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UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

Felix H. Kinlichee, Priscilla L. Davis, Filvert H. Kinlichee, Felice H. Kinlichee, Filexis Kinlichee, and Loretta Hart re their father, Filbert Henry Kinlichee, deceased,

Plaintiffs,

v.

The United States of America,

Defendant.

CIV-11-08038-PCT-JAT

MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION AND FOR FAILURE TO STATE A CLAIM

Pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6), the United States of America moves to dismiss Plaintiffs' complaint for lack of subject matter jurisdiction and for failure to state a claim. This motion is supported by the below memorandum of points and authorities and attached exhibits.

MEMORANDUM OF POINTS AND AUTHORITIES

Plaintiffs Felix H. Kinlichee, Filvert H. Kinlichee, Felice H. Kinlichee, Filexis Kinlichee, Loretta Hart, and Priscilla Davis ("Plaintiffs") filed their Complaint on March 14, 2011, for the wrongful death of Filbert Henry Kinlichee (Mr. Kinlichee). Doc. 1. In their Complaint, Plaintiffs allege that one or more of the individuals involved in the care of Mr. Kinlichee at the Chinle (Arizona) Comprehensive Health Care Facility (CCHCF) breached duties owed to Mr. Kinlichee and were negligent by failing to measure up to the standards of reasonable care, skill and practice required of members of the medical profession. *Id.* at ¶ 27.

The Federal Tort Claims Act (FTCA) provides the exclusive remedy for recovery against the United States for common law torts committed by federal employees acting within the scope of employment. 28 U.S.C. § 1346(b). The FTCA provides a limited waiver of the United States' sovereign immunity when certain jurisdictional prerequisites are met. Specifically, before a claimant may file a lawsuit, she must have "presented the claim to the appropriate federal agency." 28 U.S.C. § 2675(a).

As discussed below, this Court lacks subject matter jurisdiction to hear any of Plaintiffs' claims because Plaintiffs' counsel failed to provide documentation evidencing his ability to represent his clients. Thus, Plaintiffs have failed to satisfy the administrative claim presentation requirements of 28 U.S.C. § 2675(a). As such, the Complaint should be dismissed under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6).

Furthermore, if this Court finds that subject matter jurisdiction exists despite Defendant's arguments regarding proper presentment, Plaintiff Davis should be dismissed

from the suit because she does not have standing and has failed to state a claim. Under the FTCA, in order for a federal district court to have subject matter jurisdiction for a claim, it must be made pursuant to the laws of the state in which the claim arises. In Arizona, a plaintiff must be a surviving husband or wife, child, parent, guardian or personal representative of the deceased person in order to bring a wrongful death action. Plaintiff Davis admits that she is not blood related to Mr. Kinlichee, nor was she legally adopted by him. Since Plaintiff Davis does not qualify as any of the aforementioned classes under Arizona's wrongful death statute, she does not have standing to bring such an action and has failed to state a claim. Therefore, this Court does not have subject matter jurisdiction.

I. STANDARD OF REVIEW

At any time during the proceedings, a court must dismiss an action if it determines that it lacks subject matter jurisdiction. Fed. R. Civ. P. 12(h)(3). A motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(1) may attack either the sufficiency of the complaint's allegations supporting subject matter jurisdiction or the existence of subject matter jurisdiction apart from the pleadings. *See Thornhill Pub. Co. v. General Tel. & Electronics Corp.*, 594 F.2d 730, 733 (9th Cir. 1979). Plaintiffs have the burden of proof and must present evidence establishing subject matter jurisdiction. *See id.*; *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). Even when the defendant is the moving party, as in a motion to dismiss, Plaintiffs still "bear[] the burden of establishing that jurisdiction exists." *Rio Property, Inc. v. Rio Int'l Interlink*, 284 F.3d 1007, 1019 (9th Cir. 2002). Once a court determines that it lacks jurisdiction, the asserted action must be dismissed because

"[w]here a suit has not been consented to by the United States, dismissal of the action is required." *Gilbert v. DaGrossa*, 756 F.2d 1455, 1458 (9th Cir. 1985); *McNutt v. Gen. Motors Acceptance Corp.*, 298 U.S. 178 (1936).

