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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

CLIFTON A. JACKSON, et al.,	:	
	:	CASE NO. 2:17-cv-163
Plaintiffs,	:	
	:	
v.	:	
	:	
OHIO STATE HIGHWAY	:	
PATROL, et al.,	:	CHIEF JUDGE SARGUS
	:	
Defendants.	:	MAGISTRATE JUDGE JOLSON

DEFENDANT UNITED STATES OF AMERICA'S MOTION TO DISMISS FOR
LACK OF SUBJECT MATTER JURISDICTION

Defendant United States of America moves to dismiss itself from this action under Federal Rule of Civil Procedure 12(b)(1) because Plaintiffs did not exhaust administrative remedies under the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671-2680, before filing the complaint. This Court therefore lacks subject matter jurisdiction over Plaintiffs' state law tort claims. The reasons for this motion are more particularly described in the attached Memorandum in Support.

Respectfully submitted,

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United States Attorney

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MEMORANDUM OF LAW

I. FACTS AND PROCEDURAL HISTORY

Plaintiffs filed this action in the Franklin County Court of Common Pleas against numerous local officials, state and federal employees, and their respective entities, including DEA agents TFO Geno Taliano and SA Caitlin Szczepinski. Plaintiffs allege intentional infliction of emotional distress, "intentional tort," and [loss of] consortium, as well as "intentional discriminatory prosecution" and various Constitutional violations. Compl., ECF No. 1-1, ¶ 31. Plaintiffs seek compensatory and punitive damages in excess of \$58 million. *Id.* at p. 14.

The United States Attorney for the Southern District of Ohio, Benjamin C. Glassman, certified that TFO Taliano and SA Szczepinski were acting within the scope of their employment with the United States Government at the time of the incident out of which Plaintiffs' claims arose. *See Certification of Scope of Employment*, ECF No. 1-3. Upon that Certification, the United States of America removed Plaintiffs' action from state court to this Court under 28 U.S.C. § 2679(d)(2). *Notice of Removal*, ECF No. 1. Following removal, the United States filed a *Notice of Substitution*, substituting it as the sole defendant by operation of law in place of the individual defendants TFO Taliano and SA Szczepinski for the state law tort claims alleged. *See Notice of Substitution*, ECF No. 2.

The United States now moves to dismiss itself from this action under Federal Rule of Civil Procedure 12(b)(1) because Plaintiffs have not exhausted their administrative



remedies for their state law tort claims, which are governed by the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671-2680.

II. LAW AND ARGUMENT

The United States is immune from suit unless Congress specifically waives sovereign immunity in statutory text. *United States v. Bormes*, 133 S.Ct. 12, 16 (2012) (quoting *United States v. Nordic Village, Inc.*, 503 U.S. 30, 33-34 (1992)); *FAA v. Cooper*, 566 U.S. 284, 290 (2012) (collecting cases). “Sovereign immunity is jurisdictional in nature. Indeed, the ‘terms of [the United States]’ consent to be sued in any court define that court’s jurisdiction to entertain the suit.” *FDIC v. Meyer*, 510 U.S. 471, 475 (1994) (quoting *United States v. Sherwood*, 312 U.S. 584, 586 (1941)).¹

The Federal Tort Claims Act is a limited waiver of sovereign immunity for certain state law torts committed by federal employees. 28 U.S.C. § 1346(b); *see also* *FDIC v. Meyer*, 510 U.S. at 475-476. The FTCA applies to Plaintiffs’ state law tort claims because the individual federal defendants have been certified as acting within the scope of their employment at the time of the events giving rise to Plaintiffs’ claims. Certification of Scope of Employment, ECF No. 1-3. Upon that certification, the action is to be removed to federal district court and “deemed to be an action or proceeding brought against the

¹ The United States Supreme Court has held that the limitations periods in relation to the administrative claim are not jurisdictional. *United States v. Kwai Fun Wong*, 135 S.Ct. 1625, 1629 (2015). These requirements are in 28 U.S.C. § 2401(b). Although it appears that Plaintiffs’ claims would be time barred as they allege a date of June 14, 2011, this motion presents a question of subject matter jurisdiction because it presents an administrative exhaustion issue under 28 U.S.C. § 2675(a), not a question of timeliness under the statute of limitations periods in 28 U.S.C. § 2401(b).



