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

MAYRA PAREDES NINO,
Individually and as Wife of Decedent
Jose Alfredo Yanez Reyes; J.A.Y.P;
J.R.Y.P., Minors by MAYRA
PAREDES NINO, their Guardian ad
Litem.

Plaintiffs,

vs.

UNITED STATES OF AMERICA,
and DOES 1 through 25, inclusive,

Defendants.

CASE NO. 13cv0469 WQH
(BGS)

ORDER

HAYES, Judge:

The matter before the Court is the Motion to Dismiss For Failure to State a Claim filed by Defendant United States of America. (ECF No. 34).

I. Background

On February 27, 2013, Plaintiffs Mayra Paredes Nino, individually and as wife of Decedent Jose Alfredo Yanez Reyes, and JY and RY, minors by Mayra Paredes Nino, their Guardian ad Litem, initiated this action by filing the Complaint. (ECF No. 1). On August 26, 2013, Defendant United States of America (“United States”) filed a motion to dismiss. (ECF No. 9-1). On September 26, 2013, with the motion to dismiss pending, Plaintiffs and the United States filed a joint motion to amend the Complaint. (ECF No. 13). On October 4, 2013, Plaintiffs filed the First Amended Complaint (“FAC”). (ECF No. 17). On November 15, 2013, Defendants United States,

1 Department of Homeland Security (“DHS”), United States Customs and Border
2 Protection (“CPB”), and United States Border Patrol (“Border Patrol”) (collectively
3 “Government Defendants”) filed a motion to dismiss pursuant to Rules 12(b)(6) and
4 12(b)(1) of the Federal Rules of Civil Procedure. (ECF No. 27).

5 On March 13, 2014, the Court granted the Government Defendants’ motion to
6 dismiss. (ECF No. 32). The Court dismissed Plaintiffs’ second, third, fourth, fifth,
7 sixth, and seventh claims for relief—all brought pursuant to *Bivens v. Six Unknown*
8 *Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971) (“*Bivens* claims”)—to
9 the extent they were brought against the Government Defendants or federal employee
10 Defendants in their official capacities. *Id.* at 8-9. The Court found that these claims
11 were barred by sovereign immunity because the FAC “fails to show an ‘unequivocal
12 waiver of immunity.’” *Id.* at 9 (citing *Baker v. United States*, 817 F.2d 560, 562 (9th
13 Cir. 1987)). The Court also dismissed Plaintiffs’ first claim for relief against the
14 Government Defendants for violation of the law of nations on sovereign immunity
15 grounds.

16 On April 14, 2014, Plaintiffs filed the Second Amended Complaint (“SAC”),
17 which is the operative pleading. (ECF No. 33). The SAC names the United States,
18 Agent Chad Michael Nelson (“Agent Nelson”), and Agent Dorian Diaz (“Agent Diaz”)
19 as Defendants and asserts the following claims for relief: (1) violation of the law of
20 nations under the Alien Tort Statute (“ATS”); (2) wrongful death under the Federal Tort
21 Claims Act (“FTCA”) and California Code of Civil Procedure section 377.60-62; and
22 (3) emotional distress under the FTCA and California Common Law. On April 28,
23 2014, the United States filed the Motion to Dismiss. (ECF No. 34). On May 12, 2014,
24 Plaintiffs filed an opposition, along with the Declaration of Attorney Eric M. Welch.
25 (ECF Nos. 35, 35-1). On May 20, 2014, the United States filed a reply. (ECF No. 36).

26 **II. Allegations of the SAC**

27 At dusk on June 21, 2011, Jose Alfredo Yanez Reyes (“Yanez”), and Jose Ibarra-
28 Murrieta (“Murrieta”), crossed the border from Mexico to the United States together.

1 (ECF No. 33 at 4). Yanez and Murrieta entered the United States through a hole in the
2 primary border fence abutting Mexico, and “emerged into a dried-out concrete culvert
3 between the primary border fence (the corrugated solid metal fence closest to Mexico)
4 and the secondary border fence (the high-tech chain link fence closest to the United
5 States). The culvert runs north from the primary fence to Stuart’s Bridge, which abuts
6 the secondary fence.” *Id.*