In adjudicating a facial attack to subject matter jurisdiction, this Court must accept the complaint's allegations as true and construe them in a light most favorable to Plaintiffs. *See Thornhill*, 594 F.2d at 733-34. Dismissal is improper unless it appears beyond doubt that Plaintiffs can prove no set of facts supporting their claims that would entitle them to relief. *Love v. United States*, 915 F.2d 1242, 1245 (9th Cir. 1989). By contrast, in resolving a factual attack, this Court may consider outside evidence concerning subject matter jurisdiction to resolve any factual disputes. *Thornhill*, 594 F.2d at 733-34. The complaint's allegations are not presumed true and the existence of disputed material facts will not preclude the court from determining whether it has subject matter jurisdiction. *Id.* Consideration of materials outside of the filed pleadings does not convert a Rule 12(b)(1) motion to one for summary judgment. *See Biotics Research Corp. v. Heckler*, 710 F.2d 1375, 1379 (9th Cir. 1983).

II. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

On May 24, 2010, claimants Filbert H. Kinlichee,[1] Felix Kinlichee, Felice H. Kinlichee, Filexis Kinlichee, Priscilla L. Davis, and Lori Hart filed administrative tort claims with the Department of Health and Human Services (HHS) pursuant to the FTCA against

[1] Plaintiffs' counsel misidentified Plaintiff Filvert H. Kinlichee (decedent's son) as the decedent (Filbert H. Kinlichee) on the Standard Form-95 (SF-95). However, the Complaint properly identifies the decedent as Filbert H. Kinlichee and Plaintiff Filvert H. Kinlichee, as one of decedent's surviving sons. *Compare* Ex. 1 *with* Doc. 1.

CCHCF, a medical facility owned and operated by the Indian Health Service, an agency of HHS, located in Chinle, Arizona. The claims allege medical negligence against providers at CCHCF arising from medical care rendered to their father, Filbert H. Kinlichee, on November 8, 2009. The claims (which were assigned numbers 2010-0371 through 2010-0376 consecutively) are for wrongful death, in the amount of $10,000,000 each, and each is signed by Scott E. Borg, of the firm of Barber & Borg, on behalf of the claimants. Ex. 1 (SF-95 for Filvert H. Kinlichee)[2]; Ex. 2 (SF-95 for Felix Kinlichee); Ex. 3 (SF-95 for Felice H. Kinlichee); Ex. 4 SF-95 for Filexis Kinlichee); Ex. 5 (SF-95 for Priscilla L. Davis); Ex. 6 (SF-95 for Lori Hart).

On June 7, 2010, HHS sent a letter by first-class mail to claimants' purported representative, Mr. Borg. Ex. 7, Ltr. from HHS to S. Borg (Jun. 7, 2010). That letter acknowledged receipt of Plaintiffs' claims but requested several pieces of substantiating evidence in order to allow the United States to evaluate their claims including: (1) Two copies of all medical records pertinent to Plaintiffs' allegations; (2) Itemized bills for medical, hospital, and funeral expenses incurred by reason of the incident, or itemized receipts of payments for such expenses; (3) Authenticated Death Certificate; (4) Autopsy Report; and (5) a Letter of Representation. *Id.* at 1. The letter advised Mr. Borg that failure to provide the requested evidence could be deemed abandonment of the claim pursuant to 45 C.F.R. § 35.4(d). *Id.* at 2. The letter further advised Mr. Borg that failure to provide the requested

[2] *See supra* n.1 at 4.

evidence could result in a finding that claimants had not exhausted their administrative remedies even if suit is filed more than six months after filing the administrative claim. *Id.* Mr. Borg did not respond to HHS' requests.

On July 21, 2010, HHS sent a second letter to Mr. Borg – this time by certified mail with return receipt – requesting substantiating evidence necessary to the determination of Plaintiffs' claims. Ex. 8, Ltr. from HHS to S. Borg (July 21, 2010). Again, HHS advised Mr. Borg that failure to comply with the request could result in the finding that Plaintiffs' administrative remedies had not been exhausted, thus depriving the Court of subject matter jurisdiction over the FTCA claims. *Id.* at 1. The return receipt accepting delivery of this letter is signed on July 29, 2010 by April Mitchell of Mr. Borg's office. *Id.* at 3. However, Mr. Borg still did not respond to HHS' requests.

On October 25, 2010, HHS sent a third letter – again, by certified mail with return receipt – to Mr. Borg requesting the same information in the previous two letters and containing the same warning of the consequences of failure to comply. Ex. 9, Ltr. HHS to S. Borg (Oct. 25, 2010). The return receipt accepting delivery of this letter is signed on October 29, 2010 by Ms. Mitchell of Mr. Borg's office. *Id.* at 3. However, Mr. Borg still did not respond to HHS' requests.