United States" under the FTCA, "and the United States shall be substituted as the party defendant." 28 U.S.C. § 2679(d)(2); *see also Osborne v. Haley*, 549 U.S. 225, 230 (2007).

One of the conditions of the FTCA's limited waiver of sovereign immunity is that the claimant must completely exhaust administrative remedies with the agency that gave rise to the claim before filing a complaint in district court. Under 28 U.S.C. § 2675(a):

An action shall not be instituted upon a claim against the United States for money damages for injury or loss of property . . . caused by the 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 and his claim shall have been finally denied by the agency in writing and sent by certified or registered mail.

A claimant must satisfy both the "presentment" and "final denial" requirements before bringing state law tort claims, or else those claims must be dismissed. *McNeil v. United States*, 508 U.S. 106, 112 (1993) ("The most natural reading of the statute indicates that Congress intended to require complete exhaustion of executive remedies before invocation of the judicial process."); *see also Lundstrum v. Lyng*, 954 F.2d 1142, 1145 (6th Cir. 1991). It is the plaintiff's burden to affirmatively allege that he has exhausted administrative remedies. *Joelson v. United States*, 86 F.3d 1413, 1422 (6th Cir. 1996) ("Because [Plaintiff] does not allege that he has filed an administrative claim, he has not satisfied the jurisdictional prerequisite to obtaining judicial review under the Federal Tort Claims Act . . .").

A claimant "presents" an administrative tort claim when the federal agency whose activities gave rise to the claim receives written notification of the incident



accompanied by a claim for money damages in a sum certain. 28 U.S.C. § 2675(a); see also 28 C.F.R. § 14.2. A "Standard Form 95" is the official form on which tort claims are presented. 28 C.F.R. § 14.2(a). The SF-95 need not be used, however, so long as the appropriate federal agency receives the claimant's written notification of an incident accompanied by a claim for money damages in a sum certain. 28 C.F.R. § 14.2(a); *Blakely v. United States*, 276 F.3d 853, 864–65 (6th Cir. 2002) (quoting *Lundstrum v. Lyng*, 954 F.2d 1142, 1145 (6th Cir. 1991)). "[A]n administrative claim under the FTCA must be in careful compliance with its terms" and "to be complete, it must include a claim for damages in a sum certain." *Blakely*, 276 F.3d at 865 (citing *Glarnier v. United States Dep't of Veterans Admin.*, 30 F.3d 697, 700 (6th Cir. 1994)).

Once a claimant presents a tort claim to the appropriate federal agency, the "final denial" requirement of Section 2675(a) must be met before the complainant can institute her action. The tort claim must "have been finally denied by the agency in writing and sent by certified or registered mail," or six months must have passed without the agency's decision, in which case the claim may be deemed finally denied. 28 U.S.C. § 2675(a).

Plaintiffs' allegations are not only insufficient to invoke subject matter jurisdiction over their state law tort claims—Plaintiffs in fact *cannot* allege that they exhausted administrative remedies before filing the state court complaint. The DEA has no record that Plaintiffs, Clifton A. Jackson, Alexander Jemison, Amber Powlak, Mason Jackson, Moneh Fuller, Roman Motley, Elijah Fuller, Lorrionna Jackson, April Burns, Angel Burns Myles, Brenda Jackson, or Jamel Pittman presented an administrative tort claim



under any of the Plaintiffs names in this case. *See* Decl. of DEA Associate Chief Counsel Marcia N. Tiersky, attached hereto as Exhibit 1, at ¶¶ 4-5. Thus, because Plaintiffs have failed to present an administrative tort claim, this Court does not have subject matter jurisdiction over the United States.

