UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES—GENERAL

Case No. CV 19-10076-MWF (AGRx) **Date: October 22, 2020**
Title: Kathryn Spletstoser v. United States of America

Present: The Honorable MICHAEL W. FITZGERALD, U.S. District Judge

Deputy Clerk:	Court Reporter:
Rita Sanchez	Not Reported
Attorneys Present for Plaintiff:	**Attorneys Present for Defendant:**
None Present	None Present

Proceedings (In Chambers): ORDER DENYING MOTION TO DISMISS FOR LACK OF JURISDICTION [40]; DENYING MOTION TO CHANGE VENUE TO DISTRICT OF NEBRASKA [41]

Before the Court are two motions:

The first is Defendant United States of America's Motion to Dismiss (the "Motion to Dismiss"), filed on August 24, 2020. (Docket No. 40). On September 14, 2020, Plaintiff Kathryn Spletstoser filed an Opposition. (Docket No. 43). On September 28, 2020, Defendant filed a Reply. (Docket No. 46).

The second is Defendant's Motion Change Venue to District of Nebraska (the "Motion to Transfer"), filed on August 24, 2020. (Docket No. 41). On September 14, 2020, Plaintiff filed an Opposition. (Docket No. 42). On September 28, 2020, Defendant filed a Reply. (Docket No. 47).

The Court has read and considered the papers filed in connection with the motions and held a telephonic hearing on October 19, 2020, pursuant to General Order 20-09 arising from the COVID-19 pandemic.

For the reasons discussed below, the Motion to Dismiss is **DENIED**. Plaintiff is not bound by the allegations in her original complaint. Therefore, neither the *Feres* doctrine nor the FTCA's "intentional tort" exception bars Plaintiff's claims.

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The Motion to Transfer Venue is **DENIED** because this action could not have been brought in the District of Nebraska.

I. BACKGROUND

On November 25, 2019, Plaintiff Kathryn Spletstoser commenced this action against Defendant General John E. Hyten. (*See generally* Complaint (Docket No. 1)).

On July 23, 2020, the Court allowed the United States of America to be substituted for Defendant General Hyten and granted Defendant's Motion to Dismiss Plaintiff's Complaint with leave to amend. (*See* Order Re: Motion to Dismiss Plaintiff's Complaint and Motion to Transfer Venue (the "July 23, 2020 Order") at 1-2 (Docket No. 38)). Plaintiff filed her First Amended Complaint ("FAC") on July 30, 2020. (Docket No. 39).

Both the Complaint and the FAC are relevant to the Court's analysis. Therefore, the Court sets out the allegations in both complaints below.

A. The Original Complaint

The Complaint contained the following allegations:

Plaintiff is a Colonel with the United States Army. (Complaint ¶ 9). General Hyten was the United States Strategic Command ("STRATCOM") Commander from approximately November 3, 2016, to September 26, 2019. (*Id.* ¶ 10). General Hyten is sued in his personal capacity. (*Id.*).

Plaintiff has served in the United States Army since 1989, where she began as an Airborne Parachute Rigger as part of the United States Army Reserve. (*Id.* ¶ 13). She was elected to serve on active duty as Regular Army Officer upon receiving her Commission as a Second Lieutenant in 1992, and she eventually served four combat deployments to Afghanistan in 2002 and 2005-2006, and Iraq in 2004 and 2006-2007. (*Id.* ¶ 14). Plaintiff ascended the ranks of the United States Army, was promoted to the

rank of Major in 2003, and was promoted to the rank of Colonel in 2014. (*Id.* ¶¶ 16, 21).

Plaintiff was assigned to STRATCOM in May 2016, where she was diverted to serve as Director of the Commander's Action Group ("CAG") under Admiral Cecil Haney, who was then serving as Commander. (*Id.* ¶ 23). Prior to the events in this Complaint, Plaintiff had an unblemished record. (*Id.* ¶ 32).

General Hyten became STRATCOM Commander on or about November 3, 2016, and retained Plaintiff as his CAG Director, based on a direct recommendation from Admiral Haney. (*Id.* ¶ 26). In or around November 2016, based on Admiral Haney's recommendation, Plaintiff began to report directly to General Hyten as his CAG Director. (*Id.* ¶ 29). Plaintiff served in this Director position until General Hyten directed MG Karbler to relieve Plaintiff from this position in retaliation for opposing General Hyten's repeated sexual advancements and assaults of Plaintiff. (*Id.* ¶ 30).

A few months after Plaintiff began serving under General Hyten, commencing in or around January 2017, he began to subject Plaintiff to unwanted sexual advances. (*Id.* ¶ 34). On or around January 23, 2017, during a temporary duty assignment in Palo Alto, California, General Hyten dismissed the rest of the team after a meeting in his hotel room, but requested that Plaintiff remain in the hotel room with him. (*Id.* ¶ 35). When Plaintiff began to leave after the discussion, General Hyten unexpectedly grabbed her hand and put it on his crotch. (*Id.*). Feeling shocked and confused, Plaintiff immediately left General Hyten's hotel room. (*Id.* ¶ 36).

On or around May 18, 2017, while in Monterey, California, Plaintiff was with her coworkers and received a text message from General Hyten asking her to come to his hotel room to go over work issues. (*Id.* ¶ 38). However, when Plaintiff arrived, she saw that General Hyten was half undressed and he attempted to kiss Plaintiff and pulled her into him forcefully by her arms. (*Id.*). Plaintiff told him that this was inappropriate. (*Id.*).

On or about June 21, 2017, in Washington, D.C., General Hyten again lured Plaintiff to his hotel room after hours under a false claim that there was work to be done. (*Id.* ¶ 39). While there, he grabbed Plaintiff across the breast, turned her towards him, and began to kiss her on the lips, while putting his hands on her buttocks. (*Id.*). Plaintiff pushed General Hyten back, informed him that his comments and actions were wrong, and left his room. (*Id.* ¶ 39).

On or about August 23, 2017, while in Seoul, South Korea for a Pacific Command trip, General Hyten attempted to hug Plaintiff while rehearsing for his upcoming press conference, making contact with her breasts. (*Id.* ¶ 40). Afraid that General Hyten was going to kiss her, Plaintiff pushed him away and made clear this conduct was not part of her job and was unwelcome. (*Id.*).

In or around August 2017, Plaintiff was in her STRATCOM office when General Hyten entered and said he wanted to talk. (*Id.* ¶ 41). General Hyten closed the door and laid on the couch. (*Id.*). Plaintiff told him that was not acceptable and asked that he sit in the chair instead. (*Id.*). General Hyten moved to the chair and put his hand on his penis. (*Id.*). Plaintiff told him to stop and asked what he wanted to discuss. (*Id.*). These types of incidents occurred approximately three more times. (*Id.*).

