JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT (FEBRUARY 8, 2023)

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

CHARLES JENKINS,

Plaintiff-Appellant,

v.

TRIWEST HEALTHCARE ALLIANCE,

Defendant-Appellee.

No. 22-30429

Appeal from the United States District Court for the Eastern District of Louisiana USDC No. 2:22-CV-37

Before: SMITH, CLEMENT, and WILSON, Circuit Judges.

This cause was considered on the record on appeal and the briefs on file.

IT IS ORDERED and ADJUDGED that the judgment of the District Court is AFFIRMED.

IT IS FURTHER ORDERED that appellant pay to appellee the costs on appeal to be taxed by the Clerk of this Court.

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT (FEBRUARY 8, 2023)

UNITED STATES COURT OF APPEALS
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CHARLES JENKINS,

Plaintiff-Appellant,

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TRIWEST HEALTHCARE ALLIANCE,

Defendant-Appellee.

No. 22-30429

Appeal from the United States District Court for the Eastern District of Louisiana USDC No. 2:22-CV-37

Before: SMITH, CLEMENT, and WILSON, Circuit Judges.

PER CURIAM:*

Charles Jenkins appeals the dismissal of his suit for medical malpractice. We affirm.

* This opinion is not designated for publication. *See* 5th Cir. R. 47.5.

I.

On January 9, 2020, Jenkins sued pro se in federal district court. He alleged that three doctors, the "VA Medical Center," "Tulane Medical Center," and "Triwest Healthcare Alliance" had "engaged and/or participated in un-necessary [*sic*] surgical-negligence medical malpractice . . . ." He stated, "[t]he surgeon was experimenting," and he asked for "punitive damages because the surgeon did not have clearance to perform." Jenkins asserted federal question jurisdiction under the Federal Torts Claims Act ("FTCA"), 28 U.S.C. § 2671 *et seq.*

Defendants TriWest Healthcare Alliance ("TriWest") and University Healthcare System, L.C., d/b/a/ Tulane University Hospital & Clinic ("TUHC"), moved to dismiss, alleging, among other things, failure to state a claim, lack of subject matter jurisdiction, and that the claims were time-barred. The district court dismissed without prejudice for lack of subject matter jurisdiction.

II.

Dismissals under Rule 12(b)(1) are reviewed *de novo*. *See JTB Tools & Oilfield Servs., L.L.C. v. United States*, 831 F.3d 597, 599 (5th Cir. 2016). "The burden of proof . . . is on the party asserting jurisdiction." *Ramming v. United States*, 281 F.3d 158, 161 (5th Cir. 2001). The standard of review is similar to that of Rule 12(b)(6) but allows the court "to consider a broader range of materials," such as "undisputed facts in the record" or "the court's resolution of disputed facts." *Williams v. Wynne*, 533 F.3d 360, 365 n.2 (5th Cir. 2008) (quoting another source). A court should dismiss for lack of subject

matter jurisdiction only when "it appears certain that the plaintiff cannot prove any set of facts in support of his claim that would entitle plaintiff to relief." *Ramming*, 281 F.3d at 161.

We may affirm for any reason supported by the record, even if not relied on by the district court. *United States v. Grosz*, 76 F.3d 1318, 1324 n.6 (5th Cir. 1996). We cannot consider arguments not presented to the district court. *Nissho-Iwai Am. Corp. v. Kline*, 845 F.2d 1300, 1307 (5th Cir. 1988); *Little v. Liquid Air Corp.*, 37 F.3d 1069, 1071 n.1 (5th Cir. 1994) (en banc).

III.

The district court held that Jenkins had not established subject matter jurisdiction because he had failed to exhaust his administrative remedies, a jurisdictional prerequisite for an FTCA claim. The FTCA is a limited waiver of sovereign immunity that allows a suit against the United States only when the plaintiff has "first exhausted his administrative remedies." *McNeil v. United States*, 508 U.S. 106, 107 (1993). That exhaustion is a "jurisdictional prerequisite for FTCA claims that cannot be waived." *Coleman v. United States*, 912 F.3d 824, 834 (5th Cir. 2019). For exhaustion, the plaintiff must have "presented the claim to the appropriate Federal agency," and the agency must have denied the claim. 28 U.S.C. § 2675(a). If a plaintiff cannot show exhaustion, he has not pleaded a federal question. *See Coleman*, 912 F.3d at 834.

None of Jenkins's filings alleged that he had exhausted his administrative remedies until after the magistrate judge submitted his Report and

Recommendation. At that point, Jenkins filed an objection, stating that "the evidence of records [*sic*] will reveal that the plaintiff filed his Standard form 95 within the two (2) year statute of limitations and there was no objection to my submission." The district court overruled that objection and held that because Jenkins did not "identify the agency with which he filed [the form], the date on which it was filed, [] the disposition of his alleged filing, . . . [or] a copy of the form he says he filed," he had failed to show that he had exhausted.

Weeks later, Jenkins filed an untimely "objection" to that ruling, contending that he had indeed filed his form with the VA and that discovery would show that. But Jenkins still failed to provide any evidence pertaining to the Standard Form 95 itself. The court therefore declined to revisit the judgment. Jenkins filed a notice of appeal and attached what appears to be his Standard Form 95 and a FedEx tracking printout purportedly confirming that the Form had been delivered to a recipient in 'Lakewood, Co.' on November 6, 2018.

Regardless, Jenkins did not present that evidence until after the district court had closed the case. And "because our review is confined to an examination of materials before the lower court at the time the ruling was made[,] subsequent materials are irrelevant." *Nissho-Iwai*, 845 F.2d at 1307. Thus, the success of Jenkins's appeal rises and falls on the evidence and contentions in the filings submitted before the final judgment. There, we find nothing more than conclusory statements. Allegations such as "it's a matter of record that plaintiff did file his Standard Form 95 with the defendant" are speculative

and conclusory. Even when viewed with the deference to which Jenkins is entitled, bare allegations cannot support a finding that he properly exhausted. Without such a showing, he has not established federal question jurisdiction.[1]

The judgment of dismissal without prejudice was correct and is AFFIRMED.

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[1] Jenkins provides no other tenable basis for federal jurisdiction. His claim that he has diversity jurisdiction is without merit—from the face of the pleadings, all parties are in Louisiana. Jenkins' only assertion to the contrary is that "although TriWest does business in Louisiana, it's [*sic*] corporate Headquarters is in Arizona." But even if that is true, diversity jurisdiction requires complete diversity—"no party on one side may be a citizen of the same State as any party on the other side"—and Jenkins has made no showing that the other plaintiffs are diverse. *Mas v. Perry*, 489 F.2d 1396, 1398-99 (5th Cir. 1974); *see also* 28 U.S.C. § 1332.

ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA (JUNE 21, 2022)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

CHARLES JENKINS

v.

VA MEDICAL CENTER, ET AL.

Civil Action No. 22-37
Section M (5)

Before: Barry W. ASHE,
United States District Judge.

Before the Court is plaintiff's second objection to the United States Magistrate Judge's Report and Recommendation ("R&R"),[1] to which defendant TriWest Healthcare Alliance Corp. ("TriWest") responds in opposition.[2] Having considered the parties' arguments, the record, and the applicable law, the Court overrules plaintiff's second objection.

On January 9, 2022, plaintiff Charles Jenkins filed this action alleging claims arising under the

[1] R. Doc. 30.

[2] R. Doc. 31.

Federal Tort Claims Act ("FTCA") and asserting federal question subject-matter jurisdiction under 28 U.S.C. § 1331.[3] TriWest filed a motion to dismiss arguing, among other things, that this Court lacked subject-matter jurisdiction under the FTCA because Jenkins failed to exhaust his administrative remedies.[4] On April 28, 2022, the magistrate judge issued an R&R recommending that Jenkins's case be dismissed without prejudice because Jenkins did not meet his burden of establishing subject-matter jurisdiction.[5] On May 9, 2022, Jenkins objected to the R&R, arguing that he exhausted his administrative remedies as required by the FTCA by filing a "Standard form 95" within the two-year statute of limitations.[6] Because Jenkins provided no details regarding the "Standard form 95" in either his complaint or objection, this Court adopted the R&R and dismissed the case without prejudice for lack of subject-matter jurisdiction.[7] Judgment was entered and the case was closed on May 12, 2022.[8]

On June 2, 2022, Jenkins filed a second objection to the R&R reasserting that he filed a "Standard

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[3] R. Doc. 1. *See also* 28 U.S.C. § 1346.

[4] R. Doc. 13. Defendant University Health System, L.C. also filed a motion to dismiss (R. Doc. 15), which was dismissed as moot. *See* R. Docs. 25; 28.

[5] R. Doc. 25.

[6] R. Doc. 27.

[7] R. Doc. 28.

