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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

Case No.: 17-cv-1205 BTM-AGS

ELIZABETH JIMINEZ,
individually, and as successor in
interest of Fernando Geovanni
Llanez, deceased; FERNANDO
LLANEZ, individually, and as
successor in interest of Fernando
Geovanni Llanez, deceased

Plaintiffs,

v.

UNITED STATES OF AMERICA;
CHULA VISTA POLICE
DEPARTMENT; CITY OF
CHULA VISTA, a public entity;
RONALDO RICARDO
GONZALEZ, an individual;
MARCUS OSORIO, an
individual; CHRIS BARONI, an
individual; ANGELA SANCHEZ,
an individual; MICHAEL
BURBANK, an individual;
JEREMY DORN, an individual;
ANTHONY CASTELLANOS; an
individual, MARK MEREDITH, an
individual; DOES 1-100,

ORDER

**(1) GRANTING DEFENDANT
UNITED STATES' MOTION TO
DISMISS [ECF No. 29]**

**(2) EQUITABLY TOLLING THE
STATUTE OF LIMITATIONS**

**(3) GRANTING DEFENDANT
CITY OF CHULA VISTA'S
MOTION TO DISMISS WITH
LEAVE TO AMEND [ECF No. 15]**

1 inclusive,
2 Defendants.

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7 **I. INTRODUCTION**

8 Defendant United States has moved to dismiss the First Amended
9 Complaint (FAC) for lack of subject matter jurisdiction pursuant to Federal
10 Rule of Civil Procedure 12(b)(1). (ECF No. 29). The United States asserts
11 that Plaintiff failed to exhaust administrative remedies prior to filing,
12 depriving the district court of subject matter jurisdiction over the FAC’s Third,
13 Fourth, and Fifth causes of action. Upon review, the Court concludes it lacks
14 subject matter jurisdiction. Accordingly, Defendant United States’ Motion to
15 Dismiss is **GRANTED**. The Court equitably tolls the statute of limitations and
16 gives Plaintiffs leave to file a new action which will be consolidated with this
17 case.

18 Defendant City of Chula Vista has moved to dismiss “Count Two” of
19 the Third cause of action pursuant to Federal Rule of Civil Procedure
20 12(b)(6). (ECF No. 15). For the reasons set forth below, Defendant Chula
21 Vista’s Motion to Dismiss is **GRANTED** with leave to amend.

22 **II. BACKGROUND**

23 **A. Facts**

24 This action arises out of a fatality that occurred during a drug sting
25 operation on June 14, 2016. (ECF No. 9, “FAC”). Plaintiffs are parents of
26 Fernando Geovanni Llanez (“Llanez”), who Plaintiffs allege was wrongfully
27 shot and killed by an undercover Department of Homeland Security agent
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1 during a drug sting operation. (FAC ¶¶ 3, 20). Plaintiffs name twelve
2 Defendants, including six federal officers and a Federal Task Force Officer
3 named Mark Meredith, who Plaintiffs allege was acting as an employee of
4 the Chula Vista Police Department at the time of the incident. (FAC ¶ 12;
5 ECF No. 28). The FAC avers that the sting operation was organized by the
6 United States Department of Homeland Security (DHS) in coordination with
7 the Drug Enforcement Agency (DEA) and Customs and Border Protection
8 (CBP). (FAC ¶ 22-27). On June 14, 2016, “federal and California law
9 enforcement” transported 2,000 pounds of marijuana from Tijuana and
10 arranged for a buyer. (FAC ¶ 20). Llanez was allegedly hired to drop off and
11 pick up the rental van that would transport the marijuana. (FAC ¶ 20).

12 Llanez dropped off the empty van at a shopping center in Chula Vista
13 and left the keys. (FAC ¶ 33). Several undercover law enforcement officers,
14 including Agent Gonzalez and Meredith, allegedly picked up the van at 8:45
15 a.m. (FAC ¶ 34). The van was loaded with the marijuana and driven to the
16 arranged location for pick up. (FAC ¶¶ 35, 38). The FAC alleges that the
17 following individuals and teams were present at the pick up scene: Agent
18 Gonzalez, Agent Castellanos, the confidential informant, an undercover
19 team “of approximately six people,” San Diego County Sheriff Deputies, a
20 helicopter, and “one or more officers from the Chula Vista Police
21 Department.” (FAC ¶ 36).