On or about September 25, 2017, while in London, United Kingdom, after Plaintiff was finished with work for the day and was off duty, General Hyten texted Plaintiff and asked that she stop by his hotel room. (*Id.* ¶ 42). In his hotel room, General Hyten told Plaintiff that he wanted to discuss the day's meetings and events. (*Id.*). However, during this interaction, General Hyten grabbed Plaintiff's hand and asked for her to "stay a while" in his hotel room. (*Id.*). Plaintiff informed General Hyten that he could not keep doing this and that she was uncomfortable. (*Id.*).

In or around October 2017, General Hyten came into Plaintiff's office, shut the door, and stood behind her. (*Id.* ¶ 43). General Hyten placed both hands on Plaintiff's shoulders and kissed her on the neck. (*Id.*). He proceeded to tell Plaintiff that she was "the best" and kissed her on the head. (*Id.*). Plaintiff again asked him to stop. (*Id.*).

On or about November 19, 2017, in Halifax, Nova Scotia, General Hyten asked Plaintiff to meet him in his hotel room before they left for the airport. (*Id.* ¶ 44). Once there, General Hyten hugged Plaintiff. (*Id.*). Plaintiff again told him to stop touching her. (*Id.*).

On or about December 2, 2017, General Hyten's advances escalated. (*Id.* ¶ 45). General Hyten and Plaintiff were in Simi Valley, California for the Reagan National Defense Forum. (*Id.*). That evening, at approximately 9:45-10:45 p.m., General Hyten came to Plaintiff's hotel room under the pretense of work-related purposes. (*Id.* ¶ 46). General Hyten told Plaintiff that he needed to talk about a few things and asked her to sit down with him on her bed. (*Id.* ¶ 47). After she did so, however, General Hyten reached for Plaintiff's hand, which caused her to stand up. (*Id.*). General Hyten also stood up, pulled Plaintiff so tightly that she could not move, and began to kiss her on the lips and grab her buttocks. (*Id.*). He then told Plaintiff something to the effect of "I want to make love to you." (*Id.*). Plaintiff told him that was not going to happen. (*Id.*). General Hyten then began to rub his penis against her and ejaculated in his shorts. (*Id.*). After this incident, Plaintiff declined to spend any off-duty time with him. (*Id.* ¶ 52).

Prior to Plaintiff's repeated opposition to the sexual advancements and assaults, General Hyten gave Plaintiff extraordinary reviews. (*Id.* ¶ 49). However, General Hyten became upset by Plaintiff's repeated refusals to engage with him and undertook to retaliate against her. (*Id.* ¶ 52). For example, Plaintiff alleges that General Hyten targeted Plaintiff for investigation, and on or about January 10, 2018, General Hyten told her that he was initiating an Army Regulation ("AR") 15-6 investigation against her regarding her leadership style. (*Id.* ¶¶ 53-58). Plaintiff alleges that the officials conducting the investigation were biased against her and ignored exculpatory evidence. (*Id.* ¶¶ 59-72). Even though the AR 15-6 results showed no evidence that Plaintiff violated any punitive regulations or article of the Uniform Code of Military Justice ("UCMJ"), Plaintiff was relieved from her position as CAG Director, allegedly at General Hyten's request. (*Id.* ¶¶ 73-74). In March 2018, as part of his retaliatory

campaign, General Hyten forced Plaintiff to retire from the military. (*Id.* ¶¶ 75-76). Plaintiff did retire, but rescinded it in May 2018. (*Id.* ¶ 77).

In an announcement on or about April 9, 2019, Plaintiff learned that General Hyten was nominated to become the Vice Chairman of the Joint Chiefs of Staff. (*Id.* ¶ 80). On or about April 12, 2019, Plaintiff disclosed General Hyten's numerous sexual assaults to the Air Force Office of Special Investigation ("AFOSI" or "OSI"). (*Id.* ¶ 81). On or about April 15, 2019, AFOSI began investigating Plaintiff's allegations. (*Id.* ¶ 84). The OSI arranged a wiretap pretext phone call, and due to General Hyten's comments during the call, a Military Protective Order ("MPO") was issued, ordering General Hyten not to have any contact with Plaintiff for six months. (*Id.* ¶¶ 85-88). The OSI notified Plaintiff and her special victims counsel that the criminal investigation was completed on or about June 7, 2019. (*Id.* ¶ 89). The OSI Report of Investigation ("ROI") was eventually issued. (*See id.* ¶ 102).

Upon information and belief, Plaintiff was not supported by the military with respect to her claims of sexual assault and she alleges that the process was biased against victims. (*Id.* ¶¶ 90-116). As one example, Plaintiff alleged that General Hyten was tipped off about his interview by the OSI. (*Id.* ¶ 92). Plaintiff further alleged that the OSI investigator conducted inadequate searches and that the ROI mischaracterized certain findings. (*Id.* ¶¶ 102-104).

Following the OSI investigation, the Department of Defense ("DOD") and the Air Force did not punish or dismiss General Hyten, and no action was taken against him. (*Id.* ¶ 117). On or about June 13, 2019, Plaintiff put in a memorandum for all reviewing authorities requesting a personal appearance to discuss her allegations. (*Id.* ¶ 120). Her requests were denied. (*Id.* ¶ 121).

On or about September 20, 2019, the MPO against General Hyten was lifted even though the MPO was set to expire on November 2019 and Plaintiff's Special Victims' Counsel planned to ask for its renewal. (*Id.* ¶ 122). On or about September 26, 2019, General Hyten was confirmed as the Vice Chairman of the Joint Chiefs of

Staff and is currently the second most Senior Officer in the United States Military. (*Id.* ¶ 123).

Based on the above allegations, Plaintiff alleged seven state law claims for relief against General Hyten: (1) sexual battery, Cal. Civ. Code § 1708.5; (2) assault; (3) gender violence, Cal. Civ. Code § 52.4; (4) intentional infliction of emotional distress; (5) battery; (6) the Ralph Act, Cal. Civ. Code § 51.7; and (7) Tom Banes Civil Rights Act, Cal. Civ. Code § 52.1. (*Id.* ¶¶ 140-223).

B. The FAC

The FAC focuses solely on the alleged events that occurred on December 2, 2017, at the Hyatt Regency Westlake Hotel ("The Hyatt Hotel"), and contains the following allegations:

STRATCOM's stated mission is to deter strategic attack and employ forces, as directed, to guarantee the security of our nation and our allies. (FAC ¶ 24). STRATCOM is a combatant command, meaning that it operates at the strategic level, also sometimes called the "Policy Level." (*Id.* ¶ 25). The primary actors at this level are Congress, the Executive Branch led by civilians, ambassadors, and ultimately the National Command Authority (POTUS). (*Id.* ¶ 26). At this level, the military is directly subordinate to civilian oversight and interfaces with civilian agencies, interagency organizations, and the international community. (*Id.* ¶ 27). Upon information and belief, military service members comprise approximately thirty percent of the workforce at STRATCOM Headquarters. (*Id.* ¶ 29).