[8] R. Doc. 29.

form 95."[9] There is no provision in the Federal Rules of Civil Procedure or under 28 U.S.C. § 636 for out-of-time objections to an R&R, especially when the Court has already ruled on a previous (and substantively similar) objection. Even if the Court liberally construes Jenkins's second objection as a post-judgment motion under either Rule 59 or 60 of the Federal Rules of Civil Procedure, Jenkins has not satisfied the standard for the relief he seeks. In particular, he still has not attached a copy of the "Standard form 95" he says he filed with the appropriate federal agency (which he now says was the VA Medical Center), nor provided other essential details about any such filing (e.g., the date on which it was filed or the disposition of the alleged filing), and so has provided no basis for this Court to revisit its opinion or judgment.

New Orleans, Louisiana, this 21st day of June, 2022.

/s/ Barry W. Ashe
United States District Judge

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[9] R. Doc. 30.

ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA (MAY 12, 2022)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

RICHARD JENKINS [sic: Charles Jenkins]

v.

VA MEDICAL CENTER, ET AL.

Civil Action No. 22-37
Section M (5)

Before: Barry W. ASHE,
United States District Judge.

Having considered the complaint, the record, the applicable law, the magistrate judge's Report and Recommendation ("R&R"),[1] and the plaintiff's objection to the R&R,[2] the Court hereby overrules the plaintiff's objection, approves the R&R, and adopts the R&R as its opinion in this matter. The R&R recommends that this Court dismiss this action without prejudice for lack of subject-matter jurisdiction because plaintiff failed to plead that he exhausted his administrative remedies as required by the Federal Tort Claims

[1] R. Doc. 25.

[2] R. Doc. 27.

Act.[3] In his objection, plaintiff claims that he filed a "Standard form 95" within the two-year statute of limitations.[4] However, plaintiff provides no details (either in his complaint or in any other submission) regarding the "Standard form 95" he says he filed: he does not identify the agency with which he filed it, the date on which it was filed, or the disposition of his alleged filing. Nor does plaintiff submit a copy of the form he says he filed. Thus, plaintiff has not satisfied his obligation to plead subject-matter jurisdiction.

Accordingly,

IT IS ORDERED that plaintiff's suit is dismissed without prejudice for lack of subject-matter jurisdiction.

/s/ Barry W. Ashe
United States District Judge

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[3] R. Doc. 25. at 1-5

[4] R. Doc. 27. at 1.

REPORT AND RECOMMENDATION OF THE MAGISTRATE JUDGE (APRIL 28, 2022)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

CHARLES JENKINS

v.

VA MEDICAL CENTER, ET AL.

Civil Action No. 22-37
Section "M" (5)

Before: Michael B. NORTH,
United States Magistrate Judge.

Before the Court are Defendant's Motion to Dismiss (Rec. doc. 13) filed by TriWest Healthcare Alliance ("TWHA"), the Motion for Leave from the Court to Present Amended Complaint (Rec. doc. 14) filed by Plaintiff, and the Motion to Dismiss (Rec. doc. 15) filed by Defendant University Healthcare System ("UHS"). The District Court referred the two motions to dismiss to this Court under 28 U.S.C. § 636 on March 15, 2022. (Rec. doc. 16).[1] Jenkins filed an opposition to the motions to dismiss. (Rec.

[1] Even though Plaintiff's motion to amend is before this Court by reference pursuant to the local rules of this Court, the Court issues only a Report and Recommendation on all three motions.

doc. 19).[2] Having reviewed the pleadings and the case law, the Court recommends as follows.

I. Factual Background

Jenkins, a Louisiana resident and Veteran, filed this lawsuit *pro se* on January 9, 2022 against the VA Medical Center ("the VA"), TWHA, UHS, and three individual doctors ("the Doctors") who Jenkins alleges were or are providers at UHS. (Rec. doc. 1). Jenkins alleges subject matter jurisdiction under 28 U.S.C. § 1331, specifically, alleging jurisdiction under the Federal Tort Claims Act. (*Id.* at 4.). The complaint appears to allege "medical malpractice" that arose out of medical treatment that he received at UHS by the Doctors. (*Id.* at p. 3.) Jenkins concludes in his complaint that "[e]ach defendant engaged and/or participated in un-necessary surgical-negligence." (*Id.* at p. 5.). Specifically, Jenkins alleges that "the surgeon did not have clearance to perform. The surgeon was experimenting." (*Id.*). Jenkins alleges that this medical negligence occurred in 2016, and that he has experienced "incontinence for the past 5 years." (*Id.*). Jenkins seeks $2,000,000 in damages from each Defendant, totaling $12 million. (*Id.*).

II. Standard for a Motion to Dismiss Under Rule 12(b)(1)

The Court first considers subject-matter jurisdiction. "Motions filed under Rule 12(b)(1) of the Federal Rules of Civil Procedure allow a party to

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[2] TWHA also filed a reply, but the Clerk of Court marked it deficient for failure to file a motion for leave to file the reply in accordance with the local rules of this Court.

challenge the subject matter jurisdiction of the district court to hear a case." *Ramming v. United States*, 281 F.3d 158, 161 (501 Cir.2001). "Lack of subject matter jurisdiction may be found in any one of three instances: (1) the complaint alone; (2) the complaint supplemented by undisputed facts evidenced in the record; or (3) the complaint supplemented by undisputed facts plus the court's resolution of disputed facts." *Id.* In a 12(b)(1) motion, the party asserting jurisdiction bears the burden of proof that jurisdiction does in fact exists. *Id.* "Ultimately, a motion to dismiss for lack of subject matter jurisdiction should be granted only if it appears certain that the plaintiff cannot prove any set of facts in support of his claim that would entitle plaintiff to relief." *Id.*

III. Law and Analysis

The Federal Tort Claims Act ("FTCA") permits individuals to sue the United States based on torts committed by its employees. 28 U.S.C. 2671 *et. seq.* The FTCA constitutes a "limited waiver of sovereign immunity, making the Federal Government liable to the same extent as a private party for certain torts of federal employees acting within the scope of their employment." *United States v. Orleans*, 425 U.S. 807, 813 (1976); 28 U.S.C. §§ 1346(b), 2674, 2679(b)(1). The FTCA is the exclusive remedy for an injury caused by "the negligence or wrongful act or omission of any employee of the Government while acting within the scope of his office." *Osborn v. Haley*, 549 U.S. 225, 247 (2007). A party who seeks to file suit under the FTCA should obtain certification by the United States Attorney that a federal employee acted within the course and scope of employment at the time of the relevant incident, and the action will then

be deemed against the United States, which "shall be substituted as the party defendant." 28 U.S.C. § 2679(d)(1). A proper FTCA claim should accordingly be brought against the United States. 28 U.S.C. § 2679(d)(1). The allegedly negligent federal employee is thus immune from any such tort action. *Osborn*, 549 U.S. at 247; *Rodriguez v. Sarabyn*, 129 F.3d 760 (5th Cir. 1997).

Additionally, as a prerequisite to filing suit, a person must present any claim administratively before filing suit. 28 U.S.C. § 2875. Under the FTCA, a lawsuit cannot be initiated against the United States unless the claimant first presents the claim to the appropriate federal agency. *Life Partners Inc. v. United States*, 650 F.3d 1026, 1029 (5th Cir. 2011) (citing 28 U.S.C. § 2675(a)). Specifically,

An action shall not be instituted upon a claim against the United States for money damages for injury or loss of property or personal injury or death 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.

28 U.S.C. § 2675(a). The FTCA has strict requirements because it is a limited waiver of immunity, and it can only be based on the negligence of a federal employee and requires a person to first exhaust administrative remedies. 28 U.S.C. § 2675(a).

Having reviewed the complaint, the Court finds that Jenkins alleges no facts to establish federal-question jurisdiction under the FTCA. Even had

Jenkins alleged that one or more of the defendants is or was a federal employee – which he did not – his complaint still fails to plead federal question jurisdiction because he alleges no facts to show that he exhausted administrative remedies, which is fatal to his lawsuit. *See Coleman v. United States*, 912 F.3d 824, 834 (5th Cir. 2019) (holding that exhaustion is "a jurisdictional prerequisite for FTCA claims that cannot be waived.") (citing *McNeil v. United States*, 508 U.S. 106, 109-13 (1993) (affirming dismissal for lack of jurisdiction where the FTCA complainant had not satisfied administrative exhaustion requirements before filing the complaint)). Jenkins has thus not met his burden to establish that this Court has federal subject matter jurisdiction of his lawsuit.