22 Before picking up the van, Llanez was given a taser “in the event the
23 delivery driver tried to injure Llanez or steal the van.” (FAC ¶ 42). The FAC
24 states Llanez approached the van and met Agent Gonzalez, who then took
25 the keys and ran. (FAC ¶¶ 44-46). Llanez drew the Taser and ran after
26 Agent Gonzalez. (FAC ¶ 46). Agent Gonzalez shot Llanez four times, killing
27 him. (FAC ¶ 47).

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1 Agents Baroni and Burbank picked Gonzalez up in a truck. (FAC ¶ 50).
2 Gonzalez told Baroni and Burbank he believed he had been tased and had
3 possibly killed Llanez. (FAC ¶¶ 50-55). The FAC alleges that “none of the
4 agents in the vehicle attempted to call for medical help for . . . Llanez.” (FAC
5 ¶ 55).

6 **B. Proceedings**

7 Plaintiffs filed an administrative claim with the Chula Vista Police
8 Department on December 14, 2016, and received a denial of the claim on
9 January 5, 2017. (FAC at ¶ 64, 65; ECF No. 29 at 9). Five months later, on
10 June 6, 2017, Plaintiffs filed their Federal Tort Claims Act (FTCA)
11 administrative claim. (FAC at ¶ 66). A week later, on June 13, 2017,
12 Plaintiffs filed their original complaint, asserting claims under the FTCA
13 among others. (ECF No. 1). On September 22, 2017, Plaintiffs filed their
14 First Amended Complaint (“FAC”), which included the same FTCA claims.
15 (ECF No. 9). On October 12, 2017, Defendant City of Chula Vista moved
16 to dismiss the FAC. (ECF No. 15). Defendant United States moved to
17 dismiss the FAC on February 8, 2018. (ECF No. 29). Defendant United
18 States also substituted itself for individual defendants Ronaldo Gonzalez,
19 Jeremy Dorn, Marcus Osorio, Chris Baroni, Angela Sanchez, Michael
20 Burbank, Anthony Castellanos, and Mark Meredith. (ECF Nos. 28, 32).

21 **III. LEGAL STANDARD**

22 A party may move to dismiss an action for lack of subject matter
23 jurisdiction under Federal Rule of Civil Procedure 12(b)(1). “Subject matter
24 jurisdiction cannot be forfeited or waived and should be considered when
25 fairly in doubt.” *Ashcroft v. Iqbal*, 556 U.S. 662, 671 (2009). “Objections to
26 subject matter jurisdiction . . . may be raised at any time.” *Hendersen ex rel.*
27 *Henderson v. Shinseki*, 562 U.S. 428, 434-35 (2011). For claims brought
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1 under the Federal Tort Claims Act (FTCA), exhaustion of administrative
2 remedies is “a prerequisite for federal court jurisdiction.” *Munns v. Kerry*,
3 782 F.3d 402, 413 (9th Cir. 2015) (citing *Johnson v. United States*, 704 F.2d
4 1431, 1442 (9th Cir. 1983)).

5 “A Rule 12(b)(1) jurisdictional attack may be facial or factual. In a facial
6 attack, the challenger asserts that the allegations contained in a complaint
7 are insufficient on their face to invoke federal jurisdiction.” *Safe Air for*
8 *Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004) (internal citations
9 omitted). When “determin[ing] whether the allegations are sufficient as a
10 legal matter to invoke the court’s jurisdiction,” the court “[a]ccept[s] the
11 plaintiff’s allegations as true and draw[s] all reasonable inferences in
12 plaintiff’s favor.” *Leite v. Crane Co.*, 749 F.3d 1117, 1121 (9th Cir. 2014).

13 **IV. DISCUSSION**

14 **A. The United States’ Motion to Dismiss**

15 The FTCA, 28 U.S.C. §§ 1346, 2671-2680, “waives the United States’
16 sovereign immunity for tort actions and vests the federal district courts with
17 exclusive jurisdiction over suits arising from the negligence of government
18 employees.” *D.L. by & through Junio v. Vassilev*, 858 F.3d 1242, 1244 (9th
19 Cir. 2017) (citing *Jerves v. United States*, 966 F.2d 517, 518 (9th Cir. 1992)).
20 Whether a Plaintiff may file an FTCA action in district court is governed by
21 three timing requirements. *Kwai Fun Wong v. Beebe*, 732 F.3d 1030, 1032
22 (9th Cir. 2013); 28 U.S.C. §§ 2401(b), 2675(a). First, a claimant must
23 exhaust her administrative remedies before filing an FTCA action in district
24 court. 28 U.S.C. § 2675(a); *D.L.*, 858 F.3d at 1244; *Valadez-Lopez*, 656 F.3d
25 at 855. Second, a claimant must present her case to the appropriate federal
26 agency within two years after the claim accrues. 28 U.S.C. § 2401(b); *Kwai*
27 *Fun Wong*, 732 F.3d at 1032. Third, the action must commence within six
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1 months of the administrative agency’s final denial of the claim. 28 U.S.C. §
2 2401(b); *Kwai Fun Wong*, 732 F.3d at 1032.