In May of 2016, Plaintiff was assigned to STRATCOM, as the Director of the Commander's Action Group ("CAG") under Admiral Cecil Hanley. (*Id.* ¶ 18). Plaintiff was chosen for this role based on her record of exemplary leadership, education, and accomplishment. (*Id.* ¶ 19). On or about November 3, 2016, General Hyten became the STRATCOM Commander and kept Plaintiff on as his CAG Director, per the recommendation of Admiral Hanley. (*Id.* ¶ 19). Notwithstanding assignment to STRATCOM, Plaintiff was a member with the United States Army. (*Id.*

¶ 21). Notwithstanding assignment to STRATCOM, General Hyten was a member of the United States Air Force. (*Id.* ¶ 22).

Although General Hyten maintained the rank of General Officer, which is superior to the rank of Colonel, he was not Plaintiff's supervisor for disciplinary purposes. (*Id.* ¶ 23).

In 2017, STRATCOM was invited to attend the Reagan National Defense Forum ("RNDF" or "Event"), which was held in Simi Valley, California, from December 1-2, 2017. (*Id.* ¶ 30). The RNDF is hosted and run by the Reagan Presidential Library, a civilian organization. (*Id.* ¶ 31). The RNDF is a bipartisan annual event held at the Ronald Reagan Presidential Library in Simi Valley, California, where key stakeholders come together to address issues pertaining to national defense and peacetime efforts. (*Id.* at 32). The military had no input as to whom was invited to attend. (*Id.* ¶ 33).

The RNDF is financed and paid for by sponsors which are primarily industries in the private sector. (*Id.* ¶ 34). Representative sponsors of the event included, but were not limited to, Boeing, General Electric, General Dynamics, Global Foundries, Deloitte, Lockheed Martin, Northrop Grumman, and Rolls-Royce. (*Id.* ¶ 35).

Plaintiff attended the RNDF in Simi Valley, California from December 1-2, 2017. (*Id.* ¶ 36).

Upon information and belief, those present for the RNDF included current and former senior civilian government officials, and business and media leaders, with a comparatively low percentage of military officials in attendance. (*Id.* ¶ 37).

Security at the Event was maintained by private security personnel, contracted directly employed by the Reagan National Library. (*Id.* ¶ 39). In the event of emergency, conference attendees were to contact the security personnel or dial 911 to summon local law enforcement in Simi Valley, CA. (*Id.* ¶ 40). Conference attendees were not segregated on the basis of their military status. (*Id.* ¶ 41). During the event,

Plaintiff mingled and had discussions with civilian attendees, and attended a guided tour of the Reagan Presidential Library. (*Id.* ¶ 42).

During the conference, Plaintiff moved around freely to interact and network with civilian attendees. (*Id.* ¶ 44). Plaintiff sat through receptions, panels, a luncheon hosted by Fox News host, Bret Baier, an awards ceremony, and a meeting with a United States Senator. (*Id.* ¶ 45).

After the Event was over, Plaintiff returned to her hotel room at the Hyatt Hotel. (*Id.* ¶ 46). The Hyatt Regency is a company owned by Hyatt Hotels Corporation. (*Id.* ¶ 48). Upon information and belief, the majority of guests who stayed at the Hyatt Regency Westlake from December 1-2, 2017, were civilians, including civilian attendees of the RNDF, couples, and families. (*Id.* ¶ 51). During Plaintiff's stay, the hotel was equally open to members of the military and non-military guests, including equal access to entrances, hallways, elevators, private rooms, and facilities. (*Id.* ¶ 52). General Hyten's hotel room was directly across the hall from the Plaintiff's room. (*Id.* ¶ 53).

The military neither managed nor dictated the day-to-day operations of the hotel. (*Id.* ¶ 54). Similarly, the military was not responsible for policing the hotel or responding to emergencies during Plaintiff's stay. (*Id.* ¶ 55).

There was nothing unique about the room Plaintiff stayed in as it related to her status as a service member. (*Id.* ¶ 57). Access to Plaintiff's room and the hallway leading to her room was unrestricted, and her room could be accessed just as easily as the rooms of any other civilian guest staying at the hotel during the same time period. (*Id.* ¶ 58). Housekeeping had access to both Plaintiff's and General Hyten's room. (*Id.* ¶ 60). Upon information and belief, Plaintiff's room was identical or nearly identical, to every other civilian's room staying at the hotel during the same time period. (*Id.* ¶ 61).

On or about December 2, 2017, late in the evening and after the conference had concluded, General Hyten knocked on Plaintiff's hotel room door. (*Id.* ¶ 62). At the

time General Hyten approached Plaintiff's hotel room, she was retiring for the evening, applying face cream and readying herself for bed. (*Id.* ¶ 63). She was not expecting any visitors. (*Id.* ¶ 64). Upon opening the door, General Hyten entered Plaintiff's private hotel room, wearing workout clothes, not a military uniform. (*Id.* ¶ 65). General Hyten did not "order" the Plaintiff to open the door, nor did General Hyten "order" the Plaintiff to grant him access to her room. (*Id.* ¶¶ 66-67). Plaintiff could have declined General Hyten's entry into her hotel room had she elected to do so. (*Id.* ¶ 68).

Upon entering Plaintiff's room General Hyten did not discuss or address any military matters. (*Id.* ¶ 69). Instead, General Hyten grabbed Plaintiff so closely and tightly she was unable to move. (*Id.* ¶ 70). He began to kiss her on the lips and grabbed her buttocks. (*Id.*). General Hyten is approximately 6 foot 4 in stature. (*Id.* ¶ 71). He is a man of considerable strength in comparison to Plaintiff, who is 5 foot 7. (*Id.* ¶ 72).

While restraining Plaintiff, General Hyten uttered something to the effect of, "I want to make love to you." (*Id.* ¶ 73). Plaintiff stated "that is not going to happen" or words to that effect. (*Id.* ¶ 74). However, General Hyten restrained Plaintiff, grabbed her buttocks, kissed her against her will and rubbed his penis against her until he ejaculated. (*Id.* ¶ 75).

Plaintiff alleges that General Hyten's conduct toward the Plaintiff was not an activity performed incident to his military service. (*Id.* ¶ 85).

General Hyten was not subjected to military discipline for the alleged nonconsensual acts taken against the Plaintiff. (*Id.* ¶ 86).

As a direct and proximate result of General Hyten's intentional and reckless conduct, Plaintiff alleges she has sustained and will continue to sustain injury, including severe emotional distress, physical and mental health problems, and legal expenses, all of which have caused permanent injury in an amount to be determined at

trial. (*Id.* ¶ 87). None of the injuries sustained by Plaintiff's occurred in an activity incident to her military service. (*Id.* ¶ 88).

The FAC omits any reference to other tortious conduct. And the FAC omits any allegations of damage to Plaintiff's military career she may have suffered as a result of General Hyten's alleged misconduct.

Based solely on the alleged misconduct occurring on December 2, 2017, the FAC alleges seven state law claims for relief: (1) sexual battery, Cal. Civ. Code § 1708.5; (2) assault; (3) gender violence, Cal. Civ. Code § 52.4; (4) intentional infliction of emotional distress; (5) battery; (6) the Ralph Act, Cal. Civ. Code § 51.7; and (7) the Tom Banes Civil Rights Act, Cal. Civ. Code § 52.1. (*Id.* ¶¶ 89-148).

