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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

BARBARA J. RIEDE, et al.,
Plaintiffs,
v.
ROSA OLMOS, et al.,
Defendants.

Case No. 15-cv-1874-PJH

**ORDER GRANTING MOTION TO
DISMISS AND REMANDING CASE**

Defendants' motion to dismiss came on for hearing before this court on June 24, 2015. Plaintiffs Barbara Reide and Mike Reide ("plaintiffs") appeared through their counsel, William Paynter. Defendants Community Health Clinic Olé, Rosa Olmos, Evelyn Cazares, Laura Paoletti, Charlene Reilly, Pamela Higgins, Jennifer Despres, Rebecca Levy-Gantt, and Jerome Solomon ("the moving defendants") appeared through their counsel, Rebecca Falk. Defendants Napa Obstetrics and Gynecologists/Queen of the Valley Medical Center and St. Joseph Health/Queen of the Valley Medical Center ("the non-moving defendants") appeared through their counsel, Lauren Tate. Having read the papers filed in conjunction with the motion and carefully considered the arguments and the relevant legal authority, and good cause appearing, the court hereby GRANTS the motion to dismiss as stated at the hearing, and as follows.

The moving defendants have filed a certification asserting that Community Health Clinic Olé is covered by the Federal Tort Claims Act ("FTCA"), as are its employees (specifically, Olmos, Cazares, Paoletti, Reilly, Higgins, Despres, Levy-Gantt, and Solomon), who were acting within the scope of their employment at the time of the

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1 incidents alleged in this suit. See Dkt. 2, ¶ 2. Based on the certification, the moving
2 defendants argue that the claims against them should be dismissed, and that the United
3 States should be substituted in their place.

4 Plaintiffs do not challenge the substitution as to Community Health Clinic Olé, but
5 argue that there are factual disputes as to whether the individual defendants were acting
6 within the scope of their employment, and thus, request that dismissal and substitution be
7 denied at this time.

8 The government's certification constitutes prima facie evidence that the employees
9 were acting in the scope of their employment. Billings v. U.S., 57 F.3d 797, 800 (9th Cir.
10 1995); Pauly v. Dept. of Agriculture, 348 F.3d 1143, 1151 (9th Cir. 2003). The
11 certification is conclusive unless challenged, and may be overcome only by "presenting
12 evidence and disproving the Attorney General's certification by a preponderance of the
13 evidence." Billings, 57 F.3d at 800. Plaintiffs admit that they cannot meet this standard,
14 and instead request the opportunity to take the deposition of at least one of the
15 employees. Based on plaintiffs' failure to meet the preponderance of the evidence
16 standard, the moving defendants' request that they be dismissed and that the United
17 States be substituted is GRANTED.

18 The moving defendants then request that the claims against the United States be
19 dismissed for failure to exhaust under the FTCA. Indeed, the Supreme Court has held
20 that "the FTCA bars claimants from bringing suit in federal court until they have
21 exhausted their administrative remedies," and specifically rejected the argument that
22 exhaustion need not necessarily occur before the filing of a lawsuit, and need only occur
23 before "substantial progress" is made in the suit. McNeil v. U.S., 508 U.S. 106 (1993).
24 As a result, the claims against the United States are DISMISSED for failure to exhaust,
25 though the dismissal is without prejudice to re-filing the claims after exhaustion.

26 Finally, the court finds that it lacks subject matter jurisdiction over the remaining
27 claims, asserted against Napa Obstetrics and Gynecologists/Queen of the Valley Medical
28 Center, St. Joseph Health/Queen of the Valley Medical Center, Julio Espinosa, Richard

1 Waters, and Francine Morisette. Though the court may address the issue of subject
2 matter jurisdiction sua sponte, the non-moving defendants raised the issue at the hearing
3 by requesting remand, and plaintiffs did not oppose the request. Accordingly, as to the
4 portion of the case that has not been dismissed (i.e., the claims brought against Napa
5 Obstetrics and Gynecologists/Queen of the Valley Medical Center, St. Joseph
6 Health/Queen of the Valley Medical Center, Julio Espinosa, Richard Waters, and
7 Francine Morisette), the case is REMANDED to the Napa County Superior Court.

8 **CONCLUSION**

9 For the foregoing reasons, defendants Community Health Clinic Olé, Rosa Olmos,
10 Evelyn Cazares, Laura Paoletti, Charlene Reilly, Pamela Higgins, Jennifer Despres,
11 Rebecca Levy-Gantt, and Jerome Solomon are DISMISSED from the case and the
12 United States is substituted in their place; the claims against the United States are
13 DISMISSED without prejudice pending administrative exhaustion; and the claims against
14 Napa Obstetrics and Gynecologists/Queen of the Valley Medical Center, St. Joseph
15 Health/Queen of the Valley Medical Center, Julio Espinosa, Richard Waters, and
16 Francine Morisette are REMANDED to the Napa County Superior Court.

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18 **IT IS SO ORDERED.**

19 Dated: June 24, 2015



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22 PHYLLIS J. HAMILTON
23 United States District Judge
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