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

TYLYNNE B. HENRY,)	1:10-CV-01922 AWI MJS
)	
Plaintiff,)	ORDER GRANTING UNITED
v.)	STATES' MOTION TO
)	DISMISS
DOCTORS MEDICAL CENTER OF)	
MODESTO, INC., MEMORIAL)	(Document #4)
HOSPITAL FOUNDATION OF)	
STANISLAUS COUNTY, GOLDEN)	
VALLEY HEALTH CLINICS,)	
DR. CHAN M.D., and individual, and)	
DOES 1 through 10, inclusive,)	
Defendants.)	

BACKGROUND

On April 2, 2010, Plaintiff Tylynne B. Henry ("Plaintiff") filed a complaint in the Superior Court of the State of California, County of Stanislaus. The complaint names as Defendants Doctor's Medical Center of Modesto, Inc., Memorial Hospitals Foundation of Stanislaus County, Golden Valley Health Centers, Dr. Edward Chan, and Does 1 through 50. The complaint alleges that Defendants negligently cared for, diagnosed, and treated Plaintiff, and failed to exercise the standard of care and skill ordinarily and reasonably required to properly diagnose and treat Plaintiff.

On October 14, 2010, the United States removed the action to this court pursuant to 42 U.S.C. § 233(c) because the complaint alleges injury resulting from the performance of medical

1 functions by an employee and agency of the Public Health Service authorized by the Federally
2 Supported Health Centers Assistance Act (“FSHCAA”). Jurisdiction is appropriate under 28
3 U.S.C. § 1346 because the United States is a Defendant.

4 On October 14, 2010, the United States substituted into this action as Defendant in place
5 of Golden Valley Health Centers, its employees, and Defendant Dr. Edward Chan. The United
6 States provided a certification that these Defendants were employees of Public Health Service
7 pursuant to FSHCAA and were acting in the scope of such employment at the time of the
8 incident. As such, substitution is appropriate pursuant to 28 U.S.C. § 2679(d)(1).

9 On October 19, 2010, the United States filed a motion to dismiss for lack of jurisdiction.
10 The United States contends that Plaintiff failed to comply with the Federal Tort Claims Act
11 (“FTCA”) prior to filing this action.

12 Plaintiff did not file an opposition or non-opposition to the United States’ motion to
13 dismiss.

14 LEGAL STANDARD

15 Rule 12(b)(1) of the Federal Rules of Civil Procedure allows a motion to dismiss for lack
16 of subject matter jurisdiction. It is a fundamental precept that federal courts are courts of limited
17 jurisdiction. Limits upon federal jurisdiction must not be disregarded or evaded. Owen
18 Equipment & Erection Co. v. Kroger, 437 U.S. 365, 374 (1978). The plaintiff has the burden to
19 establish that subject matter jurisdiction is proper. Kokkonen v. Guardian Life Ins. Co., 511 U.S.
20 375, 377 (1994); Chandler v. State Farm Mut. Auto. Ins. Co., 598 F.3d 1115, 1122 (9th Cir.
21 2010). This burden, at the pleading stage, must be met by pleading sufficient allegations to show
22 a proper basis for the court to assert subject matter jurisdiction over the action. McNutt v.
23 General Motors Acceptance Corp., 298 U.S. 178, 189 (1936); Fed. R. Civ. P. 8(a)(1).

24 A defendant may attack the existence of subject matter jurisdiction based on facts outside
25 pleadings. Safe Air for Everyone v. Meyer, 373 F.3d 1035, 1039 (9th Cir. 2004); White v. Lee,
26 227 F.3d 1214, 1242 (9th Cir. 2000). “[I]n a factual attack, the challenger disputes the truth of
27

1 the allegations that, by themselves, would otherwise invoke federal jurisdiction.” Safe Air, 373
2 F.3d at 1039. Once the moving party has converted the motion to dismiss into a factual motion
3 by presenting affidavits or other evidence properly brought before the court, the party opposing
4 the motion must furnish affidavits or other evidence necessary to satisfy its burden of
5 establishing subject matter jurisdiction. Safe Air, 373 F.3d at 1039; Savage v. Glendale Union
6 High School, Dist. No. 205, Maricopa County, 343 F.3d 1036, 1040 n.2 (9th Cir. 2003). In
7 resolving a factual attack on jurisdiction, the district court may review evidence beyond the
8 complaint without converting the motion to dismiss into a motion for summary judgment. Safe
9 Air, 373 F.3d at 1039. “No presumptive truthfulness attaches to plaintiff’s allegations, and the
10 existence of disputed material facts will not preclude the trial court from evaluating for itself the
11 merits of jurisdictional claims.” Thornhill Publishing, 594 F.2d at 733.

