

1 the Federal Defendants. (Doc. # 2). The Notice of Certification, which is signed by an
2 Assistant United States Attorney, states:

3 Pursuant to the provisions of 42 U.S.C. § 233(c), and pursuant to the authority
4 vested in the United States Attorney to make scope of employment certifications
5 under 28 C.F.R. 15.3(a), ... I hereby find and certify that ... Defendant
6 Neighborhood Healthcare ... was deemed a federal employee and eligible for
7 Federal Tort Claims Act malpractice during the period at issue in this action. I
further certify that Defendants Daniel C. Harrison, M.D., Maribeth Chong, M.D.
and Amy Y. Carney, FNP, were acting within the scope of their employment as
persons who are deemed ... employees of the United States, pursuant to 42
U.S.C. § 233, at the time of such actions.

8 (Doc. # 2 at 1-2).

9 On December 23, 2009, the United States filed a Notice of Substitution of United States
10 of America for Defendants: Neighborhood Healthcare, Daniel C. Harrison, M.D., Maribeth
11 Chong, M.D., and Amy Y. Carney, FNP. (Doc. # 3).

12 On January 27, 2010, this Court entered an Order which stated:

13 Upon review and consideration of the Notice of Substitution, and it
14 appearing to the Court that this is a tort action against Defendants Neighborhood
15 Healthcare, Harrison, Chong, and Carney arising out of their actions certified by
the appropriate official to have been taken within the scope of their employment
as deemed federal employees,

16 IT IS ORDERED, pursuant to 28 U.S.C. § 2679(d), as amended by Public
17 Law 100-694, that the United States of America shall be substituted as a
18 defendant herein, in place of Defendants Neighborhood Healthcare, Harrison,
Chong, and Carney and that the title of the action be amended accordingly.

19 IT IS FURTHER ORDERED that as to Defendants Neighborhood
20 Healthcare, Harrison, Chong, and Carney this action is dismissed, with
prejudice, pursuant to 42 U.S.C. 233 (a) and (g).

21 (Doc. # 6 at 2).

22 On February 4, 2010, the United States filed the Motion to Dismiss. (Doc. # 7). The
23 United States contends that Plaintiffs' action as to the United States must be dismissed without
24 prejudice pursuant to the Federal Tort Claims Act because Plaintiffs failed to file an
25 administrative claim with the agency whose conduct caused the alleged tort.

26 Plaintiffs did not file a response to the Motion to Dismiss.

27 **II. Discussion**

28 The Federal Employees Liability Reform and Tort Compensation Act ("FELRTCA")
immunizes United States employees from liability for their "negligent or wrongful act[s] or

1 omission[s] ... while acting within the scope of [their] office or employment.” 28 U.S.C. §
2 2679(b)(1). The Attorney General certifies whether a United States employee was acting
3 within the scope of his or her employment at the time of an event giving rise to a civil claim.
4 See 28 U.S.C. § 2679(d)(1), (2). “Once certification is given in a civil action, FELRTCA
5 requires the substitution of the United States as the defendant, and, if the action was originally
6 filed in state court, the removal of the action to federal court. Under the terms of FELRTCA,
7 the substitution of the United States leaves the plaintiff with a single avenue of recovery, the
8 Federal Torts Claim Act (“FTCA”), 28 U.S.C. §§ 1346, 2671 *et seq.*” *Green v. Hall*, 8 F.3d
9 695, 698 (9th Cir. 1993) (citing 28 U.S.C. § 2679(d)(4)).

10 The United States has waived its immunity to actions sounding in tort through the
11 FTCA. Prior presentment of an administrative claim and its final denial by the agency
12 concerned or failure of the agency to make final disposition within six months, are conditions
13 precedent under the FTCA to waiver of the United States’ sovereign immunity. See *Holloman*
14 *v. Watt*, 708 F.2d 1399, 1402 (9th Cir. 1983). The FTCA provides:

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

25 28 U.S.C. § 2675(a).

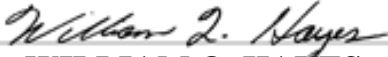
26 The United States submitted an affidavit from an attorney with the Department of
27 Health and Human Services stating that there is no record of Plaintiffs having filed an
28 administrative tort claim relating to the Federal Defendants. (Torres Dec. ¶¶ 4-6, Doc. # 7-2).
Plaintiffs failed to respond or contest this assertion. “The party who sues the United States
bears the burden of pointing to ... an unequivocal waiver of immunity.” *Holloman*, 708 F.2d
at 1401. Based upon the record, the Court concludes that Plaintiffs have failed to satisfy a
prerequisite for the maintenance of a tort action against the United States. The Motion to
Dismiss the United States is granted and the United States is dismissed without prejudice.

1 **III. Conclusion**

2 IT IS HEREBY ORDERED that the Motion to Dismiss is **GRANTED**. (Doc. # 7).
3 The United States is **DISMISSED** without prejudice.

4 All remaining parties are **ORDERED TO SHOW CAUSE** why this action should not
5 be remanded to state court for lack of subject matter jurisdiction pursuant to 28 U.S.C. §
6 1447(c). *See Bruns v. Nat'l Credit Union Admin.*, 122 F.3d 1251, 1257-58 (9th Cir. 1997).
7 This action will be remanded to San Diego Superior Court unless, no later than **fourteen (14)**
8 **days** from the date of this Order, a party files a brief stating a basis for this Court's subject-
9 matter jurisdiction.

10 DATED: March 23, 2010

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12 **WILLIAM Q. HAYES**
13 United States District Judge
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