

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

<b>CARMEN MEDINA,</b>	:	
<b>Plaintiff,</b>	:	
	:	<b>CIVIL ACTION</b>
v.	:	
	:	
<b>CITY OF PHILADELPHIA, et al.,</b>	:	<b>No. 04-5698</b>
<b>Defendants.</b>	:	
	:	

**MEMORANDUM AND ORDER**

**Schiller, J.**

**May 9, 2005**

Plaintiff Carmen Medina brings this action against Defendants City of Philadelphia, the United States Department of Housing and Urban Development (“HUD”), and the Secretary of HUD alleging that she sustained injuries from a fall on HUD’s property. HUD and the Secretary of HUD (collectively “Federal Defendants”) have moved to dismiss the claims against them on several grounds, including lack of subject matter jurisdiction based on Plaintiff’s failure to exhaust administrative remedies. For the reasons set forth below, the Court does not have subject matter jurisdiction over these claims and, accordingly, the motion to dismiss is granted.

**I. BACKGROUND**

Plaintiff avers that on December 9, 2002, she was walking on a sidewalk in front of 4057 North Reese Street in Philadelphia, Pennsylvania, a property owned by HUD. (Compl. ¶ 8.) She further asserts that she was lawfully proceeding on the sidewalk when she slipped and fell on concrete covered by ice and/or snow, causing her to suffer bodily injuries. (*Id.* ¶¶ 12, 14.)

On January 3, 2003, Plaintiff’s counsel attempted to send a letter to HUD advising HUD of this incident. (Pl.’s Resp. Ex. A (Letter of Jan. 3, 2003).) On January 24, 2004, Plaintiff’s counsel

sent a second letter to HUD that also referenced the incident and stated that “[p]reviously we had written to you, but we have not had a response.” (*Id.* Ex. B (Letter of Jan. 24, 2004); Fed. Defs.’ Mot. Ex. B (same).) On March 4, 2004, HUD responded to the January 24th letter with a letter stating that HUD did not have a record of any previous correspondence. (Pl.’s Resp. Ex. C (Letter of Mar. 4, 2004); Fed. Defs.’ Mot. Ex. C (same).) HUD’s letter informed Plaintiff’s counsel that claims made against the United States for tortious conduct are governed by the Federal Tort Claims Act (“FTCA”). (*Id.*) The letter explained that to initiate an administrative claim under the FTCA, Plaintiff had to fill out a Standard Form 95 (“Form 95”), requesting money damages in a “sum certain,” and submit the completed form to HUD’s office. (*Id.*) Attached to the letter was a copy of a blank Form 95, as well as a copy of the relevant HUD regulations. (*Id.*)

Plaintiff asserts that on March 11, 2004, she executed the Form 95 and mailed it back to HUD. (Pl.’s Resp. Ex. D (Letter of Mar. 11, 2004).) HUD, however, contends that it never received a completed Form 95 from Plaintiff. (Fed. Defs.’ Mot. Ex. D (Decl. of Thomas Rodick), Ex. E (Decl. of Kevin Carlin).) On December 9, 2004, Plaintiff filed the instant action and served HUD with a copy of the Complaint. (Pl.’s Resp. Ex. E (Aff. of Service).) The Complaint itself makes no reference to Plaintiff submitting an administrative claim to HUD or to HUD denying such a claim. Nevertheless, a copy of a completed Form 95 is attached to the back of the Complaint.

## **II. STANDARD OF REVIEW**

Federal Defendants have filed a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6), which concerns the failure to state a claim on which relief can be granted. (*See* Fed. Defs.’ Mot. at 1.) Motions to dismiss for lack of subject matter jurisdiction, however, are more

properly made under Federal Rule of Civil Procedure 12(b)(1). FED. R. CIV. P. 12(b)(1) (2005). The Court, therefore, will treat Federal Defendants' subject matter jurisdiction challenge as having been filed pursuant to that Rule. *See Jones v. Boyd*, Civ. A. No. 97-3363, 1998 WL 314668, at \*2-3, 1998 U.S. Dist. LEXIS 8695, at \*5-7 (E.D. Pa. June 11, 1998) (treating subject matter jurisdiction challenge filed pursuant to Rule 12(b)(6) as having been filed pursuant to Rule 12(b)(1)); *see also Smith v. Nat'l Flood Ins. Program of the Fed. Emergency Mgmt. Agency*, 156 F. Supp. 2d 520, 522 (E.D. Pa. 2001) (treating defendants' motion to dismiss for lack of subject matter jurisdiction as a motion made pursuant to Rule 12(b)(1)).

