Under FTCA

The United States is immune from suit except in circumstances where it has waived sovereign immunity. *Blackburn v. United States*, 100 F.3d 1426, 1429 (9th Cir. 1996). A waiver of sovereign immunity must be "unequivocally expressed" in a statute. *F.A.A. v. Cooper*, 566 U.S. 284, 290 (2012). A court cannot exercise subject matter jurisdiction unless sovereign immunity has been waived. *DaVinci Aircraft, Inc. v. United States*, 926 F.3d 1117, 1127 (9th Cir. 2019). If sovereign immunity has not been waived, the claim must be dismissed for lack of subject matter jurisdiction

1 under Rule 12(b)(1). *F.D.I.C. v. Meyer*, 510 U.S. 471, 475 (1994); *Villegas v. United*
2 *States*, 926 F. Supp. 2d 1185, 1195 (E.D. Wash. 2013).

3 The FTCA is a limited waiver of the United States’ sovereign immunity. The
4 statute waives immunity “under circumstances where the United States, if a private
5 person, would be liable to the claimant in accordance with the law of the place where
6 the act or omission occurred.” 28 U.S.C. § 1346(b)(1). The “law of the place” where
7 the act or omission occurred refers to state law. *Meyer*, 510 U.S. at 478. Thus, the
8 scope of the United States’ liability—and, correspondingly, its waiver of sovereign
9 immunity—is “determined by reference to state law.” *Molzof v. United States*, 502
10 U.S. 301, 305 (1992); *see also Schwarzer v. United States*, 974 F.2d 1118, 1122 (9th
11 Cir. 1992) (courts “look to the law of the state in which the government official
12 committed the tort to determine the scope of sovereign immunity”); *Jachetta v. United*
13 *States*, 653 F.3d 898, 904 (9th Cir. 2011) (sovereign immunity only waived when
14 government would be liable under state law).

15 Because the FTCA’s waiver of sovereign immunity is limited to situations in
16 which the United States would be liable under state law, one of the central questions
17 on a Rule 12(b)(1) motion is whether the plaintiff has stated a viable claim for relief
18 under state law. *Bolt v. United States*, 509 F.3d 1028, 1031 (9th Cir. 2007). As the
19 Seventh Circuit has explained,
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21 Because the FTCA incorporates the substantive law of the state where
22 the tortious act or omission occurred, a plaintiff must state a claim that
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1 is actionable under the substantive law in the state where the act or
2 omission occurred. Therefore, if there is no cause of action under state
3 law, the district court is without jurisdiction.

4 *Midwest Knitting Mills, Inc. v. United States*, 950 F.2d 1295, 1297 (7th Cir. 1991);
5 *Bolt*, 509 F.3d at 1031.

6 As discussed below, the Court lacks subject matter jurisdiction over Plaintiff's
7 WLAD-based claim for two independent reasons: (1) the United States has not waived
8 sovereign immunity for state civil rights torts under the FTCA; and (2) the claim fails
9 as a matter of law on the facts alleged because the United States does not own, operate
10 or exercise control over place of public accommodation in which the discrimination
11 allegedly occurred.
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14 **C. The United States has not waived sovereign immunity for state civil rights**
15 **torts under the FTCA.**

16 Plaintiff's third FTCA claim is predicated on an alleged violation of the
17 WLAD. As relevant here, the WLAD prohibits discrimination in places of public
18 accommodation on the basis of race, color, national origin, and other protected
19 characteristics. ECF No. 1 at ¶¶ 67-69 (citing RCW 49.60.030).
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21 This claim should be dismissed for lack of jurisdiction because the United
22 States has not waived sovereign immunity for state civil rights torts under the FTCA.
23 The jurisdictional analysis begins and ends with *Delta Savings Bank v. United States*,
24 265 F.3d 1017 (9th Cir. 2001). The plaintiff in that case brought FTCA claims against
25 the United States for race discrimination. *Id.* at 1019-20. The claims were predicated
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1 on alleged violations of two federal civil rights statutes, 42 U.S.C. §§ 1985 and 1986.
2 *Id.* at 1020. Applying longstanding Supreme Court precedent, the Ninth Circuit first
3 held that the claims were not viable to the extent the plaintiff was relying on violations
4 of federal law. *Id.* at 1024 (citing *F.D.I.C. v. Meyer*, 510 U.S. 471, 475-79 (1994)).
5