Finally, on March 7, 2011, HHS sent a fourth and final letter requesting the same information contained in the previous three letters and the same warning of the consequences for failing to respond to these reasonable requests. Ex. 10, Ltr. from HHS to S. Borg (Mar. 7, 2011). This letter informs Mr. Borg that it will be the last request. *Id.* at 2. The return

receipt accepting delivery of this letter was signed on March 9, 2011 by Ms. Mitchell of Mr. Borg's office. *Id.* at 3. Again, Mr. Borg still did not respond to HHS' final request. To be clear, at no point did Mr. Borg provide any of the requested materials or provide any explanation to HHS for his lack of response to its four letters.

Instead, on March 14, 2011 and on behalf of all six Plaintiffs, Mr. Borg filed suit against the United States for damages arising from the alleged medical negligence of the medical staff and CCHCF in Chinle, Arizona for the wrongful death of Filbert Henry Kinlichee. Doc. 1 at ¶ 1. Mr. Kinlichee is survived by his five children, Plaintiffs Felix H. Kinlichee, Filvert H. Kinlichee, Felice H. Kinlichee, Filexis Kinlichee and Loretta Hart. *Id.* at ¶ 6-12.

In the Complaint, Priscilla L. Davis also claims to be a daughter surviving Mr. Kinlichee. *Id.* at ¶ 7. However, Plaintiff Davis has since admitted that she is not the biological child of Mr. Kinlichee. Ex. 11, Excerpt of Pls.' Resp. to Def.'s Req. for Produc. of Docs., No. 11 (Jan. 9, 2012); Ex. 12, Excerpts of Pl. Davis' Dep. Tr. (Mar. 15, 2012). At deposition, Plaintiff Davis testified that her biological father is actually Leonard Davis. Ex. 12 at 24:6-7. Plaintiff Davis also testified at deposition that when Ms. Davis' biological mother (Sartreva Blacksheep) married Mr. Kinlichee, Plaintiff Davis considered Mr. Kinlichee to be her stepfather. *Id*. at 23:23-25 – 24:1-5. Plaintiff Davis testified that her mother affirmatively prohibited Mr. Kinlichee from adopting her as his own child, and Mr. Kinlichee never attempted to do so. *Id*. at 25:5-9.

III. LEGAL ANALYSIS

First, this Court should dismiss this entire FTCA suit because all Plaintiffs have failed to satisfy the jurisdictional presentment requirements of 28 U.S.C. § 2675(a) and this Court thus lacks jurisdiction because Plaintiffs have failed to state a claim. Second, if this Court deems that jurisdiction exists despite presentment failures, this Court nevertheless lacks subject matter jurisdiction over Plaintiff Davis' claims because she was not legally adopted by the decedent, Mr. Kinlichee. Therefore, she has failed to state a claim in this wrongful death action under Arizona law.

It is axiomatic that the United States is entitled to sovereign immunity from suit unless it consents to be sued through a statutory waiver of its immunity. The FTCA constitutes a limited waiver of the United States' sovereign immunity; thus, it must be strictly construed. *McNeil v. United States*, 508 U.S. 106, 111 (1993); *F.D.I.C. v. Craft*, 157 F.3d 697, 707 (9th Cir. 1998); *Hilgedick v. United States*, No. 2:08CV8160-LOA, 2009 WL 129912 at *1-2 (D. Ariz. Jan. 20, 2009). A court lacks subject matter jurisdiction over a claim that fails to meet the provisions of the FTCA because whether a waiver of sovereign immunity has occurred is a jurisdictional question. *Hilgedick*, 2009 WL 129912 at *2 (citing *Wright v. United States*, 719 F.2d 1032, 1034 (9th Cir. 1983)); *Monaco v. United States*, 661 F.2d 129, 131 (9th Cir. 1981)).

The FTCA constitutes a waiver of the United States' sovereign immunity only for:

> …injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the government while acting within the scope of his office or employment, under

> circumstances where the 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.

28 U.S.C. § 1346(b); *United States v. Orleans*, 425 U.S. 807, 813 (1976) ("The Federal Tort Claims Act is a limited waiver of sovereign immunity, making the Federal Government liable to the same extent as a private party for certain torts of federal employees acting within the scope of their employment").

A. All Plaintiffs' Claims Are Barred Because Presentment of an Administrative Claim is a Jurisdictional Prerequisite to Suit Under the FTCA, and the FTCA Implementing Regulations Define When a Claim Has Been Presented.

