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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

Linda McDonough,  
  
                                Plaintiff,  
  
          v.  
  
United States of America,  
  
                                Defendant.

No. 2:14-cv-01252-GEB-CMK

**ORDER GRANTING IN PART AND  
DENYING IN PART DEFENDANT'S  
MOTION TO DISMISS**

The United States moves for dismissal of Plaintiff's Complaint with prejudice, arguing it is barred by the following statute of limitations in the Federal Tort Claims Act, prescribed in 28 U.S.C. § 2401(b): "A tort claim against the United States shall be forever barred unless . . . action is begun within six months after the date of mailing, by certified or registered mail, of notice of final denial of the claim by the agency to which it was presented." The United States shows in its motion that Plaintiff failed to file this lawsuit within six months of the date on which the Department of Health and Human Services finally denied Plaintiff's administrative tort claim in a certified letter sent on April 5, 2013. Plaintiff did not file this lawsuit until May 21, 2014, more than thirteen months after her administrative claim was finally denied. Swartz v. KPMG LLP,

1 476 F.3d 756, 763 (9th Cir. 2007) (per curiam) (revealing that  
2 documents concerning denial of Plaintiff's administrative claim  
3 may be considered since they are "referenced in [the] complaint  
4 but not explicitly incorporated therein," and Plaintiff "relies  
5 on the document[s] and [their] authenticity is unquestioned.").

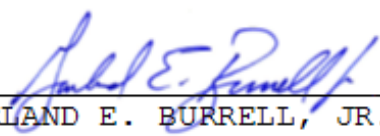
6 Plaintiff opposes the motion, solely arguing she  
7 complied with a § 2401(b) statute of limitations provision that  
8 is irrelevant to decision on the motion.

9 However, the recent Ninth Circuit's en banc decision in  
10 Kwai Fun Wong v. Beebe, 732 F.3d 1030 (9th Cir. 2013) (en banc),  
11 cert. granted sub nom. United States v. Kwai Fun Wong, 134 S. Ct.  
12 2873 (2014), a case not cited by either party, explains that  
13 contrary to the dismissal with prejudice argument made by the  
14 United States and Plaintiff's argument that the six month  
15 limitations period on which the United States relies can be  
16 disregarded, the six month limitations period on which the United  
17 States relies governs decision on the motion and "§ 2401(b) is a  
18 nonjurisdictional claim-processing rule subject to . . .  
19 equitable tolling . . ." Id. at 1033, 1047.

20 Therefore, Plaintiff's Complaint is dismissed, and  
21 Plaintiff is granted ten days leave from the date on which this  
22 Order is filed to file an amended complaint that addresses the  
23 deficiencies in the dismissed Complaint.

24 Dated: November 19, 2014

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