6 The Court then proceeded to consider whether the plaintiff could rely on a *state*
7 civil rights statute, the California Unruh Civil Rights Act (Unruh Act), as the basis for
8 his FTCA claims. *Id.* at 1025. The Court held that the claims were not viable under
9 that statute either. *Id.* at 1025. As relevant here, the Court explained that state anti-
10 discrimination laws—and more particularly, the provisions of such laws that prohibit
11 discrimination in places of public accommodation—regulate *businesses that serve the*
12 *general public.* *Id.* Because the United States did not stand in a proprietor-customer
13 relationship with the plaintiff, the Court concluded that plaintiff could not state a
14 cause of action against the United States. Thus, the plaintiff failed to meet its burden
15 of establishing jurisdiction because the FTCA did not provide a waiver of sovereign
16 immunity. *Id.*
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21 *Delta Savings* is directly on point. Like the Unruh Act, the WLAD broadly
22 prohibits discrimination in places of public accommodation. Here, as in *Delta*
23 *Savings*, Plaintiff cannot bring claims under the WLAD because the United States
24 does not stand in a proprietor-customer relationship with the Plaintiff. Therefore,
25 Plaintiff fails to establish a cause of action under the WLAD and fails to meet his
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1 burden for establishing jurisdiction under the FTCA’s limited waiver of sovereign
2 immunity.

3 The FTCA does not waive sovereign immunity for state civil rights torts. The
4 Ninth Circuit has expressly held that such claims are not actionable under the FTCA.¹
5 At least two district courts in the Western District of Washington have similarly
6 concluded that the FTCA does not waive sovereign immunity for claims asserted
7 under the WLAD. *See Candelaria v. United States*, Case No. 13-CV-5898-BHS,
8 2014 WL 4352111, at *3 (W.D. Wash. Sept. 2, 2014) (“The United States has not
9 waived its sovereign immunity for whistleblowing claims brought under state law,
10 such as the WLAD. . . . The Court therefore does not have jurisdiction under the
11 WLAD to hear Candelaria’s state law claims, and grants the Government’s motion to
12 dismiss these claims.”); *Akmal v. United States.*, Case No. 12-CV-1499-RSL, 2013
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18 ¹ Plaintiff’s complaint cites *Xue Lu v. Powell*, 621 F.3d 944 (9th Cir. 2010), for the
19 proposition that the Ninth Circuit has “recognized” state civil rights torts as a basis for
20 FTCA liability. Compl. ¶ 70, ECF No. 1 at 13. Plaintiff’s reliance on *Xue Lu* is
21 misplaced. Contrary to Plaintiff’s insinuation, *Xue Lu* does not address whether the
22 United States has waived sovereign immunity for state civil rights torts. The narrow
23 holding of the case was that the plaintiff’s allegations were sufficient to state a claim
24 for relief under the Unruh Act. *Id.* at 950.
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1 WL 3406256, at *3 (W.D. Wash. July 8, 2013) (“Because the Government has not
2 consented to be sued under the WLAD, the Court lacks subject matter jurisdiction
3 over Plaintiff’s WLAD claims.”). This Court should follow suit and dismiss
4 Plaintiff’s third FTCA claim for lack of subject matter jurisdiction.
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6 **D. Plaintiff’s WLAD claim fails as a matter of law because the United States**
7 **does not own, operate or exercise control over the place of public**
8 **accommodation in which the discrimination allegedly occurred.**

9 As outlined above, Plaintiff’s third cause of action is predicated on an alleged
10 violation of the WLAD. Plaintiff alleges that he was deprived of the right to “the full
11 enjoyment of any of the accommodations, advantages, facilities, or privileges of any
12 place of public resort, accommodation, assemblage, or amusement,” as prohibited by
13 RCW 49.60.030(1)(b), when CBP agents detained him for questioning at the Spokane
14 Intermodal Center. Compl. ¶ 68, ECF No. 1 at 13.
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16
17 This claim fails as a matter of law on the facts alleged. Under the WLAD, a
18 claim for discrimination in a place of public accommodation can only be asserted
19 *against the place of public accommodation*. There is no cause of action against third
20 parties who, like the CBP agents referenced in Plaintiff’s complaint, are not employed
21 by or otherwise affiliated with the place of public accommodation.
22

