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IN THE UNITED STATES DISTRICT COURT

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FOR THE DISTRICT OF ARIZONA

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12 Virginia Woodbeck,) No. 07-1235-PHX-RCB

13 Plaintiff,) **O R D E R**

14 vs.)

15 United States of America; ABC)

16 Corporations I-X; Black and)

White Partnerships I-X; and)

17 John Does I-X,)

18 Defendants.)

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21 Currently pending before the court is a motion by defendant,

22 the United States of America, for dismissal of this medical

23 malpractice action. For the reasons set forth below, the court

24 grants this motion.

25 **Background**

26 Plaintiff filed this action in the Superior Court of the

27 State of Arizona, Maricopa County, on September 11, 2006, naming

28 as defendants Lydia G. Ehlenberger, M.D., and John Doe

1 Ehlenberger, wife and husband, as well as Mountain Park Health
2 Center and "ABC Corporations I-X[.]" Notice of Removal (doc. 1),
3 exh. A thereto (doc. 1-4) at 3. The named defendants were
4 "deemed to be employees of the Public Health Service [("PHS")],"
5 United States Department of Health and Human Services, during the
6 relevant time frame. Id. at 3, ¶ 3.

7 PHS employees are covered under the Federal Tort Claims Act
8 ("FTCA") pursuant to the Federally Supported Health Centers
9 Assistance Act of 1995 ("FSHCAA"). See McLaurin v. U.S., 392
10 F.3d 774, 777 (5th Cir. 2004). "[T]he FSHCAA makes the FTCA the
11 exclusive remedy for action against employees of the PHS
12 resulting from the performance of medical . . . or related
13 functions and protects commissioned officers or employees of the
14 [PHS] from being subject to suit while performing medical and
15 similar functions by requiring that such lawsuits be brought
16 against the United States instead." Id. (internal quotation
17 marks and citations omitted). Because the United States
18 certified that the defendants originally named in this action
19 were PHS employees,¹ and thus under the protection of the FTCA,
20 in accordance with 28 U.S.C. § 2679(d)(2) and 42 U.S.C. § 233, it
21 removed this action on June 22, 2007.² At the same time, the
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24 ¹ Not. of Removal (doc. 1) at 2, ¶ 3; see also Memo. in Supp. of U.S.
25 Mot. to Dismiss (doc. 5), attachment 1 thereto (doc. 5-2) at 2, ¶¶ 5 and 6; and
26 exh. 1 thereto.

27 ² Removal was timely despite the more than eight month gap between the
28 filing of the state court action and removal. That is so because "[t]he
unambiguous language of Section 2679(d)(2) requires only that the government
remove 'before trial' a suit in which the PHS has deemed a qualified health care
center employee as a federal employee." McLaurin, 392 F.3d at 778-79 (quoting
28 U.S.C. § 2679(d)(2)). In the present case, the Government removed this action
"before trial" in the state court. Thus, removal was timely.

1 United States moved for substitution as the defendant herein -- a
2 motion which the court granted.

3 Thereafter the United States brought the present motion
4 arguing for dismissal on the ground that, *inter alia*, plaintiff
5 failed to exhaust her administrative remedies as section 2675(a)
6 of the FTCA requires.

7 Discussion

8 The United States is moving for dismissal pursuant to
9 Fed. R. Civ. P. 12(b)(1) for lack of subject matter jurisdiction.
10 It is also seeking dismissal pursuant to Fed. R. Civ. P. 12(b)(6)
11 for failure to state a claim upon which relief may be granted.
12 "Customarily, a federal court must first resolve doubts about its
13 jurisdiction over the subject matter," and so, too, will this
14 court. See Ruhrigas Ag v. Marathon Oil Co., 526 U.S. 574, 578
15 (1999). The court will first address the United States'
16 jurisdiction argument because if the court lacks subject matter
17 jurisdiction, it must dismiss the complaint in its entirety.
18 Arbaugh v. Y & H Corp., 126 S.Ct. 1235, 1244 (2006) (citation
19 omitted). Obviously then, there would be no need to, and indeed
20 the court could not, address the United States' motion to dismiss
21 for failure to state a claim.