No lawsuit may be initiated against the United States under the FTCA unless a claimant has first "presented" an administrative claim to the appropriate federal agency:

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

28 U.S.C. § 2675(a). The presentment of an administrative claim is a jurisdictional prerequisite to a civil action under the FTCA. *Brady v. United States*, 211 F.3d 499, 502 (9th Cir. 2000) (citing *Cadwalder v. United States*, 45 F.3d 297, 300 (9th Cir. 1995). If a claimant has failed to present a claim within the meaning of Section 2675(a), the lawsuit must be dismissed for lack of subject matter jurisdiction. *McNeil v. United States*, 508 U.S. 106, 113 (1993); *Vacek v. U.S. Postal Serv.*, 447 F.3d 1248, 1250 (9th Cir. 2006). Presentment of an

administrative claim is jurisdictional and must be pleaded and proven by a FTCA claimant. *Vacek v. U.S. Postal Serv.*, 447 F.3d 1248, 1250 (9th Cir. 2006). "Because presentment is a jurisdictional prerequisite to suit under the FTCA, and jurisdiction is a threshold issue for the district court to decide, the district court may appropriately resolve legal and factual questions determinative of jurisdiction and may dismiss the case under Federal Rule of Civil Procedure 12(b)(1) if the FTCA requirements are not met." *Id.*

This Court lacks subject matter jurisdiction over this action because Plaintiffs failed to satisfy the administrative claim presentment requirements in 28 U.S.C. § 2675(a). To comply with the "presentment" requirement, the claim must be in writing and be for a sum certain. *Warren v. U.S. Dept. of Interior Bureau of Land Mgmt.*, 724 F.2d 776, 780 (9th Cir. 1984). However, federal agencies must also consider tort claims in accordance with the regulations prescribed by the Attorney General. 28 U.S.C. § 2672. Acting pursuant to this congressional rulemaking authority, the Attorney General promulgated regulations pursuant to the FTCA that require an administrative claim be accompanied by the title or legal capacity of the person signing the form, and by evidence of such person's authority to present the claim on behalf of the claimant:

> (a) For purposes of the provisions of 28 U.S.C. 2401(b), 2672, and 2675, a claim shall be deemed to have been presented when a Federal agency ***receives from a claimant***, his duly authorized agent or legal representative, an executed Standard Form 95 or other written notification of an incident, accompanied by a claim for money damages in a sum certain for injury to or loss of property, personal injury, or death alleged to have occurred by reason of the incident; and the title or legal capacity of the person signing, and is accompanied by ***evidence of his authority to present a claim on***

> ***behalf of the claimant*** as agent, executor, administrator, parent, guardian, or other representative.

28 C.F.R. § 14.2 (emphasis added). In *Warren*, the Ninth Circuit held that the presentment requirements housed in Section 14.2 are not jurisdictional. 724 F.2d at 780. However, the lower courts within the Ninth Circuit have struggled with applying the administrative requirements in Section 14.2 as non-jurisdictional. *See Triplett v. United States*, 501 F. Supp. 118 (D. Nev. 1980); *Cummings v. United States*, 449 F. Supp. 40 (D. Mont. 1978); *Farm Mut. Auto. Ins. Co. v. United States*, 446 F. Supp. 191 (C.D. Cal. 1978); *Rothman v. United States*, 434 F. Supp. 13 (C.D. Cal. 1977). Unfortunately, the *Warren* Court's reasoning is irreconcilable with the practical effect of its decision, the legislative intent behind 28 U.S.C. § 2675(a), patent application of statutory interpretation, and the enforcement of other provisions of 28 C.F.R. § 14.2.

1. The Court's Decision in *Warren* Is Distinguishable Because the 1987 Amendment of 28 C.F.R. § 14.2(a) Made Clear Congressional Intent that the Presentment Requirements of Section 14.2(a) Should Be Interpreted as Jurisdictional.

a. Due to the amendment enacted changing Section 14.2 in 1987, which was after the Warren decision, this Court should continue to recognize the validity of Section 14.2(a)'s application to Section 2675.

In reaction to the Ninth Circuit's ruling in *Warren* and some similar rulings in other Circuit Courts of Appeal, in 1987, the Attorney General amended 28 C.F.R. § 14.2 to make explicit that this regulation was intended to govern claim presentment under Section 2675. 52 Fed. Reg. 7411 (Mar. 11, 1987); *Kanar v. United States*, 118 F.3d 527, 529 (noting some

courts' reliance on the pre-1987 regulation's silence regarding Section 2675). To the extent that these courts have relied on any arguable ambiguity in the regulation (*e.g.*, *Warren*, 724 F.2d at 778 n.5; *Adams v. United States*, 615 F.2d 284, 290 n.10 (5th Cir. 1980)), such reasoning is no longer valid.