3 The exhaustion requirement is jurisdictional, whereas the statute of
4 limitations requirements are not. See *Munn v. Kerry*, 782 F.3d 402, 413 (9th
5 Cir. 2015); *Kwai Fun Wong*, 732 F.3d at 1032, 1037. Both exhaustion and
6 timing bear on Defendants’ Motions to Dismiss and whether Plaintiffs may
7 proceed with their claims. The Court will examine each in turn.

8 **1. Exhaustion of Administrative Remedies**

9 Exhaustion of administrative remedies is required prior to filing an
10 FTCA claim in district court. *D.L.*, 858 F.3d at 1244; *Valadez-Lopez v.*
11 *Chertoff*, 656 F.3d 851, 855 (9th Cir. 2011). “A tort claimant may not
12 commence proceedings in court against the United States without first filing
13 her claim with an appropriate federal agency and either receiving a
14 conclusive denial of the claim from the agency or waiting for six months to
15 elapse without a final disposition of the claim being made.” *Valadez-Lopez*,
16 656 F.3d at 855 (quoting *Jerves*, 966 F.2d at 519). The FTCA specifically
17 provides:

18 An action shall not be instituted upon a claim against
19 the United States for money damages unless
20 the claimant shall have first presented the claim to
21 the appropriate Federal agency and his claim shall
22 have been finally denied by the agency in writing and
23 sent by certified or registered mail. The failure of an
24 agency to make final disposition of a claim within six
25 months after it is filed shall, at the option of the
26 claimant any time thereafter, be deemed a final
27 denial of the claim for purposes of this section.

28 U.S.C. § 2675(a). The exhaustion requirement is jurisdictional and
29 “strictly construed in favor of the United States.” *Valadez-Lopez*, 656 F.3d at

1 855 (quoting *Jerves*, 966 F.2d at 521); *Brady v. United States*, 211 F.3d 499,
2 502 (9th Cir. 2000) (stating “because the [administrative exhaustion]
3 requirement is jurisdictional, it must be strictly adhered to”). A failure to
4 exhaust administrative remedies before filing an FTCA action deprives the
5 district court of subject matter jurisdiction. *Brady*, 211 F.3d at 502-3 (affirming
6 decision to grant motion to dismiss for lack of subject matter jurisdiction due
7 to failure to exhaust FTCA administrative remedies).

8 Subsequent receipt of a formal administrative denial does not cure a
9 premature FTCA filing in district court. *McNeil v. United States*, 508 U.S. 106,
10 112 (1993). The exhaustion requirement is a “clear statutory command.” *Id.*
11 at 113. However, there are limited exceptions to that otherwise bright-line
12 rule. See *Valadez-Lopez*, 656 F.3d at 856; *D.L.*, 858 F.3d at 1244. Courts
13 may give leave to amend “an existing complaint asserting non-FTCA claims
14 to name the United States as a defendant and include FTCA claims once
15 those claims have been administratively exhausted.” *Valadez-Lopez*, 656
16 F.3d at 856. Courts may also give leave to amend despite a premature filing
17 if a plaintiff reasonably did not know one of the named defendants was a
18 federal employee and covered by the FTCA. *D.L.*, 858 F.3d at 1244. But the
19 Ninth Circuit has distinguished these cases from cases in which the claimant
20 “filed *an FTCA lawsuit* before exhausting his or her FTCA administrative
21 remedies.” *Valadez-Lopez*, 656 F.3d at 856 (emphasis in original).

22 Here, Plaintiffs filed *an FTCA lawsuit* in both the original and First
23 Amended Complaints. (ECF No. 1). The United States is named as a
24 Defendant, and the Fourth and Fifth causes of action specifically assert
25 FTCA wrongful death claims. (ECF Nos. 1, 9). The Third cause of action
26 asserts a wrongful death claim under state law, but is tied to the same
27 operative facts as the Fourth and Fifth. (ECF No. 1, 9). Plaintiffs admit that
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1 they filed their original Complaint in district court a week after filing the federal
2 administrative claim, prior to denial and well short of the six-month waiting
3 period. (ECF No. 34 at 9). The FAC was also filed over two months before
4 December 6, 2017, the effective date of the agency’s denial. (See ECF Nos.
5 9, 29-1 at 7).