II. MOTION TO DISMISS

Defendant argues that this action should be dismissed because it is barred by the *Feres* doctrine. (Motion to Dismiss at 5-20). Defendant contends that, in ruling on the *Feres* doctrine issue, the Court should consider Plaintiff's previously-pled allegations alongside the allegations in the FAC. (Motion to Dismiss at 5-10). Alternatively, Defendant argues that it is not liable for intentional torts under the FTCA. (*Id.* at 21-22).

A. Legal Standard

"A motion to dismiss pursuant to the *Feres* doctrine is properly treated as a Fed. R. Civ. P. 12(b)(1) motion to dismiss for lack of subject matter jurisdiction." *Dreier v. United States*, 106 F.3d 844, 847 (9th Cir. 1996), *as amended* (Feb. 4, 1997). "A Rule 12(b)(1) jurisdictional attack may be facial or factual." *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004). "In a facial attack, the challenger asserts that the allegations contained in a complaint are insufficient on their face to invoke federal jurisdiction." *Id.* "By contrast, in a factual attack, the challenger disputes the truth of the allegations that, by themselves, would otherwise invoke federal jurisdiction." *Id.*

Here, Defendant's jurisdictional attack is facial because Defendant argues that the allegations are insufficient on their face to invoke federal jurisdiction. (*See* Motion to Dismiss at 9-10, 15). Facial attacks are treated "as any other motion to dismiss on the pleadings for lack of jurisdiction," and therefore, the Court "determine[s] whether the complaint alleges sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Terenkian v. Republic of Iraq*, 694 F.3d 1122, 1131 (9th Cir. 2012) (internal quotation marks and citation omitted).

B. Previously-Pled Allegations

Defendant argues that the Court may consider Plaintiff's previously-pled allegations in ruling on the *Feres* Doctrine issue. (Motion to Dismiss at 5).

Jackson v. Loews Hotels, Inc., EDCV-18-827-DMG (JCx), 2019 WL 6721637 (C.D. Cal. July 24, 2019) is instructive. In *Jackson*, the plaintiff booked a hotel room with Loews Hotels, Inc. ("Loews"). 2019 WL 2619656, at *1. Loews experienced a data breach, whereby an intruder obtained credit card and personal information for some reservations. *Id.* The plaintiff brought state common law and statutory claims against Loews, alleging that the data breach placed her at an imminent risk of identity theft. *Id.* The Court granted Loews's Rule 12(b)(1) motion to dismiss because the plaintiff failed to demonstrate a substantial risk of future harm because her complaint alleged that she had closed or modified her financial accounts after the hacking, thereby neutralizing any risk of future fraud arising from the theft of her financial information. *Id.* at *2-4.

On amendment, the plaintiff "simply omit[ted] from her [amended complaint] any allegations that she closed or modified her financial accounts after the data breach." *Jackson*, 2019 WL 6721637, at *2. The court determined that "Plaintiff's decision to remove her previous allegations about closing or modifying her credit card or bank accounts does not simply erase those allegations from the case," but noted that the case law in the Ninth Circuit on this issue is complicated and potentially irreconcilable:

> The Ninth Circuit has held that, in the context of granting leave to amend an original complaint, "leave to amend should be liberally granted, [but] the amended complaint may only allege other facts consistent with the challenged pleading." *Reddy v. Litton Indus., Inc.*, 912 F.2d 291, 296–97 (9th Cir. 1990). It later held, without overturning *Reddy*, that "there is nothing in the Federal Rules of Civil Procedure to prevent a party from filing successive pleadings that make inconsistent or even contradictory allegations." *PAE Gov't Servs., Inc. v. MPRI, Inc.*, 514 F.3d 856, 860 (9th Cir. 2007). The circuit court has not resolved this apparent inconsistency, but it has recognized (in non-binding opinions) that *Reddy* and *PAE* may be irreconcilable. *Compare Shirley v. Univ. of Idaho, Coll. of Law*, 800 F.3d 1193, 1194 (9th Cir. 2015) (Kozinski, J., concurring) *with id* at 1194-95 (Canby, J. concurring).

Id. The court determined that the plaintiff's attempt to avoid dismissal simply by omitting the allegations that defeated her case made it unnecessary to reconcile the Ninth Circuit's conflicting decisions. *Id.* Specifically, the court explained that "the SAC's allegations do not ***contradict*** the FAC's allegations — the SAC merely ***omits*** previously-pled material information that harms Plaintiff's case. These allegations are therefore more appropriately characterized as judicial admissions that Plaintiff has not cured." *Id.* (emphasis in original) (internal citations omitted).

Ultimately, the court dismissed the action, holding that the plaintiff failed to "overcome her prior admission that she closed or modified her accounts to mitigate the impact of the data breach," and she consequently failed to cure the deficiencies exposed in her prior complaint regarding her lack of standing to sue for information exposed by the data breach. *Id.*

The Court agrees with Defendant that in certain circumstances, the Court may consider a plaintiff's previously-pled allegations in ruling on a motion to dismiss. *See e.g., Jackson*, 2019 WL 6721637, at *2-4 (considering previously-pled allegations

where the plaintiff obscured information relevant to the adjudication of her claims by omitting information indicating that she had "neutralized any future threat of credit or debit card fraud by modifying or closing her accounts"); *Smith v. Sabre Corp.*, CV 17-05149-SVW (AFMx) (C.D. Cal. Jan. 23, 2018) at 4 nn.1 & 2 ("[T]he Court is concerned with Benson's deletion of his previous affirmative admission about having not experienced any fraudulent charges. The allegation does not simply disappear because it does not appear in this version of the case. . . . Just like Benson, Smith cannot selectively delete allegations from a prior complaint to avoid dismissal of an amended complaint."); *In re YogaWorks, Inc. Sec. Litig.*, CV 18-10696-CJC-(SKx), 2020 WL 2549290, at *3 (C.D. Cal. Apr. 23, 2020) ("Plaintiff cannot avoid application of the statute of limitations by simply deleting from its amended complaint allegations evidencing that it discovered or should have discovered the factual basis of its securities claim more than one year before it filed the complaint.") (internal quotation marks and citation omitted).

Here, Plaintiff's FAC omits the previously-pled allegation that General Hyten came to Plaintiff's hotel room on December 2, 2017, "under the pretense of work-related purposes." (Complaint ¶ 45). This information is relevant to adjudicating Plaintiff's claims in the FAC because Plaintiff seeks to recover for the alleged sexual assault that took place that night, and the omission of this allegation ***obscures information*** that is critical to this court's *Feres* doctrine analysis. *See Jackson*, 2019 WL 6721637, at *2-4; *In re YogaWorks*, 2020 WL 2549290, at *3.

