

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NORTH DAKOTA

Renee Kay Martin, et al.,

Plaintiffs,

v.

United States of America, et al.,

Defendants.

Case No. 3:22-cv-136

**UNITED STATES’ MEMORANDUM IN  
SUPPORT OF MOTION TO DISMISS  
FOR LACK OF JURISDICTION**

The United States of America by Mac Schneider, United States Attorney for the District of North Dakota, and Michael D. Schoepf, Assistant United States Attorney, submits this memorandum in support of the United States’ Motion to Dismiss. Any tort claims asserted against the United States and its employees should be dismissed for lack of subject matter jurisdiction.

**INTRODUCTION**

Plaintiff Renee Kay Martin (“Martin”), on her own behalf and on behalf of her deceased son, Brandon Richard Laducer, and his children, TRL and BRW, initiated this lawsuit on August 22, 2022.<sup>1</sup> Complaint (Doc. 1). Martin’s form “Complaint for Violation of Civil Rights” alleges the named defendants—federal, state, and local law enforcement officers named in their individual and official capacities—shot and killed Brandon Richard Laducer on August 23, 2020. Id. at 9-11. She asserts their actions violated certain constitutional rights, and seeks damages under 42 U.S.C. § 1983 and Bivens v. Six Unknown Named Agents of Federal Bureau of

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<sup>1</sup> This Brief does not attempt to correct every mistake of fact or identify every jurisdictional defect in this lawsuit. For example, the claims Martin has attempted to bring on behalf of Brandon Richard Laducer, TRL, and BRW have not been properly presented and could be dismissed on that basis. See Trottier v. United States, No. 3:21-CV-93, 2021 WL 5237287, at \*3 (D.N.D. Nov. 10, 2021).

Narcotics, 403 U.S. 388 (1971). Id. at 3, 10. This memorandum does not address Martin’s constitutional claims asserted against the individual defendants.

Martin also names the United States as a defendant.<sup>2</sup> Construing the pro se Complaint liberally, along with a Standard Form 95 (“SF95”) received by the Department of the Interior (“DOI”), see Declaration of Rebecca Pock, it is possible to read the Complaint as alleging that the United States’ negligence contributed to Brandon Richard Laducer’s death. Further, it is possible to construe it as asserting a claim against the United States and the named federal law enforcement officers in their official capacities under the Federal Torts Claim Act (“FTCA”) for the wrongful death of Brandon Richard Laducer. Id. at 10. To the extent the Court reads the Complaint to include such claims under the FTCA, they should be dismissed for lack of jurisdiction.

The FTCA waives the United States’ sovereign immunity and allows individuals to sue the United States for tortious conduct committed by its employees acting in their official capacity. However, before bringing a claim under the FTCA in court, the claimant must “first present[] the claim to the appropriate Federal agency” and allow the agency the opportunity to dispose of it administratively. 28 U.S.C. § 2675(a). If the claim is finally denied or the agency fails to act on it in six months, then the plaintiff may proceed to court. Id.

In accordance with the requirements for filing suit against the United States under the FTCA, Martin submitted her claim by mailing an SF95 to the Department of Justice (“DOJ”) on

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<sup>2</sup> In the caption of the form Complaint, Martin has identified the Defendant as  
United States of America  
“see attached”

Complaint at 1 (Doc. 1). Martin does not identify the United States as a party in the section of the form that lists defendants. See id. at 2–8. Nor has she specifically identified the tortious conduct allegedly committed by the United States and its employees.

or about August 19, 2022. See Declaration of Rebecca Pock ¶ 6(a). The DOJ forwarded the SF95 to the DOI on or about December 12, 2022. See id. Neither agency issued a final decision on Plaintiffs’ administrative claim prior to the initiation of this lawsuit. See id. ¶ 6–11. Accordingly, Martin failed to present and exhaust her administrative claim, and therefore any FTCA claim she intended to plead in this case should be dismissed for lack of jurisdiction.

### **LAW AND ARGUMENT**

“[T]he United States, as sovereign, is immune from suit unless it has consented to be sued. A corollary to the immunity doctrine is the rule that the United States may define the conditions under which actions are permitted against it.” Peterson v. United States, 428 F.2d 368, 369 (8th Cir. 1970)(citations omitted). The FTCA is a waiver of the United States’ sovereign immunity. See 28 U.S.C. §§ 1346, 2671-2680. Under the FTCA, as long as the conditions are met, the United States may be held liable for injuries or death caused by the negligent or wrongful acts of any federal employee while acting within the scope of their employment. Id. § 2675(a); Washington v. DEA, 183 F.3d 868, 873 (8th Cir. 1999).

Waiver of sovereign immunity under the FTCA requires prospective plaintiffs to first present an administrative claim to the appropriate agency and receive a written denial or allow the passage of six months (whichever occurs first) before filing suit in district court. 28 U.S.C. § 2675(a). “This presentment requirement ‘provides federal agencies a fair opportunity to meaningfully consider, ascertain, adjust, determine, compromise, deny, or settle FTCA claims prior to suit.’” Roiger v. Veterans Affairs Health Care System, No. 18-cv-591, 2019 WL 572655, at \*3 (D. Minn. Feb. 12, 2019)(quoting Mader v. United States, 654 F.3d 794, 800-801 (8th Cir. 2011)).

