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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

FRANK W. MICHELL, et al.,	
v.	Plaintiffs,
UNITED STATES OF AMERICA; COURTNEY NUNEZ,	
Defendants.	

Case No. 09cv387 BTM(BGS)
**ORDER DENYING MOTION TO
AMEND COMPLAINT**

Plaintiffs Lori Nunez and Luis Nunez IV (“Plaintiffs”) have filed a motion to amend their complaint to re-name “Nominal Defendant” Courtney Nunez as a Plaintiff in this matter, or, in the alternative, to join Courtney Nunez as a necessary party. For the reasons discussed below, Plaintiffs’ motion is **DENIED**.

I. BACKGROUND

This litigation arises out of a series of accidents on August 27, 2006, on State Route 94, in San Diego County. Frank Modica, who was riding a motorcycle, was involved in a collision with a bicyclist. The United States Border Patrol arrived at the scene of the accident and, according to Plaintiffs, parked their vehicles in such a manner as to unreasonably block the road and traffic. A group of motorcycle riders came upon the scene at different times and crashed due to the blockage. Luis S. Nunez, III (“Nunez”), suffered fatal injuries.

1 On or about August 12, 2008, Lori Nunez, Nunez's widow, and Luis Nunez IV,
2 Nunez's son, filed administrative claims with the U.S. Customs and Border Protection
3 Agency. (Gov't Exs. 1, 2.) On or about November 10, 2008, the claims were denied. (Id.)

4 On March 9, 2009, Lori Nunez and Luis Nunez IV filed their action against the United
5 States, asserting claims for negligence and wrongful death. Plaintiffs named Courtney
6 Nunez ("Courtney"), Nunez's daughter, as a nominal defendant because Plaintiffs were
7 unable to obtain her consent to participate in the action. Plaintiffs have since obtained
8 Courtney's consent and seek to amend their complaint to re-name her as a Plaintiff.

9 10 **II. DISCUSSION**

11 The United States opposes Plaintiffs' motion to re-name Courtney Nunez as a Plaintiff
12 on the ground that the Court lacks subject matter jurisdiction over Courtney's claims. As
13 discussed below, the Court agrees that it lacks subject matter jurisdiction over Courtney's
14 claims because she did not exhaust her administrative remedies under the Federal Tort
15 Claims Act ("FTCA").

16 The FTCA waives sovereign immunity for claims against the federal government
17 arising from torts committed by federal employees who are acting within the scope of their
18 employment. 28 U.S.C. §§ 1346(b)(1), 2679(d)(1). The FTCA requires that claimants under
19 the FTCA exhaust administrative remedies before filing suit:

20 An action shall not be instituted upon a claim against the United States for
21 money damages for injury or loss of property or personal injury or death
22 caused by the negligent or wrongful act or omission of any employee of the
23 Government while acting within the scope of his office or employment, unless
the claimant shall have first presented the claim to the appropriate Federal
agency and his claim shall have been finally denied by the agency in writing
and sent by certified or registered mail.

24 28 U.S.C. § 2675(a).

25 The FTCA also provides:

26 A tort claim against the United States shall be forever barred unless it is
27 presented in writing to the appropriate Federal agency within two years after
28 such claim accrues or unless action is begun within six months after the date
of mailing . . . of notice of final denial of the claim by the agency to which it was
presented.

1 28 U.S.C. § 2401(b). The time limits set forth in § 2401(b) are jurisdictional and cannot be
2 extended by estoppel or equitable tolling. Marley v. United States, 567 F.3d 1030, 1038
3 (9th Cir. 2009).

4 The Ninth Circuit has “repeatedly held that the exhaustion requirement is jurisdictional
5 in nature and must be interpreted strictly.” Vacek v. United States Postal Service, 447 F.3d
6 1248, 1250 (9th Cir. 2006). As explained by the Ninth Circuit:

7 This is particularly so since the [Act] waives sovereign immunity. Any such
8 waiver must be strictly construed in favor of the United States. Section 2675(a)
9 establishes explicit prerequisites to the filing of suit against the Government in
10 district court. It admits of no exceptions. Given the clarity of the statutory
11 language, we cannot enlarge that consent to be sued which the Government,
12 through Congress, has undertaken so carefully to limit.

13 Jerves v. United States, 966 F.2d 517, 521 (9th Cir.1992) (internal quotations and citations
14 omitted)

15 It is undisputed that Courtney never filed her own administrative claim and was not
16 mentioned in the administrative claim filed by Plaintiffs. The fact that Courtney’s mother and
17 brother filed their own administrative claims does not excuse Courtney from filing her own
18 claim. See, e.g., Johnson v. United States, 704 F.2d 1431, 1442 (9th Cir. 1983) (holding that
19 although plaintiff’s husband, a serviceman who was injured in an automobile accident, filed
20 an administrative claim and identified plaintiff as his spouse, the district court lacked subject
21 matter jurisdiction over plaintiff’s loss of consortium claim because she had failed to exhaust
22 the FTCA’s procedures).

23 Courts have relaxed the exhaustion requirements in cases involving minor children,
24 allowing claims of minor children to proceed even if the children did not file separate
25 administrative claims. Hilburn v. United States, 789 F. Supp. 338, 341 (D. Hawaii 1992).
26 Courtney, however, was not a minor at the time Plaintiffs’ administrative claims were filed.
27 (See Doc. No. 83.)

28 Therefore, Courtney has not complied with the exhaustion requirements of the FTCA,
and the Court lacks subject matter jurisdiction over her claims. Accordingly, it would be futile
for Plaintiffs to re-name Courtney as a Plaintiff.

Plaintiffs argue that Courtney is a necessary party under California law because she

1 is an heir of the decedent and has standing to bring a wrongful death claim. However, as
2 already discussed, Courtney failed to exhaust her administrative remedies, and the Court
3 lacks subject matter jurisdiction over any wrongful death claim by her. Therefore, Courtney
4 is not a necessary party to the adjudication of the wrongful death case brought by her mother
5 and brother.

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III. CONCLUSION

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For the reasons set forth above, Plaintiffs' motion to amend their complaint to re-name

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Courtney Nunez as a Plaintiff in this action is **DENIED**.

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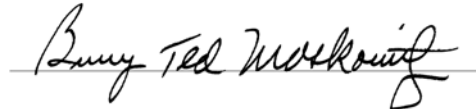
IT IS SO ORDERED.

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DATED: August 23, 2011

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Honorable Barry Ted Moskowitz
United States District Judge

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