Plaintiff also omits several allegations that are ***not*** related to the harm she sustained at the Hyatt Hotel on December 2, 2017. Specifically, Plaintiff omits the following allegations:

- General Hyten allegedly sexually harassed and assaulted Colonel Spletstoser "repeatedly" on "multiple occasions" "for several months" from January 2017 to December 2017, Complaint ¶¶ 1, 34, 37, 51;

- Colonel Spletstoser was allegedly subjected to this behavior on at least nine separate occasions, in multiple locations, including five alleged incidents that occurred when she was working in her STRATCOM office in Nebraska, *id.* ¶¶ 41-43;

- For refusing General Hyten's "sexual advances and assaults," General Hyten allegedly caused Colonel Spletstoser to receive negative performance appraisals and targeted her for an AR 15-6 investigation, which resulted in Colonel Spletstoser receiving an official reprimand, being relieved of her duties as CAG Director, and being forced to retire from the military, id. ¶¶ 49, 52-60, 62, 64-71, 73-77.

The omission of these allegations does not amount to obscuring information necessary to properly adjudicate the claims in the FAC, in contrast to the omissions in *Jackson, Smith*, and *In re Yogaworks.* Here, the FAC presents seven claims relating to the alleged sexual assault that occurred at the Hyatt Hotel on December 2, 2017. The omitted allegations referenced above do not relate to the alleged sexual assault at the Hyatt Hotel; they relate solely to other allegedly tortious conduct by General Hyten.

A pattern of tortious conduct, part of which takes place on-base and part of which takes place off-base, is plainly relevant to the *Feres* doctrine analysis where a plaintiff seeks to recover for the ***entire pattern of tortious conduct***. *See Stauber v. Cline*, 837 F.2d 395, 396 (9th Cir. 1988) (Plaintiffs' claims are barred by the *Feres* doctrine where they sought to recover for harassment that took place "over a five-year period . . . both on- and off-base, during regular work-duty hours and after hours."); *Becker v. Pena*, No. 95-36172, 1997 WL 90570, at *1 (9th Cir. Feb. 28, 1997) ("[v]irtually all of the harassing conduct occurred during working hours on the Coast Guard base").

However, Plaintiff here seeks to recover for only one alleged instance of sexual assault that took place off-base and off-duty. Defendant cites to no authority for the proposition that the *Feres* doctrine requires courts to consider possible patterns of

military-related tortious conduct for which a plaintiff does not seek to recover. The Court therefore determines that the potential existence of this other tortious conduct is not relevant to the *Feres* doctrine analysis here.

Accordingly, the Court chooses to incorporate into the FAC Plaintiff's previously-pled allegation that General Hyten came to her hotel room on December 2, 2017, "under the pretense of work-related purposes," (Complaint ¶ 45), but declines to incorporate Plaintiff's previously-pled allegations relating to other allegedly tortious conduct by General Hyten.

C. The *Feres* Doctrine

1. Background

The Federal Tort Claims Act ("FTCA") waives the federal government's sovereign immunity in tort actions: "The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages." 28 U.S.C. § 2674. "However, this blanket waiver contained an exception, by which the Government withheld consent to be sued for '[a]ny claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war.'" *Costo v. United States*, 248 F.3d 863, 866 (9th Cir. 2001) (quoting 28 U.S.C. § 2680(j)). Two years after the passage of the FTCA, the Supreme Court broadened this exception in *Feres v. United States*, holding that "the Government is not liable under the Federal Tort Claims Act for injuries to servicemen ***where the injuries arise out of or are in the course of activity incident to service***." *Id.* (quoting *Feres v. United States*, 340 U.S. 135, 146 (1950)) (emphasis added). "This broad exception has been labeled 'the *Feres* doctrine.'" *Id.*

Although *Feres* itself involved claims against the Government under the FTCA, the Ninth Circuit has "extended *Feres* to suits between individual members of the military, recognizing an intramilitary immunity from suits based on injuries sustained incident to service." *Bowen v. Oistead*, 125 F.3d 800, 804 (9th Cir. 1997) (citing *Lutz*

v. Secretary of the Air Force, 944 F.2d 1477, 1480-81 (9th Cir. 1991)) (internal quotation marks omitted). Moreover, "courts applying the *Feres* doctrine have given a broad reach to *Feres*' 'incident to service' test and have barred recovery by members of the armed services for injuries that at first blush may not have appeared to be closely related to their military service or status." *Dreier*, 106 F.3d at 848. "[P]ractically any suit that 'implicates the military judgments and decisions' . . . runs the risk of colliding with *Feres*." *Persons v. United States*, 925 F.2d 292, 295 (9th Cir. 1991) (quoting *United States v. Johnson*, 481 U.S. 681, 691 (1987)).

The Supreme Court has enunciated three policy rationales for the *Feres* doctrine: (1) the distinctively federal nature of the relationship between the Government and the armed forces requires a uniform system of compensation for soldiers stationed around the country and around the world; (2) a generous compensation scheme for soldiers (the Veterans' Benefits Act) serves as an ample alternative to tort recovery; and (3) permitting military personnel to sue the armed forces would endanger discipline. *See Johnson*, 481 U.S. at 684 n.2. The third rationale — the interest in maintaining military discipline is considered "'the most persuasive justification' for the [*Feres*] doctrine." *Schoenfeld v. Quamme*, 492 F.3d 1016, 1019 (9th Cir. 2007) (quoting *Dreier*, 106 F.3d at 849.

"These policy justifications and the doctrine itself have been heavily criticized by commentators and by [the Ninth Circuit]." *Costo*, 248 F.3d at 866 (collecting cases). For example, "[t]he [first] goal of uniformity has been criticized as textually unsupported . . . and illogical." *Id.* (citing *Johnson*, 481 U.S. at 695-96 (Scalia, J., dissenting)). "The second rationale for the bar to tort suits — the existence of the Veterans' Benefits Act — has been criticized as incoherent, given the fact that in certain cases, soldiers have been permitted to recover under ***both*** the VBA and the FTCA." *Id.* (citing *Johnson*, 481 U.S. at 697-98 (Scalia, J., dissenting)) (emphasis in original). The third policy rationale — the danger to discipline — has been identified as the best explanation for *Feres*, but even this rationale "has not . . . escaped criticism." *Id.* "If the danger to discipline is inherent in soldiers suing their commanding officers, then ***no*** such suit should be permitted, regardless of whether the

'injuries arise out of or are in the course of activity incident to service.'" *Id.* at 867 (emphasis in original). "But *Feres* itself imposes this limitation." *Id.*

"Perhaps because of these criticisms, circuit courts — including [the Ninth Circuit] — have shied away from attempts to apply these policy rationales." *Costo*, 248 F.3d at 867. Instead, the Ninth Circuit has outlined four factors in determining whether a particular suit should be barred by the *Feres* doctrine:

> 1) the place where the negligent act occurred;
> 2) the duty status of the plaintiff when the negligent act occurred;
> 3) the benefits accruing to the plaintiff because of his [or her] status as a service member; and
> 4) the nature of the plaintiff's activities at the time the allegedly unlawful act occurred.

