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CLERK, U.S. DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
BY: *MXN* DEPUTY

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

EZTOR PLACENCIA, et al.,
Plaintiffs,
v.
United States of America, et al.,
Defendants.

Case No.: 3:16-cv-02354-BEN-MDD
**ORDER GRANTING DEFENDANT'S
MOTION TO DISMISS**

Before this Court is the Motion to Dismiss Plaintiffs' Complaint filed by Defendant United States of America (hereinafter, "the government"). (Docket No. 6.) The Motion is fully briefed. The Court finds the Motion suitable for determination on the papers without oral argument, pursuant to Civil Local Rule 7.1.d.1. For the reasons set for below, the government's Motion is **GRANTED**.

BACKGROUND¹

In January 2015, decedent Andreina Tortolero ("Tortolero") coordinated with the Federal Bureau of Investigation ("FBI") and the Drug Enforcement Administration ("DEA") to participate in undercover drug negotiations with drug dealers in Mexico. The

¹ The following overview of facts are drawn from the allegations of Plaintiffs' Complaint. (Docket No. 1.) The Court is not making findings of fact.

1 “FBI and DEA had [Tortolero] set up [an] agreement to deliver 10 kg of . . .
2 methamphetamine” to the dealers in Mexico. (Docket No. 1, Compl. at 3.) “On or about
3 the day of the proposed drug deal, the DEA and/or FBI sent [Tortolero] to Mexico with
4 the understanding that she was to deliver [the drugs].” (*Id.*) Tortolero waited for the
5 delivery of the drugs, but the drugs never arrived because the DEA and FBI never
6 intended to provide the drugs. Tortolero was subsequently strangled and killed by
7 Mexican drug cartel members.

8 On September 19, 2016, Plaintiffs Ezor Placencia, Ezor Placencia, Jr., and
9 Gabriella Torolero Mejias (Tortolero’s husband, son, and mother, respectively) filed this
10 action asserting claims against the government under the Federal Tort Claims Act
11 (“FTCA”) for wrongful death and related emotional distress. (Docket No. 1.) The
12 government responded by filing the instant motion to dismiss for lack of subject matter
13 jurisdiction on the grounds that it was immune from suit under the foreign country
14 exception to the FTCA. (Docket No. 6.)

15 LEGAL STANDARD

16 Under Federal Rule of Civil Procedure 12(b)(1), a party may seek dismissal of an
17 action for lack of subject matter jurisdiction. The party opposing a motion to dismiss
18 brought under Rule 12(b)(1) bears the burden of proving that the case is properly in
19 federal court. *See In re Ford Motor Co./Citibank (S. Dakota), N.A.*, 264 F.3d 952, 957
20 (9th Cir. 2001) (“The party asserting federal jurisdiction bears the burden of proving the
21 case is properly in federal court.”) (citing *McNutt v. General Motors Acceptance Corp.*,
22 298 U.S. 178, 189 (1936)). Dismissal is appropriate if the complaint, considered in its
23 entirety, on its face fails to allege facts that are sufficient to establish subject matter
24 jurisdiction. *In re Dynamic Random Access Memory (DRAM) Antitrust Litig.*, 546 F.3d
25 981, 985 (9th Cir. 2008) (citing *Love v. United States*, 915 F.2d 1242, 1245 (9th Cir.
26 1990)).

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1 “A Rule 12(b)(1) jurisdictional attack may be facial or factual.” *Safe Air for*
2 *Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004) (citing *White v. Lee*, 227 F.3d
3 1214, 1242 (9th Cir. 2000) (citation omitted in original)). In a facial attack, the moving
4 party contends that the complaint’s allegations are insufficient on their face to invoke
5 federal jurisdiction. *Id.* In contrast, the moving party in a factual attack disputes the truth
6 of the allegations that, by themselves, would otherwise establish federal jurisdiction. *Id.*
7 A district court considering a factual attack need not presume the truthfulness of a
8 plaintiff’s allegations, *id.* (citing *White*, 227 F.3d at 1242), and may review evidence
9 beyond the complaint without converting the motion into a motion for summary
10 judgment. *Id.* (citing *Savage v. Glendale Union High Sch.*, 343 F.3d 1036, 1039 n. 2 (9th
11 Cir. 2003)).