7 Murrieta led the pair and traversed the length of the culvert and climbed out at
8 Stuart’s Bridge. *Id.* at 5. Murrieta encountered Agent Nelson at Stuart’s Bridge. *Id.*
9 “Murrieta leapt back into the culvert and began scaling a pole up the side of Stuart’s
10 Bridge.” *Id.* Yanez, who had stayed in the culvert, escaped back into Mexico through
11 the hole in the primary border fence. Murrieta “evaded Agent Nelson and ran south
12 toward the primary fence where Yanez had just escaped.” *Id.* Agent Nelson caught
13 Murrieta in the culvert near the primary border fence. Murrieta and Agent Nelson
14 “grappl[ed] for a short time.” *Id.* Murrieta escaped Agent Nelson’s hold and in
15 attempting to evade Agent Nelson, Murrieta tripped and fell to the ground. “When
16 Murrieta stood up, Agent Nelson grabbed him by the neck in an attempt to subdue him.”
17 *Id.* “Murrieta and Agent Nelson began grappling again in the dirt road, and Agent
18 Nelson swept Murrieta’s legs and wrestled him to the ground. Agent Nelson then
19 admittedly began to strike Murrieta while pinning him to the ground.” *Id.* “Meanwhile,
20 Yanez climbed into a tree that leaned against the southern side of the primary fence near
21 where Agent Nelson and Murrieta were grappling ... Yanez was over United States
22 Territory as he was peering over the fence to observe those events.” *Id.* at 5-6.

23 From this point forward, the FAC recounts both the Agents’ and Murrieta’s
24 versions of the events. “The Agents assert that during Nelson’s struggle with Murrieta,
25 Yanez threw two rocks (per Agent Nelson) or one or possibly two rocks (per Agent
26 Diaz) at Agent Nelson.” *Id.* at 6. Agents Nelson and Diaz “assert that while Agent
27 Nelson and Murrieta struggled on the ground, Yanez threw a nail-studded board that
28 struck Agent Nelson in the head, glancing off his hat.” *Id.* “According to Agent

1 Nelson, at about the time that Yanez allegedly threw the board, Diaz arrived to help
2 subdue Murrieta. Agent Diaz allegedly told Yanez to get off the fence, and then began
3 helping Agent Nelson get control of Murietta.” *Id.*

4 Agent Nelson acknowledges that then, without any warning and any
5 further alleged throwing of a rock or a board by Yanez, Agent Nelson
6 pulled away from the scuffle with Murrieta. Agent Diaz removed his
7 sidearm from its holster, uttered not a single additional word, and shot
8 Yanez in the head ... Yanez fell out of the tree, dead or dying, on the
9 southern side of the primary fence, but at any event ... always within
10 United States Territory.

11 *Id.*

12 Murrieta’s account “differs markedly from those of the Agents.” *Id.* at 7.

13 Murrieta asserts that Yanez never through [sic] anything at Nelson or
14 anyone else. Indeed, the shape and height of the tree, the height of the
15 primary border fence, and the distance of the tree and the fence from
16 Agent Nelson made it impossible for Yanez (or any person) to throw rocks
17 or wood at the agent with lethal force or accuracy.

18 *Id.* “Instead, both Agent Nelson and Agent Diaz had Murrieta down on the ground and
19 were beating him.” *Id.* at 8. “In an effort to stop the attack, Yanez yelled that he was
20 going to use his cellphone to take video and pictures of the beating.” *Id.* at 8. “Upon
21 hearing Yanez’s threat to record the Agents’ attack on Murieta, Agent Diaz stopped
22 beating Murieta, stood up, and, without warning or provocation, shot Yanez in the
23 head.” *Id.*

24 The Agents’ use of excessive, lethal force against Yanez did not spring
25 from their spontaneous acts. Instead, they were acting pursuant to, and
26 while implementing, a Rocking Policy that has the imprimatur of the
27 highest-ranking DHS officials. Pursuant to this unlawful Rocking Policy,
28 Border Patrol agents along the southern border regularly use excessive,
lethal force against persons of perceived Hispanic descent and Mexican
nationality.

Id. at 9. The United States knew or reasonably should have known that Border Patrol
Agents had implemented the Rocking Policy, tacitly approved the Rocking Policy,
defended the Rocking Policy, and failed to adequately train Border Patrol agents
“concerning the proper use of force.” *Id.* at 9-10, 19.