Indeed, since the 1987 amendment to Section 14.2(a), several Circuit Courts of Appeal that had previously rejected the regulation's application to Section 2675 have looked to the amended version of Section 14.2(a) to define presentment under that statute without discussion. In the Ninth Circuit, *compare Warren*, 724 F.2d at 776 *with Vacek*, 447 F.3d at 1251 (Section 14.2 "governs the question of when an administrative claim is presented for purposes of the [FTCA]"). In the DC Circuit, *compare GAF Corp. v. United States*, 818 F.2d 901 (D.C. Cir. 1987) *with Bembenista v. United States*, 866 F.2d 493, 499 (D.C. Cir. 1989) (holding Section 14.2(a) provides the applicable definition of claim presentation under Section 2675). The Third and Sixth Circuit's practices regarding Section 14.2 have also been mixed. *Compare Tucker v. USPS*, 676 F.2d 954, 959 (3d Cir. 1982) *with Penn. v. Nat'l Ass'n of Flood Ins.*, 520 F.2d 11, 19-20 (3d Cir. 1975), *overruled on other grounds, Penn. v. Porter*, 659 F.2d 306 (3d Cir. 1981) (en banc); *see Douglas v. United States*, 658 F.2d 445, 447-48 (6th Cir. 1981) (agreeing with *Adams* that the "regulations promulgated under 28 U.S.C. § 2672" only "govern administrative settlement proceedings" and "do not set federal jurisdictional prerequisites" but citing to Section 14.2 to determine when "requirements of § 2675 are met"); *Blakely v. United States*, 276 F.3d 853, 865 (6th Cir. 2002) (noting without

discussion that Section 14.2(a) lists the requirements for a properly presented claim to a federal agency).

A prime example of difference in outcome of applying the 1987 amendment to Section 14.2(a) can be found in *Mader v. United States*, 654 F.3d 794 (8th Cir. 2011). The *Mader* court was asked to adjudicate whether the failure of a claimant to present evidence that she was acting as a personal representative would deprive the Court of subject matter jurisdiction. *Mader*, 654 F.3d at 798. Like the facts of the case at bar, the federal agency sent the purported personal representative in *Mader* four requests for evidence of authority to bring the claim on behalf of the estate and its beneficiaries, all of which were ignored. *Id.* After reviewing the legislative amendments to 28 C.F.R. § 14.2(a), the court found that a "properly presented" claim under § 2675(a) must include:

> [E]vidence of a representative's authority to act on behalf of the claim's beneficiaries under state law. ***The presentation of such evidence is not a pointless administrative hurdle – it is fundamental to the meaningful administrative consideration and settlement process contemplated in §§ 2675(a) and 2672.*** Moreover, we note that the presentation of such evidence is far from burdensome. Assuming a representative is, in fact, duly authorized to present a FTCA claim on behalf of beneficiaries under applicable state law, evidence of such authority is uniquely in the representative's possession.

Id. at 803-04 (emphasis added). As the *Mader* court points out, the disaggregated view of Sections 2675 and 2672 is legally incorrect and fails to appreciate these provisions' interconnected nature. Congress added the claim presentation requirement and gave federal agencies claim settlement authority at the same time, as part of an integrated scheme to allow agencies an opportunity to settle meritorious tort claims, under uniform regulations

promulgated by the Attorney General. Indeed, Congress added the current version of Section 2675 not only to allow claimants a chance at a speedier settlement, but also to benefit "'the courts, the agencies, and the Department of Justice itself.'" *McNeil v. United States*, 508 U.S. 106, 112 n.7 (1993) (quoting S. Rep. 1327 at 2). Uncoupling Section 2675's claim presentment provision from Section 2672's claim settlement provision would contravene the orderly regime Congress established in its 1966 FTCA amendments, and the court in *Mader* astutely recognized the important distinction.

If Plaintiffs' counsel had simply complied with the reasonable request to produce evidence of representation, the United States could have settled – or at least attempted to settle – the claim without the necessity of litigation. Absent evidence proving Plaintiffs' counsel was empowered to settle claims on their behalf, Plaintiffs' counsel divested the United States of any power to negotiate in good faith.

b. The practical effect of Warren is to render the enforcement powers of the Attorney General moot.

In *Warren*, the Ninth Circuit Court of Appeals found that the regulations promulgated by the Attorney General are not jurisdictional prerequisites to filing suit under the FTCA, and that all that was required was that the claimant provide notice of "the manner and general circumstances of the injury and harm suffered, and a sum certain representing damages" to comply with the claims presentation requirement of 28 C.F.R. § 2675(a). 724 F.2d at 780. In *Warren*, plaintiff's counsel sent a letter to the Bureau of Land Management making a wrongful death claim and demanding $100,000. *Id.* at 777. Plaintiff's counsel was requested

to comply with the requirements of 14.3(e) (now 14.2(a)) requiring evidence of his authority to present the claim on behalf of the claimants and also advised to use the SF-95s which were enclosed. *Id*. Plaintiff's counsel submitted the claims on the SF-95s, signing them as attorney but did not provide evidence of his authority to represent the claimants. *Id*. Nevertheless, despite the attorney's failure to comply with section 14.3(e), the Bureau of Land management decided the claims on the merits and denied them. *Id*.

