

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

**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 matters before the Court are the Motion to Dismiss Plaintiffs' Second Amended Complaint (ECF No. 43) and the Ex Parte Application Requesting Permission to Submit Evidence in Defendant's Reply Brief Responding to Plaintiffs' Opposition Evidence (ECF No. 50) filed by Defendant United States of America.

I. Background

On February 27, 2013, Plaintiffs Mayra Paredes Nino ("Nino"), individually and as wife of Decedent Jose Alfredo Yanez Reyes ("Yanez"); and JY and RY, minors by Plaintiff Nino, their Guardian *ad Litem*, initiated this action by filing the Complaint. (ECF No. 1). On August 26, 2013, Defendant United States of America filed a motion to dismiss. (ECF No. 9). 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.

1 13). On October 4, 2013, Plaintiffs filed the First Amended Complaint (“FAC”). (ECF
2 No. 17). On November 15, 2013, Defendants United States, Department of Homeland
3 Security (“DHS”), United States Customs and Border Protection (“CBP”), and United
4 States Border Patrol (“Border Patrol”) (collectively “Government Defendants”) filed
5 a motion to dismiss pursuant to Rules 12(b)(6) and 12(b)(1) of the Federal Rules of
6 Civil Procedure. (ECF No. 27).

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

18 On April 14, 2014, Plaintiffs filed the Second Amended Complaint (“SAC”),
19 which is the operative pleading. (ECF No. 33). The SAC names the United States as
20 a Defendant and asserts the following claims for relief: (1) violation of the law of
21 nations under the Alien Tort Statute (“ATS”); (2) wrongful death under the Federal Tort
22 Claims Act (“FTCA”) and California Code of Civil Procedure section 377.60-62; and
23 (3) emotional distress under the FTCA and California Common Law. On April 28,
24 2014, Defendant United States filed a motion to dismiss the SAC pursuant to Federal
25 Rules of Civil Procedure 12(b)(1) and 12(b)(6). (ECF No. 34).

26 On October 6, 2014, the Court issued an Order granting in part and denying in
27 part Defendant’s motion to dismiss. (ECF No. 37). The Court denied Defendant’s
28 motion to the extent Defendant sought dismissal for lack of subject matter jurisdiction

1 based on the Federal Tort Claims Act's ("FTCA") foreign country exception.¹ The
2 Court found that the foreign country exception contentions had "not been properly
3 raised in the present motion to dismiss" and that Defendant "raises no contentions
4 specific to the SAC, the operative pleading." *Id.* at 14.

5 On December 16, 2014, Defendant filed the Motion to Dismiss Plaintiffs' Second
6 Amended Complaint pursuant to Federal Rule of Civil Procedure 12(b)(1). (ECF No.
7 43). On January 3, 2015, Plaintiffs filed an opposition, wherein Plaintiffs requested a
8 continuance and opportunity to counter evidence submitted by Defendant. (ECF No.
9 44). On January 11, 2015, Defendants filed a reply. (ECF No. 46).

10 On January 16, 2015, the Court issued an Order, stating that "Plaintiffs shall have
11 until Monday, February 2, 2015 to file any evidence in opposition to Defendant's
12 Motion to Dismiss. Defendant shall have until Monday, February 9, 2015 to file a reply
13 limited to legal argument." (ECF No. 47 at 3). On February 2, 2015, Plaintiffs filed a
14 supplemental opposition. (ECF No. 48). On February 9, 2015, Defendant filed a reply
15 with evidence (ECF No. 49), accompanied by the Ex Parte Application Requesting
16 Permission to Submit Evidence in Defendant's Reply Brief Responding to Plaintiffs'
17 Opposition Evidence (ECF No. 50). On February 27, 2015, the Court heard oral
18 argument on the Motion to Dismiss Plaintiffs' Second Amended Complaint. (ECF No.
19 52).

20 **II. Contentions of the Parties**

21 Defendant moves to dismiss this action pursuant to Federal Rule of Civil
22 Procedure 12(b)(1). First, Defendant moves to dismiss Plaintiffs' second claim for
23 wrongful death pursuant to the foreign country exception to the FTCA, on the ground
24 that Yanez died on Mexican soil. Second, Defendant moves to dismiss Plaintiffs' third
25 claim for emotional distress pursuant to the foreign country exception to the FTCA, on
26 the ground that Plaintiffs personally witnessed Yanez's death while standing on

27
28 ¹ The FTCA's foreign country exception provides: "The provisions of this chapter and section 1346(b) of this title shall not apply to ... [a]ny claim arising in a foreign country." 28 U.S.C. § 2680(k).