12 When the government invokes its sovereign immunity in a Rule 12(b)(1) motion to
13 dismiss, a district court must examine whether it has subject matter jurisdiction. *Singh v.*
14 *United States*, No. 16-CV-01919 NC, 2017 WL 635476, at *2 (N.D. Cal. Feb. 16, 2017)
15 (“Whether the government waived sovereign immunity is a question of the Court’s
16 subject matter jurisdiction.”) (citing *Cato v. United States*, 70 F.3d 1103, 1107 (9th Cir.
17 1995)). Because the government relies on extrinsic evidence to support its motion to
18 dismiss, the Court treats the government’s motion as a factual 12(b)(1) attack and
19 considers all admissible evidence in the record.² *Righthaven LLC v. Newman*, 838 F.
20 Supp. 2d 1071, 1074 (D. Nev. 2011) (“Attacks on jurisdiction pursuant to Rule 12(b)(1)
21 can be either facial, confining the inquiry to the allegations in the complaint, or factual,
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24 ² Plaintiffs’ Complaint alleges they complied with the requirements of the FTCA.
25 (Docket No. 1 at 4.) Therefore, the Court grants the government’s unopposed Request
26 for Judicial Notice as to Plaintiffs’ Administrative Tort Claim documents (Docket No. 6-
27 2, Decl. of Dianne Schweiner (hereinafter “Schweiner Decl.”), Exs. A-C). *See Okla.*
28 *Firefighters Pension & Ret. Sys. v. IXIA*, 50 F. Supp. 3d 1328, 1349 (C.D. Cal. 2014)
 (“courts can consider documents that are referenced in the complaint under the
 ‘incorporation by reference doctrine.’”) (citing *In re Stac Electronics Sec. Litig.*, 89 F.3d
 1399, 1405 n. 4 (9th Cir. 1996).

1 permitting the court to look beyond the complaint.”) (citing *Savage v. Glendale Union*
2 *High Sch.*, 343 F.3d 1036, 1039 n. 2 (9th Cir. 2003)).

3 DISCUSSION

4 The Complaint describes a tragic and disturbing chain of events resulting in the
5 death of Tortolero at the hands of drug dealers. However, because it is undisputed that
6 decedent died in a foreign country (Mexico), Defendants argues that Plaintiffs’ claims are
7 barred under the foreign country exception to the FTCA, 28 U.S.C. § 2680(k). Plaintiffs’
8 opposition contends the foreign country exception does not apply to Plaintiffs’ claims
9 because the majority of the government’s actions or omissions occurred in the United
10 States. In addition, Plaintiffs’ opposition requests leave from the Court to file an
11 amended complaint to assert additional claims under the Alien Tort Statute (“ATS”) and
12 *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971).
13 In its reply, the government opposes Plaintiffs’ request for leave to amend on futility
14 grounds. The Court considers the government’s motion to dismiss and Plaintiffs’ request
15 for leave to amend in turn.

16 A. The Government’s Motion to Dismiss

17 “The FTCA generally waives the United States’ sovereign immunity from suits in
18 tort, ‘render[ing] the Government liable in tort as a private individual would be under like
19 circumstances.’” *S.H. by Holt v. United States*, 853 F.3d 1056, 1059 (9th Cir. 2017)
20 (quoting *Richards v. United States*, 369 U.S. 1, 6 (1962)); *see also* 28 U.S.C. § 2674.
21 However, this waiver is subject to certain exceptions. *See generally* 28 U.S.C. § 2680.
22 Under the foreign country exception, upon which the government relies, “the FTCA’s
23 waiver of immunity does not apply to ‘[a]ny claim arising in a foreign country.’” *S.H.* at
24 1059 (quoting 28 U.S.C. § 2680(k)).

25 The Supreme Court in *Sosa v. Alvarez-Machain*, held that the foreign country
26 exception “bars all claims based on any injury suffered in a foreign country.” 542 U.S.
27 692, 712 (2004). Other federal courts have applied the FTCA’s foreign country
28 exception to claims that are necessarily derivative of injuries sustained in a foreign

1 country. *See Gross v. United States*, 771 F.3d 10, 13 (D.C. Cir. 2014) (holding that
2 foreign country exception applied because wife’s economic injuries in the United States
3 were derivative of harm suffered by husband abroad); *see also Harbury v. Hayden*, 522
4 F.3d 413, 423 (D.C. Cir. 2008) (district court lacked jurisdiction over a plaintiff’s claims
5 for emotional or economic injuries occurring in the United States because those injuries
6 were derivative of harm suffered by plaintiff’s spouse in a foreign country). The Court
7 finds the reasoning in these courts’ decisions persuasive. It is clear that the FTCA’s
8 foreign country exception would preclude a claimant who was actually injured (or a
9 claimant’s estate where the claimant was killed) in a foreign country from bringing a
10 lawsuit against the government, and it appears Congress intended to similarly bar
11 emotional distress and related survivor claims by persons who sustained their injuries in
12 the United States.