27 **III. Contentions of the Parties**

28 The Motion to Dismiss is brought by the United States. The United States moves

1 to dismiss the SAC on the following grounds:

2 (1) Plaintiffs' First Claim for "Violation of the Law of Nations" has
3 already been dismissed by this Court based on sovereign immunity;

4 (2) Plaintiffs' Second and Third Claims under the Federal Tort Claims Act
(FTCA) are time-barred;

5 (3) Plaintiffs' requests for declaratory and injunctive relief are barred as
6 there is no real and substantial controversy and Plaintiffs are seeking an
improper advisory opinion; and

7 (4) Plaintiffs' request for attorney's fees should be dismissed as
8 unrecoverable.

9 (ECF No. 34-1 at 2). In addition, the United States "incorporates by reference herein
10 its foreign country exception argument raised in its first motion to dismiss[,]” namely,
11 that tort claims are barred against the United States when “based on injuries suffered
12 in foreign countries.” *Id.*

13 Plaintiff contends that it may bring an ATS claim against the United States.
14 Plaintiff contends that the FTCA claims of the SAC relate back to the time of the filing
15 of the original Complaint. Plaintiff also contends that declaratory and injunctive relief
16 are proper remedies to stop the alleged “Rocking Policy.” (ECF No. 35 at 9). Finally,
17 Plaintiff contends that attorneys’ fees are recoverable pursuant to 42 U.S.C. section
18 1988.

19 **IV. Rule 12(b)(6) Standard**

20 Federal Rule of Civil Procedure 12(b)(6) permits dismissal for “failure to state
21 a claim upon which relief can be granted.” Fed. R. Civ. P. 12(b)(6). Federal Rule of
22 Civil Procedure 8(a) provides: “A pleading that states a claim for relief must contain ...
23 a short and plain statement of the claim showing that the pleader is entitled to relief.
24 Dismissal under Rule 12(b)(6) is appropriate where the complaint lacks a cognizable
25 legal theory or sufficient facts to support a cognizable legal theory. *See Balistreri v.*
26 *Pacifica Police Dep’t*, 901 F.2d 696, 699 (9th Cir. 1990).

27 When considering a motion to dismiss, a court must accept as true all
28 “well-pleaded factual allegations.” *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009).

1 However, a court is not “required to accept as true allegations that are merely
2 conclusory, unwarranted deductions of fact, or unreasonable inferences.” *Sprewell v.*
3 *Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001). “In sum, for a complaint to
4 survive a motion to dismiss, the non-conclusory factual content, and reasonable
5 inferences from that content, must be plausibly suggestive of a claim entitling the
6 plaintiff to relief.” *Moss v. U.S. Secret Serv.*, 572 F.3d 962, 969 (9th Cir. 2009)
7 (quotations omitted).

8 Rule 12(b)(1) of the Federal Rules of Civil Procedure allows a defendant to move
9 for dismissal on grounds that the court lacks jurisdiction over the subject matter. Fed.
10 R. Civ. P. 12(b)(1). The burden is on the plaintiff to establish the court has subject
11 matter jurisdiction over an action. *Assoc. of Med. Colls. v. United States*, 217 F.3d 770,
12 778-779 (9th Cir. 2000). In resolving an attack on a court’s jurisdiction, the court may
13 go outside the pleadings and consider evidence beyond the complaint relating to
14 jurisdiction without converting the motion to dismiss into a motion for summary
15 judgment. *Safe Air For Everyone v. Doyle*, 373 F.3d 1035, 1039 (9th Cir. 2004). Issues
16 regarding subject matter jurisdiction may be raised at any time, even on appeal, by
17 motion or sua sponte by the court. Fed. R. Civ. P. 12(h)(3); *Snell v. Cleveland*, 316
18 F.3d 822, 826-27 (9th Cir. 2002).

19 **V. Violation of the Law of Nations (First Claim)**

20 The United States contends that Plaintiffs’ violation of the law of nations claim
21 is identical to the violation of the law of nations claim contained in the FAC, which the
22 Court dismissed in its March 13, 2014 Order for failing to state a claim. Plaintiffs
23 contend that the “extrajudicial killing” alleged in the SAC is “among the gravest
24 violations of the law of nations.” (ECF No. 35 at 8). Plaintiffs contend that the ATS
25 provides for a cause of action for a violation of the law of nations. Plaintiffs assert that
26 they have “spelled out in detail within the SAC” the “statutes, treaties and conventions
27 which apply to this case.” *Id.*

