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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

JAMES M. GROGAN,

 Plaintiff,

 v.

BEALE AERO CLUB; JOHN HENRY;
UNITED STATES OF AMERICA; and
DOES 1-30,

 Defendants.

No. 2:15-cv-00562-GEB-KJN

**ORDER GRANTING DEFENDANTS
UNITED STATES OF AMERICA
AND BEALE AERO CLUB'S
DISMISSAL MOTION**

Defendants United States of America and Beale Aero Club (collectively, "Defendants") seek to be dismissed as defendants in this action under Federal Rules of Civil Procedure ("Rules") 12(b)(1) and 12(h)(3), arguing:

Plaintiff did not exhaust administrative remedies prior to filing suit[; and that] [t]he Court should . . . dismiss Beale Aero Club, an instrumentality of the United States, as a party Defendant, with prejudice [since t]he [Federal Tort Claims Act ('FTCA')] . . . provides district courts . . . with subject matter jurisdiction only over actions against the United States[;] [and] the claims against Defendants Does 1-30 should be

1 dismissed unless Plaintiff attests that these
2 unknown Defendants are not federal employees
3 or agencies whose acts or omissions would
subject the United States to liability under
the FTCA.

4 (Def.'s Notice of Mot. to Dismiss 2:1-15, ECF No. 11.) Plaintiff
5 opposes the motion, arguing:

6 Plaintiff agrees that the administrative
7 remedies described by the United States must
8 be exhausted prior to being able to commence
9 a suit against the United States . . .
[Plaintiff] opposes the motion to the extent
10 that it seeks to dismiss any person or entity
11 not covered by the [FTCA]. Specifically, this
12 [C]ourt must maintain subject matter
13 jurisdiction [over] Defendant John Henry
14 . . . and Does 1 through 30 as the amount in
controversy in this case exceeds \$75,000 and
Mr. Grogan and Mr. Henry are citizens of
different states pursuant to 28 U.S.C. §
1332(a)(1).

. . . .

[Further, f]or efficient use of judicial
resources, [Plaintiff] request[s] that the
Court maintain its jurisdiction over the
entirety of the [D]efendants and stay the
proceedings while the administrative process
resolves because the claims arise out of the
same operative facts.

19 (Pl.'s Opp'n to Def.'s Mot. ("Opp'n") 1:20-27, 3:24-26, ECF No.
20 15.)

21 **I. DISCUSSION**

22 Defendants argue the motion should be granted because
23 Plaintiff has not exhausted applicable administrative remedies
24 since he "filed suit . . . only five days after presenting his
25 administrative claim to the Air Force." (Mot. 9:4-5.) 28 U.S.C. §
26 2675(a) of the FTCA prescribes: "An action shall not be
27 instituted upon a claim against the United States . . . unless
28 the claimant shall have first presented the claim to the

1 appropriate Federal agency and his claim shall have been finally
2 denied by the agency." (emphasis added). Plaintiff concedes he is
3 currently "participating in [the administrative claim] process,"
4 and that "Defendant United States may properly be dismissed
5 without prejudice for lack of subject matter jurisdiction due to
6 the [pending] administrative proceeding." (Opp'n 1:22, 3:22-23)
7 (emphasis added). Therefore, Plaintiff's claims against the
8 United States are dismissed.

9 Defendants also argue "Beale Aero Club should be
10 dismissed as a party Defendant for lack of subject matter
11 jurisdiction" since "suits [may not] be brought against federal
12 agencies and instrumentalities in their own name due to [the]
13 absence of subject matter jurisdiction" (Mot. 9:18-10:1); and
14 argue Does 1-30 should be dismissed "unless Plaintiff attests
15 that these unknown Defendants are not federal employees or
16 agencies whose acts or omissions would subject the United States
17 to liability under the FTCA." (Notice of Mot. 2:8-15.)