6 Plaintiffs blame their premature filing on the difficulties of complying
7 with two different statutes of limitations. (ECF No. 34 at 9). Yet Plaintiffs
8 admit that after they received an administrative denial from the City of Chula
9 Vista they waited five months to file their FTCA administrative forms. (ECF
10 No. 34 at 9). Plaintiffs further chose not to file a complaint naming only the
11 City of Chula Vista, which would have given them the option of later
12 amending the Complaint to include the United States. (See ECF Nos. 1, 9).
13 Compliance with both statutes of limitations was not an impossibility, and
14 Plaintiffs’ unfortunate miscalculation is not a ground for waiving
15 administrative exhaustion requirements.

16 Plaintiffs further assert that they complied with § 2675(a) because their
17 federal administrative claim was denied before they *served* the United States
18 with the Complaint. (ECF No. 34 at 9). Plaintiffs are mistaken. An FTCA
19 claimant must have exhausted administrative remedies at the time of filing
20 or removal, not at the time of service. 28 U.S.C. § 2675(a) (providing “[a]n
21 action shall not be instituted”); *McNeil v. United States*, 508 U.S. 106,
22 112 (1993) (interpreting “institute” as “synonymous with the words ‘begin’
23 and ‘commence’ and concluding “Congress intended to require complete
24 exhaustion . . . before *invocation* of the judicial process”) (emphasis added);
25 *D.L. by & through Junio v. Vassilev*, 858 F.3d 1242, 1245 (9th Cir. 2017)
26 (stating jurisdiction is “determined at the time of removal” for claims initiated
27 in state court and that “the FTCA’s exhaustion requirement demands that a
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1 plaintiff exhaust his administrative remedies before he *files* an FTCA claim
2 in federal court”) (emphasis added). Moreover, the fact that Plaintiffs
3 received an administrative denial after they filed suit does not excuse
4 Plaintiffs’ failure to exhaust administrative remedies prior to filing. See
5 *McNeil*, 508 U.S. at 112.

6 Because Plaintiffs failed to exhaust administrative remedies before
7 filing, the Court does not have subject matter jurisdiction over the FAC.
8 Accordingly, Plaintiffs must file a new complaint as to the Third, Fourth, and
9 Fifth causes of action.

10 **2. Statute of Limitations**

11 As outlined above, 28 U.S.C. § 2401(b) requires that an FTCA
12 complaint (1) be presented to a federal agency two years from the date the
13 claim accrues; and (2) the action must commence within six months of
14 receipt of the agency’s denial. The agency’s effective denial was December
15 6, 2017. (ECF No. 29-1 at 7). The six month deadline passed in June, while
16 Defendant United States’ Motion to Dismiss was pending before the Court.

17 The Supreme Court has held that the six-month time bar under 28
18 U.S.C. § 2401(b) is “nonjurisdictional and subject to equitable tolling.” *U.S.*
19 *v. Kwai Fun Wong*, 135 S.Ct. 1625, 1638 (2015). “[A] litigant seeking
20 equitable tolling bears the burden of establishing two elements: (1) that he
21 has been pursuing his rights diligently, and (2) that some extraordinary
22 circumstances stood in his way.” *Kwai Fun Wong v. Beebee*, 732 F.3d 1030,
23 1052 (9th Cir. 2013) (quoting *Credit Suisse (USA) LLC v. Simmonds*, 566
24 U.S. 221, 227 (2012)). The first showing “requires the effort that a
25 reasonable person might be expected to deliver under his or her particular
26 circumstances.” *Id.* (quoting *Doe v. Busby*, 661 F.3d 1001, 1015 (9th Cir.
27 2011)). “Central to the analysis is whether the plaintiff was ‘without any fault’
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1 in pursuing his claim.” *Id.* (quoting *Fed. Election Comm’n v. Williams*, 104
2 F.3d 237, 240 (9th Cir. 1996)). As for the second prong, the litigant must
3 establish that “extraordinary circumstances were the cause of his
4 untimeliness and . . . ma[de] it impossible to file [the document] on time.” *Id.*
5 (alterations in original) (quoting *Ramirez v. Yates*, 571 F.3d 993, 997 (9th
6 Cir. 2009)). Equitable tolling is generally granted “when litigants are unable
7 to file timely [documents] as a result of external circumstances beyond their
8 direct control.” *Id.* (quoting *Harris v. Carter*, 515 F.3d 1051, 1055 (9th Cir.
9 2008)).

