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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

| | | |
|-----------------------|---|----------------------------------|
| KEITH MACHART, |) | Case No. 1:10-cv-1080-OWW-JLT |
| |) | |
| Plaintiff, |) | FINDINGS AND RECOMMENDATION |
| |) | DISMISSING FIRST AMENDED |
| vs. |) | COMPLAINT WITHOUT LEAVE TO AMEND |
| |) | |
| CLINICA SIERRA VISTA, |) | |
| |) | (Doc. 4) |
| Defendant. |) | |
| |) | |
| _____ |) | |

I. First Amended Complaint

A. Screening

On June 22, 2010, the Court granted Plaintiff’s motion to proceed in forma pauperis. (Doc. 3) The Court is required to review complaints filed IFP. 28 U.S.C. §1915A(a); 28 U.S.C. 1915(e). The Court must review the complaint and dismiss the action if it is frivolous or malicious, fails to state a claim on which relief may be granted, or seeks monetary relief against a defendant who is immune from such relief. 28 U.S.C. § 1915 (e)(2)(B); see Noll v. Carlson, 809 F. 2d 1446, 1448 (9th Cir. 1987 (citing Franklin v. Murphy, 745 F. 2d 1221, 1228 (9th Cir. 1984)). If the Court determines that the complaint fails to state a claim, leave to amend may be granted to the extent that the deficiencies of the complaint can be cured by amendment. Lopez v.

1 Smith, 203 F.3d 1122, 1127-1128 (9th Cir. 2000) (en banc).

2 **1. Federal Rule of Civil Procedure 8(a)**

3 Federal Rule of Civil Procedure 8(a) requires Plaintiff to provide, “a short and plain
4 statement of the grounds for the court’s jurisdiction, unless the court already has jurisdiction and
5 the claim needs no new jurisdictional support”, “a short and plain statement of the claim showing
6 that the pleader is entitled to relief” allegations outlining the relief sought. Although the Federal
7 Rules of Civil Procedure adopt a flexible pleading policy, a complaint must give fair notice and
8 state the elements of the plaintiff’s claim plainly and succinctly. Jones v. Community
9 Redevelopment Agency, 733 F.2d 646, 649 (9th Cir. 1984).

10 **B. Analysis**

11 **1. Summary of Allegations in Complaint**

12 Plaintiff alleges that he was a patient of defendant, Clinica Sierra Vista (“Clinica”)
13 beginning on June 1, 2007. (Doc. 4 at 1) He attended the clinic several times with symptoms
14 including severely swollen lymph nodes, difficulty swallowing and occasional difficulty in
15 breathing. Id. Employees of Clinica failed to properly diagnose and treat this condition and he
16 was told repeatedly that he had “a virus.” Id. at 1-2. Despite his worsening condition, the
17 Defendants failed to treat Plaintiff or arrange appropriate treatment for him. Id. Although
18 Plaintiff requested a referral to a specialist, employees of Clinica failed to arrange it. (Doc 4 at 2)
19 Finally, in May 2008, Plaintiff’s wife arranged for him to see a specialist through their insurance
20 company. Id. On June 18, 2008, the specialist performed a biopsy and diagnosed Plaintiff as
21 suffering from stage 4A “Squamous Cell Carcinoma.” Id. Plaintiff contends that the delay in
22 treatment by Clinica was below the standard of care, caused him pain and suffering and “possibly
23 permanent injury” and almost cost him his life Id. at 2-3.

24 Plaintiff alleges that he has sued the same defendant in Kern County Superior Court in
25 case number “CV268396DRL” but has now filed this action because the defendant’s attorney
26 told him that this is a “Federal Court matter.” (Doc 4 at 2) Review of the docket of Kern County
27 Superior Court case number S-1500-CV-268396, reveals that Plaintiff has sued Clinica, Arvin

1 Community Health Center and Aurora T. Cole-Reimer PAC, although none of the defendants
2 have filed a responsive pleading as yet.¹

3 Plaintiff alleges that he has filed a federal tort claim and is awaiting response to the claim.
4 (Doc. 4 at 2) However, Plaintiff has attached a copy of a June 23, 2010 letter from the United
5 States Department of Justice related to his June 13, 2010 administrative tort claim. (Doc. 4,
6 attachment) The letter indicates that the claim was determined to be invalid and was being
7 returned to Plaintiff due to the fact that it “lacks a sum certain.” Id.

8 **2. The First Amended Complaint must be dismissed because Plaintiff**
9 **has not yet exhausted his administrative remedy.**

10 Claims of medical malpractice against federally funded health care facilities and their
11 employees acting in the scope of their employment must be initiated under the Federal Tort
12 Claims Act (“FTCA”). To do this, a Plaintiff must have filed an administrative claim and
13 received a final determination of his claim. 42 U.S.C. § 233(g) (exclusive remedy against United
14 States for actions against federally funded clinics and employees acting in the scope of their
15 employment). Only after the administrative claim is denied or deemed denied (28 U.S.C. §
16 2675(a)) whichever occurs first, may the claimant file his action in federal court and then, he has
17 only six months in which to act. 28 U.S.C. § 2401(b). The purpose of the FTCA’s claims-filing
18 requirement is “to encourage administrative settlement of claims against the United States and
19 thereby to prevent an unnecessary burdening of the courts.” Brady v. United States, 211 F.3d
20 499, 502 (9th Cir. 2000) quoting Jerves v. United States, 966 F.2d 517, 520 (9th Cir. 1992).