Jenkins only alleges federal question jurisdiction under the FTCA. (Rec. doc. 1 at p. 4). TWHA is the only Defendant to raise the issue of federal subject matter jurisdiction under the FTCA. Indeed, neither the VA nor the Doctors has yet to appear in this lawsuit. Not all Defendants in this case have thus moved to dismiss the complaint. However, because the Court concludes that the complaint is deficiently pleaded as a matter of law for lack of subject matter jurisdiction and because the claims against all Defendants are premised on identical allegations, dismissal of Plaintiff's claims regarding each Defendant is appropriate. *See Taylor v. Acxiom Corp.*, 612 F.3d 325, 339-40 (5th Cir. 2010) ("While the district court did dismiss *sua sponte* some defendants who did not join the motion to dismiss, there is no prejudice to the plaintiffs in affirming the judgment in its entirety because the plaintiffs make the same allegations against all defendants."); *Siddhar v. Varadharajan*,

No. CIV. A. 4:13-CV-1933, 2014 WL 2815498, at *5 (S.D. Tex. June 20, 2014) (same); *Reeves v. Nelnet Loan Servs.*, No. 4:17-CV-3726, 2018 WL 2200112, at *6 (S.D. Tex. May 14, 2018) (same).[3]

Plaintiff's amended complaint does not cure this jurisdictional deficiency. In that pleading, Plaintiff still references the FTCA and 28 U.S.C. § 1331 as the basis for subject matter jurisdiction. (Rec. doc. 14-2 at p. 6). Accordingly, any grant of Plaintiff's motion to amend would be an exercise in futility, as he has still not alleged that he has exhausted his administrative remedies.

IV. Conclusion

For the foregoing reasons,

IT IS RECOMMENDED that Defendant's Motion to Dismiss (Rec. doc. 13) be GRANTED.

IT IS FURTHER RECOMMENDED that the Motion for Leave from the Court to Present Amended Complaint (Rec. doc. 14) be DENIED.

IT IS FURTHER RECOMMENDED that the Motion to Dismiss (Rec. doc. 15) be DISMISSED WITHOUT PREJUDICE AS MOOT.

IT IS FURTHER RECOMMENDED that Plaintiff's claims against all Defendants be DISMISSED WITHOUT PREJUDICE for lack of subject matter jurisdiction.

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[3] As noted above, Jenkins alleges globally that "[e]ach defendant engaged and/or participated in un-necessary surgical-negligence." (Rec. doc. 1 at p. 5).

NOTICE OF RIGHT TO OBJECT

A party's failure to file written objections to the proposed findings, conclusions, and recommendation contained in a magistrate judge's report and recommendation within 14 days after being served with a copy shall bar that party, except upon grounds of plain error, from attacking on appeal the unobjected-to proposed factual findings and legal conclusions accepted by the district court, provided that the party has been served with notice that such consequences will result from a failure to object. *Douglass v. United States Auto. Assoc.*, 79 F.3d 1415 (5th Cir. 1996) (en banc).[4]

New Orleans, Louisiana, this 27th day of April, 2022.

/s/ Michael B. North
United States Magistrate Judge

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[4] *Douglass* referenced the previously-applicable 10-day period for the filing of objections. Effective December 1, 2009, 28 U.S.C. § 636(b)(1) was amended to extend that period to 14 days.

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT DENYING PETITION FOR REHEARING (MARCH 31, 2023)

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

CHARLES JENKINS,

Plaintiff-Appellant,

v.

TRIWEST HEALTHCARE ALLIANCE,

Defendant-Appellee.

No. 22-30429

Appeal from the United States District Court
for the Eastern District of Louisiana
USDC No. 2:22-CV-37

Before: SMITH, CLEMENT, and WILSON,
Circuit Judges.

PER CURIAM:

The petition for panel rehearing is DENIED. Because no member of the panel or judge in regular active service requested that the court be polled on rehearing en banc (Fed. R. App. P. 35 and 5th Cir. R. 35), the petition for rehearing en banc is DENIED.

APPELLEE'S BRIEF
(OCTOBER 3, 2022)

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

CHARLES JENKINS,

Plaintiff-Appellant,

v.

TRIWEST HEALTHCARE ALLIANCE,

Defendant-Appellee.

No. 22-30429

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CERTIFICATE OF INTERESTED PARTIES

The undersigned certifies that the following listed persons and entities as described in the fourth sentence of 5th Cir Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

Defendants/Appellees

1. TriWest Alliance, Inc. is the parent company and wholly owns TriWest.
2. TriWest Alliance, Inc. is owned by 14 non-profit health plans and university hospital systems.
3. TriWest Healthcare Alliance Corp. has no subsidiaries or affiliates.
4. No parent company, subsidiary, or affiliate holds any shares issues to the public.

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Plaintiff/Appellant

Charles Jenkins

Counsel for Appellant:

Charles Jenkins, Pro se

/s/ Jason R. Scheiderer

STATEMENT REGARDING ORAL ARGUMENT

Because this appeal involves the application of well-established principles of statutory interpretation, federal question jurisdiction, and prescriptive periods, oral argument is unnecessary to aid the Court's decisional process.

TO THE HONORABLE U.S. COURT OF APPEALS FOR THE FIFTH CIRCUIT:

Plaintiff/Appellee Jenkins believes that the District Court for the Eastern District of Louisiana wrongfully dismissed his Complaint, in which Jenkins attempted to bring a Federal Tort Claims Act ("FTCA") action alleging damages resulting from medical care he received more than five years prior to filing his Lawsuit. Jenkins alleged he received care at Defendant Tulane Medical Center ("Tulane"), by Defendants Dr. Kenneth Delay, Jr., Dr. Russell Libby, and Dr. Julie Wang (collectively, the "Doctors"). Jenkins – allegedly a Veteran – has also sued the "VA Medical Center" and Defendant/Appellee TriWest, an administrator of care for Veterans at non-VA facilities. All of the negligence he alleged occurred more than five years prior to his lawsuit.

Jenkins failed to state any valid claim for relief against TriWest because his claim was time-barred by Louisiana's one-year prescriptive period for medical malpractice actions. (*See* La. R.S. 9:5628). Second, even if not time barred, Jenkins' allegations were insufficient to overcome TriWest's derivative sovereign immunity. Third, Jenkins failed to plead federal question jurisdiction under the FTCA. Thus, the District Court properly found it lacked subject-matter jurisdiction over the matter. Finally, Jenkins'

allegations failed to state any viable caused of action against TriWest, so the District Court also properly dismissed Jenkins' Complaint on that basis.

ISSUES PRESENTED

1. Jenkins filed a medical malpractice action more than five years after the allegedly negligent medical care. Louisiana requires medical malpractice actions to be filed within one-year from the alleged negligence. (*See* La. R.S. 9:5628) Is Jenkins' claim barred by the prescriptive period?

2. The VA has not waived immunity and the federal government has properly delegated administration of the Veterans Choice Program ("VCP") to TriWest by a statutorily authorized contract, to which TriWest has adhered. Even if Jenkins' claim is not time barred, is TriWest entitled to *Yearsley* immunity for Jenkins' medical malpractice claim?

3. The Federal Tort Claims Act authorizes an individual to bring a tort claim for the torts committed by federal employees who were acting within the course and scope of their employment. Neither TriWest nor the doctors who provided the allegedly negligent medical care were employees of the federal government. Were Jenkins' allegations sufficient to plead federal question jurisdiction?

STATEMENT OF THE CASE

I. Jenkins' Claim Is Barred By the Prescriptive Period

The Louisiana[1] prescriptive period for a medical malpractice claim requires a person to file within one-year from the alleged negligence or discovery thereof, but in no event, more than three years from the alleged negligence:

> A. No action for damages for injury or death against any physician . . . whether based in tort, or breach of contract, or otherwise, arising out of patient care shall be brought unless filed within one year from the date of the alleged act, omission, or neglect, or within one year from the date of discovery of the alleged act, omission, or neglect; however, even as to claims filed within one year from the date of such discovery, in all events such claims shall be

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[1] Even if Jenkins had sufficiently alleged federal question jurisdiction under the FTCA, the result would be the same. "State law controls liability for medical malpractice under the FTCA." *Dupree v. United States*, 495 F. App'x 422, 424 (5th Cir. 2012) (citing *Ayers v. United States*, 750 F.2d 449, 452 n. 1 (5th Cir. 1985).) Pursuant to the Federal Tort Claims Act, 28 U.S.C. § 1346(b), liability of the United States is determined in accordance with the law of the place where the act or omission occurred. "The FTCA authorizes civil actions for damages against the United States for personal injury or death caused by the negligence of a government employee under circumstances in which a person would be liable under the law of the state in which the negligent act or omission occurred." *Hannah v. United States*, 523 F.3d 597, 601 (5th Cir. 2008) (citing 28 U.S.C. §§ 1346(b)(1), 2674).

> filed at the latest within a period of three years from the date of the alleged act, omission, or neglect.

La. R.S. 9:5628.

