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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

KAIDEN ROGERS *et al.*,

Plaintiffs,

v.

JOHN BENNETT, M.D., *et al.*,

Defendants.

Civil No. 10cv1027-L(JMA)

**ORDER (1) GRANTING THE UNITED STATES’ MOTIONS TO SUBSTITUTE THE UNITED STATES IN PLACE OF DEFENDANT DAVID PLOURD, M.D. AND TO DISMISS THE CLAIMS AGAINST THE UNITED STATES FOR LACK OF JURISDICTION; AND (2) REMANDING TO STATE COURT THE CLAIMS AGAINST THE REMAINING DEFENDANT**

Plaintiffs filed this medical malpractice action in State court against several Defendants. The action was removed to this court pursuant to the Federal Tort Claims Act (“FTCA”), 28 U.S.C. § 2679(d)(2), because one of the Defendants, David Plourd, M.D., is covered by the Federally Supported Health Centers Assistance Act, 42 U.S.C. Section 233. (Notice of Removal; Notice of Certification of Def. David Plourd, M.D. & Notice of Substitution of United States of America for Def. David Plourd, M.D., all filed May 13, 2010.) Specifically, Dr. Plourd “was acting within the scope of his employment as a person who is deemed an employee of the United States, pursuant to 42 U.S.C. § 233, at the time of such actions.” (Notice of Certification of Def. David Plourd, M.D.)

The United States filed a motion to amend the caption to remove Dr. Plourd as a named defendant and substitute the United States in his place. Plaintiffs did not oppose the motion. For

1 the reasons which follow, the motion is **GRANTED**.

2 If an opposing party fails to file any papers in opposition to a motion, “that failure may  
3 constitute a consent to the granting of a motion . . .” Civ. Loc. Rule 7.1(f)(3)(c). Accordingly,  
4 the motion is granted based on Plaintiffs’ lack of any opposition. In the alternative, the motion  
5 is granted under 28 U.S.C. Section 2679(d)(1), which provides:

6 Upon certification by the Attorney General that the defendant employee was acting  
7 within the scope of his office or employment at the time of the incident out of  
8 which the claim arose, any civil action or proceeding commenced upon such claim  
9 in a United States district court shall be deemed an action against the United States  
under the provisions of this title and all references thereto, and the United States  
shall be substituted as the party defendant.

10 *See also United States v. Smith*, 499 U.S. 160, 164 n.5 (1991). Moreover,

11 The remedy against the United States . . . for . . . personal injury or death arising or  
12 resulting from the negligent or wrongful act or omission of any employee of the  
13 Government while acting within the scope of his office or employment is *exclusive*  
14 of any other civil action or proceeding for money damages by reason of the same  
subject matter against the employee whose act or omission gave rise to the claim  
. . . .

15 28 U.S.C. § 2679(b)(1) (emphasis added); *see also* 42 U.S.C. § 233 (the FTCA remedy  
16 exclusive). The motion to amend the caption by removing Dr. Plourd as a named defendant and  
17 adding the United States in his place is therefore granted on this alternative basis.

18 The United States also moved to dismiss the claims asserted against it for failure to  
19 exhaust administrative remedies. Again, Plaintiffs did not oppose the motion. For the reasons  
20 which follow, the motion to dismiss is **GRANTED**.

21 The motion is granted initially because Plaintiffs did not oppose it. *See* Civ. Loc. Rule  
22 7.1(f)(3)(c). In the alternative, the motion is granted because Plaintiffs failed to comply with 28  
23 U.S.C. Section 2675(a). Once the United States is substituted into the case, as is required by  
24 section 2679(d)(1), the action “shall proceed in the same manner as any action against the United  
25 States filed pursuant to [the FTCA] and shall be subject to the *limitations and exceptions*  
26 applicable to those actions.” *Smith*, 499 U.S. at 166, quoting 28 U.S.C. § 2679(d)(4) (brackets  
27 and emphasis in original). A jurisdictional prerequisite to an FTCA action against the United  
28 States is the filing of an administrative claim with the appropriate federal agency, as provided in

1 28 U.S.C. Section 2675(a). *Brady v. United States*, 211 F.3d 499, 502 (9th Cir. 2000). Section  
2 2675(a) requires in pertinent part:


3 An action shall not be instituted upon a claim against the United States for money  
4 damages for injury or loss of property or personal injury or death caused by the  
5 negligent or wrongful act or omission of any employee of the Government while  
acting within the scope of his office or employment, unless the claimant shall have  
first presented the claim to the appropriate Federal agency . . .

6 Plaintiff did not file an administrative claim as required by section 2675(a). (*See Decl. of*  
7 *Meredith Torres.*) Accordingly, Plaintiff cannot proceed against the United States. The remedy  
8 under the FTCA against the United States is exclusive, 28 U.S.C. § 2679(b)(1), “even though the  
9 FTCA itself does not provide a means of recovery,” *F.D.I.C. v. Meyer*, 510 U.S. 471, 478 n.6  
10 (1994), citing *Smith*, 499 U.S. at 166. The action against the United States is therefore  
11 **DISMISSED WITHOUT PREJUDICE** for lack of jurisdiction.

12 Finally, it appears that after dismissal of the United States, Jerald White, M.D. remains a  
13 Defendant in this case. On or About April 19, 2010, and prior to the removal of the action to  
14 this court, the complaint was amended to join Dr. White as a party defendant. The United States  
15 does not maintain that Dr. White can be deemed its employee for purposes of 42 U.S.C. Section  
16 233 or the FTCA. Because nothing in the record suggests an independent ground for subject  
17 matter jurisdiction over the claims asserted against Dr. White, the action is **REMANDED**  
18 pursuant to 28 U.S.C. Section 1367(c) to the Superior Court of the State of California for the  
19 County of San Diego.

20 **IT IS SO ORDERED.**

21  
22 DATED: October 28, 2010

23   
24 M. James Lorenz  
United States District Court Judge

25 COPY TO:

26 HON. JAN M. ADLER  
27 UNITED STATES MAGISTRATE JUDGE

28 ALL PARTIES/COUNSEL