The Court in *Warren* relied upon "the relevant statutes and their legislative histories [to] reveal that Congress did not intend to treat regulations promulgated pursuant to section 2672 as jurisdictional prerequisites under section 2675(a)." 724 F.2d at 778. The practical effect of *Warren* is that "any agent or representative of a claimant can now refuse to comply with the Attorney General's section 2672 regulations requiring 'evidence of his authority' to represent the claimant." *Id.* at 780.

Judge Sneed's dissent in *Warren* has proven prophetic to the facts of the case at bar. Here, Plaintiffs' counsel was advised repeatedly of the need to submit a letter of representation to HHS and was warned of the consequences of failing to do so. He ignored each of the United States' requests and continues to do so at this very moment. If this Court refuses to enforce the legitimate exercise of power granted to the Attorney General by Congress under 28 U.S.C. § 2672, any regulation enacted pursuant to this authority is effectively unenforceable.

c. The Warren court did not follow one of the most basic rules of statutory construction: if a statute's plain meaning is apparent, the inquiry ends there.

In addition, the majority in *Warren* did not follow one of the most basic rules of statutory construction which is that where the language of a statute is clear and unambiguous the courts must not – under the guise of interpreting the language – look outside the text for its meaning. "The preeminent canon of statutory interpretation requires [a court] to presume that the legislature says in a statute what it means, and means in a statute what it says there. Thus, [a court's] inquiry begins with the statutory text, and ends there as well if the text is unambiguous." *Tides v. The Boeing Co.*, 644 F.3d 809, 814 (9th Cir. 2011) (quoting *BedRoc Ltd., LLC v. United States*, 541 U.S. 176, 183 (2004) (internal citations and quotations omitted)).

In 28 U.S.C. § 2672, Congress clearly delegated to the Attorney General the task of determining the specific conditions under which a federal agency would be permitted to settle claims, and the Attorney General has specifically defined the conditions under which the claims presentation requirement in 28 U.S.C. 2675(a) will be "deemed" to have been met. Requirements for the settlement of administrative claims must be adhered to by both claimants and federal agencies to facilitate the purpose of orderly and efficient settlement of claims at the administrative level. *Caton v. United States*, 495 F.2d 635, 637 (9th Cir. 1974) (rejecting the argument that by defining the claims presentation requirement in 28 C.F.R. § 14.2(a), the Attorney General had overstepped the limits of the authority delegated to him).

d. All of the Circuit Courts of Appeal that have considered the issue and decided it directly have held that the sum certain requirement in 14.2(a) is a prerequisite for filing suit; thus, the Court in Warren cherry-picked what parts of the regulation to enforce.

All of the Circuit Courts of Appeal that have considered whether or not the sum certain requirement in 14.2(a) is a prerequisite for filing suit and have ruled directly on it have held that it is. *See Bialowas v. United States*, 443 F.2d 1047 (3d Cir. 1971); *Melo v. United States*, 505 F.2d 1026 (8th Cir. 1974); *Caton*, 495 F.2d at 635; *Avril v. United States*, 461 F.2d. 1090 (9th Cir. 1972). In addition, the Eighth Circuit held in *Mader* that the evidence of authority requirement in Section 14.2(a) was a jurisdictional prerequisite in the context of a personal representative filing on a behalf of a deceased claimant. 654 F.3d at 794. Further in *Kanar*, the Judge Easterbrook of the Seventh Circuit specifically acknowledged that in order to present a claim under the FTCA, 28 C.F.R. § 14.2(a) requires four elements to be met: "(i) notification of the incident; (ii) a demand for a sum certain; (iii) the title or capacity of the person signing; and (iv) evidence of this person's authority to represent the claimant." *Kanar* at 528.

Like the case at bar, *Kanar* involved the failure of an attorney to provide "evidence of his authority" to represent the claimant, even after being advised by the federal agency of this requirement. *Id.* The attorney was notified of this requirement three months prior to the expiration of the statute of limitations under the FTCA but did not submit a letter of representation until nine months later. *Id.* The Seventh Circuit ruled that the claim had not been properly presented within the statutory time limits to the federal agency and that the suit

was properly dismissed for failure to exhaust administrative remedies. *Id.* By comparison, Plaintiffs' counsel Mr. Borg (timely or not) did not at all – even after numerous requests to submit evidence of his authority to bring a claim on Plaintiffs' behalf – comply with *any* of the federal agency's reasonable requests for information prior to filing suit.

