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8 UNITED STATES DISTRICT COURT  
9 EASTERN DISTRICT OF CALIFORNIA  
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11 SHANNON MILLER,

NO. 2:09-cv-01687 MCE KJM

12 Plaintiff,

13 v.

MEMORANDUM AND ORDER

14 MAYERS MEMORIAL HOSPITAL; LES  
15 DEVIES, D.O.; UNITED STATES OF  
AMERICA,

16 Defendants.  
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19 In this medical malpractice action, Plaintiff Shannon Miller  
20 ("Plaintiff") seeks redress for a perforated colon she suffered  
21 while undergoing surgery in April of 2008 for a tubal ligation.  
22 Plaintiff's lawsuit, initially filed in the Superior Court of the  
23 State of California for the County of Shasta, named Mayer  
24 Memorial Hospital ("Hospital"), Dr. Les Devies ("Devies"), and  
25 Dr. Thomas Watson ("Watson") as Defendants.

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1 The United States ("Government") subsequently substituted as a  
2 Defendant on Watson's behalf upon certifying that Watson was  
3 acting within the scope of his employment with the Government  
4 when performing Plaintiff's surgery. Concurrently with that  
5 certification, the Government removed the action, pursuant to  
6 28 U.S.C. § 2679(d), on June 15, 2009.

7 Presently before the Court is the Government's Motion to  
8 Dismiss for lack of subject matter jurisdiction under Federal  
9 Rule of Civil Procedure 12(b)(1).<sup>1</sup> The Government's Motion is  
10 predicated on the argument that Plaintiff has not exhausted  
11 administrative remedies under the Federal Tort Claims Act,  
12 28 U.S.C. § 1346 et seq. ("FTCA") against Watson, as a government  
13 employee, and consequently cannot maintain this action. For the  
14 following reasons, the Government's Motion will be granted.

#### 15 16 **BACKGROUND** 17

18 On or about April 2, 2008 Plaintiff underwent tubal ligation  
19 surgery at Mayer Memorial Hospital. Watson performed the surgery  
20 and Devies served as first assistant surgeon. Compl., ¶ 11.  
21 Plaintiff alleges that during the surgery, Watson perforated her  
22 colon, and that the perforation resulted in a post-operative  
23 infection. *Id.* at ¶ 15.

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28 <sup>1</sup> All further references to "Rule" or "Rules" are to the  
Federal Rules of Civil Procedure unless otherwise noted.



1 *Attorneys Trust v. Videotape Computer Products, Inc.*, 93 F.3d.  
2 593, 594-95 (9th Cir. 1996). Lack of subject matter jurisdiction  
3 may be raised by the district court *sua sponte*: "Nothing is to be  
4 more jealously guarded by a court than its jurisdiction." *In re*  
5 *Mooney*, 841 F.2d. 1003, 1006 (9th Cir. 1988).

6 In moving to dismiss for lack of subject matter jurisdiction  
7 pursuant to Rule 12 (b)(1), the challenging party may either make  
8 a facial attack on the allegations of jurisdiction contained in  
9 the complaint or can instead take issue with subject matter  
10 jurisdiction on a factual basis. *Thornhill Publ'g Co. v. Gen.*  
11 *Tel. & Elect. Corp.*, 594 F.2d 730, 733 (9th Cir. 1979); *Mortensen*  
12 *v. First Fed. Sav. & Loan Ass'n*, 549 F.2d 884, 891 (3rd Cir.  
13 1977).

14 If the motion constitutes a facial attack, the Court must  
15 consider the factual allegations of the complaint to be true.  
16 *Williamson v. Tucker*, 645 F.2d 404, 412 (5th Cir. 1981);  
17 *Mortensen*, 549 F.2d at 891. If the motion constitutes a factual  
18 attack, however, "no presumptive truthfulness attaches to  
19 plaintiff's allegations, and the existence of disputed material  
20 facts will not preclude the trial court from evaluating for  
21 itself the merits of jurisdictional claims." *Thornhill*, 594 F.2d  
22 at 733 (quoting *Mortensen*, 549 F.2d at 891). The court may  
23 properly consider extrinsic evidence in making that  
24 determination. *Velasco v. Government of Indonesia*, 370 F.3d 392,  
25 398 (4th Cir. 2004).

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Plaintiff initially filed the action in the Superior Court of the State of California for the County of Shasta on April 1, 2009. While Plaintiff claims that she did not know at the time she filed the action that Watson was a federal employee, that assertion is belied by the Administrative Claim under the FTCA signed by Plaintiff the day beforehand. Moreover, even assuming that Plaintiff was indeed unaware of Watson's employment status, that lack of knowledge does not excuse compliance with § 2675(a). Despite Plaintiff's reliance on a New York district court decision to the contrary,<sup>3</sup> subsequent Supreme Court and Ninth Circuit case law explicitly requires compliance with the administrative procedures mandated by the FTCA.

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<sup>3</sup> See *Van Lieu v. United States*, 542 F. Supp. 862 (N.D.N.Y. 1982).

1 See *McNeil*, 508 U.S. at 113 (requiring "strict adherence to the  
2 procedural requirements" of § 2675(a)); *Cadwalder v. United*  
3 *States*, 45 F.3d 297,300 (9th Cir. 1995) ("section 2675(a)  
4 establishes explicit prerequisites to the filing of suit against  
5 the Government in district court. It admits of no exceptions.  
6 Given the clarity of the statutory language, we cannot enlarge  
7 that consent to be sued which the Government, through Congress,  
8 has undertaken so carefully to limit.") (quoting *Jerves v. United*  
9 *States*, 966 F.2d 517, 521 (9th Cir. 1992)). The fact that  
10 Plaintiff's Administrative Claim under the FTCA has not yet been  
11 adjudicated prevents Plaintiff from commencing suit against  
12 Watson as a federal employee.

13 Plaintiff asserts that granting the Government's Motion to  
14 Dismiss would be wasteful and needless formalism, since "it is  
15 substantially certain that the claim will be denied." (Pl.'s  
16 Opp., 2:2-3). That contention is also misplaced. "If the  
17 claimant is permitted to bring suit prematurely and simply amend  
18 his complaint after denial of the administrative claim the  
19 exhaustion requirement would be rendered meaningless." *Sparrow*,  
20 825 F. Supp. at 255. In *Sparrow*, the plaintiff's administrative  
21 claim was denied but the FTCA action was filed before the actual  
22 denial. The court granted the defendant's motion to dismiss  
23 because it lacked subject matter jurisdiction at the time the  
24 action was filed.

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1 **CONCLUSION**

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3 For the foregoing reasons, the Government's Motion to

4 Dismiss (Docket No. 5) is GRANTED, without prejudice, because

5 this Court lacks jurisdiction until after Plaintiff's

6 Administrative Claim under the FTCA has been adjudicated.<sup>4</sup> The

7 case is hereby remanded to the Superior Court of the State of

8 California in and or the County of Shasta for further disposition

9 with respect to the remaining defendants.

10 IT IS SO ORDERED.

11 Dated: September 17, 2009

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14 MORRISON C. ENGLAND, JR.  
15 UNITED STATES DISTRICT JUDGE

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27 <sup>4</sup> Because oral argument was not of material assistance, the

28 Court ordered this matter submitted on the briefs. E.D. Cal.  
Local Rule 78-230(h).