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**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION**

BERNABE MORA,)	Case No.: 10-CV-01147-LHK
)	
Plaintiff,)	
v.)	
)	ORDER DISMISSING CASE WITH
TIMOTHY BRENNAN, M.D., CLINICA de)	PREJUDICE
SALUD de VALLE de SALINAS, DOES 1-50,)	
INCLUSIVE,)	[re: docket no. 25]
)	
Defendants.)	
)	

I. Background

Plaintiff Bernabe Mora, representing himself, filed this action in the Santa Cruz County Superior Court on January 21, 2010. Plaintiff alleges that he was injured by Dr. Timothy Brennan, a dentist working at Clinica de Salud de Valle de Salinas (“Clinica de Salud”). See Dkt. No. 1, Ex. A at 3-5. Plaintiff claims that he was injured while being treated by Dr. Brennan (or others working with him) on April 3, 2007. *Id.* Plaintiff further claims that after the injury, Dr. Brennan referred him to another doctor, Dr. Block, who diagnosed him with “a granuloma and hematoma” on April 11, 2007. *Id.* Plaintiff alleges that the granuloma was caused “by Defendants’ negligence, by negligently and carelessly introducing a needle.” *Id.*

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ORDER DISMISSING CASE WITH PREJUDICE

1 The Clinica de Salud is a federally deemed health center, and Dr. Brennan is employed
2 there. *See* Dkt. Nos. 2, 6. As a federally deemed health center, the Clinica de Salud is an
3 employee of the Public Health Service and is insured against malpractice claims through the
4 Federal Tort Claims Act (FTCA). 42 U.S.C. § 233 (g)-(n) (Federally Supported Health Centers
5 Assistance Act); Dkt. No. 2. On March 18, 2010, Defendants removed the action to this Court
6 pursuant to 42 U.S.C. § 233(c), and 28 U.S.C. § 2679(d)(2), the FTCA. Both statutes provide for
7 removal of state court actions brought against federal and/or Public Health Service employees upon
8 certification by the Attorney General that the employee was acting “within the scope of his . . .
9 employment at the time of the incident out of which the claim [or suit] arose.” The removal was
10 supported by a declaration by the Chief of the Civil Division, stating that Dr. Brennan was acting
11 within the course and scope of his employment while working at the Clinica de Salud in April
12 2007, and that the Clinica de Salud is a federally-deemed health center. *See* Dkt. No. 2. Once the
13 case is removed, the United States government must be substituted as defendant in place of
14 individual, named defendants. 28 U.S.C. 2679(d)(2).

17 On March 22, 2010, Defendants filed a motion to dismiss this case on the ground that this
18 Court lacks subject matter jurisdiction over Plaintiff’s claims because Plaintiff failed to exhaust
19 administrative remedies as required by the FTCA. Defendants also move to dismiss on the ground
20 that Plaintiff’s claims are time-barred.

22 Pursuant to Local Rule 7-1(b), the Court finds Defendants’ motion suitable for decision
23 without oral argument, and hereby VACATES the hearing on this motion previously set for
24 September 16, 2010 at 1:30 pm. The Court finds that Plaintiff failed to exhaust administrative
25 remedies before bringing this action, and further that the statute of limitations on Plaintiff’s claim
26 has run. Because no amendment of pleadings can cure this jurisdictional defect, this matter is
27 DISMISSED WITH PREJUDICE.

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2 **II. Analysis**

3 Plaintiff seeks money damages based on injuries he claims were caused by employees of a
4 federally deemed health care provider. According to the Complaint and to the Swanson
5 Declaration (Dkt. No. 2), the individuals Plaintiff accuses were acting within the scope of their
6 employment at the time of the alleged injuries. As a result, the FTCA is the exclusive remedy
7 available to Plaintiff. 28 U.S.C. § 2679(b)(1).
8