28 The United States, as a sovereign, is immune from suit. *United States v. Mitchell*,

1 445 U.S. 535, 538 (1980). “It is axiomatic that Congressional waiver of sovereign
2 immunity is a prerequisite to any suit brought against the United States.” *Roberts v.*
3 *United States*, 498 F.2d 520, 525 (9th Cir. 1974). The United States “may not be sued
4 without its consent and the terms of such consent define the court’s jurisdiction.” *Baker*
5 *v. United States*, 817 F.2d 560, 562 (9th Cir. 1987). A waiver of sovereign immunity
6 as contained in any statute “will be strictly construed, in terms of its scope, in favor of
7 the sovereign.” *Lane v. Pena*, 518 U.S. 187, 192 (1996). “A party bringing a cause of
8 action against the federal government bears the burden of showing an unequivocal
9 waiver of immunity.” *Baker*, 817 F.2d at 562. A waiver of the sovereign immunity of
10 the United States must be “unequivocally expressed.” *Franconia Assoc. v. United*
11 *States*, 536 U.S. 129, 141 (2002).

12 The ATS provides that “[t]he district courts shall have original jurisdiction of any
13 civil action by an alien for a tort only, committed in violation of the law of nations or
14 a treaty of the United States.” 28 U.S.C. § 1350. The “[ATS] has been interpreted as
15 a jurisdiction statute only—it has not been held to imply any waiver of sovereign
16 immunity.” *Tobar v. United States*, 639 F.3d 1191, 1196 (9th Cir. 2011) (quoting
17 *Goldstar (Panama) S.A. v. United States*, 967 F.2d 956, 968 (4th Cir. 1992)); *see also*
18 *Koohi v. United States*, 976 F.2d 1328, 1333 n.4 (9th Cir. 1992); *Industria Panificadora*
19 *S.A. v. United States*, 957 F.2d 886, 887 (D.C. Cir. 1992). Therefore, “any party
20 asserting jurisdiction under the [ATS] must establish, independent of that statute, that
21 the United States has consented to suit.” *Tobar*, 639 F.3d at 1196.

22 The SAC’s sections titled “International and Domestic Strictures on Excessive,
23 Lethal Force” and “Applicable Treaties” are identical to those contained in the FAC.
24 The SAC alleges that the “Rocking Policy” violates the law of nations, which prohibits
25 extrajudicial killing, and that the United States “is liable for Yanez’s death under the
26 law of nations, because it formulated, authorized, approved, directed, and ratified the
27 Rocking Policy.” (ECF No. 33 at 26-27). The SAC does not allege, nor do Plaintiffs
28 contend in opposition, that the United States has waived its sovereign immunity under

1 the ATS.

2 For the reasons given in the Court’s March 13, 2014 Order, Plaintiffs have failed
3 to state a claim against the United States for a violation of the law of nations in the
4 SAC. The United States’ motion to dismiss Plaintiff’s first claim for violation of the
5 law of nations is granted.

6 Plaintiffs have made no attempt to cure the pleading deficiencies identified in the
7 Court’s March 13, 2014 Order. Plaintiffs do not contend that the United States has
8 waived its sovereign immunity for violations of the law of nations. Controlling case
9 law is clear that the United States has not waived its sovereign immunity under the
10 ATS. Because amendment would be futile, dismissal is with prejudice.

11 **VI. FTCA Statute of Limitations (Second and Third Claims)**

12 The United States contends that Plaintiffs failed to bring FTCA claims within six
13 months of the denial of an administrative claim, as required by 28 U.S.C. § 2401(b).
14 The United States asserts that Plaintiffs’ administrative claim was denied on August 27,
15 2012, but Plaintiffs did not bring FTCA claims until April 14, 2014, the date the SAC
16 was filed. The United States contends that Plaintiffs cannot rely on the date of the
17 original Complaint, filed February 27, 2013, because Plaintiffs did not assert FTCA
18 claims in the FAC.

19 Plaintiffs contend that the SAC’s FTCA claims “relate back” to the filing of the
20 Complaint because they arise from the same general set of facts as the original pleading.
21 Plaintiffs assert that they did not voluntarily dismiss the FTCA claims alleged in the
22 original Complaint. Plaintiffs’ counsel Eric Welch states that, “[a]fter consulting with
23 Perez’ counsel [in related case *Perez v. United States, et al.*, Southern District of
24 California, Case No. 13cv1417] and upon reviewing applicable law involving *Bivens*
25 claims and the Judgment Bar which would operate to bar application of both *Bivens* and
26 the FTCA within the same case, I had opted to follow a *Bivens* approach in the First
27 Amended Complaint (FAC).” (ECF No. 35-1 at 2).