10 Plaintiffs have pursued their rights diligently. In Plaintiffs’ Opposition
11 to the United States’ Motion to Dismiss, dated March 18, 2018, Plaintiffs
12 reminded the Court of the statutes of limitations and offered to amend the
13 FAC or file a new suit to “remove all doubt as to . . . subject matter
14 jurisdiction.” (ECF No. 33 at 10). Section 2410(b) did not require Plaintiffs to
15 file an entirely new complaint while waiting for the Court’s ruling on the
16 Motion to Dismiss. *See id.* at 1053. Plaintiffs pursued their claims as a
17 reasonable person would under the circumstances. *See id.* The six month
18 deadline thus came and went through no fault of Plaintiffs. *See id.* at 1052.

19 Plaintiffs also satisfy the second prong. Delays caused by the time it
20 takes for a presiding court to decide a motion can qualify as “extraordinary
21 circumstances.” *Id.* at 1053 (concluding equitable tolling was appropriate
22 because plaintiff’s failure to file FTCA claim within six months was “due
23 solely” to district court’s delay in ruling on motion for leave to amend despite
24 “time to spare”). Here, “[e]xternal circumstances beyond [Plaintiffs] direct
25 control” — the Court’s lengthy consideration of all pending motions — made
26 it impossible for Plaintiff to timely file, even after requesting leave to do so
27 should the Court determine it lacked jurisdiction over Plaintiff’s FAC. *See id.*
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1 The Court therefore finds it appropriate to equitably toll the six-month
2 deadline should Plaintiffs decide to file a new action. The six month statute
3 of limitations is tolled from the filing of the Plaintiffs' opposition (March 18,
4 2018) to the entry of this order.

5 **B. City of Chula Vista's Motion To Dismiss**

6 Also pending before the Court is City of Chula Vista's ("Chula Vista")
7 Motion to Dismiss "Count Two" of Plaintiffs' Third Cause of Action, which
8 asserts a state law negligence claim against Chula Vista. (ECF No. 15).
9 Chula Vista contends that the FAC's allegations as to Chula Vista's role in
10 the federal sting operation are conclusory, and that the "vast majority" of the
11 FAC's allegations demonstrate that "the operation was organized and carried
12 out solely by federal agencies." (ECF No. 15 at 2). Chula Vista argues that
13 Agent Meredith was acting in his capacity as a federal officer, and that
14 nothing in the FAC establishes that Chula Vista or its agents were the
15 proximate cause of Llanez's death. (ECF No. 15 at 2). Even assuming
16 Meredith was acting as an agent for Chula Vista at that time, Chula Vista
17 argues the allegations as to Meredith are insufficient to plead negligence on
18 the part of Chula Vista. (ECF No. 15 at 2).

19 Plaintiffs argue that Meredith's status as a "cross-sworn federal agent"
20 does not absolve City of its liability for negligence. (ECF No. 23 at 7).
21 Plaintiffs contend that the factual allegations are sufficient to support an
22 inference of City involvement because "City very likely derives substantial
23 monetary benefit from seizures associated with these types of operations"
24 and that "discovery will very likely lead to direct involvement by Chula Vista
25 Police dispatch and departmental involvement in the operation." (ECF No.
26 23 at 7). Plaintiffs point to allegations in the FAC that Meredith was
27 employed by and acting as an agent of Chula Vista, (FAC ¶¶ 12, 36) and
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1 assert that although Meredith did not actually shoot Llanez, the FAC alleges
2 he was present at the scene and his negligence for “failing to protect” and
3 “render timely first aid” to Llanez was the proximate cause of Llanez’s death.
4 (ECF No. 23 at 6-7).

5 **1. The FAC Fails to Sufficiently Allege That Chula Vista Police**
6 **Officers Were Involved In the Operation.**

7 The FAC fails to allege facts showing that Mark Meredith was acting in
8 his capacity as an employee of Chula Vista, rather than as a federal agent,
9 at the time of the fatality. The FAC also fails to allege any involvement or
10 misconduct by other officers in the Chula Vista Police Department. This
11 pleading deficiency weighs against any finding of negligence on the part of
12 the City of Chula Vista.