When considering a motion to dismiss under Rule 12(b)(1), a district court must distinguish between facial and factual challenges to its subject matter jurisdiction. *Mortensen v. First Fed. Sav. & Loan Ass'n*, 549 F.2d 884, 891 (3d Cir. 1977). "In a facial attack, a defendant argues that the plaintiff did not properly plead jurisdiction . . . [whereas] a 'factual' attack asserts that jurisdiction is lacking on the basis of facts outside of the pleadings." *Smolow v. Hafer*, 353 F. Supp. 2d 561, 566 (E.D. Pa. 2005) (*citing Mortensen*, 549 F.2d at 891). In reviewing a facial attack, "the court must only consider the allegations of the complaint and documents referenced therein and attached thereto, in the light most favorable to the plaintiff." *Gould Elecs., Inc. v. United States*, 220 F.3d 169, 176 (3d Cir. 2000) (citations omitted). If the attack is factual, however, the court is not confined to the allegations in the complaint and "can look beyond the pleadings to decide factual matters relating to jurisdiction." *Cestonaro v. United States*, 211 F.3d 749, 752 (3d Cir. 2000) (citation omitted). Furthermore, with a factual challenge, the plaintiff bears the burden of proving that jurisdiction does, in fact, exist. *Carpet Group Int'l v. Oriental Rug Imps. Ass'n*, 227 F.3d 62, 69 (3d Cir. 2000). A contention that the plaintiff has failed to exhaust administrative remedies before filing a lawsuit is

a factual rather than a facial attack, “because it challenges the existence of jurisdiction as opposed to the sufficiency of the pleadings.” *Hardy v. United States*, Civ. A. No. 03-CV-0042, 2003 WL 22425003, at \*2, 2003 U.S. Dist. LEXIS 19496, at \*4 (E.D. Pa. Oct. 22, 2003); *see also Gland v. United States*, Civ. A. No. 03-CV-1697, 2003 WL 23094911, at \*1, 2003 U.S. Dist. LEXIS 23894, at \*2 (E.D. Pa. Dec. 16, 2003).

### III. DISCUSSION

Plaintiff asserts claims against Federal Defendants pursuant to the FTCA, 28 U.S.C. §§ 2671-2680 (2005). (*See* Compl. at 1.) The FTCA “waives sovereign immunity as to claims against the United States for money damages for injury caused by the negligent or wrongful act or omission of a government employee acting within the scope of his employment.”<sup>1</sup> *Beneficial Consumer Disc. Co. v. Poltonowicz*, 47 F.3d 91, 95-96 (3d Cir. 1995). A court, however, does not have subject matter jurisdiction over an FTCA action unless the plaintiff has first “presented” a claim to the proper federal agency and allowed the agency six months to evaluate that claim. 28 U.S.C. § 2675(a); *see also Bialowas v. United States*, 443 F.2d 1047, 1049 (3d Cir. 1971) (stating that this requirement “is jurisdictional and cannot be waived”). Federal Defendants contend that this Court does not have subject matter jurisdiction over the claims against them because Plaintiff failed to first

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<sup>1</sup> Plaintiff concedes that she should have named the United States, rather than HUD and the Secretary of HUD, as the defendant for her FTCA claims. (Pl.’s Mem. in Supp. of Resp. at 7-9); *see also McNiff v. Asset Mgmt. Specialists*, 337 F. Supp. 2d 685, 691 (E.D. Pa. 2004) (“The only proper defendant in an action brought pursuant to the Federal Tort Claims Act is the United States of America.”). Plaintiff has requested an opportunity to amend the caption to correct her mistake. (Pl.’s Mem. in Supp. of Resp. at 7-9.) An amendment to the caption, however, would not affect the Court’s jurisdictional analysis, which pertains to Plaintiff’s failure to exhaust administrative remedies prior to filing suit. The Court thus concludes that amendment is unnecessary.

present an administrative claim to HUD. The Court agrees and concludes that the claims against Federal Defendants must be dismissed.