1 Mexican soil. Finally, Defendant moves to dismiss claims asserted by Plaintiff Nino
2 on the ground that Plaintiff Nino lacks standing to sue on behalf of Yanez's estate.
3 Defendant contends that Plaintiff Nino is not Yanez's wife, heir, personal
4 representative, or successor in interest.

5 Plaintiffs contend that this motion is barred by collateral estoppel because the
6 Court ruled on October 7, 2014 that the SAC states valid claims for relief. Plaintiffs
7 contend that Yanez's death occurred on United States soil. Plaintiffs contend that the
8 foreign country exception to the FTCA does not apply to this case because Defendant
9 trained its officers on United States soil. Plaintiffs contend that Plaintiff Nino may
10 assert claims as the guardian ad litem to Yanez's children and as a "qualified domestic
11 partner [of Yanez] under Mexican law." (ECF No. 44 at 9). Plaintiffs request leave to
12 amend to clarify facts alleged in the SAC in the event that the Court rules in
13 Defendant's favor.

14 **III. Discussion**

15 **A. Plaintiff Nino's Standing**

16 Defendant moves to dismiss claims asserted by Plaintiff Nino on the ground that
17 Plaintiff Nino "has no standing to sue as an heir due to the fact that the evidence shows
18 the decedent was married to someone else." (ECF No. 43 at 2). First, Defendant
19 contends that Plaintiff Nino lacks standing to sue as Yanez's personal representative.
20 Specifically, Defendant contends that Plaintiff Nino, alleged to be Yanez's common law
21 wife, cannot be Yanez's personal representative because she is not Yanez's surviving
22 spouse. Second, Defendant contends that Plaintiff Nino lacks standing to sue as
23 Yanez's successor in interest because Plaintiff Nino failed to file a declaration under
24 penalty of perjury pursuant to California Code of Civil Procedure section 377.32(a) and
25 a copy of Yanez's death certificate.

26 Plaintiffs contend that Plaintiff Nino may assert claims as the guardian *ad litem*
27 to Yanez's children. Plaintiffs contend that Plaintiff Nino is Yanez's qualified domestic
28 partner under Mexican law and may therefore assert claims on behalf of Yanez's estate.

1 Plaintiffs assert that they can provide proof of Plaintiff Nino’s standing “within the
2 discovery process.” (ECF No. 44 at 9-10).

3 **i. 12(b)(1) Standard**

4 Rule 12(b)(1) of the Federal Rules of Civil Procedure allows a defendant to move
5 for dismissal on grounds that the court lacks jurisdiction over the subject matter. Fed.
6 R. Civ. P. 12(b)(1). The burden is on the plaintiff to establish that the court has subject
7 matter jurisdiction over an action. *Assoc. of Med. Colls. v. United States*, 217 F.3d 770,
8 778-779 (9th Cir. 2000). “Federal courts are courts of limited jurisdiction. They
9 possess only that power authorized by Constitution and statute, which is not to be
10 expanded by judicial decree. It is to be presumed that a cause lies outside this limited
11 jurisdiction, and the burden of establishing the contrary rests upon the party asserting
12 jurisdiction.” *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994)
13 (citations omitted).

14 “A Rule 12(b)(1) jurisdictional attack may be facial or factual. In a facial attack,
15 the challenger asserts that the allegations contained in a complaint are insufficient on
16 their face to invoke federal jurisdiction. By contrast, in a factual attack, the challenger
17 disputes the truth of the allegations that, by themselves, would otherwise invoke federal
18 jurisdiction.” *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004).

19 In a facial attack, the Court should “assume [the plaintiff]’s allegations to be true
20 and draw all reasonable inferences in his favor.” *Wolfe v. Strankman*, 392 F.3d 358,
21 362 (9th Cir. 2004). However, the pleading standards of *Ashcroft v. Iqbal*, 556 U.S. 662
22 (2009) and *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007) are applicable. *See Harris*
23 *v. Rand*, 682 F.3d 846, 851 (9th Cir. 2012) (noting that the “district court may require
24 more specific pleading” where jurisdictional allegations are “implausible”) (citing
25 *Iqbal*, 556 U.S. at 679); *Terenkian v. Republic of Iraq*, 694 F.3d 1122, 1131 (9th Cir.
26 2012) (“Where a defendant claims only that ‘the allegations contained in a complaint
27 are insufficient on their face to invoke federal jurisdiction,’ ... [w]e ... determine
28 whether the complaint alleges ‘sufficient factual matter, accepted as true, to state a

1 claim to relief that is plausible on its face.’’) (citing *Iqbal*, 556 U.S. at 678).