Id. (citation omitted); *see also Dreier*, 106 F.3d at 848 ("In cases where the existence of a *Feres* bar is not clear, we have looked to [the above] four factors to determine whether an activity is incident to military service").

"Despite this framework, [the Ninth Circuit's] *Feres* jurisprudence is something of a muddle." *Schoenfeld,* 492 F.3d at 1019. "First, none of these factors is dispositive," and courts focus on "the totality of the circumstances." *Costo*, 248 F.3d at 867; *see also United States v. Shearer*, 473 U.S. 52, 57 (1985) ("The *Feres* doctrine cannot be reduced to a few bright-line rules; each case must be examined in light of the statute as it has been construed in *Feres* and subsequent cases."). "Second, [the Ninth Circuit has] reached the unhappy conclusion that the cases applying the *Feres* doctrine are irreconcilable." *Id.* Therefore, "comparison of fact patterns to outcomes in cases that have applied the *Feres* doctrine is the most appropriate way to resolve *Feres* doctrine cases." *Id.* (internal quotation marks and citation omitted).

With these competing considerations, the Court again must apply the *Feres* doctrine to the allegations here.

2. Relevant Ninth Circuit Decisions

The parties argue at length about whether the injuries were or were not "incident to service" and articulate different standards to make this determination. (*See* Motion to Dismiss at 10-20; Motion to Dismiss Opposition at 6-19; Motion to Dismiss Reply at 11-17). In particular, Defendant cites numerous cases, both in and out of the Ninth Circuit, where courts applied the *Feres* doctrine to tort claims by service members arising out of rape, sexual assault, or other forms of harassment or abuse. (*See* Motion to Dismiss at 10-15). The Court agrees with Defendant that the nature of the claims does not remove them from the scope of the *Feres* doctrine.

The Court provides a summary of the three Ninth Circuit decisions that appear to be most factually analogous:

In *Stauber*, the Ninth Circuit held that the *Feres* doctrine barred a state law tort action between civilian technicians working for Alaska Army National Guard. 837 F.2d at 396. There, the plaintiff sued three co-workers for intentional infliction of emotional distress and libel, alleging that the "defendants, over a five-year period, continuously harassed him, both on- and off-base, during regular work-duty hours and after hours." *Id.* The defendants allegedly engaged in numerous harassing and intimidating conduct, including "the use of sirens and horns and other noisemaking devices, all directed at plaintiff; forcing plaintiff to leave his work area door open so as not to be able to shut the noise out . . . ; physically pushing plaintiff; threatening to make negative reports about plaintiff to plaintiff's superiors; . . . and representing to plaintiff that eventually defendants would succeed in getting plaintiff fired from his position as a civilian technician." *Id.* at 396, n.2. All three defendants were superior in rank to the plaintiff, although only one had direct authority over him. *Id.* at 396.

The Ninth Circuit held that the action was properly dismissed under the *Feres* doctrine because "the conduct that occurred at the maintenance shop [could] not give rise to actionable tort claims without impinging on military authority and calling into question matters which are exclusively the subject of military remedies." *Id.* at 399. The court reasoned that "[the parties'] conduct was subject to military discipline, and

indeed, plaintiff requested that his superiors step in to improve the situation." *Id.* at 400. "Although [the plaintiff] alleged that some of the harassment occurred off-base, the district court concluded that his claims arose from conduct in the workplace," which the Ninth Circuit did not find clearly erroneous. *Id.* The Ninth Circuit further held that "[t]o examine the relationship between on- and off-base events in this case, beyond determining that the conduct involved was incident to service, would result in an impermissible intrusion upon military matters." *Id.*

Next, in *Lutz*, the Ninth Circuit once again examined whether a plaintiff's claims regarding harassment were barred by the *Feres* doctrine. 944 F.2d at 1478. There, a former major in the United States Air Force alleged that three of her subordinates (technical sergeants) broke into her office and took her personal papers, including a sealed letter and notes. *Id.* at 1479. Apparently, the letter and notes could be read to imply that the major was involved in a lesbian relationship with her civilian secretary. *Id.* The defendants made copies of the notes and showed them to various squadron personnel allegedly to ruin the major's reputation and career. *Id.* In fact, the major's superiors subsequently took a series of actions, which effectively destroyed her career in the military, ultimately compelling her to resign. *Id.* The major filed a complaint in federal court, asserting *Bivens* claims and common law claims under California state law against various individual defendants. *Id.* The individual defendants moved to dismiss based on the *Feres* doctrine, but the district court denied the motion. *Id.* at 1479-80. The Ninth Circuit agreed with the district court, determining that "the individual acts were not 'incident to military service' and thus not protected by the *Feres* doctrine." *Id.* at 1487, 1480.

The Ninth Circuit started with the recognition that "not every action by one member of the armed services against another implicates military decision making, relates to the military mission, or is incident to service." *Id.* at 1484. The Ninth Circuit also rejected the defendants' focus on the major's "status as an active duty military officer, on the fact that [the major] and the sergeants were all 'subject to military discipline,' and on the fact that the damages she allege[d] was to her career ***in the military***." *Id.* at 1485 (emphasis in original). The court determined such criteria to

be overbroad because "every lawsuit by one active-duty member of the military against another would clearly implicate the first two factors, and any suit involving an injury impairing the plaintiff's ability to continue working would involve damage to his or her 'military' career." *Id.* The Ninth Circuit also held that courts should not "examine[] the possible effect of the suit on military discipline in a particularized, fact-based manner," because the Supreme Court in *United States v. Stanley*, 483 U.S. 669, 680 (1987), rejected inquiry into whether "in the particular case the disciplinary structure of the military would be affected." *Id.*

Instead, the Ninth Circuit held that "courts should answer the broader question of whether the injury arises out of the activity incident to service." *Id.* at 1485. The court then examined the defendants' actions and concluded that "[it], like the district court, [could] not fathom how they [could] be construed to be 'activities incident to service.'" *Id.* at 1486. The defendants argued that their actions were "incident to service" because it was their duty to report any violations of Air Force regulations by their superior officers to the appropriate authorities, but the Ninth Circuit held that "it [was] not conceivable that this duty required defendants to remove personal documents from their commander's desk after working hours and distribute them to other Air Force personnel." *Id.*

The Ninth Circuit further distinguished *Lutz* from *Stauber* based on two factual differences. First, "[u]nlike the present case, the defendants in *Stauber* were all superior in rank to the plaintiff and one was his direct supervisor." *Id.* "While this [was] not controlling, it inform[ed] [the court's] consideration." *Id.* In a footnote, the Ninth Circuit "recognize[d] the potential injustice in suggesting that a superior officer may be able to invoke *Feres* to avoid liability for harassment of a subordinate while the subordinate may not be able to do the same." *Id.* at 1486, n.12. "Nonetheless, in light of the widely acknowledged practice in the military of superior officers treating subordinates severely and in a manner which many civilians would find harassing, the officer-subordinate relationship may be one factor informing [the court's] consideration of whether the activity was 'incident to military service.'" *Id.*