**A. Mailing the Administrative Claim**

Plaintiff first contends that she satisfied the FTCA's presentment requirement by executing and mailing an administrative claim to HUD on March 11, 2004. It is undisputed that on March 4, 2004, HUD sent Plaintiff a copy of the HUD regulations relevant to the presentment of administrative claims. (*See* Pl.'s Resp. Ex. C.) Under those regulations, administrative claims are deemed "presented" to HUD when "the Department [of HUD] *receives* . . . an executed "Claim for Damages or Injury," Standard Form 95, or other written notification of an incident, accompanied by a claim for money damages in a sum certain . . . ." 24 C.F.R. § 17.2 (2005) (emphasis added). In this case, two HUD employees have submitted declarations stating that HUD has no record of receiving an administrative claim filed by Plaintiff. (Fed. Defs.' Mot. Ex. D ¶ 4, Ex. E ¶¶ 5-6.) Plaintiff, in turn, has produced only an unsigned letter to HUD purporting to enclose the claim, as well as an affidavit from her counsel stating that she mailed the claim. (Pl.'s Resp. Ex. D, Ex. F (Aff. of Rania Major-Trufino).) This evidence falls well short of proving subject matter jurisdiction, because it has been established that "[t]he mere mailing of an administrative claim will *not* satisfy the requisite presentment." *Anderson v. United States*, 744 F. Supp. 641, 643 (E.D. Pa. 1990) (emphasis in original). As Plaintiff has not produced a return receipt or any other proof that her alleged mailing ever reached HUD, the Court holds that her administrative claim was not presented to HUD in March of 2004.<sup>2</sup> *See id.* at 663-64 (holding plaintiff's administrative claim not properly

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<sup>2</sup> It is unclear whether Plaintiff is contending that, alternatively, she presented an administrative claim to HUD via her January 3, 2003 letter and/or her January 24, 2004 letter. (*See* Pl.'s Resp. Exs. A & B.) Nonetheless, this argument must be rejected, as neither of those

commenced by mailing of Form 95 where plaintiff failed to produce record of receipt); *see also Dark v. United States*, Civ. A. No. 91-1438, 1991 WL 147544, at \*2, 1991 U.S. Dist. LEXIS 10551 (E.D. Pa. July 26, 1991) (holding plaintiff's unsigned letter insufficient to establish presentment to agency without certificate of mailing, return receipt, registration slip, or agency acknowledgment).

### **B. Attaching the Administrative Claim to the Complaint**

Plaintiff also argues that she presented her administrative claim to HUD on December 9, 2004, the day when she served the Complaint on HUD, because she attached a copy of a completed Form 95 to the back of that document. (*See* Pl.'s Resp. Ex. F.) Even if Plaintiff were correct, her lawsuit could not proceed against Federal Defendants at this time, as HUD has not been given the requisite six months to consider Plaintiff's Form 95. *See* 28 U.S.C. § 2675(a) (stating that an agency has six months to make a final disposition on an administrative claim before litigation may be instituted). Regardless, the Court finds that Plaintiff is not correct. Filing suit, in and of itself, "does not meet the [FTCA's] requirement of first presenting a claim to the appropriate governmental agency." *Flickinger v. United States*, 523 F. Supp. 1372, 1377 (W.D. Pa. 1981) (citations omitted); *see also Bogl v. United States Postal Serv.*, Civ. A. No. 93-0889, 1993 WL 264900, at \*3, 1993 U.S. Dist. LEXIS 9314, at \*12 (E.D. Pa. July 1, 1993) ("[P]laintiff's commencement of an action in Pennsylvania state court on December 4, 1992, does nothing to satisfy the requirements of section 2675(a)."). If filing suit constituted presentment, plaintiffs would be able to circumvent the goals of the FTCA's procedural prerequisite, which are "to improve and expedite disposition of monetary

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letters requested money damages in a "sum certain." *See* 24 C.F.R. § 17.2; *see also Le Grand v. Lincoln*, 818 F. Supp. 112, 115 (E.D. Pa. 1993) ("This Court has consistently held that a claimant who fails to include a claim for money damages in a sum certain on the administrative claim form has not satisfied the FTCA requirement that a claim first be filed with the appropriate administrative agency.").

claims against the government by establishing a system for prelitigation settlement, to enable consideration of claims by the agency having the best information concerning the incident, and to ease court congestion and avoid unnecessary litigation.” *Flickinger*, 523 F. Supp. at 1376 (citing S. REP. NO. 1327, 89th Cong., 2d Sess. (1966), reprinted in 1966 U.S.C.C.A.N. 2516). Similarly, if courts allowed plaintiffs to “present” administrative claims by affixing them as exhibits to lawsuits, these goals would be subverted and § 2675(a) would become meaningless. Moreover, piggybacking an administrative claim onto a complaint ignores the plain language of the statute, which clearly states that a claimant “shall have *first* presented his claim to the appropriate Federal agency” before commencing litigation. 28 U.S.C. § 2675(a) (emphasis added). Therefore, the Court holds that Plaintiff did not present her administrative claim to HUD by merely attaching it to her Complaint.