III. CONCLUSION

For the reasons set forth above, the Court should dismiss the United States from this action for lack of subject matter jurisdiction.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on February 24, 2017, I electronically filed the foregoing Motion to Dismiss using the CM/ECF system, and that on the same date I mailed a copy by first class mail via the United States Postal Service to:

Clifton A. Jackson
Lake Erie Correctional Institution, # A652-163
501 Thompson Road
Conneaut, OH 44030

Alexander Jemison
[REDACTED]
Buffalo, NY [REDACTED]

Amber Powlak
[REDACTED]
Buffalo, NY [REDACTED]

Mason Jackson
[REDACTED]
Buffalo, NY [REDACTED]

Moneh Fuller
[REDACTED]
Buffalo, NY [REDACTED]

Roman Motley
[REDACTED]
Buffalo, NY [REDACTED]

Elijah Fuller
[REDACTED]
Buffalo, NY [REDACTED]

Lorrionna Jackson
[REDACTED]
Buffalo, NY [REDACTED]

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April Burns
[REDACTED]

Detroit, MI [REDACTED]

Angel Burns Myles
[REDACTED]

Detroit, MI [REDACTED]

Brenda Jackson
[REDACTED]

Detroit, MI [REDACTED]

Jamel Pittman
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Detroit, MI [REDACTED]

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State Trooper, Michael Trader
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Elyria, OH 44035

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s/Leah M. Wolfe
LEAH M. WOLFE (0093299)
Assistant United States Attorney

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**IN THE COURT OF COMMON PLEAS
FRANKLIN COUNTY, OHIO**

_____)	
)	
CLIFTON A. JACKSON, et al.,)	
	Plaintiffs,)	CASE NO. 17CV-01-616
v.)	
)	
OHIO STATE)	
HIGHWAY PATROL, et al.,)	JUDGE YOUNG
	Defendants.)	
_____)	

DECLARATION OF MARCIA N. TIERSKY

I, Marcia N. Tiersky, declare and say:

1. I am Associate Chief Counsel for the Civil Litigation Section of the Office of Chief Counsel of the United States Department of Justice, Drug Enforcement Administration (DEA).
2. As such, I have custody of agency records related to the filing, evaluation and disposition of administrative claims presented to DEA under the Federal Tort Claims Act (FTCA). Agency procedures require that all FTCA claims over \$500 be submitted to this office for review.
3. As a routine business practice, this office maintains an electronic record of each such claim. This system has been in effect for over ten years.
4. On or about February 21, 2017, I searched the records of this office to determine whether a tort claim was presented to DEA by or on behalf of Plaintiffs Clifton A. Jackson, Alexander Jemison, Amber Powlak, Mason Jackson, Moneh Fuller, Roman Motley, Elijah

EXHIBIT

1

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Fuller, Lorrionna Jackson, April Burns, Angel Burns Myles, Brenda Jackson, and Jamel Pittman, arising out of the events described in their Complaint, filed on or about January 20, 2017.

5. There is no record of an FTCA claim having been presented by or on behalf of any of the Plaintiffs in this case.

I declare under penalty of perjury pursuant to 28 U.S.C. § 1746 that the forgoing statements are true and correct.

Executed in Arlington, Virginia,
February 21, 2017


MARCIA N. TIERSKY

COPY

**IN THE COURT OF COMMON PLEAS
FRANKLIN COUNTY, OHIO**

_____)		
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CLIFTON A. JACKSON, et al.,)	
)	CASE NO. 17CV-01-616
Plaintiffs,)	
v.)	
)	
OHIO STATE)	
HIGHWAY PATROL, et al.,)	JUDGE YOUNG
)	
Defendants.)	
_____)		

DECLARATION OF MARCIA N. TIERSKY

I, Marcia N. Tiersky, declare and say:

1. I am Associate Chief Counsel for the Civil Litigation Section of the Office of Chief Counsel of the United States Department of Justice, Drug Enforcement Administration (DEA).

2. As such, I have custody of agency records related to the filing, evaluation and disposition of administrative claims presented to DEA under the Federal Tort Claims Act (FTCA). Agency procedures require that all FTCA claims over \$500 be submitted to this office for review.

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any of the Plaintiffs in this case.

I declare under penalty of perjury pursuant to 28 U.S.C. § 1746 that the forgoing
statements are true and correct.

Executed in Arlington, Virginia,
February 21, 2017


MARCIA N. TIERSKY