28 In reply, the United States contends that Plaintiffs are not permitted to engage in

1 an “alternative pleading strategy” which allows Plaintiffs to “resurrect” the original
2 Complaint in the SAC after pursuing different claims in the FAC. (ECF No. 36 at 4).
3 The United States contends that “an amended complaint supersedes a previous
4 complaint and constitutes a waiver of the claims listed in the previous complaint.” *Id.*
5 at 4 (citing *King v. Atiyeh*, 814 F.2d 565, 567 (9th Cir. 1987)).

6 **A. “Abandoned” or “Waived” Claims**

7 In *Forsyth v. Humana, Inc.*, 114 F.3d 1467 (9th Cir. 1997), the U.S. Court of
8 Appeals for the Ninth Circuit held that claims dismissed pursuant to Rule 12(b)(6) were
9 waived on appeal after the plaintiff failed to reallege them in an amended complaint.
10 *Id.* at 1474. In *Lacey v. Maricopa Cnty.*, 693 F.3d 896 (9th Cir. 2012), the Court of
11 Appeals partially overruled *Forsyth* and held that a plaintiff is not required to reallege
12 a claim in an amended complaint that was “dismissed with prejudice and without leave
13 to amend.” *Id.* at 928.

14 In opposition to the Government Defendants’ Motion to Dismiss the FAC,
15 Plaintiffs requested that “[i]n the event that this Court rules for Defendants, then
16 Plaintiffs seek the right to amend their Complaint, specifically to allege FTCA causes
17 of action as justified by the facts (and in the event that such are not subject to the
18 ‘judgment bar’ so as to invoke claim preclusion).” (ECF No. 28 at 21). In reply, the
19 Government Defendants opposed the addition of an FTCA claim, contending that
20 Plaintiffs abandoned their FTCA claim in the FAC after being faced with a motion to
21 dismiss the original Complaint. (ECF No. 30 at 9). In the March 13, 2014 Order, the
22 Court granted Plaintiffs’ request for leave to amend the First Amended Complaint
23 without qualification. (ECF No. 32 at 11).

24 Although claims may be waived for the purposes of an appeal when not realleged
25 in the operative complaint, *see Forsyth*, 114 F.3d at 1474; *Lacey*, 693 F.3d at 928, the
26 United States has cited no authority for the proposition that a district court may not
27 permit a plaintiff to “resurrect” claims alleged in an original complaint that are not
28 realleged in a first amended complaint. Furthermore, nothing in the record evinces an

1 intent to abandon FTCA claims. Eric M. Welch, Plaintiffs’ counsel, opted to test the
2 sufficiency of a *Bivens* action instead of an FTCA action in the FAC in order to avoid
3 the potential FTCA judgment bar. (ECF No. 35-1 at 2); *see also Gasho v. United*
4 *States*, 39 F.3d 1420, 1436-38 (9th Cir. 1994) (“[A]ny FTCA judgment, regardless of
5 its outcome, bars a subsequent *Bivens* action on the same conduct that was at issue in
6 the prior judgment.”) (emphasis in original). The decision to omit FTCA claims from
7 the FAC was part of a broader pleading strategy in which FTCA claims were a part of.
8 The fact that FTCA claims were asserted in the SAC further demonstrates an intent to
9 pursue FTCA claims. The Court does not construe Plaintiffs’ successive complaints as
10 having abandoned Plaintiffs’ FTCA claims.

11 **B. Relation Back to the Original Complaint**

12 Federal Rule of Civil Procedure 15(c) provides that “[a]n amendment to a
13 pleading relates back to the date of the original pleading when... the amendment asserts
14 a claim or defense that arose out of the conduct, transaction, or occurrence set out—or
15 attempted to be set out—in the original pleading....” Fed. R. Civ. P. 15(c)(1)(B).
16 “Claims arise out of the same conduct, transaction, or occurrence if they ‘share a
17 common core of operative facts’ such that the plaintiff will rely on the same evidence
18 to prove each claim.” *Williams v. Boeing Co.*, 517 F.3d 1120, 1133 (9th Cir. 2008)
19 (citing *Martell v. Trilogy Ltd.*, 872 F.2d 322, 325-26 (9th Cir. 1989)). “The requirement
20 that the allegations in the amended complaint arise from the same conduct, transaction,
21 or occurrence is meant to ensure that the original pleading provided adequate notice of
22 the claims raised in the amended pleading.” *Williams*, 517 F.3d at 1133 n.9.