23 The Court need look no further than the elements of the prima facie case. To
24 prevail on a claim for discrimination in a place of public accommodation, a plaintiff
25 must prove: “(1) that the plaintiff is a member of a protected class; (2) that *the*
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1 *defendant is a place of public accommodation*; (3) that *the defendant* discriminated
2 against the plaintiff, whether directly or indirectly; and (4) that the discrimination
3 occurred ‘because of’ the plaintiff’s status[.]’ *State v. Arlene’s Flowers, Inc.*, 193
4 Wn.2d 469, 501-02 (2019) (emphasis added) (citations omitted). The second and
5 third elements confirm that the claim can only be asserted *against* the place of public
6 accommodation for discrimination *perpetrated by* the place of public accommodation.
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8 *Accord Floeting v. Grp. Health Coop.*, 192 Wn.2d 848, 853 (2019) (plaintiff must
9 prove that (2) the “defendant’s establishment” is a place of public accommodation,
10 and (3) that the defendant failed to treat the plaintiff “in a manner comparable to the
11 treatment it provides to persons outside [the protected] class”).
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14 The text of the WLAD itself is also instructive. The public accommodation
15 provision on which Plaintiff relies guarantees the right to “full enjoyment” of any
16 place of “public resort, accommodation, assemblage, or amusement.” RCW
17 49.60.030(1)(b). The term “full enjoyment” is defined as follows:
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19 “Full enjoyment of” includes the right to purchase any service,
20 commodity, or article of personal property offered or sold on, or by,
21 any establishment to the public, and the admission of any person to
22 accommodations, advantages, facilities, or privileges of any place of
23 public resort, accommodation, assemblage, or amusement, without acts
24 directly or indirectly causing persons of any particular race, creed,
25 color, sex, sexual orientation, national origin, or with any sensory,
26 mental, or physical disability, or the use of a trained dog guide or
27 service animal by a person with a disability, *to be treated as not
welcome, accepted, desired, or solicited.*

27 RCW 49.60.040(14) (emphasis added).

1 The essence of “full enjoyment” under this definition is the right to visit a place
2 of public accommodation without being treated as “not welcome, accepted, desired, or
3 solicited.” RCW 49.60.040(14). The duty to respect that right—*i.e.*, to refrain from
4 engaging in discrimination—falls singularly on the place of public accommodation
5 and its employees. *See Patrice v. Murphy*, 43 F. Supp. 2d 1156, 1162 (W.D. Wash.
6 1999) (WLAD’s public accommodation provision “outlaw[s] discrimination by those
7 who make money serving the masses”); WAC 162-26-070 (listing unfair practices “in
8 the operation of” a place of public accommodation). Nothing in the statute purports to
9 require independent third parties to ensure that everyone is treated as welcome,
10 accepted, desired and solicited in places of public accommodation.
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14 The Washington courts’ treatment of the statute further underscores the point.
15 Those courts have consistently treated the WLAD’s public accommodation provision
16 as a protection against discrimination by businesses that open their doors to the public.
17 *See, e.g., Arlene’s Flowers*, 193 Wn.2d at 503-505 (affirming judgment against flower
18 shop owner for refusing to provide floral arrangements for same-sex wedding);
19 *Floeting*, 192 Wn.2d at 852-53 (describing right to “full enjoyment” of a place of
20 public accommodation as “the right to purchase any service or commodity” sold by
21 the place of public accommodation without being discriminated against); *Evergreen*
22 *Sch. Dist. No. 114 v. Wash. State Human Rights Comm’n*, 39 Wn. App. 763, 775
23 (1985) (intent of public accommodation provision is to prevent “operators and owners
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1 of businesses catering to the general public” from discriminating against their
2 patrons).

3 The CBP agents who engaged in the alleged discrimination were not employees
4 or agents of the Spokane Intermodal Center, and the United States does not own,
5 operate or exercise control over the Spokane Intermodal Center. Accordingly, there is
6 no basis for holding the United States liable under the WLAD as a matter of law. The
7 Court should dismiss this claim with prejudice.
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9

10 **CONCLUSION**

11 For the reasons set forth above, Defendant respectfully requests that Plaintiff’s
12 third cause of action be dismissed for lack of subject matter jurisdiction pursuant to
13 Federal Rule of Civil Procedure 12(b)(1).
14

15 DATED this 9th day of September, 2019.
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18 WILLIAM D. HYSLOP
19 United States Attorney

20 /s/John T. Drake

21 John T. Drake
22 Vanessa R. Waldref
23 Assistant United States Attorneys
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CERTIFICATE OF SERVICE

I hereby certify that on September 9, 2019, I caused to be delivered via the method listed below the document to which this Certificate of Service is attached (plus any exhibits and/or attachments) to the following:

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