9 The FTCA requires that before bringing a case in court, a plaintiff must exhaust
10 administrative remedies with the appropriate agency—in this case, the Department of Health and
11 Human Services (“Department”). 28 U.S.C. § 2675(a). Plaintiff does not allege that he filed any
12 complaint or claim with the Department before filing the instant Complaint. Moreover, Defendants
13 have submitted a declaration demonstrating that there was no record of any complaint by Plaintiff
14 on file at the Department as of March 10, 2010. *See* Dkt. No. 6. The exhaustion requirement is
15 jurisdictional; if Plaintiff has not exhausted his administrative remedies, the Court has no
16 jurisdiction over his claims. *Burns v. United States*, 764 F.2d 722, 724 (9th Cir. 1985). Defendants
17 note that on March 31, 2010, after service of their opposition brief pointing out the exhaustion
18 requirement, Plaintiff did file a complaint with the Department. *See* Dkt. No. 9, Ex. A. However,
19 this does not solve the jurisdictional problem. Plaintiff’s administrative remedies are not
20 “exhausted” until the Department has made a final denial, in writing, or has failed to respond to the
21 complaint for six months. 28 U.S.C. § 2675(a). Because Plaintiff does not allege that his
22 administrative remedies have been exhausted, the Court lacks jurisdiction over Plaintiff’s claim,
23 and the case must be dismissed.
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26 Defendants argue that the case should be dismissed with prejudice, rather than with leave to
27 amend, because Plaintiff’s claim is barred by the statute of limitations. “A claim must be filed
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1 with the agency within two years of the claim's accrual and the claimant must file suit within six
2 months of administrative denial of the claim. If either requirement is not met, suit will be time
3 barred." *Dyniewicz v. United States*, 742 F.2d 484, 485 (9th Cir. 1984); 28 U.S.C. § 2401(b).
4 Medical malpractice claims accrue when "the plaintiff has discovered, or, in the exercise of
5 reasonable diligence should have discovered, both his injury and its cause." *Davis v. United States*,
6 642 F.2d 328, 331 (9th Cir. 1981). In his complaint, Plaintiff states that after sustaining the alleged
7 injuries at Clinica de Salud on April 3, 2007, he was referred by Dr. Brennan to another doctor, Dr.
8 Block, who diagnosed him with "a large granuloma" on April 18, 2007. Dr. Block's April 18,
9 2007 letter containing this diagnosis is referenced and quoted in the complaint. Therefore, based
10 on the pleadings, the Plaintiff knew of both his injury and its cause as of April 18, 2007. Plaintiff
11 was required to bring his complaint to the Department by no later than April 18, 2009. Plaintiff
12 does not allege ever having submitted a complaint with the Department, and the Defendants'
13 declaration demonstrates that no such complaint was received by the Department before the
14 underlying case was filed in the Superior Court on January 21, 2010. *See* Dkt. No. 6.

17 Because the Defendants have challenged the Court's jurisdiction over Plaintiff's claims
18 under Fed. R. Civ. P. 12(b)(1), the Court may consider evidence on the question of jurisdiction.
19 Under Fed. R. Civ. P. 12(b)(1), the Court need not take all of Defendants' allegations as true and
20 may instead "evaluat[e] for itself the merits of the jurisdictional claims." *Thornhill Pub. Co. v.*
21 *General Tel. & Electronics Corp.*, 594 F.2d 730, 733 (9th Cir. 1979). Based on the Complaint and
22 on the evidence submitted by Defendants, the Court concludes that the statute of limitations on
23 Plaintiff's claim has run.
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25 Plaintiff submitted a sur-reply to the Defendants' Rely Brief in which Plaintiff disputes that
26 Dr. Brennan was a federal employee at the relevant time, and states that he did not become aware
27 of his injuries until 2008. Although the Court need not consider this additional briefing, as it was
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1 submitted without leave, it does not change the outcome here. The Complaint clearly establishes
2 the Plaintiff's knowledge of his injury and its cause in April, 2007. Plaintiff's knowledge or
3 ignorance of the involvement of federal employees in his injury is irrelevant to determining when
4 his claim accrued, and to calculating the statute of limitations. *Dyniewicz*, 742 F.2d at 487.
5 Furthermore, Plaintiff has submitted no admissible evidence to contradict the Swanson Declaration
6 which establishes that Dr. Brennan was a federal employee in April, 2007. On a motion to dismiss
7 for lack of jurisdiction, once the moving party has submitted evidence showing that the court lacks
8 jurisdiction, it is the opposing party's burden to "present affidavits or any other evidence necessary
9 to satisfy its burden of establishing that the court, in fact, possesses subject matter jurisdiction. *St.*
10 *Clair v. Chico*, 880 F.2d 199, 201 (9th Cir. 1989). Plaintiff has failed to do so here.
11

12 **III. Order**

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14 The Court finds that Plaintiff failed to exhaust administrative remedies before bringing this
15 action, and further that the statute of limitations on Plaintiff's claim has run. Because no
16 amendment of pleadings can cure this jurisdictional defect, this matter is DISMISSED WITH
17 PREJUDICE. The hearing on this motion set for September 16, 2010 at 1:30 pm is hereby
18 VACATED. The Clerk shall close the file and terminate any pending motions.

19 **IT IS SO ORDERED.**

20 Dated: September 13, 2010

21 
22 LUCY H. KOH
23 United States District Judge