This statute sets forth two prescriptive limits within which to bring a medical malpractice action: one year from the date of the alleged act or one year from the date of discovery, with a single qualification that the discovery rule is expressly made inapplicable after three years from the act, omission, or neglect. *Campo v. Correa*, 2001-2707 (La. 06/21/02), 828 So.2d 502. The plain language of the statute requires a plaintiff who alleges he or she experienced medical malpractice in Louisiana to bring a medical malpractice action within one year of the alleged negligence and, "in all events" no later than "three years from the date of the alleged act, omission, or neglect." *Id.*

Here, Jenkins alleged that he experienced negligence at least five years ago. (Compl. at 5.) Jenkins' claim was therefore filed four years beyond the one-year prescriptive period and two-years beyond the three year statute of repose. La. R.S. 9:5628. Because Jenkins' claim is forever time barred by the Louisiana prescriptive period, Jenkins has failed to state a claim for which relief can be granted. Rule 12(b)(6); *Ashcroft*, 556 U.S. at 662. Therefore, Jenkins' claim must be dismissed with prejudice. *See Newton v. United States*, 836 F. App'x 308, 309 (5th Cir. 2021) (dismissing with prejudice medical malpractice claims brought under the Federal Tort Claims Act as barred by prescriptive period).

II. Triwest Is Entitled to *Yearsley* Immunity for Its Administration of VCP

Separately, dismissal of TriWest is appropriate because TriWest is entitled to derivative immunity for its administration of the VCP. "Under the concept of derivative sovereign immunity, stemming from the Supreme Court's decision in *Yearsley*, . . . agents of the sovereign are also sometimes protected from liability for carrying out the sovereign's will," including private contractors such as TriWest. *Cunningham v. Gen. Dynamics Info. Tech., Inc.*, 888 F.3d 640, 643 (4th Cir. 2018). To extend derivative sovereign immunity under *Yearsley v. W.A. Ross Const. Co.*, 309 U.S. 18 (1940), "a government contractor is not subject to suit if (1) the government authorized the contractor's actions and (2) the government 'validly conferred' that authorization, meaning it acted within its constitutional power." *Id.* at 646 (quotation omitted) (citing *Yearsley*, 309 U.S. at 20-21).

As long as the authorization was validly conferred, "'there is no liability on the part of the contractor' who simply performed as the Government directed." *Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663, 673 (2016) (quoting *Yearsley*, 309 U.S. at 20-21). "Authorization is 'validly conferred' on a contractor if Congress authorized the government agency to perform a task and empowered the agency to delegate that task to the contractor, provided it was within the power of Congress to grant the authorization." *Cunningham*, 888 F.3d at 646-47 (citing *Yearsley*, 309 U.S. at 20; *Campbell-Ewald*, 136 S.Ct. at 672).

"*Yearsley* immunity," "the *Yearsley* doctrine /defense," or "derivative sovereign immunity" "operates as a jurisdictional bar to suit and not as a merits

defense to liability." *Id.* at 650.[2] "Sovereign immunity is a jurisdictional, threshold matter that is properly

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[2] Whether *Yearsley* immunity constitutes a jurisdictional bar has not yet been conclusively resolved by the United States Supreme Court. According to TriWest's research, *Cunningham* is the only case to evaluate whether "*Yearsley* immunity" should be analyzed under the 12(b)(1) standard since the Supreme Court's *Campbell-Ewald* decision. Prior to *Campbell-Ewald*, the Fifth Circuit agreed that "[i]f the basis for dismissing a *Yearsley* claim is sovereign immunity, then a *Yearsley* defense would be jurisdictional," but ultimately concluded that *Yearsley* "does not deny the court of subject-matter jurisdiction" because *Yearsley* "does not discuss sovereign immunity or otherwise address the court's power to hear the case." *Ackerson v. Bean Dredging LLC*, 589 F.3d 196, 207 (5th Cir. 2009). Later, but also prior to *Campbell-Ewald*, the Sixth Circuit adopted the Fifth Circuit's reasoning. *See Adkisson v. Jacobs Eng'g Grp., Inc.*, 790 F.3d 641, 647 (6th Cir. 2015). However, the Fourth Circuit in *Cunningham* concluded that *Yearsley* immunity is jurisdictional because *Campbell-Ewald* "reaffirmed" the test for the applicability of *Yearsley* derivative sovereign immunity. *Cunningham*, 888 F.3d at 646.

Thus, *Campbell-Ewald* seemingly resolves in the affirmative the Fifth and Sixth Circuits' questions as to whether a "*Yearsley* defense" is based on sovereign immunity, which those Courts also found would constitute a jurisdictional bar. Because *Cunningham* is the most recent on-point federal decision and takes into account *Campbell-Ewald*, and the older Fifth and Sixth Circuit cases seem now to have been answered by *Campbell-Ewald*, *Yearsley* immunity constitutes a jurisdictional bar that should be addressed under Rule 12(b)(1); *See also Taylor Energy Co., L.L.C. v. Luttrell*, 3 F.4th 172, 175 (5th Cir. 2021) ("*Yearsley* immunity is 'derivative sovereign immunity.' *Campbell-Ewald Co. v. Gomez*, 577 U.S. 153, 160, 136 S.Ct. 663, 193 L.Ed.2d 571 (2016). Such immunity shields contractors whose work was 'authorized and directed by the Government of the United States' and 'performed pursuant to [an] Act of Congress.' *Id.* at 167, 136 S.Ct. 663 (quoting *Yearsley*, 309 U.S. at 20, 60 S.Ct. 413).").

addressed under Rule 12(b)(1)." *Keselyak v. Curators of the Univ. of Missouri*, 200 F. Supp. 3d 849, 853 (W.D. Mo. 2016), *aff'd sub nom. Keselyak v. Curators of Univ. of Missouri*, 695 F. App'x 165 (8th Cir. 2017). Rule 12(b)(1) motions may assert either a "facial" or "factual" attack on jurisdiction. *E.g.*, *Moss v. United States*, No. 17-1928, 2018 WL 3489927, at *3 (8th Cir. July 20, 2018).

Because TriWest's entitlement to *Yearsley* immunity is a jurisdictional fact not fully evident from the face of the Complaint, TriWest attaches hereto, as further support, a factual affidavit and public records. "Where, as here, a party brings a factual attack, a district court may look outside the pleadings to affidavits or other documents," without converting the motion into one for summary judgment or providing the non-moving party with the benefit of Rule 12(b)(6)'s safeguards. *Id.* Jenkins, the party invoking federal jurisdiction, has the burden of overcoming these facts to prove jurisdictional facts by a preponderance of the evidence. *Id.*

A. The United States Has Not Waived Immunity

As a threshold matter to the *Yearsley* immunity test, courts must ensure that the United States has not waived its immunity from suit invoking the particular alleged federal law. The United States is immune from all suits against it absent an express waiver of its immunity, and any such express waiver "must be unequivocally expressed in statutory text." *Lane v. Pena*, 518 U.S. 187, 192 (1996). The United

States has not waived immunity for the administration of the VCP or for the negligence of private actors.[3]

The VACAA established the VCP, a program to furnish hospital care and medical services to Veterans through eligible non-VA healthcare providers. (*Id.*); *see also* 38 U.S.C. § 1703, 38 C.F.R. § 17.1500(b) *See* 28 U.S.C. § 2671; *Rodriguez v. Sarabyn*, 129 F.3d 760, 765 (5th Cir. 1997). Here, Jenkins alleged three Tulane employees provided negligent medical care. (Compl. at 2-3.) The United States has not waived its immunity from claims regarding the negligence of non-VA doctors. Accordingly, this Court should next consider the *Yearsley* immunity test.

B. The United States Authorized TriWest to be its Contractor

The federal government, through the VA, authorized TriWest to administer VCP within the legislated confines of VACAA. (*See* Exhibit A to Exhibit 2, at 46-47.) TriWest is performing under a VA contract for services, to which it undisputedly adhered. Any discretion as to a Veteran's eligibility for healthcare outside the statutory requirements belongs to the

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[3] Although the FTCA can waive the United States' immunity in certain circumstances, the FTCA expressly retains immunity for its employees and persons acting on behalf of a federal agency. *See* 28 U.S.C. § 2671. "It is settled doctrine that the United States cannot be held liable under the Federal Tort Claims Act for the negligence of its independent contractors." *Mocklin v. Orleans Levee Dist.*, 690 F. Supp. 527, 528-29 (E.D. La. 1988), aff'd, 877 F.2d 427 (5th Cir. 1989) (citing *United States v. Orleans*, 425 U.S. 807 (1976); *Logue v. United States*, 412 U.S. 521, (1973); *Cavazos v. United States*, 776 F.2d 1263, 1264 (5th Cir.1985); *Lathers v. Penguin Industries*, 687 F.2d 69, 72 (5th Cir. 1982).

VA, not TriWest. The contract, on its face, vests this discretion with the VA only. (*See, e.g.*, Exhibit A to Exhibit 2, at 63-64 ("Upon notification by the Contractor [for emergency services], VA will determine Veteran eligibility and generate an authorization to the Contractor[.]"). "In the event that care is not authorized by VA, the Contractor's provider may submit claims directly to the VA for reconsideration outside the terms of this contract." (*Id.*) Further, Veterans are put on notice that the VA holds this discretion. As required by VACAA, each Choice Card must contain the following statement: "This card is for qualifying medical care outside the Department of Veterans Affairs. Please call the Department of Veterans Affairs phone number specified on this card to ensure that treatment has been authorized." Pub. L. No. 113-146, Sec. 101 (a)(1)(f)(3)(E).