22 I. Governing Legal Standard - Fed. R. Civ. P. 12(b)(1)

23 Before turning to the merits, the court notes that the
24 United States filed a "speaking motion," rather than a facial
25 attack, "in that it is attacking jurisdiction with extrinsic
26 evidence." See American Economy Insurance Co. v. Herrera, 2007
27 WL 2696716, at *1, n.1 (S.D.Cal. Sept. 11, 2007) (citing
28 Trentacosta v. Frontier Pac. Aircraft Indus., Inc., 813 F.2d

1 1553, 1558 (9th Cir. 1987)). More specifically, to support its
2 lack of jurisdiction argument, the United States is relying upon
3 the sworn declaration of Richard G. Bergeron, a Senior Attorney
4 in the General Law Division, Office of the General Counsel,
5 Department of Health and Human Services. See Mot. (doc. 5),
6 attachment thereto (doc. 5-2) at 1, ¶ 1. Because that
7 declaration is properly before the court, "the party opposing
8 the motion [*i.e.* plaintiff Woodbeck] must furnish affidavits or
9 other evidence to satisfy [her] burden of establishing subject
10 matter jurisdiction.'" See Quezada v. Bogle, 2007 WL 3335011, at
11 *2 (E.D.Cal. 2007) (quoting Safe Air For Everyone v. Meyer, 373
12 F.3d 1035, 1039 (9th Cir. 2004) (other citation omitted). Thus,
13 given the procedural posture of this motion, "[t]he court may
14 . . . look beyond the allegations of the complaint to decide
15 [this] factual attack on jurisdiction." See id. (citing, *inter*
16 *alia*, Meyer, 373 F.3d at 1039).

17 **II. Administrative Claim Requirement**

18 The FTCA bars claimants from seeking damages against the
19 United States until they first file an administrative claim. 28
20 U.S.C. § 2675(a)(West 2006).³ The purpose of this "procedure is

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22 ³ That statute reads as follows:

23 An action shall not be instituted upon a claim
24 against the United States for money damages for
25 injury or loss of property or personal injury or death
26 caused by the negligent or wrongful act or omission
27 of any employee of the Government while acting within
28 the scope of his office or employment, unless the claimant
shall have first presented the claim to the appropriate
Federal agency and his claims shall have been finally
denied by the agency in writing and sent by certified
or registered mail. The failure of any agency to
make final disposition of a claim within six months
after it is filed shall, at the option of the claimant
any time thereafter, be deemed a final denial of the

1 to encourage administrative settlement of claims against the
2 United States and thereby prevent an unnecessary burdening of the
3 courts." Wright v. United States, 2005 WL 1353869, at *1
4 (D.Idaho 2005) (citing Brady v. United States, 211 F.3d 499, 503
5 (9th Cir. 2000)). As the Supreme Court explained more fully in
6 McNeil v. United States, 508 U.S. 106 (1993):

7 Congress intended to require complete
8 exhaustion of Executive remedies before
9 invocation of the judicial process. Every
10 premature filing of an action under the FTCA
11 imposes some burden on the judicial system
12 and on the Department of Justice which must
assume the defense of such actions. Although
the burden may be slight in an individual
case, the statute governs the processing
of a vast multitude of claims.

13 Id. at 503 (footnote omitted). This administrative claim
14 requirement is "jurisdictional[]" and as such, according to the
15 Ninth Circuit, "must be strictly adhered to[]" by FTCA claimants.
16 Brady, 211 F.3d at 502 (internal quotation marks and citations
17 omitted). Strict adherence to this requirement is necessary
18 because the FTCA "waives sovereign immunity[;]" and "[a]ny such
19 waiver must be strictly construed in favor of the United States."
20 Id. (internal quotation marks and citation omitted).

21 According to attorney Bergeron, a "search of the Claims
22 Branch's database" showed "no record of an administrative tort
23 claim filed by [plaintiff] Virginia Woodbeck or an authorized
24 representative relating to Mountain Park Health Center or Lydia
25 Ehlenberger, M.D." Id. at 2, ¶ 4. Evidently plaintiff

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27 claim for purposes of this section.

28 28 U.S.C. § 2675(a) (West 2006).

1 recognizes her failure to comply with the FTCA's administrative
2 prerequisites and, in turn, her failure to meet her burden on
3 this motion because she rightly concedes that dismissal "is
4 appropriate[.]" See Resp. (doc. 11) at 1. Consequently the
5 court, as it must, grants the United States' motion to dismiss
6 for lack of subject matter pursuant to Fed. R. Civ. P. 12(b)(1).
7 See Jost v. United States Post Office, 2007 WL 1517695, at *1
8 (E.D.Cal. 2007) (where plaintiff "concede[d] he ha[d] not
9 complied with the FTCA[,]. . . court ha[.]d no choice but to
10 dismiss th[e] action as against the United States Post
11 Office[.]"); see also Wright v. United States, 2007 WL 1353869, at
12 *4 (D.Idaho 2005) (dismissing claims against United States
13 pursuant to Rule 12(b)(1) where plaintiffs did not timely present
14 their claims under the FTCA, and thus "they . . . failed to
15 exhaust their administrative remedies and [could] not establish
16 that subject matter jurisdiction [w]as proper[.]").