Additionally, and "[m]ore importantly, the plaintiff in *Stauber* alleged harassing acts which largely took place during working hours and in the process work," and "many of the harassing acts were related to working conditions." *Id.* at 1486-87. The Ninth Circuit explained that "[i]n effect, *Stauber* holds that where it is sufficiently ambiguous whether challenged actions were 'incident to military service,' and the process of disentangling conduct not incident to service from that incident to service would itself work an impermissible intrusion upon military matters, *Feres* must be applied to the whole course of conduct." *Id.* at 1487. "However, where . . . the actions were completely separate from on-the-job activities, the rationale of *Stauber* does not apply." *Id.* Therefore, the court concluded that "[i]ntentional tortious and unconstitutional acts directed by one servicemember against another which further no conceivable military purpose and are not perpetrated during the course of a military activity surely are past the reach of *Feres*." *Id.*

Finally, in an unpublished and brief disposition, the Ninth Circuit held that a Coast Guard service member's claims regarding sexual harassment brought under the FTCA were barred by the *Feres* doctrine. *Becker v. Pena*, No. 95-36172, 1997 WL 90570, at *1 (9th Cir. Feb. 28, 1997). "While the acts of sexual harassment served no military purpose," the Ninth Circuit still concluded that "they were incident to Becker's military service." *Id.* The Ninth Circuit noted that "[v]irtually all of the harassing conduct occurred during working hours on the Coast Guard base," "[the plaintiff's] harassers were predominantly superior in rank and were subject to military discipline for harassing her." *Id.* Therefore, the court concluded that the plaintiff's alleged injuries were incident to her military service and that her claims under the FTCA were barred under the *Feres* doctrine.

3. Application of the *Feres* Doctrine

As a preliminary matter, the Court rejects Defendant's arguments focusing on Plaintiff's previously-pled allegations relating to a pattern of misconduct by General Hyten. (*See* Motion to Dismiss at 15-20). For example, Defendant emphasizes the factual similarities between this case and *Stauber*, but Defendant's reliance on *Stauber* is misplaced in light of the FAC. (Motion at 15-16). The plaintiff in *Stauber* sought to

recover for a pattern of harassment that took place "over a five-year period, . . . both on- and off-base, during regular work-duty hours and after hours." 837 F.2d at 396. Here, Plaintiff brings claims relating to a single instance of sexual misconduct occurring separate and apart from her military service.

As discussed above, the circumstances that would justify considering Plaintiff's previously-pled allegations relating General Hyten's pattern of misconduct are simply not present here: The omissions in the FAC do not obscure information relevant to adjudicating the amended claims. *See e.g., Jackson*, 2019 WL 6721637, at *2-4 (considering previously-pled allegations where the plaintiff obscured information relevant to the adjudication of her claims by omitting information indicating that she had "neutralized any future threat of credit or debit card fraud by modifying or closing her accounts").

At the hearing, Defendant argued, essentially, that ignoring all the allegations in the Complaint would allow Plaintiff to engage in a charade. Defendant ignores that Plaintiff has substantively and severely limited her action. Neither her damages nor, potentially, her ability to prove her claims remains what it was.

Now that the pertinent allegations are determined, the Court focuses on the following considerations enunciated in *Stauber*, *Lutz*, and *Becker*: (1) whether the alleged acts occurred on- or off-base; (2) whether they occurred during working hours and were related to working conditions; (3) whether the defendant was superior in rank to the plaintiff and whether he was subject to military discipline for harassing the plaintiff; and (4) whether the actions could conceivably serve any military purpose.

The first two factors are mixed, but ultimately militate against application of the *Feres* doctrine. Plaintiff alleges that the acts occurred off-base, off-duty, and in a location not subject to military judgment or operating procedures. Specifically, Plaintiff alleges that she was staying at the Hyatt Hotel, a private hotel that was not controlled, operated, or secured by the military. (*See* FAC ¶¶ 47-61). She was attending the Reagan National Defense Forum ("RNDF"), which is run by a civilian organization and funded by sponsors who are primarily industries in the private sector.

(*See* FAC ¶¶ 30-46). Plaintiff alleges that the event was attended by current and former senior civilian government officials, and business and media leaders, and a few military officials. (*See* FAC ¶¶ 37). And Plaintiff alleges she was harassed and assaulted late in the evening while getting ready for bed, by General Hyten in civilian clothes. (*See* FAC ¶¶ 62-75).

Plaintiff was invited to this event because of her assignment to STRATCOM, where military service members make up approximately 30% of the workforce. (*See* FAC ¶ 30). Although this allegation by itself suggests that trip was incidental to Plaintiff's military service, it does not outweigh the other allegations demonstrating that Plaintiff was not on-base or on-duty at the time of the alleged misconduct. Therefore, on-balance, the first two factors militate against application of the *Feres* doctrine.

The third factor considers whether the defendant was superior in rank to the plaintiff and whether he was subject to military discipline for harassing the plaintiff. It is undisputed that General Hyten was superior in rank to Plaintiff, and that he was subject to investigation by the OSI after Plaintiff disclosed the alleged sexual assaults. However, General Hyten was ultimately not subjected to military discipline. (FAC ¶ 86).

The Court agrees with Plaintiff that potential interference with military discipline is not a persuasive factor when no actual military disciplinary action is implicated:

> [T]he prosecution of this action will not impair the functioning of the military justice system. Defendants contend that because the Air Force conducted investigations into the incident underlying this action and decided not to bring charges, that the present suit will undermine Air Force discipline. This argument is not supported by the record in this action. Although there were four separate investigations carried out by the Air Force before plaintiff's superior officer, Colonel Dempsy, made his decision not to take action against defendants[.]

Lutz v. Ivory, No. C87-0679-DLJ, 1989 U.S. Dist. LEXIS 14159, at *7 (N.D. Cal. Aug. 1, 1989)). Nonetheless, the third factor still weighs in favor of applying the *Feres* doctrine because of General's Hyten's superior rank. *Miller v. Newbauer*, 862 F.2d 771, 774 (9th Cir. 1988) ("[C]ivilian courts must hesitate before taking on a suit that would require judicial tampering with the established relationship between military personnel and their superior officers.").

The fourth factor considers whether the actions could conceivably serve any military purpose. Plaintiff previously alleged that General Hyten came to her room at the Hyatt Hotel under the pretense of work-related purposes. Specifically, the Complaint alleged:

> General Hyten came to Plaintiff's hotel room under the ***pretense of work-related purposes***. General Hyten told Plaintiff that he needed to talk about a few things and asked her to sit down with him on her bed. After she did so, however, General Hyten reached for Plaintiff's hand, which caused her to stand up. General Hyten also stood up, pulled Plaintiff so tightly that she could not move, and began to kiss her on the lips and grab her buttocks. He then told Plaintiff something to the effect of "I want to make love to you." Plaintiff told him that was not going to happen. General Hyten then began to rub his penis against her and ejaculated in his shorts.

Complaint ¶¶ 46-47 (emphasis added) (internal citations omitted).

