UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
Civil No. 0:24-cv-01892-JMB-LIB

NICOLE JOHNS,

Plaintiff,

v.

UNITED STATES OF AMERICA, et al.,

Defendants.

REPLY IN SUPPORT OF DEFENDANT UNITED STATES OF AMERICA'S MOTION TO DISMISS

Plaintiff Nicole Johns concedes the legal and factual points that require dismissing her claims under the FTCA. As to the law, Johns acknowledges that presenting a proper administrative claim was a jurisdictional prerequisite to bringing her current FTCA action. Johns also agrees that presenting her administrative claim required providing the DOI with proof of: (1) her authority to pursue a wrongful death action under Minnesota law; and (2) her attorney's authority to sign and submit an administrative claim on her behalf. As to the facts, Johns does not dispute that she failed to give the DOI documentation or other extrinsic evidence on either proof-of-authority issue before she filed this lawsuit. Given these concessions, Johns's FTCA claims are barred by sovereign immunity.

None of the arguments in Johns's opposition compel a different conclusion. Most notably, Johns is wrong that written statements in her attorney's correspondence with the DOI filled the proof-of-authority gaps. She is also wrong that the DOI was obligated to request proof of authority from her, and wrong that the DOI's denial of her administrative claim relieved Johns and her attorney of their obligation to comply with the proof-of-authority requirements. For these reasons, the Court should dismiss Counts I and II.

ARGUMENT

Defendant United States of America moves to dismiss Johns's FTCA claims in this case because she failed to satisfy two separate proof-of-authority requirements when presenting an administrative claim to the DOI. Specifically, Johns did not provide evidence of: (1) her authority to pursue a wrongful death action on behalf of Joseph Fairbanks, Jr.; and (2) her attorney's authority to sign and present an administrative claim on Johns's behalf. To avoid dismissal, Johns must prove otherwise on both points. *See Two Eagle v. United States*, 57 F.4th 616, 620 (8th Cir. 2023); *Osborn v. United States*, 918 F.2d 724, 730 (8th Cir. 1990). Besides adding a publicly available docket sheet, Johns does not suggest that anything is missing from the documents that the United States already provided to the Court. *See* Dkt. 29. There was no overlooked communication with the DOI, no omitted engagement letter separately sent to the agency, and no state court order appointing Johns as a wrongful death trustee mailed with her administrative claim. In other words, Johns concedes that she never gave the DOI documentary evidence of her appointment as a wrongful death trustee or of her attorney's authority to act on her behalf. That means sovereign immunity bars Counts I and II.

I. Statements from Johns's Attorney and the Proof-of-Authority Requirement

The main argument Johns raises against dismissing her FTCA claims is that her attorney's correspondence with the DOI provided the necessary proof of authority on both issues. Dkt. 28, at 5-7. This is the sole basis on which Johns opposes the United States' motion; all her other arguments rest on the assumption that an attorney's written statements qualify as evidence of authority under 28 C.F.R. § 14.2(a). But Johns misunderstands the

law regarding presentment, misreads the cases discussing the proof-of-authority requirement, and misconstrues the documents that Johns's attorney provided.

Presentment of a proper administrative claim—including proof of authority—is not a make-work exercise. Congress conditioned the FTCA's waiver of sovereign immunity on a claimant first presenting an administrative claim to encourage and facilitate out-of-court settlements for tort claims arising out of the acts or omissions of federal employees. *McNeil v. United States*, 508 U.S. 106, 112 n.7 (1993); *Mader v. United States*, 654 F.3d 794, 800-01 (8th Cir. 2011) (en banc). And to assure agencies that any settlements they reach will be effective and enforceable, "§ 2675(a) requires the presentment of evidence of a personal representative's authority to act on behalf of a claim's beneficiaries, something totally essential to meaningful agency consideration." *Mader*, 654 F.3d at 801; *see also* 28 C.F.R. § 14.2(a). That is why the FTCA's regulations, the decisions from federal courts in the Eighth Circuit, and the SF-95 instructions all use the word "evidence" when describing the proof-of-authority requirement. A claimant must prove that she has the authority to bring and settle a wrongful death action, and her attorney must prove that he has the authority to sign, submit, and settle an administrative claim on the claimant's behalf.

Johns complains that the United States is "manufacturing" requirements by insisting on evidence of authority beyond her attorney's say-so. *See* Dkt. 28, at 7. Not true at all. The plain language of § 14.2(a) requires that an administrative claim identify "[t]he title or legal capacity of the person signing, and [be] accompanied by ***evidence*** of his authority to present a claim on behalf of the claimant." (emphasis added). And the Eighth Circuit's

analysis of the regulation in *Mader* confirms what evidence of authority is required and why that evidence is important.

Mader began with a cover letter and an SF-95, both of which were signed by a lawyer purporting to act on behalf of "Nancy Mader, Personal Representative of the Estate of Robert L. Mader, Deceased." No. 08-cv-119-LSC-FG3, ECF No. 16-2, at 6-8 (D. Neb., filed Oct. 8, 2008). Those statements, although written by a lawyer, were not evidence of the lawyer's authority or of the claimant's authority. Thus, the district court in *Mader* granted the United States' motion to dismiss because the claimant's administrative "claim included no evidence to substantiate her authority to represent the Estate of Robert Mader, nor did it include any evidence to substantiate [Attorney] Ellis's authority to represent her." 2008 U.S. Dist. LEXIS 102348, at *9 (D. Neb. Dec. 2, 2008). The en banc Eighth Circuit affirmed, lamenting that "after five years of consideration at the administrative, trial and appellate court levels, it has only recently become clear that Ms. Mader lacked the requisite authority to file a claim with the VA or to file a wrongful death action against the United States in federal district court." 654 F.3d at 802. The Eighth Circuit specifically attributed the delay to the plaintiff's failure to provide ***evidence*** of her status, rejecting the idea that the attorney's statements in his cover letter and in the SF-95 were sufficient proof of authority. *Id.* That has long been the law in this circuit, and Johns is wrong that the United States is now breaking new ground in moving to dismiss Counts I and II.

