

UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ELLEN MARIANI, Individually and as :  
Personal Representative of the :  
Estate of LOUIS NEIL MARIANI, Deceased, :  
Plaintiff :

v. :

Civil Case No. 03-5273

THE UNITED STATES OF AMERICA, :  
GEORGE W. BUSH, The President of the :  
United States, Officially and Individually, :  
RICHARD CHENEY, Vice President of the :  
United States, Officially and Individually, :  
JOHN ASHCROFT, Attorney General of the :  
United States, Officially and Individually, :  
DONALD H. RUMSFELD, Secretary of Defense, :  
Officially and Individually, UNITED STATES :  
DEPARTMENT OF DEFENSE (DOD), :  
CENTRAL INTELLIGENCE AGENCY, :  
NATIONAL SECURITY AGENCY, :  
DEFENSE INTELLIGENCE AGENCY, :  
COUNCIL ON FOREIGN RELATIONS :  
and named and unnamed officials, agents, :  
representatives of THE UNITED STATES :  
OF AMERICA, :  
Defendants

**ORDER**

**AND NOW**, this \_\_ day of \_\_\_\_\_, 2003, upon consideration of Federal Defendants' Motion

To Dismiss The Complaint, and Memorandum In Support Thereof, and any response thereto, it is  
hereby

**ORDERED** that the complaint herein is **DISMISSED** with prejudice as to the United  
States and all federal agency and employee defendants.

\_\_\_\_\_  
**EDUARDO C. ROBRENO, J**

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representatives of THE UNITED STATES :  
OF AMERICA, :  
Defendants :

**FEDERAL DEFENDANTS' MOTION TO DISMISS**  
**COMPLAINT WITH PREJUDICE**

The United States of America, by its attorneys, Patrick L. Meehan, United States Attorney for the Eastern District of Pennsylvania, and Viveca D. Parker, Assistant United States Attorney for the Eastern District of Pennsylvania, on behalf of itself and all federal agency and employee defendants named herein, hereby moves this Court to dismiss with prejudice the complaint filed herein on grounds of failure to exhaust administrative remedies, statute of limitations, improper venue, improper parties, and improper service. In support of its motion, the

United States submits the accompanying memorandum of law.

Respectfully submitted,

PATRICK L. MEEHAN  
United States Attorney

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VIRGINIA A. GIBSON  
Assistant United States Attorney

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VIVECA D. PARKER  
Assistant United States Attorney

November , 2003

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CENTRAL INTELLIGENCE AGENCY,  
NATIONAL SECURITY AGENCY,  
DEFENSE INTELLIGENCE AGENCY,  
COUNCIL ON FOREIGN RELATIONS  
and named and unnamed officials, agents,  
representatives of THE UNITED STATES  
OF AMERICA,  
Defendants

**MEMORANDUM OF LAW IN SUPPORT OF FEDERAL DEFENDANTS’  
MOTION TO DISMISS THE COMPLAINT**

The United States of America, by its attorneys, Patrick L. Meehan, United States Attorney for the Eastern District of Pennsylvania, and Viveca D. Parker, Assistant United States Attorney for the Eastern District of Pennsylvania, on behalf of itself and the federal agency and employee defendants named herein, hereby files this memorandum of law in support of its motion to dismiss the complaint in the above-captioned matter with prejudice on grounds of

failure to exhaust administrative remedies, statute of limitations, improper venue, improper parties, and improper service. In support of its motion, the United States states:

### **BACKGROUND**

In the complaint, plaintiff alleges that defendants' negligent and/or reckless conduct caused the death of her husband, Louis Mariani, who was a passenger on the airliner that crashed into the South Tower of the World Trade Center on September 11, 2001. Plaintiff sues on behalf of herself, her husband's estate and all other beneficiaries of her husband's estate. Plaintiff seeks economic and non-economic damages for injury to person and property, decedent's pain and suffering, loss of support, and expenses arising from Mr. Mariani's death.

Plaintiff filed the complaint on September 12, 2003, over two years after the attacks on the World Trade Center. Plaintiff did not file an administrative claim before filing the complaint

### **ARGUMENT**

#### **I. THE COURT LACKS SUBJECT MATTER JURISDICTION OVER THESE CLAIMS BECAUSE PLAINTIFF DID NOT EXHAUST HER ADMINISTRATIVE REMEDIES BEFORE FILING SUIT.**

Plaintiff's claims sound in tort, therefore the Federal Tort Claims Act ("FTCA") applies to this case. See 28 U.S.C. § 2674. The FTCA provides that an action may not be instituted against the United States for money damages unless the claimant has first exhausted her administrative remedies. 28 U.S.C. § 2675(a). See McNeil v. United States, 508 U.S. 106, 113 (1993) ("The FTCA bars claimants from bringing suit in federal court until they have exhausted their administrative remedies.") This requirement is jurisdictional, not subject to waiver by the government, and must be strictly construed. "It is only under the FTCA that the terms of the United States' consent to be sued, and thus the jurisdiction of the federal district courts, is

defined.” Acheampong v. United States, 2002 WL 32130108 (E.D.Pa. Oct. 16, 2002) (citation omitted). “[A] court does not have jurisdiction before administrative remedies have been exhausted.” Wilder v. Luzinski, 123 F.Supp.2d 312, 313 (E.D.Pa. 2000).