2 **ii. Analysis**

3 Because Defendant challenges the sufficiency of the allegations of the SAC and
4 does not present evidence on Plaintiff Nino and Yanez’s relationship, this is a facial
5 jurisdictional attack. *Safe Air for Everyone*, 373 F.3d at 1039. In this case, the SAC
6 alleges that Plaintiff Nino “was the common law wife, now widowed, of [Yanez]. As
7 legal wife of Decedent under applicable common law and as beneficiary of provisions
8 of C.C.P. Section 377.60(b), she survives as his legal beneficiary to these claims and,
9 thus, is entitled to bring this claim in his stead.” (ECF No. 33 at 2).

10 28 U.S.C. section 1346(b)(1), as part of the FTCA, provides:

11 Subject to the provisions of chapter 171 of this title, the district courts,
12 together with the United States District Court for the District of the Canal
13 Zone and the District Court of the Virgin Islands, shall have exclusive
14 jurisdiction of civil actions on claims against the United States, for money
15 damages, accruing on and after January 1, 1945, for injury or loss of
16 property, or personal injury or death caused by the negligent or wrongful
17 act or omission of any employee of the Government while acting within
18 the scope of his office or employment, under circumstances where the
19 United States, if a private person, would be liable to the claimant in
20 accordance with the law of the place where the act or omission occurred.

21 28 U.S.C. § 1346(b)(1). “Section 1346(b) grants the federal district courts jurisdiction
22 over a certain category of claims for which the United States has waived its sovereign
23 immunity and ‘render[ed]’ itself liable.” *F.D.I.C. v. Meyer*, 510 U.S. 471, 477 (1994)
24 (citing *Richards v. United States*, 369 U.S. 1, 6 (1962)). “A claim comes within this
25 jurisdictional grant—and thus is ‘cognizable’ under § 1346(b)—if it is actionable under
26 § 1346(b). And a claim is actionable under § 1346(b) if it alleges[,]” all of the elements
27 of section 1346(b), including that the claim arose “under circumstances where the
28 United States, if a private person, would be liable to the claimant in accordance with the
law of the place where the act or omission occurred.” *Id.* (quoting 28 U.S.C. §
1346(b)). Plaintiff Nino must have a cognizable claim under California law in order to
invoke this Court’s jurisdiction pursuant to section 1346(b) of the FTCA.

California Code of Civil Procedure section 377.60(a) provides that “[a] cause of
action for the death of a person caused by the wrongful act or neglect of another may

1 be asserted by any of the following persons or by the decedent’s personal representative
2 on their behalf: (a) The decedent’s surviving spouse, domestic partner, children, and
3 issue of deceased children, or, if there is no surviving issue of the decedent, the persons,
4 including the surviving spouse or domestic partner, who would be entitled to the
5 property of the decedent by intestate succession.” Cal. Code Civ. Proc. § 377.60(a).
6 Subsection (b) provides that “the putative spouse, children of the putative spouse,
7 stepchildren, or parents” may bring a wrongful death action “if they were dependent on
8 the decedent.” Cal. Code Civ. Proc. § 377.60(b). Subsection (b) defines “putative
9 spouse” as “the surviving spouse of a void or voidable marriage who is found by the
10 court to have believed in good faith that the marriage to the decedent was valid.” *Id.*

11 The Court finds that the allegations of the SAC are insufficient to permit the
12 inference that Plaintiff Nino, through a common law marriage, is Yanez’s “putative
13 spouse,” as defined by California Code of Civil Procedure section 377.60(b). The SAC
14 fails to allege facts showing that Plaintiff Nino “believed in good faith that the marriage
15 to the decedent was valid[,]” when neither Mexico nor California recognize common
16 law marriages. Cal. Code Civ. Proc. § 377.60(b); *Rosales v. Battle*, 113 Cal. App. 4th
17 1178, 1183-84 (2003) (“There are three types of unions between a man and woman in
18 Mexico: civil marriages, unions performed by religious authorities, and concubinages....
19 [C]oncubinage is not equivalent to a common law marriage because it does not confer
20 on the parties all of the rights and duties of marriage.”); *Estate of Edgett*, 111 Cal. App.
21 3d 230, 232 (1980) (“California does not accept the doctrine of common law marriage
22 abolished in California by statute in 1895.”). Defendant’s motion to dismiss Plaintiff
23 Nino’s claims is granted to the extent Plaintiff asserts claims as “legal wife” of Yanez
24 or as “a beneficiary of provisions of C.C.P. 377.60(b).” (ECF No. 33 at 2).