17 Aware that this failure by plaintiff "can be remedied[,]"⁴
18 plaintiff "requests that the Court grant [her] leave . . . to
19 refile her claim pursuant to the [FTCA], 28 U.S.C. § 2679(B)."
20 Resp. (doc. 11) at 1. There are two flaws in this request. The
21 first is plaintiff's failure to accurately cite to the relevant
22 statute. The FTCA does not include a "§ 2679(B)." It appears
23 that plaintiff intended to rely upon 28 U.S.C. § 2678(5)(B).
24 That statute provides as follows:

25 Whenever an action or proceeding in
26 which the United States is substituted
27 as the party defendant under this subsection

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 ⁴ See Le v United States, 2007 WL 1541752, at *3 n.1 (D.Or. 2007).

1 is dismissed for failure first to present a
2 claim pursuant to section 2675(a) of this title,
3 such a claim shall be deemed to be timely
4 presented under section 2401(b) of this title
5 if - . . .

6 (B) the claim is presented to the appropriate
7 Federal agency within 60 days after dismissal
8 of the civil action.

9 28 U.S.C. § 2679(5)(B) (West 2006).

10 Even assuming that plaintiff had relied upon the correct
11 statute, there is nothing on the face of that statute which gives
12 the court authority to grant her discretion to "refile." Rather
13 it is incumbent upon plaintiff to proceed as she deems
14 appropriate and necessary to protect her interests under the FTCA
15 in light of this dismissal. In light of the foregoing, the court
16 dismisses this action without prejudice. See Marks v. United
17 States, 2007 WL 3087157, at *1 (W.D.Wash. 2007) (dismissing FTCA
18 claims without prejudice where plaintiff had not properly
19 exhausted his administrative remedies under 28 U.S.C. § 2675(a));
20 see also Oeser v. Ashford, 2007 WL 1280584, at *1 (N.D.Cal. 2007)
21 (dismissing FTCA complaint without prejudice to renew, and
22 allowing plaintiff to timely refile in accordance with the
23 requirements of that Act).

24 **III. Fictitious Defendants**

25 In her complaint plaintiff names several fictitious
26 defendants in the caption: "ABC Corporations I-X; Black and White
27 Partnerships I-X; [and] John Does I-X[.]" Co. (doc. 1-4) at 3.
28 The complaint is completely void, however, of any allegations as
to the fictitious partnerships. Thus, the court *sua sponte*
dismisses this action as against those entities.

1 Likewise, the court *sua sponte* dismisses this action as
2 against the remaining fictitious defendants, although it does so
3 for a different reason. "Not surprisingly, none of the[se]
4 [fictitious] defendants were served either before or after
5 removal." See Dugay v. JPMorgan Chase, 2006 WL 3792043, at *5
6 (D.Ariz. 2006). "Indeed it is virtually impossible to serve Doe
7 Defendants because of their anonymity." Id. (internal quotation
8 marks and citation omitted). As this court has previously
9 explained:

10 Generally, the use of anonymous type
11 appellations to identify defendants is not
12 favored . . . In fact, Rule 10(a) of the Federal
13 Rules of Civil Procedure requires the plaintiff
14 to include the names of the parties in the action.
15 . . . By the same token though, the Ninth
16 Circuit has [long] held that where identity is
17 unknown prior to the filing of a complaint, the
18 plaintiff should be given an opportunity through
19 discovery to identify the unknown defendant, unless
20 it is clear that discovery would not uncover
21 the identities, or that the complaint would be
22 dismissed on other grounds.

23 Id. (internal quotation marks and citations omitted). Here,
24 dismissal is appropriate, as discussed above. Thus, "it would be
25 futile to give [plaintiff] the opportunity to identify and serve
26 the unnamed Doe defendants [and fictitious corporations]." See
27 id. Accordingly, the court *sua sponte* dismisses this action as
28 against the John Doe defendants, as well as against the ABC
Corporations.

25 Conclusion

26 For the reasons set forth above,


27 IT IS ORDERED that defendant United States' motion for
28 dismissal pursuant to Fed. R. Civ. P. 12(b)(1) for lack of

1 subject matter jurisdiction is GRANTED without prejudice (doc.
2 4); and

3 IT IS FURTHER ORDERED that plaintiffs' claims against the
4 fictitious defendants are *sua sponte* dismissed without prejudice.

5 DATED this 31st day of January, 2008.

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Robert C. Broomfield
Senior United States District Judge

copies to all counsel of record