23 In this case, the original Complaint and the SAC arise out of the alleged shooting
24 of Yanez in response to alleged rock throwing. Both complaints name the United States
25 as a defendant. The United States does not contend that it was without notice of the
26 claims against it until the filing of the SAC.

27 The FTCA claims asserted in the SAC relate back to the date the original
28 Complaint was filed on February 27, 2013 because the claims arise for the exact same

1 “conduct, transaction, or occurrence”: the shooting of Yanez. Fed. R. Civ. P.
2 15(c)(1)(B). The fact that Plaintiffs filed an FAC in the interim does not limit the
3 application of Rule 15. *See Baker v. Major League Baseball Properties, Inc.*, No. 3:09-
4 CV-00982, 2012 WL 2564905, at *2 (S.D. Cal. July 2, 2012) (finding that a proposed
5 fifth amended complaint satisfied Rule 15(c)(1)(B) because “the amendment asserts a
6 claim or defense that arose out of the conduct, transaction, or occurrence set out ... in
7 the original pleading”) (citing Fed. R. Civ. P. 15(c)(1)(B)). Because Plaintiffs’
8 administrative claim was denied on August 27, 2012, Plaintiffs timely filed the present
9 action within six months on February 27, 2013. (ECF No. 34-1 at 5; ECF No. 1).

10 The United States’ motion to dismiss Plaintiffs’ Second and Third Claims under
11 the FTCA is denied.

12 **VII. Injunctive Relief**

13 The United States contends that Plaintiffs do not have standing to seek injunctive
14 relief to enjoin future execution of the “Rocking Policy” because Plaintiffs seek redress
15 for an alleged past wrong but do not allege any facts demonstrating that Plaintiffs face
16 the threat of future injury. (ECF No. 34-1 at 8-9) (citing *City of Los Angeles v. Lyons*,
17 461 U.S. 95 (1983)). The United States contends that even if Plaintiffs “were to allege
18 in this action that at some point in the future, they plan to illegally cross the border
19 through a small hole in the international border fence and throw rocks and nail-studded
20 wood boards at border patrol agents, they cannot possibly predict what will happen if
21 they choose to do so.” *Id.* at 9. Plaintiffs contend that the specific policy they have
22 alleged, the “Rocking Policy,” must be enjoined to prevent those similarly situated to
23 Yanez from being harmed pursuant to the “Rocking Policy.” (ECF No. 35 at 9).

24 “Federal courts are courts of limited jurisdiction. They possess only that power
25 authorized by Constitution and statute, which is not to be expanded by judicial decree.
26 It is to be presumed that a cause lies outside this limited jurisdiction, and the burden of
27 establishing the contrary rests upon the party asserting jurisdiction.” *Kokkonen v.*
28 *Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994) (citations omitted). The party

1 invoking federal jurisdiction bears the burden of establishing Article III standing. *Lujan*
2 *v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). This party must establish (1) an
3 “injury in fact”—an invasion of a legally protected interest which is (a) concrete and
4 particularized ... and (b) ‘actual or imminent, not conjectural or hypothetical,’” (2) a
5 causal connection between the injury and the conduct complained of, and (3) a
6 likelihood that the injury will be redressed by a favorable decision. *Id.* at 560-61
7 (citations omitted). “Abstract injury is not enough. The plaintiff must show that he ‘has
8 sustained or is immediately in danger of sustaining some direct injury’ as the result of
9 the challenged official conduct and the injury or threat of injury must be both ‘real and
10 immediate,’ not ‘conjectural’ or ‘hypothetical.’” *City of Los Angeles v. Lyons*, 461 U.S.
11 95, 101-02 (1983) (citations omitted). “[A] plaintiff must demonstrate standing for each
12 claim he seeks to press.” *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006).

13
14 The SAC alleges that “[a]bsent a revocation and prohibition of Defendants’
15 policies, practices, and patterns as well as the implementation of affirmative policies,
16 practices, and procedures ensuring compliance with the requirements of law, many
17 other persons remain at risk of being the next victims of extrajudicial killings at the
18 hands of U.S. Border Patrol agents.” (ECF No. 33 at 30). The SAC requests injunctive
19 relief, enjoining the United States from, *inter alia*, “continuing to authorize and
20 implement the Rocking Policy,” “deeming others’ throwing of rocks at agents to be per
21 se lethal force that, in turn, justifies the agents’ counter-use of lethal force against those
22 others,” and “expressly or implicitly approving the Rocking Policy by any means....”
23 *Id.* at 31.