“The command that an ‘action shall not be instituted ... 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’ is unambiguous. We are not free to rewrite the statutory text.” McNeil v. United States, 508 U.S. 106, 111-113 (1993) (affirming dismissal of action filed prior to “final denial” by agency because Plaintiff “failed to heed clear statutory command”). As the United States Supreme Court stated in McNeil,

Every premature filing of an action under the FTCA imposes some burden on the judicial system and on the Department of Justice which must assume the defense of such actions. Although the burden may be slight in an individual case, the statute governs the processing of a vast multitude of claims. The interest in orderly administration of this body of litigation is best served by adherence to the straightforward statutory command.

Id. at 112.

“An FTCA plaintiff bears the burden of pleading and proving complete exhaustion of administrative remedies; without exhaustion according to these requirements, a federal court does not have subject-matter jurisdiction to consider the claim.” Roiger, 2019 WL 572655, \*3 (citing McNeil, 508 U.S. at 112)(emphasis added). “The exhaustion of [the FTCA] administrative remedies requirement is an absolute prerequisite to maintaining an action and cannot be waived.” Vinje v. United States, No. 1:16-CV-024-CSM, 2016 WL 3248238, at \*2 (D.N.D. June 10, 2016); Mader, 654 F.3d at 805 (“[C]ompliance with § 2675(a)’s presentment requirement is a jurisdictional precondition to filing an FTCA suit in federal district court.”). The United States Supreme Court has specifically found “[t]he FTCA bars claimants from bringing suit in federal court until they have exhausted their administrative remedies.” McNeil, 508 U.S. at 113.

McNeil found that administrative remedies were not exhausted, and dismissal was warranted, where the complaint was filed before the final determination—even though no

substantial progress in the litigation had occurred until after the final agency determination. See id. at 107, 113. Circuit Courts of Appeal have followed McNeil and acknowledge the proper remedy for failure to exhaust is to dismiss the complaint, such that it must be refiled after exhaustion has occurred. See Barber v. Simpson, 94 F.3d 648 (8th Cir. 1996)(citing McNeil for the proposition that a complaint filed before exhaustion will not be deemed properly filed as of the date of final agency action, but instead must be dismissed and then refiled after exhaustion); Duplan v. Harper, 188 F.3d 1195, 1199 (10th Cir. 1999) (“Allowing claimants generally to bring suit under the FTCA before exhausting their administrative remedies and to cure the jurisdictional defect by filing an amended complaint would render the exhaustion requirement meaningless and impose an unnecessary burden on the judicial system”); Harvey v. Turnbo, 35 F.3d 560 (5th Cir. 1994); Turner ex rel. Turner v. United States, 514 F.3d 1194, 1202, n.5 (11th Cir. 2008); Kaba v. Stepp, 458 F.3d 678, 687–88 (7th Cir. 2006); Barrett ex rel. Estate of Barrett v. United States, 462 F.3d 28, 37–38 (1st Cir. 2006). See also Benter v. United States, No. 06-3669, 2006 WL 3759756, at \*2 (D. Minn. Dec. 21, 2006) (finding the requirements of 28 U.S.C. § 2675(a) are absolute, and suit must be dismissed for lack of jurisdiction when a plaintiff fails to exhaust administrative remedies); Gregory v. Mitchell, 634 F.2d 199, 204 (5th Cir. 1981)(jurisdiction under FTCA “must exist at the time the complaint is filed,” and a court may not “stay or hold in abeyance” a premature claim “until the six month period accrues” in a case where plaintiffs did not wait the required six months or receive final agency denial of claim.).

In this case, Martin partially submitted an administrative claim.<sup>3</sup> See Declaration of Rebecca Pock ¶ 6(a). Martin completed the SF95 and submitted it to the DOJ on or after August

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<sup>3</sup> As noted in footnote one, Martin did not complete the process of submitting administrative claims with respect to any claims she attempted to file on behalf of Brandon Richard Laducer,

19, 2022. See id. Ex. 1 at 3. Martin filed her Complaint three days later on August 22, 2022. Doc. 1. Neither agency had issued a final decision by the date Martin filed her Complaint, nor had six months passed since she submitted it. Accordingly, Martin failed to comply with the mandatory statutory requirements and the Complaint should be dismissed for lack of jurisdiction. 28 U.S.C. § 2675(a); Mader, 654 F.3d at 807 (“[A] claim that fails to satisfy § 2675(a)’s requirements remains inchoate, unperfected, and not judicially actionable.”).

### CONCLUSION

For the foregoing reasons, Martin’s claims against the United States; Bureau of Indian Affairs Officers Kelan Gourneau, Michael Slater, Evan Parisien, Earl Charbonneau, and Heather Baker, in their official capacities; and FBI Agent Reed Mesman, in his official capacity, should be dismissed under Fed. R. Civ. P. 12(b)(1) for lack of subject matter jurisdiction.

Dated: May 1, 2023

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TRL, and BRW. See Trotter, No. 3:21-CV-93, 2021 WL 5237287, at \*3. She has not provided any proof of her authority file suit for them.