Plaintiff makes no allegation that she filed her claim administratively before filing the complaint. An inquiry of the named federal agency defendants indicates that plaintiff did not file an administrative claim relating to this matter. Therefore, this Court lacks jurisdiction to consider her claims, and her complaint must be dismissed.

**II. THE COMPLAINT SHOULD BE DISMISSED WITH PREJUDICE BECAUSE PLAINTIFF’S CLAIMS ARE FOREVER BARRED.**

The FTCA provides a strict two-year statute of limitations; if a claim is not properly submitted to the appropriate agency within two years of its accrual, it is “forever barred.” 28 U.S.C. § 2401(b). Plaintiff is beyond the two-year period from the accrual of her claim and therefore cannot now submit a timely tort claim to a federal agency.

The injuries allegedly occurred on September 11, 2001. Plaintiff filed this action on September 12, 2003. Even if plaintiff submits her claim to the appropriate agency now, her claim would not be timely. Moreover, both the submission of a timely claim and receipt of a final denial by the agency are required for the Court to exercise jurisdiction under the FTCA. See 28 U.S.C. § 2675(a). Plaintiff is no longer capable of submitting a timely claim and her claim is forever barred. Therefore the complaint should be dismissed with prejudice.

**III. THE COMPLAINT SHOULD BE DISMISSED FOR IMPROPER VENUE.**

An action under the FTCA may be prosecuted “only in the judicial district where the plaintiff resides or wherein the act or omission complained of occurred.” 28 U.S.C. § 1402(b).

In her complaint, plaintiff alleges that she “is an adult individual and a citizen of the State of New Hampshire,” and that on the date the injury occurred, she was “domiciled in New Hampshire.” The acts and omissions plaintiff complains of occurred in New York, New York. Complaint ¶ 1. Because plaintiff does not reside within the Eastern District of Pennsylvania, and the conduct alleged did not occur in the Eastern District of Pennsylvania, the complaint should be dismissed as this Court is not the proper venue for plaintiff’s claims.

**IV. ALL CLAIMS AGAINST THE INDIVIDUAL AND AGENCY DEFENDANTS SHOULD BE DISMISSED.**

Plaintiff alleges that at all relevant times each individual defendant was acting within the scope of his employment. Complaint at ¶ 9. The FTCA prohibits naming an agency or an individual acting within the scope of his employment as a defendant. 28 U.S.C. § 2679(a), (b). Because plaintiff has named agencies and individuals as defendants, those claims should be dismissed leaving the United States as the sole defendant, as prescribed by the FTCA at section 2679(d) of Title 28 of the United States Code.

**V. THE COMPLAINT SHOULD BE DISMISSED FOR IMPROPER SERVICE OF PROCESS.**

To properly serve a lawsuit grounded in the FTCA, plaintiff must serve the Attorney General of the United States, the U.S. Attorney for the district in which the suit was filed, and any agency named in the suit. F.R.C.P. 4(i). Although plaintiff served the U.S. Attorney for the Eastern District of Pennsylvania on September 23, 2003, neither the Attorney General nor any of the agencies named by plaintiff herein have been served. Accordingly, the complaint should be dismissed for failure to properly serve.

WHEREFORE, the United States requests that this Court enter an Order dismissing the complaint with prejudice.

November       , 2003

Respectfully submitted,

PATRICK L. MEEHAN  
United States Attorney

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VIRGINIA A. GIBSON  
Assistant United States Attorney

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VIVECA D. PARKER  
Assistant United States Attorney



**CERTIFICATE OF SERVICE**

I hereby certify that on the    day of November 2003, I caused a true and correct copy of the foregoing **FEDERAL DEFENDANTS' MOTION TO DISMISS THE COMPLAINT AND MEMORANDUM OF LAW IN SUPPORT THEREOF** to be served by U.S. mail upon:

Philip J. Berg, Esquire  
706 Ridge Pike  
Lafayette Hill, PA 19444

November    , 2003

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Viveca D. Parker  
Assistant United States Attorney