Further, the Ninth Circuit in *Caton* held that there was a "rational basis" for the Attorney General's regulation and that it was necessary in order to enable the heads of federal agencies and the Attorney General to carry out their respective duties in connection with processing and attempting to settle claims under the Tort Claims Act." 495 F.2d at 637. The rational basis test for whether a regulation is a valid exercise of delegated authority is a rather low threshold. One can hardly dispute in the context of the administrative claims process where a federal agency has the task of considering claims that can arise in any jurisdiction of this country that requiring an agent or legal representative to present evidence of his authority to pursue a claim on behalf of the claimant is reasonably necessary for meaningful consideration of the claim.

Admittedly, the enforcement of the Attorney General's regulations could result in meritorious claims being shut out of court but all "technical" limits on legal actions may have that result. The onus is on any personal representative to read the FTCA, its implementing regulations and relevant practice treatises (which are all readily available on-line) to properly present the claim to the federal agency implicated. Here, where Plaintiffs' personal representative is an attorney who received and ignored four separate notices of his compliance failures, the remedy for those failures is not to ignore the regulations and avoid

the harsh result of denying the legitimate Plaintiffs (all but Plaintiff Davis) their day in court. To do so would be legislating from the bench, rather than interpreting the law.

The administrative claim in this case, as in *Caton* and *Avril*, is a "nullity" and Plaintiffs have not exhausted the requirement to present an administrative claim prior to filing suit. The majority's holding in *Warren* is not consistent with the Court's prior decisions to uphold the sum certain requirement of 14.2(a) and its affirmation that the Attorney General is within the limits of his delegated authority in defining the requirements for presentation of claim. For the foregoing reasons, all of Plaintiffs' claims should be dismissed.

B. Plaintiff Priscilla Davis' Claims Are Barred Because the Arizona Wrongful Death Statute Does Not Support Actions From Non-Adopted Children.

The FTCA authorizes suits against the United States for its employees' torts, but it does not define those torts. 28 U.S.C. § 1346(b). Instead, the FTCA provides that, with certain exceptions, the United States is to be liable for its torts in the same manner and to the same extent as a private individual would be liable under like circumstances, in accordance with the law of the place in which the act or omission occurred. 28 U.S.C. § 2674. Ms. Davis asserts a claim of wrongful death arising out of the actions that occurred at CCHCF in Chinle, Arizona. Therefore, the validity of such a claim will be construed under Arizona law. *Gandy v. United States*, 437 F. Supp. 2d 1085, 1086 (D. Ariz. 2006).

The right of action for wrongful death is purely statutory and the action must be brought in the names of the persons to whom the right is given by statute. *Solomon v. Harman*, 107 Ariz. 426, 428 (1971). The question of whom may bring or maintain an action

for wrongful death must be distinguished from that of those for whose benefit the action is brought or recovery sought, or of those who are entitled to share in the recovery. *Id.* at 429. Under the Arizona wrongful death statute, an action for wrongful death may be brought by a surviving spouse, child, parent, guardian or personal representative of the deceased person.

Arizona's statute states:

> An action for wrongful death shall be brought by and in the name of the surviving husband or wife, child, parent or guardian, or personal representative of the deceased person for and on behalf of the surviving husband or wife, children or parents, or if none of these survive, on behalf of the decedent's estate.

A.R.S. § 12-612. The classes of persons who may bring a wrongful death action listed in Section 12-612 are meant to be comprehensive of the parties who have standing to bring such a suit. *Edonna v. Heckman*, 227 Ariz. 108 (Ct. App. 2011).

For example, in *Edonna*, following the death of his father in an automobile accident, a biological son lacked standing to file a wrongful death complaint against defendant driver, because the biological son was adopted by his stepfather, and upon adoption, the relationship between the child and his previous parents was "completely severed," and all "legal consequences" of the relationship ceased to exist. *Id.* Commenting on Section 12-612, the *Edonna* court held that the statute creates a limited class of people who may have standing to bring a wrongful death action:

> By its plain language, the statute creates a limited class of beneficiaries who may sue. That class does not include several relationships that the law generally recognizes as sufficiently close to trigger rights of inheritance. For example, the statute does not grant siblings, grandparents or grandchildren – each of whom might be expected to have enjoyed the

> closest of family relationships with the decedent in many cases – the right to bring a wrongful death action. Moreover, the statute contains no elastic category that would permit the court to evaluate the extent or quality of the familial relationship.