To the extent TriWest had any involvement in Jenkins' medical care, TriWest's actions to administer the VCP were thus non-discretionary and were done at the express direction of the U.S. government.[4] *See Cunningham*, 888 F.3d at 647-48 (finding contractor "adhered" to its contract to administer aspects of the HealthCare.gov website per the Affordable Care Act, which in turn directs the U.S. Department of Health and Human Services, Centers for Medicare & Medicaid Services to establish a system to keep applicants informed about their eligibility for enrollment in a qualified health plan, leading to contracted administrators such as the defendant); *Cabalce v. Thomas E. Blanchard & Assocs., Inc.*, 797 F.3d 720, 732 (9th Cir. 2015) ("derivative sovereign immunity, as

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discussed in *Yearsley*, is limited to cases in which a contractor had no discretion in the design process and completely followed government specifications." (internal quotation omitted)). As a result, the first *Yearsley* criterion is satisfied here.

C. TriWest's VA Contract Was a Proper Delegation from the United States to TriWest

The VA is vested with the authority to "make arrangements, by contract or other form of agreement . . . of health-care resources" with any "entity or individual." 28 U.S.C. § 8153(a)(1). TriWest's VA contract is thereby a permissible means for the VA (and the government more broadly) to meet its "unquestioned need to delegate governmental functions" while avoiding "[i]mposing liability on private agents of the government[, which] would directly impede the significant governmental interest in the completion of its work." *Cunningham*, 888 F.3d at 643 (quotations omitted) (finding contract was "validly conferred" by government to defendant contractor pursuant to statutorily mandated directives under the Affordable Care Act). There is no assertion in the Complaint that the VA was not authorized by Congress to engage private contractors to effect the statutorily mandated VCP under VACAA. To the contrary, and consistent with post-*Campbell-Ewald* case law as to *Yearsley*-immune private contractors, the VACAA validly confers authorization to delegate VCP administration. *See In re Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mexico, on Apr. 20, 2010*, No. MDL 2179, 2016 WL 614690, at *9 (E.D. La. Feb. 16, 2016) (finding that the Clean Water Act mandates that the President direct all oil spill

response efforts on navigable waters of the United States, including those actions undertaken by private parties, and that the federal government "validly conferred authority upon the Clean-Up Responder Defendants to carry out various oil spill response activities. As a result, . . . the Clean-Up Responder Defendants are immunized under the CWA."). The second *Yearsley* criterion is also met.

Because the VA has not waived immunity and the federal government has properly delegated administration of the VCP to TriWest by a statutorily authorized contract to which TriWest has adhered, the *Yearsley* standards are established. The Court here should follow *Campbell* and *Taylor Energy Co., L.L.C. v. Luttrell*, 3 F.4th 172, 175 (5th Cir. 2021), *see* footnote 8, *supra*, when, as here, Jenkins has not submitted any allegations challenging TriWest's immunity in administering the VCP. In short, Jenkins' vague and conclusory allegations do not establish jurisdiction over TriWest. And, given that TriWest is entitled to *Yearsley* immunity, this Court should affirm that the district courts are of limited jurisdiction and dismiss the claims against TriWest.

III. Jenkins Failed to Plead Federal Question Jurisdiction

A. The Federal Tort Claims Act

The Federal Tort Claims Act ("FTCA") permits individuals to sue the United States based on torts committed by U.S. employees. 28 U.S.C. § 2671, *et. seq.* The FTCA waives the United States government's sovereign immunity for the negligence of federal employees acting within the course and scope of their

employment. 28 U.S.C. § 2679(b)(1). Thus, the FTCA constitutes a "limited waiver of sovereign immunity, making the Federal Government liable to the same extent as a private party for certain torts of federal employees acting within the scope of their employment." *United States v. Orleans*, 425 U.S. 807, 813 (1976); 28 U.S.C. §§ 1346(b), 2674. The FTCA is the exclusive remedy for an injury caused by "the negligence or wrongful act or omission of any employee of the Government while acting within the scope of his office." *Id.*

A proper FTCA claim should be brought against the United States. 28 U.S.C. § 2679(d)(1). Under the FTCA, the allegedly negligent federal employee is immune from any such tort action. *Osborn v. Haley*, 549 U.S. 225, 247 (2007); *Rodriguez v. Sarabyn*, 129 F.3d 760 (5th Cir. 1997). A party seeking to file suit under the FTCA should obtain certification by the U.S. Attorney that a federal employee acted within the course and scope of employment at the time of the relevant incident, and then the action is deemed against the United States, which "shall be substituted as the party defendant." 28 U.S.C. § 2679(d)(1).

Additionally, as a prerequisite to filing suit, a person must present any claim administratively before filing suit. 28 U.S.C. § 2875. Specifically,

> An action shall not be instituted upon a claim against the United States for money damages for injury or loss of property or personal injury or death 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.

28 U.S.C. § 2675(a). The FTCA has these strict requirements because it is a limited waiver of immunity. 28 U.S.C. § 2675(a).

B. Jenkins' Allegations Do Not Establish FTCA Federal Question Jurisdiction

Jenkins' alleged no facts to establish federal question jurisdiction under the FTCA. Even if Jenkins had alleged that the Doctors were federal employees, his allegations still failed to plead federal question jurisdiction because he alleged no facts to show that he exhausted administrative remedies. This alone is fatal to Jenkins' action. *See Coleman v. United States*, 912 F.3d 824, 834 (5th Cir. 2019) (holding that exhaustion is "a jurisdictional prerequisite for FTCA claims that cannot be waived." (citing *McNeil v. United States*, 508 U.S. 106, 109-13 (1993) (affirming a dismissal for lack of jurisdiction where the FTCA complainant had not satisfied administrative exhaustion requirements before filing the complaint))); *see also Life Partners Inc. v. United States*, 650 F.3d 1026, 1029 (5th Cir. 2011) (citing 28 U.S.C. § 2675(a)).

Jenkins' allegations are insufficient to establish federal question jurisdiction, and dismissal is appropriate. *See* 12(b)(1); *Wiley*, 2021 WL 4460529, at *2. This Direct Court properly concluded that it lacked subject matter jurisdiction over Jenkins' claim.

IV. Jenkins' Allegations Fail to State Any Viable Claim Against TriWest

In order to state a viable claim against TriWest, Jenkins was required to plead allegations showing his entitlement to relief—beyond mere speculation. Rule 12(b)(6); *Twombly*, 550 U.S. at 555, 127 S.Ct. 1955; *Ashcroft*, 129 S.Ct. at 1949 (requiring that "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'"). Jenkins' Complaint makes no allegations about TriWest specifically. Indeed, the name "TriWest" is not even mentioned in Jenkins statement of claim or relief requested. (Compl., *generally.*) Even construing Jenkins' pro se allegations liberally, he failed to plead facts to show a right to relief. *Coleman v. United States*, 912 F.3d 824, 828 (5th Cir. 2019) ("pro se plaintiffs must still plead factual allegations that raise the right to relief above the speculative level.").

Jenkins' lone allegation is actually a legal conclusion that "each defendant engaged and/or participated in" medical malpractice. (Compl. at 5.) The Court should disregard such legal conclusions. *Chevron Corp.*, 484 F.3d at 780 (5th Cir. 2007); *see also Iqbal*, 129 S.Ct. at 1940 ("While legal conclusions can provide the complaint's framework, they must be supported by factual allegations."). Once Jenkins' conclusions are struck, what remains is insufficient to state any viable claim against TriWest. Accordingly, this Court should affirm dismissal of Jenkins' claims.

SUMMARY OF THE ARGUMENT

Jenkins believes that the District Court for the Eastern District of Louisiana wrongfully dismissed

his Complaint, in which Jenkins attempted to bring an FTCA action alleging damages resulting from medical care he received more than five years prior to his lawsuit. Jenkins failed to state any valid claim for relief against TriWest because his claim was time-barred by Louisiana's one-year prescriptive period for medical malpractice actions. *See* La. R.S. 9:5628. Second, even if not time barred, Jenkins' allegations were insufficient to overcome TriWest's derivative sovereign immunity. Third, Jenkins failed to plead federal question jurisdiction under the FTCA. Thus, the District Court properly found it lacked subject-matter jurisdiction over the matter. Finally, Jenkins' allegations failed to state any viable caused of action against TriWest, so the District Court also properly dismissed Jenkins' Complaint on that basis.

ARGUMENT

This Court employs a *de novo* standard of review when considering a motion to dismiss under Rule 12(b)(1), *JTB Tools & Oilfield Services, L.L.C. v. United States*, 831 F.3d 597, 599 (5th Cir. 2016), and under Rule 12(b)(6), *Meador v. Apple, Inc.*, 911 F.3d 260, 264 (5th Cir. 2018). This includes

> "accepting all well-pleaded facts as true and viewing those facts in the light most favorable to the plaintiffs." *Dorsey v. Portfolio Equities, Inc.*, 540 F.3d 333, 338 (5th Cir. 2008) (quotation omitted). A complaint survives a motion to dismiss only if it "pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft*

v. Iqbal, 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009).