21 The requirement of administrative exhaustion is jurisdictional and cannot be waived
22 (Brady, 211 F.3d at 502) and strict compliance with its provisions is required. Cadwalder v.
23 United States, 45 F.3d 297, 300 (9th Cir. 1995); Vacek v. United States Postal Service, 447 F.3d

24
25 ¹The Court may take notice of facts that are capable of accurate and ready determination by resort to sources
26 whose accuracy cannot reasonably be questioned. Fed. R. Evid. 201(b); United States v. Bernal-Obeso, 989 F.2d 331,
27 333 (9th Cir. 1993). The records of the Kern County Superior Court is a source whose accuracy cannot reasonably be
questioned and judicial notice may be taken of court records. Mullis v. United States Bank, Ct., 828 F.2d 1385, 1388
n.9 (9th Cir. 1987); Valerio v. Boise Cascade Corp., 80 F.R.D. 626, 635 n. 1 (N.D.Cal.1978), *aff’d*, 645 F.2d 699 (9th
Cir.); see also Colonial Penn Ins. Co. v. Coil, 887 F.2d 1236, 1239 (4th Cir. 1989); Rodic v. Thistledown Racing Club,
Inc., 615 F.2d 736, 738 (6th Cir. 1980).

1 1248, 1250 (9th Cir. 2006) (“We have repeatedly held that the exhaustion requirement is
2 jurisdictional in nature and must be interpreted strictly”). When a civil action is filed before the
3 FTCA claim has been denied or is deemed denied due to the expiration of the six-month claim
4 review period, the court has no jurisdiction and the matter must be dismissed. McNeil v. United
5 States, 508 U.S. 106, 111-112 (1993); Jerves v. United States, 966 F.2d at 518519.

6 Here, Plaintiff filed his administrative claim but it was determined to be invalid and was
7 returned to him due to the failure of the claim to specify the amount of money that Plaintiff
8 sought. Even if the June 13, 2010 claim was valid, this Court would not have had authority over
9 this civil action until after the claim was rejected or six months had passed from the time of the
10 filing of the claim. As it stands, no matter the seriousness of the allegations Plaintiff raises in his
11 First Amended Complaint, this Court has no authority to consider his case. Only compliance
12 with the FTCA “vests the federal district courts with exclusive jurisdiction over suits arising
13 from the negligence of Government employees.” Jerves v. United States, 966 F.2d 517, 518 (9th
14 Cir. 1992). Therefore, it is recommended that the Court **DISMISS** this case **WITHOUT**
15 **LEAVE TO AMEND.**

16 **3. Once again, the Complaint must be dismissed because it fails to allege**
17 **facts that would give rise to Federal Court jurisdiction**

18 As noted above, it appears that in his First Amended Complaint, Plaintiff is seeking to
19 impose liability on Clinica for medical malpractice. A medical malpractice claim, generally,
20 would not confer jurisdiction on this Court, absent involvement by a federal agency or federally
21 funded health care facility. (42 USC § 233(g) - (n)) Furthermore, Plaintiff’s allegation, that
22 Clinica’s attorney told him that this case is a “Federal Court matter,” is insufficient to invoke this
23 Court’s jurisdiction.

24 Ordinarily, the Court would grant Plaintiff leave to file an amended complaint to address
25 this deficiency. However, because First Amended Complaint makes clear that the Court lacks
26 the authority to decide this case, due to his failure to complete the FTCA claims process, granting
27 leave to amend would be futile.

1 **II. Recommendation**

2 Because Plaintiff has failed to complete the claims-filing procedures of the FTCA, the
3 Court recommends that Plaintiff's First Amended Complaint be dismissed. Accordingly, it is
4 **RECOMMENDED** that,

- 5 1. The First Amended Complaint be **DISMISSED** without leave to amend because
6 the Court lacks jurisdiction in the matter; and
- 7 2. The Clerk of Court enter judgment for Defendants because this dismissal with
8 prejudice would terminate the action in its entirety.

9 These findings and recommendations are submitted to the United States District Court
10 Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636 (b)(1)(B) and Rule 304
11 of the Local Rules of Practice for the United States District Court, Eastern District of California.
12 Within 14 days after being served with a copy, any party may file written objections with the
13 Court and serve a copy on all parties. Such a document should be captioned "Objections to
14 Magistrate Judge's Findings and Recommendations." The Court will then review the Magistrate
15 Judge's ruling pursuant to 28 U.S.C. § 636 (b)(10)(C). Plaintiff is advised that his failure to file
16 objections within the specified time may waive the right to appeal the District Court's order.
17 Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

18
19 IT IS SO ORDERED.

20 Dated: July 19, 2010

20 /s/ Jennifer L. Thurston
21 UNITED STATES MAGISTRATE JUDGE