13 Here, each of Plaintiffs’ wrongful death claims and emotional distress claims
14 derives from Tortolero’s death. (*See generally* Complaint.) The Complaint alleges the
15 government “sent [Tortolero] to Mexico” and while it does expressly state Tortolero died
16 in Mexico, the government provided copies of Plaintiffs’ Administrative Tort Claim
17 documents,³ wherein Plaintiffs indicate Tortolero “was beaten & strangled to death in or
18 near Tijuana, Mexico.” Schweiner Decl., Ex. A. Plaintiffs also provided Tortolero’s
19 death certificate, which states Tortolero’s place of death as “Tijuana, Baja California.”
20 *Id.*, Exs. B-C. Thus, it appears that, based on Plaintiffs’ own pleadings, admissions, and
21 evidence, Tortolero’s death occurred in Mexico.

22 Rather than dispute this fact, Plaintiffs urge the Court to apply the now-defunct
23 “headquarters doctrine.” (Pls. Opp’n at 3-4.) Under the headquarters doctrine, § 2680(k)
24 did not bar suit where “negligent acts in the United States proximately cause [d] harm in
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27 ³ As discussed earlier in this Order, Plaintiffs’ did not object to the introduction of these
28 documents, which the Court judicially notices as documents incorporated by reference in
Plaintiffs’ Complaint. *See* fn. 2, above.

1 a foreign country.” *Clouser v. Sierra Nevada Corp.*, No. 4:15-CV-00468 JWS, 2016
2 WL 912313, at *1 (D. Ariz. Mar. 10, 2016) (quoting *Cominotto v. United States*, 802
3 F.2d 1127, 1130 (9th Cir. 1986), abrogated by *Sosa, supra*, 542 U.S. at 703-04). These
4 claims, similar to what Plaintiffs’ attempt to argue in opposition,⁴ typically involved
5 allegations of negligent conduct by government employees within the United States that
6 resulted in damages to a plaintiff while in a foreign country. *Id.*

7 However, as the government points out, the Supreme Court in *Sosa* determined
8 that the “headquarters [doctrine] analysis should have no part in applying the foreign
9 country exception” before holding that “the FTCA’s foreign country exception bars *all*
10 *claims* based on any injury suffered in a foreign country, *regardless of where the tortious*
11 *act or omission occurred.*” *Sosa*, 542 U.S. at 711-12 (emphasis added and in original).
12 Indeed, this Court has previously examined *Sosa*, and determined that proximate
13 causation does not eliminate application of the foreign country exception. *See Ortega-*
14 *Chavez v. United States*, No. 11-CV-1507 BEN DHB, 2012 WL 5988844, at *2 (S.D.
15 Cal. Nov. 29, 2012). *Sosa* continues to control, and because Plaintiffs do not dispute the
16 fact that Tortolero was killed in Mexico, the Court finds Plaintiffs’ derivative claims are
17 barred under the foreign country exception.

18 Plaintiffs’ final argument asserts, without citing any case authority, that the
19 government waived the foreign country exception defense by enacting 21 U.S.C. § 904.
20 But Section 904 merely authorizes the Attorney General to “pay tort claims in the manner
21 authorized by section 2672 of Title 28, when such claims arise in a foreign country in
22 connection with the operations of the Drug Enforcement Administration abroad.”⁵ 21
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⁴ “The actions of the Defendants occurred primarily in the United States. The actions or
inactions of the Defendants were a substantial factor in causing the death of [Tortolero]. .
The last act that occurred that established liability, on the defendants, occurred in the
United States by the agents.” Pls. Opp’n at 3.

⁵ The full text of 21 U.S.C. § 904 provides:

1 U.S.C. § 904. In turn, Section 2672 of Title 28 sets forth guidelines regarding the
2 Attorney General's *administrative* adjustment of claims – nowhere does it discuss the
3 government's general relinquishment of its immunity from being sued in a district court.
4 In short, Plaintiffs have not met their burden to demonstrate this Court has subject matter
5 jurisdiction over their claims.