Id. Just as the District Court concluded, Jenkins' claim failed to state any viable claim, compelling dismissal.

I. The District Court Correctly Determined That It Lacks Subject Matter Jurisdiction

A. TriWest's Motion to Dismiss was Appropriate Because Jenkins' Claim Was Filed Beyond All Applicable Prescriptive Periods

TriWest appropriately sought dismissal under the Federal Tort Claims Act ("FTCA"), and its two-year prescriptive period, which governed Jenkins' claims. Even after amendment, Jenkins' allegations in his Amended Complaint (*see* Doc. 14-2) could not save his untimely-filed claims. Jenkins admitted that the allegedly negligent medical conduct occurred in November 2016 – more than five years before he filed the underlying lawsuit, well beyond the two-year prescriptive period under the FTCA. Am. Compl., ¶ 2. Dismissal of Jenkins' claims with prejudice was therefore appropriate under well-settled law. *See Newton v. United States*, 836 F. App'x 308, 309 (5th Cir. 2021) (dismissing with prejudice medical malpractice claims brought under the Federal Tort Claims Act as barred by prescriptive period).

It is established law that allegations of diversity jurisdiction such as those alleged by Jenkins could not save prescribed claims. *See Vinzant v. United States*, No. CV 06-10561, 2007 WL 9809136, at *2 (E.D. La. Mar. 28, 2007) (rejecting a plaintiff's claim

of diversity jurisdiction, because his personal injury claims was prescribed). Because the law clearly supported TriWest's arguments below, TriWest's position is not frivolous.

B. TriWest's Motion to Dismiss was Appropriate Because Jenkins Failed to Allege Any Well-Pleaded Facts Showing That TriWest Failed to Follow the Government Directive

TriWest properly sought dismissal of Jenkins' claims because Jenkins failed to state a claim for relief. Even affording Jenkins all deference he is entitled to as a *pro se* plaintiff, his allegations are incomprehensible and do not support any claim against TriWest. *See Cunningham v. Gen. Dynamics Info. Tech., Inc.*, 888 F.3d 640, 646 (4th Cir. 2018) (*Yearsley* immunity applies and "a government contractor is not subject to suit if (1) the government authorized the contractor's actions and (2) the government 'validly conferred' that authorization, meaning it acted within its constitutional power.").

Because Jenkins has alleged *no* well-pleaded facts that would render *Yearsley* immunity inapplicable, TriWest's argument for dismissal was reasonable and made in good faith. Jenkins' Amended Complaint still does not actually allege any facts showing that TriWest failed to follow a Government directive. *See* Am. Compl., *generally*. Nor does his Memorandum in Opposition to TriWest's Motion to Dismiss cite a single case to establish that the Government directed TriWest to control the medical procedure Tulane performed. *See* Mem. Opp. Defs.' Mot. to Dismiss at 2-3. No such duty or directive existed. Accordingly,

Jenkins failed to overcome the jurisdictional bar of *Yearsley* immunity, and TriWest appropriately sought dismissal of Jenkins' claims. *See Cunningham*, 888 F.3d 640 at 650.

C. TriWest's Motion to Dismiss was Appropriate Because Jenkins Failed to Allege Facts Showing His Claim Under the FTCA is Viable

TriWest acted reasonably and in good faith by seeking dismissal of Jenkins' FTCA claim. First, Jenkins alleged no facts to establish federal question jurisdiction under the FTCA. To state a claim under the FTCA, Jenkins was required to obtain certification by the U.S. Attorney that a federal employee acted within the course and scope of employment at the time of the relevant incident, and then the action is deemed against the United States, which "shall be substituted as the party defendant." 28 U.S.C. § 2679(d)(1). The FTCA has strict requirements because it is a limited waiver of immunity. 28 U.S.C. § 2675(a).

Jenkins alleged no facts to show that he exhausted administrative remedies, nor did he allege that he obtained certification by the U.S. attorney that a federal employee was acting within the course and scope of employment at the time of the relevant incident. These failures are each fatal to Jenkins' action. *See* 28 U.S.C. § 2679(d)(1); *Coleman v. United States*, 912 F.3d 824, 834 (5th Cir. 2019) (holding that exhaustion is "a jurisdictional prerequisite for FTCA claims that cannot be waived." (citing *McNeil v. United States*, 508 U.S. 106, 109-13 (1993) (affirming a dismissal for lack of jurisdiction where the FTCA complainant had not satisfied administrative

exhaustion requirements before filing the complaint))). Because the FTCA is the exclusive remedy for an injury caused by "the negligence or wrongful act or omission of any employee of the Government while acting within the scope of his office," its requirements are mandatory. *Id.* Jenkins' failure to allege well-pleaded facts to show he exhausted administrative remedies is fatal. *Life Partners Inc. v. United States*, 650 F.3d 1026, 1029 (5th Cir. 2011) (citing 28 U.S.C. § 2675(a)).

Second, Jenkins cannot bring his FTCA claim against a nongovernmental entity like TriWest. A proper FTCA claim should be brought against the United States. 28 U.S.C. § 2679(d)(1). The FTCA does not provide Jenkins with a private cause of action against TriWest, a private entity. Because Jenkins' FTCA claim cannot be brought against TriWest, the district court lacked subject matter jurisdiction over Jenkins' lawsuit, and TriWest reasonably sought its dismissal.

Third, Jenkins' allegations do not state a claim under the FTCA, and diversity of Jenkins' and TriWest's citizenship is irrelevant. *See Johnson v. United States*, 576 F.2d 606, 611 (5th Cir. 1978) (recognizing similarities between diversity jurisdiction and actions under the FTCA but holding "diversity jurisdiction principles do not govern Tort Claims actions"). For at least these reasons, TriWest's argument for dismissal were reasonable.

D. TriWest's Motion to Dismiss was Appropriate Because Jenkins' Allegations are Fatal to Diversity Jurisdiction

TriWest argued in good-faith that there was no federal diversity jurisdiction in this case. To establish federal diversity jurisdiction under 28 U.S.C.A. § 1332, all parties must be diverse. As this Court held in *Mas v. Perry*, 489 F.2d 1396, 1398 (5th Cir. 1974), the general rule of diversity jurisdiction is that there must be complete diversity. That is, all defendants must be diverse from all defendants. *Id.* Here, Jenkins alleged he is a resident of Louisiana and that Defendant Tulane Medical Center and the individual Defendants are also residents of Louisiana. *See* Compl. at 2 (Doc. 1). Therefore, it is well settled that Jenkins failed to establish diversity jurisdiction. Jenkins' allegations are fatal to his assertion of diversity jurisdiction. Therefore, TriWest reasonably sought dismissal of Jenkins' lawsuit.

II. The District Court Decision Is Not Tantamount as Favorable to Jenkins

The District Court decision unequivocally dismissed Jenkins' claims against TriWest. Jenkins reading of the District Court decision as being "tantamount" to a decision in his favor is flawed. Jenkins' suggests (wrongly) that he proved he had timely raised his claim. Jenkins also asserts (wrongly) that the District Court's decision did not say he was not entitled to the damages demanded. Under Jenkins' flawed reading of the District Court's decision, he is still somehow authorized to pursue his monetary claim. But there is no legal or factual basis for Jenkins' argument.

III. Triwest Did Not File This Appeal, So Triwest Cannot Be Sanctioned for Filing a Frivolous Appeal

Jenkins is the Appellant. If the Court deems this appeal frivolous, Jenkins is the appropriate party to sanction, not TriWest. Federal Rule of Appellate Procedure permits a court to impose sanctions against the appellant for a frivolous appeal: "If a court of appeals determines that an appeal is frivolous, it may, after a separately filed motion or notice from the court and reasonable opportunity to respond, award just damages and single or double costs to the appellee." FRAP 38.

Jenkins filed this appeal yet seeks sanctions against TriWest for the frivolousness of his own appeal. Jenkins' Motion fails to establish any reasonable good-faith basis for the Court to enter sanctions against TriWest for Jenkins' own frivolous appeal. The Federal Rules of Civil Procedure do authorize an appellate court to impose sanctions against a party for filing a frivolous appeal; however, if the Court determines that the instant appeal is frivolous, Jenkins is the appropriate party to be sanctioned.

IV. Even If Rule 38 Applied to Appellee, Triwest, Sanctions are Inappropriate, Because Triwest's Arguments and Actions Have Been in Good Faith

Even if Rule 38 applied, sanctions are not appropriate because TriWest has made reasonable, good-faith arguments based on well-settled law. Federal Rule of Appellate Procedure 38 authorizes a court of appeals to issue sanctions for a frivolous appeal: "If a

court of appeals determines that an appeal is frivolous, it may, after a separately filed motion or notice from the court and reasonable opportunity to respond, award just damages and single or double costs to the appellee." Sanctions are not appropriate when an appeal is based on reasonable arguments made in good faith.