25 Defendant’s motion is denied to the extent Defendant moves to dismiss Plaintiff
26 Nino’s claims as an individual or as guardian *ad litem* to Plaintiffs JY and RY.

27
28 **B. Jurisdictional Discovery and Supplemental Briefing**

1 With respect to the issues of whether the foreign country exception bars
2 Plaintiffs' claims, the motion shall remain pending. The parties are granted ninety days
3 of jurisdictional discovery from the date this Order is filed, in order to address any
4 factual issues relevant to jurisdiction in light of the foreign country exception to the
5 FTCA. No later than Monday, June 22, 2015, Defendant shall file a supplemental brief
6 addressing the application of the foreign country exception with any supporting
7 evidence. Defendant shall address whether factual jurisdictional issues related to the
8 foreign country exception are intertwined with factual issues going to the merits.
9 Defendant shall also address what standard applies if the facts are intertwined, and what
10 standard applies if the facts are not intertwined. No later than Monday, July 6, 2015,
11 Plaintiffs shall file an opposition brief with any supporting evidence and responding to
12 the legal issues identified above. No later than Monday, July 13, 2015, Defendant may
13 file a reply brief limited to legal argument.

14 **C. Ex Parte Application Requesting Permission to Submit Evidence**
15 **in Defendant's Reply Brief Responding to Plaintiffs' Opposition**
16 **Evidence (ECF No. 50)**

17 Because the Court is granting the parties jurisdictional discovery, followed by
18 supplemental briefing, Defendant's ex parte application is denied as moot.

19 **IV. Conclusion**

20 IT IS HEREBY ORDERED that Defendant's Motion to Dismiss Plaintiffs'
21 Second Amended Complaint (ECF No. 43) is GRANTED in part and DENIED in part,
22 and only with respect to Plaintiff Nino's standing. Defendant's motion is GRANTED
23 to the extent Plaintiff asserts claims as legal wife of Yanez or pursuant to California
24 Code of Civil Procedure section 377.60(b). Defendant's motion is DENIED to the
25 extent Defendant moves to dismiss Plaintiff Nino's claims as an individual or as
26 guardian *ad litem* to Plaintiffs JY and RY. Plaintiffs may file a motion for leave to
27 amend the Second Amended Complaint, accompanied by a proposed third amended
28 complaint, no later than **thirty (30) days** from the date this Order is filed.

1 IT IS FURTHER ORDERED that Defendant's Motion to Dismiss Plaintiffs'
2 Second Amended Complaint (ECF No. 43) shall remain pending on issues related to the
3 foreign country exception.

4 IT IS FURTHER ORDERED that the parties are granted ninety days of
5 jurisdictional discovery from the date this Order is filed in order to address factual
6 issues relevant to jurisdiction in light of the foreign country exception to the FTCA. No
7 later than Monday, June 22, 2015, Defendant shall file a supplemental brief addressing
8 the application of the foreign country exception with any supporting evidence.
9 Defendant shall address whether factual jurisdictional issues related to the foreign
10 country exception are intertwined with factual issues going to the merits. Defendant
11 shall also address what standard applies if the facts are intertwined, and what standard
12 applies if the facts are not intertwined. No later than Monday, July 6, 2015, Plaintiffs
13 shall file an opposition brief with any supporting evidence and responding to the legal
14 issues identified above. No later than Monday, July 13, 2015, Defendant may file a
15 reply brief limited to legal argument.

16 IT IS FURTHER ORDERED that the Ex Parte Application Requesting
17 Permission to Submit Evidence in Defendant's Reply Brief Responding to Plaintiffs'
18 Opposition Evidence (ECF No. 50) is DENIED as moot.

19 DATED: March 6, 2015

20 
21 **WILLIAM Q. HAYES**
22 United States District Judge
23
24
25
26
27
28