13 Plaintiffs aver that the following statement sufficiently alleges that
14 Chula Vista was involved in the operation and that Meredith was acting as
15 Chula Vista’s employee at the time of the fatality:

16 Defendant OFFICER MARK MEREDITH is and at all times
17 mentioned herein was, an Agent employed by the Defendant
18 CITY OF CHULA VISTA, who was acting within the course and
19 scope of his employment as an Officer acting as a member of the
20 “ROAD KILL TEAM” and employed by the CITY OF CHULA
21 VISTA POLICE DEPARTMENT, who was acting within the
course and scope of his employment at the time he undertook
the activities alleged herein . . .

22 (FAC ¶ 12). Plaintiffs also urge the Court to consider the FAC’s allegation
23 that “one or more officers from the Chula Vista Police Department” were
24 present or involved in the operation. (FAC ¶ 36).

25 These allegations that Meredith was acting as Chula Vista’s agent
26 during the sting are too conclusory to withstand a 12(b)(6) motion to dismiss,
27 particularly given the United States’ substitution for Meredith as a Defendant
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1 and its certification that Meredith is a “Federal Task Force Officer” who was
2 acting as a federal employee at the time of the fatality. (See ECF Nos. 28,
3 32). Moreover, the FAC states the sting operation was organized by the
4 United States Department of Homeland Security (DHS) in coordination with
5 the Drug Enforcement Agency (DEA) and Customs and Border Protection
6 (CBP). (FAC ¶ 22-27). Although the FAC asserts “other Chula Vista police
7 officers” were present on the scene, none of the other factual allegations
8 allege how Chula Vista was involved in planning or executing the operation.
9 (FAC ¶ 36). The FAC alleges that Meredith worked closely with six other
10 named individuals, all of whom were federal agents, in a federal drug sting.
11 (FAC ¶ 22-27). Little in the FAC gives rise to a plausible inference that
12 Meredith was acting in any other capacity than as a federal agent. *See Iqbal*,
13 556 U.S. at 679 (stating “where the well-pleaded facts do not permit the court
14 to infer more than the mere possibility of misconduct, the complaint has
15 alleged—but it has not shown—that the pleader is entitled to relief”) (internal
16 alterations and quotations omitted). The allegations that Meredith was acting
17 as an agent of Chula Vista at the time, and that other Chula Vista officers
18 happened to be on the scene, are wholly conclusory and not entitled to a
19 presumption of truth. *Id.*

20 **2. The FAC Fails To Allege A Facially Plausible Negligence Claim** 21 **Against Meredith**

22 Even if Meredith was an agent of Chula Vista, the FAC fails to plead
23 facts showing Meredith’s negligence. The only factual allegations related to
24 Meredith are that he was present when Llanez picked up the van, and that
25 “one or more officers from the Chula Vista Police Department” were on the
26 scene when Llanez was killed. (FAC ¶¶ 34, 36). The FAC does not allege
27 how Meredith could have protected Llanez from Agent Gonzalez, or provide
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1 facts showing how Meredith could plausibly have rendered aid to Llanez to
2 prevent his death. Plaintiffs' assertion of negligence is thus a legal
3 conclusion unsupported by facts; it therefore fails to meet the pleading
4 standard. *See Iqbal*, 556 U.S. at 678 (providing a complaint will not suffice if
5 it "tenders naked assertions devoid of further factual enhancement") (internal
6 alterations and quotations omitted).

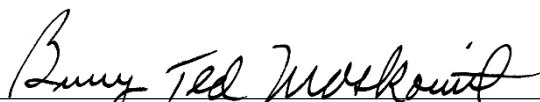
7 Accordingly, the Court grants Chula Vista's Motion to Dismiss "Count
8 Two" of the FAC's Third Cause of Action, with leave to amend to cure the
9 deficiencies identified above.

10 **C. CONCLUSION**

11 For the foregoing reasons, the Court GRANTS Defendant United
12 States' motion to dismiss for lack of subject matter jurisdiction. (ECF No.
13 29). The Court equitably tolls the statute of limitations from the filing of
14 Plaintiffs' Opposition on March 18, 2018 to the entry of this order. The Court
15 grants Chula Vista's motion to dismiss with leave to amend on or before
16 January 30, 2019. (ECF No. 15). The Clerk shall enter judgment dismissing
17 the case against the United States without prejudice to the filing of a new
18 action.

19 IT IS SO ORDERED.

20 Dated: December 12, 2018

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24 Barry Ted Moskowitz, Chief Judge
25 United States District Court
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