In *Coghlan v. Starkey*, 852 F.2d 806, 809 (5th Cir. 1988), this Court discussed Rule 38 sanctions at length, stating "that there can be little tolerance for unmerited appeals without articulable support in the law. Appeal as of right does not translate into propriety of appeal when counsel can make no reasonable argument for extension, modification, or reversal of precedent clearly elaborated by the district court opinion." Moreover,

> [w]hen the appellant files an appeal, he asks for this court's attention. [T]he notion that an appellant has an untrammelled right of review cannot shift the burden of going forward to the appellee. . . . Appellee should not be forced to endure the expense and anxiety of waiting unnecessarily to have its dispute resolved. With so many worthy claims waiting to be resolved, we cannot tolerate unfounded and undeveloped claims [to clog our docket and consume appellate time and resources].

Id. at 809-10 (citing *Reliance Ins. Co. v. Sweeney Corp.*, 792 F.2d 1137, 1139 (D.C. Cir. 1986) (per curiam) (in opinion affirming summary judgment, panel sua sponte ordered appellant and its attorney to show cause why sanctions should not be imposed;

appellant filed no response and, based upon affidavit of appellee, $5220.00 was awarded)).

V. Conclusion

Yet regardless of how couched, Jenkins' medical malpractice claim was time barred by the Louisiana prescriptive period for medical malpractice actions. And, even if his claim was timely, Jenkins' allegations do not overcome TriWest's derivative sovereign immunity. The District Court properly determined it lacked subject-matter jurisdiction over Jenkins' claims because Jenkins' allegations were insufficient to establish federal question jurisdiction. For any of these reasons, dismissal was and is appropriate.

Based on the foregoing, TriWest respectfully requests that the Court affirm the District Court decision dismissing Jenkins' Complaint and Deny Jenkins' Motion for Sanctions.

Respectfully submitted this 3rd day of October, 2022.

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REPLY BRIEF OF APPELLANT CHARLES JENKINS (OCTOBER 20, 2022)

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

CHARLES JENKINS,

Plaintiff-Appellant,

v.

TRIWEST HEALTHCARE ALLIANCE,

Defendant-Appellee.

No. 22-30429

On Appeal from the United States District Court
for the Eastern District of Louisiana
2:22-CV-37

SUBMITTED BY:

Charles J. Jenkins
11261 Idlewood Court
New Orleans, LA 70128
(504) 708-3498

Pro se litigant

CERTIFICATE OF INTERESTED PARTIES

The undersigned certifies that the following listed persons and entities as described in the fourth sentence of 5th Cir Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judge of this court may evaluate possible disqualification or recusal.

Appellees:

TriWest Healthcare Alliance

Counsel for Appellees:

Jason R. Scheiderer Dentons US, LLP, New Orleans
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Appellant:

Charles Jenkins

Counsel for Appellant:

Charles Jenkins, New Orleans

Other Interested Parties:

VA Medical Center

Counsel for Interested Parties:

Robert Hilton Adams of DOJ-USAO New Orleans, LA

Other Interested Parties:

Tulane Medical Center

Counsel for Interested Parties:

Peter Sperling, Brittany Sloan, Nairda Colon of Frilot L.L.C.New Orleans,LA

/s/Charles Jenkins

STATUTE

28 U.S.C. § 1331 - 1332

TABLE OF AUTHORITY

Cardsoft v. Verifone Inc., 807 F.rd 1346 (2015)

This Court has jurisdiction over the case at bar due to the fact of TriWest's diversity of citizenship in that they does business in the States of Louisiana but is headquartered in the States of Arizona. Whereby Plaintiff-Appellant Jenkins resides in the States of Louisiana pursuant to 28 U.S.C. § 1331-1332.

STATEMENT OF THE ISSUE(S)

Whether Defendant - Appellee TriWest Healthcare Alliance (TriWest) properly pleaded arguments in their brief pertaining to the Doctrines of Res judicata and Collateral Estoppel.

SUMMARY OF THE ARGUMENT(S)

This case turns on whether TriWest pleaded in their brief the Doctrines of collateral Estoppel and Res judicata. If not, then TriWest's appeal has been waived.

ARGUMENT(S)

And once more TriWest pleads the same arguments as they did before in opposing Jenkins's motion for sanctions. And that is they are trying to re-litigate a thing decided. All that blustering and

saber rabbling is just that, a bunch of "Toro Manure" and those voluminous citing of authorities are all moot and null and void. It would be a waste of the court's valuable time to even consider such a debacle. We are reminded that the fifth circuit has alway been known for its conservatism but maybe this time they want be as lenient for TriWest being so picayunish and frivolous. The facts of the matter is that TriWest failed to plead the primary issues (e.g., Res judicata and Collateral Estoppel). That means once again, You cannot re-litigate issues already decided. In the case at bar this is the death nil for TriWest whose failure to plead in their brief. Those are situations where the courts has applied the rule that arguments that are not appropriately developed in a party's briefing may be deemed waive. *See Cardsoft v. Verifone Inc.*, 807 F.rd 1346 (2015). There's an adage in the American Jurisprudence lexicon which says "if you don't have the law on your side you argue the facts and if you don't have the facts on your side you pound the table and yell hell." In TriWest's case they didn't yell hell loud enough.

CONCLUSION

Ergo, Plaintiff-Appellant, Jenkins is entitled to summary judgment as a matter of law since there's no genuine issue of material facts pursuant to FRCP Rule 56. Also Jenkins should be entitled to receive the award he requested (*e.g.*, two million dollars as per those 6 (six)) Tortfeasors jointly and severally and/or appoint a special master to direct meaningful negotiation toward a settlement.

That TriWest filed a frivolous appeal and whatever else the Court may determine for the continuing and

ongoing incontinence, the humiliation of wearing diapers for the rest of his life, for the urinary urgency along with the long term sequalae of infections.

SUBMITTED BY:

/s/ Charles Jenkins
11261 N Idlewood Ct
New Orleans, LA 70128

PLAINTIFF-APPELLANT PETITION FOR PANEL REHEARING AND/OR REHEARING EN BANC (MARCH 6, 2023)

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

CHARLES JENKINS,

Plaintiff-Appellant,

v.

TRIWEST HEALTHCARE ALLIANCE,

Defendant-Appellee.

No. 22-30429

Appeal from the United States District Court
for the Eastern District of Louisiana
The Honorable Barry W. Ashe
Case No. 2:22-CV-37

SUBMITTED BY:

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Pro se litigant

CERTIFICATE OF INTERESTED PARTIES

The undersigned certifies that the following listed persons and entities as described in the fourth sentence of 5th Cir Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judge of this court may evaluate possible disqualification or recusal.

Appellees:

TriWest Healthcare Alliance

Counsel for Appellees:

Jason R. Scheiderer Dentons US LLP, New Orleans

Appellant:

Charles Jenkins

Counsel for Appellant:

Charles Jenkins, New Orleans

/s/Charles Jenkins

STATEMENT OF THE ISSUE-REHEARING EN BANC

(1). Whether the panel for this case has violated the statute by failing to adhere to its mandate of accepting the July 16, 2022 judgement of a rule 36 decision of which Plaintiff-Appellant contends is favorable to his case/claim/appeal thereby making the Defendant-Appellee claims moot pursuant to the rule 36 decision. Therefore, supplanting another case in its stead is also moot and/or subject to collateral estoppel/res judicata.

STATEMENT OF THE ISSUE-REHEARING

(2). And whether the other elements *e.g.*, jurisdiction, diversity of citizenship, failure to state a claim among others are all subsumed in the doctrine of *res judicata* a thing decided.

SUMMARY OF THE ARGUMENT(S)

This case will turn on whether an en banc panel be enjoined to correct the imbalances in the tribunal decision to break away/violate the statutorily mandate of the rule 36 decision, replace one in its stead and come in compliance with the other panel/circuits.

And whether the appeal court will provide a rehearing to determine the issues *e.g.*, jurisdiction, diversity of citizenship, failure to state a claim and the like to determine whether those issues are subject to collateral estoppel/res judicata.

ARGUMENT(S)

(1). Arguments to Issue One-1 Rehearing En Banc

Now comes, Plaintiff-Appellant Charles Jenkins appearing pro se respectfully requests a rehearing or rehearing en banc as provided by this court to accept the lower courts rule 36 decision which says it "does not endorse or reject a specific part of the trial court's reasoning" and is non-precedential, *i.e.*, not binding on the Court . . .