24 The Court concludes that the facts alleged in the SAC are not sufficient to
25 demonstrate Plaintiffs’ standing to seek an injunction. Plaintiffs do not allege that they
26 have “sustained or [are] immediately in danger of sustaining some direct injury as the
27 result of the challenged official conduct.” *Lyons*, 461 U.S. at 102, 105-10 (holding that
28 a plaintiff lacked standing to seek an injunction preventing an allegedly unlawful police

1 practice absent an allegation that he would have another encounter with police officers,
2 even though the plaintiff presumably had “standing to claim damages against the
3 individual officers”).

4 The United States’ motion to dismiss Plaintiffs’ request for injunctive relief is
5 granted.

6 **VIII. Declaratory Relief**

7 The United States contends that Plaintiffs’ request for declaratory relief must be
8 dismissed because Plaintiffs fail to “articulate what they seek at this time.” (ECF No.
9 34-1at 10). Plaintiffs contend that the constitutionality of the “Rocking Policy” is
10 brought “front and center” throughout the body of the SAC. (ECF No. 35 at 9).

11 The content of the SAC’s requested declaratory relief is identical to its requested
12 injunctive relief. Both requests seek to prevent future execution of the “Rocking
13 Policy.” As discussed above, Plaintiffs lack standing to seek to prevent future conduct
14 without alleging that Plaintiffs, personally, are “immediately in danger of sustaining
15 some direct injury” as a result of the “Rocking Policy.” *Lyons*, 461 U.S. at 101-02
16 (1983).

17 The United States’ motion to dismiss Plaintiffs’ request for declaratory relief is
18 granted.

19 **IX. Attorneys’ Fees**

20 The United States contends that it has not waived sovereign immunity for
21 attorneys’ fees for either FTCA or violation of the law of nations actions. Plaintiffs
22 contend that 42 U.S.C. § 1988 authorizes an award of attorneys’ fees in this case.

23 42 U.S.C. section 1988(b) provides that “in any action or proceeding to enforce
24 a provision of sections 1981, 1981a, 1982, 1983, 1985, and 1986 of this title, ... the
25 court, in its discretion, may allow the prevailing party, other than the United States, a
26 reasonable attorney’s fee as part of the costs.” 42 U.S.C. § 1988(b).

27 Section 1988(b) cannot provide the basis for the recovery of attorney’s fees
28 against the United States. Section 1988(b) only applies to actions brought under 42

1 U.S.C. sections 1981, 1981a, 1982, 1983, 1985, and 1986, none of which are asserted
2 as claims for relief in the SAC.

3 Because the Court has dismissed Plaintiffs’ violation of the law of nations claim,
4 Plaintiffs may not recover attorneys’ fees for a violation of the law of nations. Plaintiffs
5 may not recover attorneys’ fees against the United States under the FTCA because
6 “Congress has not waived the government’s sovereign immunity for attorneys’ fees and
7 expenses under the FTCA.” *Anderson v. United States*, 127 F.3d 1190, 1191-92 (9th
8 Cir. 1997).

9 The United States’ motion to dismiss Plaintiffs’ request for attorneys’ fees against
10 the United States is granted.

11 **X. Foreign Country Exception**

12 The United States “incorporates by reference herein its foreign country exception
13 argument raised in its first motion to dismiss[,]” namely, that tort claims are barred
14 against the United States when “based on injuries suffered in foreign countries.” (ECF
15 No. 34-1 at 2). The Court finds that this argument has not been properly raised in the
16 present motion to dismiss. The United States raises no contentions specific to the SAC,
17 the operative pleading. The motion to dismiss is denied without prejudice as to the
18 United States’ arguments regarding the “foreign country exception.”

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1 **XI. Conclusion**

2 IT IS HEREBY ORDERED that the United States' Motion to Dismiss (ECF No.
3 34) is GRANTED in part and DENIED in part. Plaintiffs' First Claim for violation of
4 the law of nations is DISMISSED with prejudice. Plaintiffs' requests for injunctive
5 relief and declaratory relief are DISMISSED. Plaintiffs' request for attorneys' fees
6 against the United States is DISMISSED.

7 DATED: October 6, 2014

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9 **WILLIAM Q. HAYES**
10 United States District Judge

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