6 Accordingly, the government's Motion to Dismiss for lack of subject matter
7 jurisdiction is **GRANTED**.

8 **B. Plaintiffs' Request for Leave to Amend**

9 Before trial, and after the time has elapsed for which a party may amend its
10 pleading as a matter of course, Rule 15(a)(2) of the Federal Rules of Civil Procedure
11 provides that: "a party may amend its pleading only with the opposing party's written
12 consent or the court's leave." Fed. R. Civ. P. 15(a). Leave to amend under Rule 15(a)(2)
13 should be "freely give[n] . . . when justice so requires." Fed. R. Civ. P. 15(a)(2). Courts
14 consider "undue delay, bad faith, dilatory motive, repeated failure to cure deficiencies by
15 previous amendments, undue prejudice to the opposing party, and futility of the proposed
16 amendment" in deciding whether justice requires granting leave to amend under Rule 15.
17 *Moore v. Kayport Package Express, Inc.*, 885 F.2d 531, 538 (9th Cir. 1989) (citing
18 *Foman v. Davis*, 370 U.S. 178, 182 (1962)). Although each factor may warrant
19 consideration, "prejudice to the opposing party ... carries the greatest weight." *Eminence*
20 *Capital*, 316 F.3d at 1052.

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25 Notwithstanding section 2680(k) of Title 28, the Attorney
26 General, in carrying out the functions of the Department of
27 Justice under this subchapter, is authorized to pay tort claims in
28 the manner authorized by section 2672 of Title 28, when such
claims arise in a foreign country in connection with the
operations of the Drug Enforcement Administration abroad.

1 Plaintiffs seek leave to amend their Complaint. (Pls.' Opp'n at 4.) The Court has
2 considered the *Foman* factors and finds justice does not require granting Plaintiffs leave
3 to amend.

4 First, with respect to the proposed ATS claim, Plaintiffs have not established the
5 Court has jurisdiction over their claims. As Plaintiffs know, in actions against the United
6 States, "[t]he waiver of sovereign immunity is a prerequisite to federal-court
7 jurisdiction." *Tobar v. United States*, 639 F.3d 1191, 1195 (9th Cir. 2011). A plaintiff
8 asserting a claim against the government must also demonstrate the government's
9 consent to the lawsuit, or face mandatory dismissal for lack of jurisdiction. *See Dunn &*
10 *Black, P.S. v. United States*, 492 F.3d 1084,1088 (9th Cir. 2007) ("Where a suit has not
11 been consented to by the United States, dismissal of the action is required [because] the
12 existence of such consent is a prerequisite for jurisdiction.") (quotation marks and
13 citation omitted).

14 Here, the ATS is a jurisdiction statute only; it does not waive sovereign immunity.
15 *Tobar*, 639 F.3d at 1196. As a result, "any party asserting jurisdiction under the [ATS]
16 must establish, *independent of that statute*, that the United States has consented to suit."
17 *Id.* (emphasis added). Plaintiffs have not established that independent consent, and the
18 Court is unaware of authority that would allow them to proceed with their claims.
19 Therefore, it appears to the Court that it would be futile to allow Plaintiffs to amend their
20 pleading to include ATS claims.

21 Second, with respect to Plaintiffs' proposed *Bivens* claims, Plaintiffs cite no case
22 authority or statute that would authorize Plaintiffs' proposed *Bivens* claims (i.e. that the
23 government is liable to Plaintiffs because "Federal officers violated [Tortolero's] Fifth
24 Amendment in that she was deprived of her life [sic]" because they put her in a position
25 that was likely to result in her death at the hands of members of the Mexican cartel).⁶
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28 ⁶ Pls.' Opp'n at 5.

1 Moreover, the Supreme Court recently discussed *Bivens*-type claims at length and stated
2 that it has “made clear that *expanding* the *Bivens* remedy is now a “disfavored” judicial
3 activity.” *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1857 (2017) (emphasis added). Thus, it
4 appears that amendment would also be futile as to Plaintiffs’ proposed *Bivens* claims.

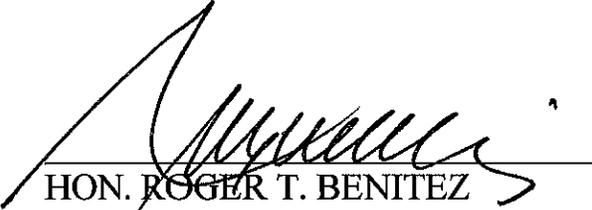
5 In sum, Plaintiffs have not demonstrated why justice requires the Court to grant
6 them leave. Fed. R. Civ. P. 15(a)(2). In contrast, the government has indicated that
7 granting Plaintiffs leave to amend would cause undue prejudice and waste judicial
8 resources in light of the unmeritorious claims. Plaintiffs’ request for leave to amend their
9 Complaint is denied.

10 **CONCLUSION**

11 For the reasons outlined above, Defendant’s Motion to Dismiss is **GRANTED** and
12 Plaintiffs’ request for leave to file an amended complaint is **DENIED**.

13 **IT IS SO ORDERED.**

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15 DATED: July 13, 2017

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17 HON. ROGER T. BENITEZ
18 United States District Judge
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