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

CYNTHIA O'CONNER,)	
)	2:11-cv-02803-GEB-CMK
Plaintiff,)	
)	
v.)	<u>DISMISSAL ORDER</u>
)	
UNITED STATES OF AMERICA,)	
)	
Defendant.)	
_____)	

Defendant seeks dismissal with prejudice of Plaintiff's Complaint for lack of subject matter jurisdiction under Federal Rule of Civil Procedure ("Rule") 12(h)(3), arguing Plaintiff failed to satisfy certain jurisdictional requirements of the Federal Tort Claims Act ("FTCA"). (Def.'s Mot. to Dismiss ("Def.'s Mot."), ECF No. 16.) Specifically, Defendant argues:

[P]laintiff prematurely filed her complaint less than six months after presenting her administrative tort claim to the United States Department of Health and Human Services ("HHS"), in violation of 28 U.S.C. § 2675(a). Dismissal should be with prejudice because plaintiff did not file a timely complaint against the United States within six months after HHS denied her administrative tort claim as required by 28 U.S.C. § 2401(b).

(Def.'s Mot. 2:2-6.)

Plaintiff filed a Statement of Non-Opposition in response to Defendant's dismissal motion in which she states: "Plaintiff, CYNTHIA

1 O'CONNER, by and through her attorney of record herein, herewith states
2 that she does not intend to oppose Defendants' [sic] Motion to Dismiss
3 for Lack of Subject [Matter] Jurisdiction . . . , and hereby submits
4 that she will file no opposition to the same." (Pl.'s Stmt. of Non-
5 Opp'n, ECF No. 21.)

6 I. FACTUAL SUMMARY

7 The following facts are taken from Plaintiff's Complaint and
8 exhibits attached thereto, and Exhibit D to Defendant's dismissal
9 motion.¹

10 Plaintiff mailed an administrative tort claim to the
11 Department of Health and Human Services ("HHS") on May 16, 2011, which
12 HHS received on May 25, 2011. (Compl. ¶¶ 3-4; id., Exs. 1, 2, ECF No.
13 2.) Plaintiff filed her Complaint on October 24, 2011. (Compl.) HHS
14 denied Plaintiff's administrative tort claim on January 26, 2012, in a
15 letter that included the following statement: "[I]f [Plaintiff] is
16 dissatisfied with this determination, she is entitled to file suit
17 against the United States in the appropriate federal district court
18 within six (6) months from the date of the mailing of this determination
19 (28 U.S.C. § 2401(b))." (Def.'s Mot., Ex. D.) Plaintiff did not file a
20 lawsuit against the United States as authorized by HHS in the January
21 26, 2012 letter.

22
23
24 ¹ "In resolving a factual attack on jurisdiction, the district
25 court may review evidence beyond the complaint without converting the
26 motion into a motion for summary judgment." Safe Air for Everyone v.
27 Meyer, 373 F.3d 1035, 1039 (9th Cir. 2004) (citing Savage v. Glendale
28 Union High Sch., 343 F.3d 1036, 1039 n.2 (9th Cir. 2003)). "Thus, the
Court is not restricted to the face of the pleadings and 'may review any
evidence, such as affidavits and testimony, to resolve factual disputes
concerning the existence of jurisdiction.'" Coble v. DeRosia, 823 F.
Supp. 2d 1048, 1050 (E.D. Cal. 2011) (quoting McCarthy v. United States,
850 F.2d 558, 569 (9th Cir. 1988)).

1 **II. DISCUSSION**

2 Section 2675(a) of the FTCA provides, in relevant part:

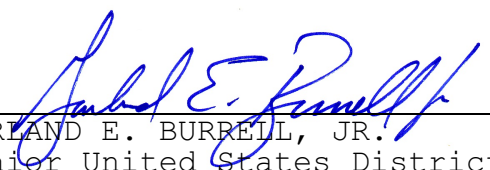
3 An action shall not be instituted upon a claim
4 against the United States for money damages for
5 injury or loss of property or personal injury or
6 death caused by the negligent or wrongful act or
7 omission of any employee of the Government while
8 acting within the scope of his office or
9 employment, unless the claimant shall have first
10 presented the claim to the appropriate Federal
11 agency and his claim shall have been finally denied
12 by the agency in writing and sent by certified or
13 registered mail. The failure of an agency to make
14 final disposition of a claim within six months
15 after it is filed shall, at the option of the
16 claimant any time thereafter, be deemed a final
17 denial of the claim for purposes of this section.

18 "[T]he statutory procedure is clear. A tort claimant may not commence
19 proceedings in court against the United States without first filing her
20 claim with an appropriate federal agency and either receiving a
21 conclusive denial of the claim from the agency or waiting for six months
22 to elapse without a final disposition of the claim being made." Jerves
23 v. United States, 966 F.2d 517, 519 (9th Cir. 1992) (internal quotation
24 marks omitted). "[The] claim requirement of section 2675 is
25 jurisdictional in nature and may not be waived.'" Id. (quoting Burns v.
26 United States, 764 F.2d 722, 724 (9th Cir. 1985)).

27 Further, once a federal agency denies an administrative tort
28 claim, 18 U.S.C. § 2401(b) requires the claimant to file suit "within
29 six months after the date of mailing, by certified or registered mail,
30 of notice of [the] final denial of the claim by the agency." "A district
31 court does not have jurisdiction to hear a tort claim against the United
32 States unless the claimant files a complaint in federal court within six
33 months after final agency decision." Goodman v. United States, 298 F.3d
34 1048, 1053 (9th Cir. 2002) (citing 28 U.S.C. § 2401(b)).

1 Plaintiff's October 24, 2011 Complaint was prematurely filed
2 since it was filed less than six months after HHS received her
3 administrative tort claim. Further, Plaintiff failed to file a lawsuit
4 within six months after HHS denied her administrative tort claim in
5 writing on January 26, 2012. Therefore, Defendant's dismissal motion is
6 granted, and this action is dismissed with prejudice for lack of subject
7 matter jurisdiction. See McNeil v. United States, 508 U.S. 106, 110-12
8 (1993) (affirming dismissal of pro se complaint filed prematurely under
9 the FTCA where plaintiff did not commence a new action after receiving
10 notice of the federal agency's denial of his administrative tort claim).

11 Dated: May 31, 2013

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GARLAND E. BURRELL, JR.
Senior United States District Judge