12 **FACTS**

13 Defendant United States has filed a Certificate of Scope of Federal Employment that
14 states Dr. Chan and Golden Valley Health Centers, a federally supported health center, were
15 acting in the scope of their federal employment at the time of the incidents alleged in the
16 complaint. As such, the United States was substituted as a proper party in place of Dr. Chan and
17 Golden Valley Health Centers.

18 Defendant United States has provided evidence that Plaintiff has not filed an
19 administrative claim with the United States Department of Health & Human Services (“HHS”).
20 Plaintiff has neither opposed Defendant United States’ motion nor provided evidence that
21 Plaintiff has filed an administrative claim.

22 **DISCUSSION**

23 The FTCA provides the exclusive remedy for “injury or loss of property, or personal
24 injury or death arising or resulting from the negligent or wrongful act of omission of any
25 employee of the Government while acting within the scope of his office or employment” 28
26 U.S.C. § 2679(b)(1). Title 42 U.S.C. § 233(a) provides that the FTCA is the exclusive remedy

1 against the United States for personal injury arising from actions by members of the Public
2 Health Service. The FTCA's coverage extends to employees of designated federally supported
3 medical clinics. 42 U.S.C. § 233(g).

4 The FTCA bars claimants from seeking damages against the United States in federal
5 court until they have exhausted their administrative remedies. 28 U.S.C. § 2675(a); McNeil v.
6 United States, 508 U.S. 106, 113 (1993); Ibrahim v. Department of Homeland Sec., 538 F.3d
7 1250, 1258 (9th Cir. 2008); Jerves v. United States, 966 F.2d 517, 518-19 (9th Cir.1992).

8 An action shall not be instituted upon a claim against the United States for money
9 damages for injury or loss of property or personal injury or death caused by the
10 negligent or wrongful act or omission of any employee of the Government while
11 acting within the scope of his office or employment, unless the claimant shall
12 have first presented the claim to the appropriate Federal agency and his claim
shall have been finally denied by the agency in writing and sent by certified or
registered mail. The failure of an 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 claim for purposes of this section.

13 28 U.S.C. § 2675(a). This exhaustion requirement is jurisdictional, and it must be strictly
14 adhered to. Brady v. United States, 211 F.3d 499, 502 (9th Cir. 2000). The court is not allowed
15 to proceed in the absence of a plaintiff's fulfillment of the FTCA's conditions merely because
16 dismissal would visit a harsh result upon the plaintiff. Vacek v. U.S. Postal Service, 447 F.3d
17 1248, 1250 (9th Cir. 2006).

18 Defendant United States provides evidence that as of September 1, 2010, Plaintiff had not
19 filed an administrative tort claim relating to Golden Valley Health Centers or Dr. Edward Chan.
20 Plaintiff has not provided any evidence showing that she did file a tort claim. In fact, Plaintiff
21 did not even file an opposition to Defendant United States' motion. Based on the evidence
22 before the court, Plaintiff has failed to exhaust her administrative remedies before filing this
23 action. Thus, the court lacks subject matter jurisdiction over Plaintiff's claims against
24 Defendant United States.

25 //

1 **ORDER**

2 Accordingly, the court ORDERS that:

- 3 1. Defendant United States' motion to dismiss is GRANTED;
- 4 2. Defendant United States, sued as Golden Valley Health Clinics and Dr. Edward
- 5 Chan, is DISMISSED from this action.

6

7 IT IS SO ORDERED.

8 Dated: November 23, 2010

9 
CHIEF UNITED STATES DISTRICT JUDGE