And seeking that each merits panel may enter precedential opinions, a party seeking en banc consideration must typically show that either the merits panel has (1) failed to follow existing decisions of the U.S. Supreme Court or Federal Circuit precedent or (2) followed Federal Circuit precedent that the petitioning party now seeks to have overruled by the en banc court. This tribunal has chosen to violate its statute and mandates according to 35 U.S.C. 144 and 15 U.S.C. 1074 (a)(4). *See* 35 Patent § 144, and Patent Trademark Office (USPTO) which allow the Federal Circuit to write an opinion in every appeal from the USPTO. And If the Federal Circuits dismiss with affirmance, they are not allowed to ignore a rule 36 decision and select in its stead a negative decision in that same case.

The above statute and USPTO further elucidates that;

> a). Petitioner asserts that written opinions are necessary to achieve such objectives as "unifying and improving the administration of patent law," Pet. 31; ensuring transparent

> and correct court decisions, *ibid.*; providing "meaningful appellate review" to patent owners, Pet. 34; and preserving the possibility of further review, *ibid.* But nothing about the Federal Circuit's practices suggests that the court is breaching its duty to articulate the law, apply it properly, and promote uniformity. The Federal Circuit issues Rule 36 judgments only after giving cases "the full consideration of the court," *United States Surgical Corp. v. Ethicon, Inc.*, 103 F.3d 1554, 1556 (Fed. Cir.), *cert. denied*, 522 U.S. 950 (1997), and only if it concludes that an opinion would not meaningfully serve the interests that petitioner highlights. In particular, the court issues a Rule 36 judgment without opinion only if it determines that an opinion would have no precedential value and that there is no ground to revisit the decision of the lower tribunal. *See* Fed. Cir. R. 36.

For similar reasons, the question presented has limited practical significance. Rule 36 authorizes summary affirmance only when the Federal Circuit determines that the decision under review contains no reversible error. Thus, for example, when a summary affirmance is used in a case involving a legal challenge reviewed de novo, the affirmance communicates the court's judgment that the trial court or agency committed no error. *See* Fed. Cir. R. 36(a)(4) and (5).

When a summary affirmance is used to reject a factual challenge reviewed for clear error, the affirmance indicates that the court found no such clear error in the underlying factual finding. *See* Fed.

Cir. R. 36(a). An opinion that simply stated those conclusions explicitly would add little to what is already implicit in the judgment.

This Court has repeatedly and recently denied challenges to the Federal Circuit's use of summary dispositions under Rule 36. *See* pp. 9-10, *supra* (collecting examples). The same result is warranted here.

1st Conclusion:

It is suggested that the federal circuit especially this panel is guilty of violating the en banc doctrine by dismissing this Plaintiff-Appellant rule 36 decision as allowed by the USPTO and not letting rule 36 decision stand by dismissing it and put a negative decision in its stead.

This is why the judges and/or panel should enjoin their full complement of the Federal Circuit judges to resolve this blatant violation of the statue on the use of summary affirmances and replacing it with a surrogate decision in the same case especially when it appears the lower court rule 36 decision was dispositive of this case. *E.g.*, Collateral Estoppel and/res judicata.

(2). Arguments to Issue Two-2 Rehearing

Rehearing-In addition, this panel has determined that this litigant has no subject matter jurisdiction, no diversity of citizenship and failure to state a claim among others. However, as the Court has stated the standard of review for subject matter jurisdiction is the following:

II. STANDARD OF REVIEW

This Court evaluates *de novo* the district court's grant of Appellee's Rules 12(b)(1) and 12(b)(6) motion for dismissal applying the same standard used by the district court. *Hebert v. United States*, 53 F.3d 720, 722 (5th Cir. 1995).

> Motions filed under Rule 12(b) (1) of the Federal Rules of Civil Procedure allow a party to challenge the subject matter jurisdiction of the district court to hear a case. Fed. R. Civ. P. 12(b) (1). Lack of subject matter jurisdiction may be found in any one of three instances: (1) the complaint alone; (2) the complaint supplemented by undisputed facts evidenced in the record; or (3) the complaint supplemented by undisputed facts plus the court's resolution of disputed facts.

Barrera-Montenegro v. United States, 74 F.3d 657, 659 (5th Cir. 1996).

The burden of proof for a Rule 12(b) (1) motion to dismiss is on the party asserting jurisdiction. *McDaniel v. United States*, 899 F.Supp. 305, 307 (E.D. Tex. 1995). Accordingly, the plaintiff constantly bears the burden of proof that jurisdiction does in fact exist. *Menchaca v. Chrysler Credit Corp.*, 613 F.2d 507, 511 (5th Cir. 1980).

When a Rule 12(b)(1) motion is filed in conjunction with other Rule 12 motions, the court should consider the Rule 12(b)(1) jurisdictional attack before addressing any attack on the merits. *Hitt v. City of Pasadena*, 561 F.2d 606, 608 (5th Cir. 1977) (per curiam). This requirement prevents a court without jurisdiction

from prematurely dismissing a case with prejudice. The court's dismissal of a plaintiff's case because the plaintiff lacks subject matter jurisdiction is not a determination of the merits and does not prevent the plaintiff from pursuing a claim in a court that does have proper jurisdiction. *Id.*

In examining a Rule 12(b) (1) motion, the district court is empowered to consider matters of fact which may be in dispute. *Williamson v. Tucker*, 645 F.2d 404, 413 (5th Cir. 1981). Ultimately, a motion to dismiss for lack of subject matter jurisdiction should be granted only if it appears certain that the plaintiff cannot prove any set of facts in support of his claim that would entitle plaintiff to relief. *Home Builders Ass'n of Miss., Inc. v. City of Madison, Miss.*, 143 F.3d 1006, 1010 (5th Cir. 1998).

This litigant suggests that his subject matter jurisdiction is attained in all three instances *e.g.*, (1) the complaint alone; (2) the complaint supplemented by undisputed facts evidenced in the record; or (3) the complaint supplemented by undisputed facts plus the court's resolution of disputed facts. *Barrera-Montenegro v. United States*, 74 F.3d 657, 659 (5th Cir. 1996).

And since this court evaluated de novo this grant of appellees rule . . . be advised that in the court's decision filed February 08, 2023 *see* ROA p.3 it should take "judicial notice"[1] that an SF-95 was filed

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[1] Judicial notice-is used by a court when it declares a fact presented as evidence as true without a formal presentation of evidence. A court can take judicial notice of indisputable facts. If a court takes judicial notice of an indisputable fact in a civil case, the fact is considered conclusive.

within the two (2) years Federal Tort Claims Act (FTCA) framework and was received by a proper agent of the Veterans Administration with his signature as verified by FedEx carrier.

Nevertheless, the above issues *supra* are a matter of res judicata. That is to say once the lower court accepted the rule 36 decision those issues are now moot.

In regards to diversity of citizenship this issue was adjudicated also and was rule on in its finality which is again is moot and a matter of res judicata because of the acceptance of the rule 36 decision by the lower court. As a result, the merits of this claim cannot be attacked because a de novo evaluation has proven that this litigant has subject matter jurisdiction especially construed in a light most favorable to him.

And once more again, motions to dismiss for failure to state a claim are appropriate when a defendant attacks the complaint because it fails to state a legally cognizable claim. Fed. R. Civ. P. 12(b)(6). The test for determining the sufficiency of a complaint when he can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957). *See also, Grisham v. United States*, 103 F.3d 24, 25-26 (5th Cir. 1997).

However, subsumed within the rigorous standard of the *Conley* test is the requirement that the plaintiff's complaint be stated with enough clarity to enable a court or an opposing party to determine whether a claim is sufficiently alleged. *Elliott v. Foufas*, 867 F.2d 877, 880 (5th Cir. 1989). Further, "the plaintiff's complaint is to be construed in a light most favorable

to the plaintiff, and the allegations contained therein are to be taken as true." *Oppenheimer v. Prudential Securities Inc.*, 94 F.3d 189, 194 (5th Cir. 1996). This is consistent with the well-established policy that the plaintiff be given every opportunity to state a claim. *Hitt*, 561 F.2d at 608.

In other words, a motion to dismiss an action for failure to state a claim "admits the facts alleged in the complaint, but challenges plaintiff's rights to relief based upon those facts." *Tel-Phonic Servs. Inc. v. TBS Int'l, Inc.*, 975 F.2d at 608.

Once again, the issue regarding a failure to state a claim, that is to say each element of the action has been clearly stated in the complaint. And again, there was no challenge to this Plaintiff-Appellant rights to relief based upon the facts. See citation above *supra.* Consequently, this issue is also subjected to the doctrine of Res judicata things already decided.

2nd Conclusion

We respectfully submits that the court enjoin the full circuit for a rehearing panel to resolve the issues in question and determine whether the July 16 lower Court Rule 36 decision prevail and that it would attach summary judgment and possible Rule 36 offer. And respectfully request a rehearing to determine whether the instant tribunal erred in its conclusion not to concede that the doctrine of res judicata prevailed in their attempt to nullify Plaintiff-Appellants claim of subject matter jurisdiction, failure to state a claim, diversity of citizenship and the like.

SUBMITTED BY:

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