Id. at 110. Therefore, the Arizona legislature intended that standing exists to bring a wrongful death action only for those persons expressly identified in Section 12-612. *Id.*

Additionally, the *Edonna* court found that despite the fact that the Arizona statute governing wrongful death actions was silent as to the definition of a child, the legislature had expressly outlined the legal rights of adopted children under A.R.S. § 8-117. *Id.* at 111. Only a lawfully adopted child has all of the rights that a child of natural birth does to bring a wrongful death suit in the name of the parent who adopts them:

> On entry of the decree of adoption, the relationship of parent and child and all the legal rights, privileges, duties, obligations and other legal consequences of the natural relationship of child and parent thereafter exist between the adopted child and the adoptive parent as though the child were born to the adoptive parent in lawful wedlock.

A.R.S. § 8-117. According to Section 8-117, *only* upon an entry of decree of adoption will a child have full legal rights and stand in the shoes of a biological child.

Under Arizona law, several steps are required before a court enters a decree of adoption. First, a court-ordered temporary custody pending adoption is required. A.R.S. § 8-108. Second, the adoptive applicant is required to apply for pre-adoption certification from the court to determine his suitability to adopt a child. A.R.S. § 8-105. Third, judicial termination of parental rights prior to an adoption or parental consent (unless waived under A.R.S. § 8-106.01) is required prior to the granting of a final order of adoption. A.R.S. §§ 8-

533, 8-106, 8-107. Finally, a one-year curative period after the final order is entered assures the finality of the adoption. A.R.S. § 8-123.

When adopting a child of Native American descent (like Plaintiff Davis, a member of the Navajo Nation), additional steps must be taken according to the Indian Child Welfare Act of 1978. An "Indian Child" is defined in the Act as "any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe." 25 U.S.C. § 1903(4). In any involuntary state court proceeding for foster care, termination or adoption of an Indian child, the Indian tribe has jurisdiction exclusive as to any state. *Id.* at § 1911(a). The tribe may request intervention in the case, even if the tribe is not seeking jurisdiction. *Id.* at § 1912(a). Certain preferences for adoptive placement of an Indian child with Indian families or other tribal members are set forth in the Indian Child Welfare Act, and must be followed and evidenced by written records maintained by the court. *Id.* at § 1912(b). Finally, consent of a parent to adoption of an Indian child must be executed in writing, recorded before a judge of a court of competent jurisdiction, and accompanied by the judge's certificate that the terms and consequences of the consent were fully explained in detail and fully understood by the parent. *Id.* at § 1913(a).

By Plaintiff Davis' own admissions, she is not the decedent Mr. Kinlichee's biological child. Ex. 11; Ex. 12 at 24:6-7. Plaintiff Davis admits that Mr. Kinlichee did not adopt her. Ex. 12 at 25:5-9. As discussed above, Arizona law states that if there has not been a formal adoption complying with the standards set forth in Title 8 of the Arizona Revised Statutes, the

plaintiff will lack standing to bring a wrongful death action under A.R.S. § 12-612. Furthermore, Plaintiff Davis has testified that she is a member of the Navajo Nation herself. *Id*. at 6:24-25. She provided her Certificate of Indian Birth Census Number at deposition. *Id.* at 6:22-23. Therefore, Plaintiff Davis is an Indian Child under the Welfare Act. So, in order for Mr. Kinlichee to adopt her, he must have also complied with explicit provisions set forth in the Indian Child Welfare Act. There is no evidence that Mr. Kinlichee complied with any provision of the Indian Child Welfare Act or even attempted to adopt her. *Id.* at 25:5-9.

Plaintiff Davis was not legally adopted by Mr. Kinlichee. Mr. Kinlichee did not comply with Arizona or Federal laws involving the adoption of a Native American child, therefore divesting Plaintiff Davis of her standing to bring a wrongful death suit in Arizona. Since there is no standing to bring a claim under the wrongful death statute in Arizona, there has been no waiver of the United States' sovereign immunity under the FTCA. Without such a waiver, a federal district court does not have subject matter jurisdiction over Plaintiff Davis' Complaint. She has failed to state a claim upon which relief can be granted and her claims should be dismissed for lack of subject matter jurisdiction pursuant to Federal Rules of Civil Procedure 12(b)(1) and (b)(6).

IV. CONCLUSION

For the forgoing reasons, Defendant respectfully requests that this Court grant this motion and dismiss all of Plaintiffs' claims pursuant to Federal Rules of Civil Procedure 12(b)(1) and (b)(6).

Respectfully submitted this 8th day of June, 2012 by:

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CERTIFICATE OF SERVICE

I hereby certify that on June 8, 2012, I filed the forgoing with the Clerk's Office using the CM/ECF system, which will send a Notice of Electronic Filing to the following registered users:

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