In sum, the Court finds that Plaintiff did not properly present an administrative claim to HUD at any time on or before December 9, 2004. As a result, the Court does not have subject matter jurisdiction over Plaintiff’s claims against Federal Defendants. Moreover, Plaintiff cannot be permitted to re-file these claims at a later date, because Plaintiff’s administrative claim against HUD is now time-barred. *See* 28 U.S.C. § 2401(b) (2005) (“A tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues . . . .”); (*see also* Pl.’s Mem. in Supp. of Resp. at 10 (noting that a Form 95 must be filed within two years of the tort alleged)). While this undoubtedly works a hardship upon Plaintiff, the courts “are not free to enlarge that consent to be sued which the Government, through Congress, has undertaken so carefully to limit . . . . It is the prerogative of Congress, not that of the courts, to make any such change.” *Flickinger*, 523 F. Supp. at 1377 (citations omitted). Accordingly, the claims against Federal Defendants must be dismissed with prejudice.

#### **IV. CONCLUSION**

For the reasons stated above, Federal Defendants' motion to dismiss is granted. An appropriate Order follows.

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<b>Plaintiff,</b>	:	
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v.	:	
	:	
<b>CITY OF PHILADELPHIA, et al.,</b>	:	<b>No. 04-5698</b>
<b>Defendants.</b>	:	
	:	

**ORDER**

AND NOW, this 9<sup>th</sup> day of May, 2005, upon consideration of the Motion to Dismiss, or in the alternative, for Summary Judgment filed by Defendants United States Department of Housing and Urban Development (“HUD”) and the Secretary of HUD (collectively “Federal Defendants”), Plaintiff’s response thereto, Federal Defendants’ reply thereon, and for the foregoing reasons, it is hereby **ORDERED** that:

1. Federal Defendants’ Motion to Dismiss (Document No. 4) is **GRANTED**. Plaintiff’s claims against Federal Defendants are **DISMISSED with prejudice** for lack of subject matter jurisdiction.
2. Defendant City of Philadelphia’s Cross-Claim against Federal Defendants (Document No. 13) is **DISMISSED**.<sup>1</sup>

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<sup>1</sup> As Plaintiff’s claims against Federal Defendants are being dismissed for lack of subject matter jurisdiction, the cross-claim against them must also be dismissed. *See Fairview Park Excavating Co. v. Al Monzo Constr. Co.*, 560 F.2d 1122, 1125 (3d Cir. 1977) (“If a federal court dismisses a plaintiff’s claim for lack of subject matter jurisdiction, any cross-claims dependent upon ancillary jurisdiction must necessarily fall as well, because it is the plaintiff’s claim to which the cross-claim is ancillary that provides the derivative source of jurisdiction for the cross-claim.”); *see also Hynson v. City of Chester*, 684 F. Supp. 1294, 1300 n.12 (E.D. Pa. 1988) (dismissing cross-claims against defendants because plaintiff’s claims against those defendants were being dismissed on jurisdictional grounds).

3. As Plaintiff's only remaining claim arises under state law, the above-captioned action is **DISMISSED** for lack of subject matter jurisdiction. Pursuant to 42 PA. CONS. STAT. § 5103(b)(1), Plaintiff may transfer this matter to the Philadelphia Court of Common Pleas.<sup>2</sup>
4. The Clerk of Court is directed to close this case.

**BY THE COURT:**

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**Berle M. Schiller, J.**

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<sup>2</sup> Only one claim now remains in this case: Plaintiff's state law negligence claim against the City of Philadelphia. (*See* Compl. Count I.) "The Third Circuit has held that where, as here, all federal claims are dismissed or otherwise no longer viable before trial, the Court should decline to exercise jurisdiction over pendent state claims unless 'extraordinary circumstances' are present." *ARA Servs. v. Sch. Dist. of Phila.*, 590 F. Supp. 622, 630 (E.D. Pa. 1984) (citations omitted). As there are no "extraordinary circumstances" here that would justify the Court's retention of jurisdiction, this case must be dismissed for lack of subject matter jurisdiction. *See id.*; *see also Rousseau v. City of Phila.*, 589 F. Supp. 961, 974 (E.D. Pa. 1984). Pursuant to Pennsylvania statute, however, Plaintiff will now have the opportunity to bring her state law claim in the Philadelphia Court of Common Pleas by transferring the claim on her own. *See* 42 PA. CONS. STAT. § 5103(b)(1) (2005); *see also McLaughlin v. Arco Polymers, Inc.*, 721 F.2d 426, 431 (3d Cir. 1983) (holding that district court should have dismissed case rather than ordered case transferred to state court, because § 5103(b)(1) allows litigants to transfer such matters of their own accord).