In looking at the both the Complaint and the FAC, the Court determines that the alleged sexual assault cannot conceivably serve any military purpose. Regardless of whether General Hyten came to Plaintiff's hotel room under the pretense of work-related purposes, it is not conceivable that General Hyten's military duties would require him to sexually assault Plaintiff, or that such an assault would advance any conceivable military objective. *Lutz*, 944 F.2d at 1486 ("[W]e echo the district court's conclusion that 'it is not conceivable that this duty required defendants to remove personal documents from their commander's desk after working hours and distribute

them to other Air Force personnel.'") (citation omitted). Therefore, the fourth factor cuts strongly against application of the *Feres* doctrine.

Considering all these factors, the Court determines that Plaintiff's claims do not fall within the *Feres* doctrine. *See id.* at 1487 ("Intentional tortious and unconstitutional acts directed by one servicemember against another which further no conceivable military purpose and are not perpetrated during the course of a military activity surely are past the reach of *Feres*."). Plaintiff seeks to recover for a single instance of alleged sexual assault that occurred while she was off-duty and off-base. The fact that she was allegedly assaulted by a higher-ranking officer is an important factor, but does not, by itself, bring this claim into *Feres* doctrine territory. *See id.* at 1486, n.12. ("[T]he officer-subordinate relationship may be one factor informing [the court's] consideration of whether the activity was 'incident to military service.'").

There is no perfectly analogous case, but many of the cases cited by Defendant are easily distinguishable. For example, *Stauber*, *Becker, Corey*, and *Perez* involved plaintiffs alleging a pattern of misconduct that took place predominately on premises subject to military control and discipline. The persuasive value of these cases is diminished here in light of Plaintiff's singular focus on the alleged assault at the Hyatt Hotel on December 2, 2017. None of the cases cited by Defendant involve a plaintiff seeking to recover for a singular instance of sexual assault that took place while the plaintiff was off-base and off-duty. (*See* Motion at 12 n. 6, 13 n. 7).

The Court finds the Ninth Circuit's reasoning in *Lutz* to be particularly persuasive, and the facts here are even more favorable to Plaintiff than those in *Lutz*. As in *Lutz*, Plaintiff seeks to recover for a single incident of wrongful conduct that served no conceivable military purpose. *Lutz*, 944 F.2d at 1478, 1480 ("the individual acts were not 'incident to military service' and thus not protected by the *Feres* doctrine."). But unlike in *Lutz*, Plaintiff alleges conduct that took place entirely off-base and does not seek to recover for damage to her career in the military. *Id.* at 1479. Therefore, *Lutz* in particular supports this Court's conclusion that Plaintiff's claims are not barred by the *Feres* doctrine.

Accordingly, the Motion to Dismiss is **DENIED** with respect to the *Feres* doctrine issue.

D. FTCA Intentional Tort Exception

Defendant argues that the FTCA's "intentional tort" exception bars government liability here. (*See* Motion to Dismiss at 21 (citing 28 U.S.C. § 2680(h)). The Court disagrees.

The Westfall Act accords federal employees absolute immunity from common law tort claims arising out of "negligent" and "wrongful" acts or omissions of an employee acting "within the scope of his office or employment." 28 U.S.C. § 2679(b)(1). The Act provides that "the principles of respondeat superior of the state in which the alleged tort occurred" applies when analyzing the scope-of-employment issue. *Pelletier v. Fed. Home Loan Bank*, 968 F.2d 865, 876 (9th Cir. 1992).

The Attorney General certified that General Hyten was acting in the scope of his employment. (*See* Docket No. 22-1 at 3). But Plaintiff can rebut a Westfall Certification by demonstrating that the individually-named defendant was not acting within the scope of employment. *See Gutierrez de Martinez v. Lamagno*, 515 U.S. 417, 436-37 (1995) ("The statute is fairly construed to allow petitioners to present to the District Court their objections to the Attorney General's scope-of-employment certification, and we hold that construction the more persuasive one."); *Billings v. United States*, 57 F.3d 797, 800 (9th Cir. 1995) (finding that an employee does not act within scope of employment if employee "substantially deviated from his duties for personal purposes").

The Court agrees with Plaintiff that her factual allegations, if true, rebut the presumption created by the Attorney Generals' Westfall Certification. *See Tate v. United States*, CV 18-3079 PA (PLAx), 2018 U.S. Dist. LEXIS 186667, *8 (C.D. Cal. 2018) ("California courts have rarely held that employees who have engaged in sexual misconduct with third parties acted within the scope of their employment.").

Accordingly, the Motion to Dismiss is **DENIED** with respect to the FTCA's intentional tort exception.

III. MOTION TO TRANSFER VENUE

Defendant argues that this action should be transferred to the District of Nebraska to prevent unnecessary inconvenience. (Venue Motion at 1-3). The Court disagrees.

"For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought . . . ." § 1404(a). However, a motion to transfer should not merely shift the inconvenience from the moving party to the opposing party. *See Decker Coal Co. v. Commonwealth Edison Co.*, 805 F.2d 834, 843 (9th Cir. 1986) (affirming the denial of a transfer because the transfer "would merely shift rather than eliminate the inconvenience").

The moving party has the burden to demonstrate that transfer is appropriate. *Commodity Futures Trading Comm. v. Savage*, 611 F.2d 270, 279 (9th Cir. 1979) (concluding that the moving party "had the burden to justify by particular circumstances that the transferor forum was inappropriate"); *Allstar Mktg. Group, LLC v. Your Store Online, LLC*, 666 F. Supp. 2d 1109, 1131 (C.D. Cal. 2009) ("The burden is on the moving party to establish that a transfer will allow a case to proceed more conveniently and better serve the interests of justice."). The threshold question under § 1404(a) requires the court to determine whether the case could have been brought in the forum to which the transfer is sought." *Roling v. E*Trade Secs., LLC*, 756 F. Supp. 2d 1179, 1184 (N.D. Cal. 2010). Venue is proper in "a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated[.]" 28 U.S.C. § 1391(b).

Defendant argues that venue would have been proper in the District of Nebraska had this case been filed there originally. (*See* Venue Motion at 3). Having determined

that Plaintiff is not bound to the allegations in her Complaint relating to a pattern of sexual misconduct, the Court concludes that this action could not have been brought in the District of Nebraska: Plaintiff seeks to recover for alleged misconduct occurring solely in California. The FAC does not allege that any tortious conduct took place in Nebraska, and neither party resides there.

Accordingly, the Motion to Transfer Venue is **DENIED.**

IV. CONCLUSION

The Motion to Dismiss is **DENIED**. Plaintiff is not bound by the allegations in her original complaint relating to a pattern of sexual misconduct. Therefore, neither the *Feres* doctrine nor the FTCA's intentional tort exception bars Plaintiff's claims.

The Motion to Transfer Venue is **DENIED**. This action could not have been brought in the District of Nebraska.

Defendant shall answer the FAC on or before **November 9, 2020.**

IT IS SO ORDERED.