18 "[I]f a suit is 'cognizable' under [28 U.S.C.] §
19 1346(b) of the FTCA, the FTCA remedy is 'exclusive' and the
20 federal agency cannot be sued 'in its own name.'" Endicott v.
21 Bureau of Alcohol, Tobacco, Firearms & Explosives, 338 F. Supp.
22 2d 1183, 1185 (W.D. Wash. 2004) (quoting 28 U.S.C. § 2679(a) of
23 the FTCA and F.D.I.C. v. Meyer, 510 U.S. 471, 476 (1994)). 28
24 U.S.C. § 2671 of the FTCA states "the term 'Federal agency'
25 includes the executive departments, . . . the military
26 departments, independent establishments of the United States, and
27 corporations primarily acting as instrumentalities or agencies of
28 the United States." "Air Force Aero Clubs are established and

1 operate as non-appropriated instrumentalities of the United
2 States under the control of the Air Force." Walls v. U.S., 832
3 F.2d 93, 94 n.2 (7th Cir. 1987); see also Bruckner v. United
4 States, 338 F.2d 427, 428 (9th Cir. 1964) (indicating that an Air
5 Force Base Aero Club "is an instrumentality of the United States,
6 organized and operated under the auspices of the Air Force to
7 give authorized personnel an opportunity to fly for recreation
8 and the development of aeronautical skills.") Since Beale Aero
9 Club is an instrumentality of the United States, it may not be
10 sued eo nomine. See F.D.I.C. v. Craft, 157 F.3d 697, 706 (9th
11 Cir. 1998) (stating even when "claims . . . arise from the acts
12 or omissions of United States agencies . . . , an agency itself
13 cannot be sued under the FTCA.") Therefore, Beale Aero Club's
14 motion to be dismissed as a defendant is granted with prejudice.

15 However, Defendants have not shown that the portion of
16 the motion seeking dismissal of the Doe Defendants is ripe for
17 judicial decision. Therefore, that portion of the motion is
18 denied.

19 Defendants also argue:

20 [T]he Court must resolve the incongruity
21 between Plaintiff's (1) concession that he
22 does not oppose dismissal of any Defendant
23 that is subject to the FTCA and, (2) his
24 request [in his Opposition to the dismissal
25 motion] that 'the Court maintain its
26 jurisdiction over the entirety of the
27 [D]efendants and stay the proceedings while
28 the administrative process resolves because
the claims arise out of the same operative
facts.' These two positions cannot be
logically reconciled. The Court has no
jurisdiction over the United States or Beale
Aero Club, and therefore cannot 'maintain its
jurisdiction' over them during the
administrative claims process by issuing a
stay instead of dismissing them from the

1 case.

2 (Reply 3:23-4:3.)

3 Plaintiff has not shown that the Court has authority to
4 stay proceedings which he prematurely filed against the United
5 States; nor has he shown how such a stay could issue without
6 "vitiat[ing] the exhaustion requirement [which] is
7 jurisdictional and must be strictly adhered to." Jackson v. U.S.
8 Dep't of Veterans Affairs, No. CV 08-541-DDP AGR, 2010 WL 480983,
9 at *3 n.2 (C.D. Cal. Feb. 2, 2010). Plaintiff has also failed to
10 show justification for staying his suit against the remaining
11 Defendant John Henry.

12 Defendant Henry has not yet appeared in this lawsuit,
13 and it is unclear whether he has been served with process.
14 Therefore, Plaintiff is notified under Rule 4(m) of the Federal
15 Rules of Civil Procedure that his failure to serve Defendant
16 Henry with process within 120 days of the date of removal, which
17 elapsed on July 10, 2015, may result in Henry and this action
18 being dismissed. To avoid dismissal, on or before seven days
19 after the date on which this Order is filed, Plaintiff shall file
20 proof of service for Henry or a sufficient explanation for why
21 service was not completed within Rule 4(m)'s prescribed service
22 period.

23 **II. CONCLUSION**

24 For the stated reasons, the United States is dismissed
25 as a Defendant in this action, and Beale Aero Club is dismissed
26 as a Defendant with prejudice. Lastly, on or before seven days
27 after the date on which this Order is filed, Plaintiff shall file
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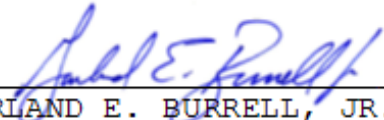
1 proof that Defendant Henry has been served with process or a
2 sufficient explanation for why service was not completed within
3 Rule 4(m)'s prescribed service period.

4 Dated: July 16, 2015

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

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