Since *Mader*, district courts have analyzed the proof-of-authority requirement and drawn a clear line between what does and does not qualify as "evidence" of authority under § 14.2(a). The United States cited many of these cases in its opening brief. *See* Dkt. 22, at

8-9. Johns does not confront them in her opposition, let alone explain how her approach to proof-of-authority is viable given that courts insist on extrinsic evidence of a claimant's (or her attorney's) authority. To pick a few examples:

- In *Pretends Eagle v. United States*, signature blocks identifying claimants as "representatives" and an attorney's letters to the agency identifying claimants as "special administrators" did not supply proof of the claimants' statuses. 692 F. Supp. 3d 864, 876-78 (D.S.D. 2023).

- In *Pipes v. Kirksville Missouri Hospital Company*, an attorney-client contract was necessary to prove the attorney's authority, while the attorney's repeated written statements regarding the claimants' status as parents and legal guardians did not prove the claimants' status as court-appointed guardians. 2022 U.S. Dist. LEXIS 229569, at *4-5, *14-16 (E.D. Mo. Dec. 21, 2022).

- In *Hennager v. United States*, an attorney's cover letter identifying the claimant as "the grandfather and guardian" was insufficient to prove the claimant's status. 2020 U.S. Dist. LEXIS 223334, at *4-5 (D.N.D. Nov. 30, 2020).

- In *Runs After v. United States*, a retainer agreement signed by the claimant and her attorney was required to prove the attorney's authority, while the attorney's written statements regarding the claimant's status as a "legal custodian" were insufficient to prove the claimant's authority. 2012 U.S. Dist. LEXIS 100265, at *7, *23-24 (D.S.D. July 18, 2012), *aff'd*, 511 F. App'x 596 (8th Cir. 2013).

Each of these cases involved at least one unsworn and unsupported statement from a lawyer who represented a claimant. And each of these cases was dismissed because § 14.2(a) demands evidence beyond an attorney's cover letter or other correspondence. That rule dooms Johns's FTCA claims in this case.

District courts outside the Eighth Circuit have confronted nearly identical facts and expressly held that statements from lawyers are not evidence of authority. Take *Erway v. United States Transportation Security Administration*, in which an attorney's demand letter was insufficient evidence of his authority to act on the claimant's behalf and "rendered her

would-be administrative claim incompletely presented within the meaning of 28 C.F.R. § 14.2(a).” 2020 U.S. Dist. LEXIS 202959, at *15 (E.D.N.C. Oct. 29, 2020). As the *Erway* court explained:

> Plaintiff next argues that Plaintiff's counsel's signature on his submission, in which he certifies that he has the authority to represent Plaintiff in connection with her claim, satisfies the evidence-of-representative-authority element. But Plaintiff's counsel's certification is not sworn, and an attorney's unsworn statement does not constitute evidence of anything.

Id. at *13 (citations omitted). A different district court reached the same result in *Osmon v. United States*, where an attorney signed an administrative claim and presented it to an agency, purportedly with the claimant's authority and on her behalf. 2020 U.S. Dist. LEXIS 252435, at *7 (W.D.N.C. Dec. 7, 2020). Because the claimant did not sign the administrative claim herself or provide other evidence of the attorney's authority to act on her behalf, the *Osmon* court held that the plaintiff's FTCA claim was not properly presented. *Id.* at *11-12; *see also Del Valle v. Veterans Admin., Kingsbridge*, 571 F. Supp. 676, 678 (S.D.N.Y. 1983) (documents submitted by the claimant's lawyer—“a claim form that he signed, another that was unsigned, and a letter signed only by him stating that he represented the claimants—provided a wholly insufficient basis for the VA to move forward in processing the claim forms”); *Triplett v. United States*, 501 F. Supp. 118, 118 (D. Nev. 1980) (letter from the claimant's lawyer on firm letterhead and reciting that the firm represented the claimants was insufficient evidence of the lawyer's authority).

One other out-of-circuit decision deserves mention because it underscores what evidence complies with § 14.2(a) and directly refutes Johns's arguments in this case. In *Jackson v. United States*, a lawyer submitted an administrative claim to Immigration and

Customs Enforcement on the claimant's behalf. 2013 U.S. Dist. LEXIS 12149, at *2-3 (E.D. Mich. Jan. 30, 2013), *aff'd*, 751 F.3d 712 (6th Cir. 2014). Although the claimant later changed lawyers, the agency sent its determination letter to the first lawyer. *Id.* at *4-5. The issue in *Jackson* was the timeliness of the plaintiff's FTCA lawsuit, but the court explained in passing that the second lawyer "never provided ICE with 'evidence' that he actually represented Plaintiff as is required when a claim is presented to an agency under the applicable regulations." *Id.* at *12 (citing 28 C.F.R. § 14.2(a)). That was in contrast to the first lawyer, who "complied with the regulations when he submitted a letter stating that he represented plaintiff and swore, *under penalty of perjury*, that he was the 'attorney for claimant.'" *Id.* (emphasis added). The *Jackson* court was spot-on: the first attorney's sworn statement was evidence of his authority to represent the claimant, and the second attorney's remarks during a phone call were not. In this case, the cover letter from Johns's attorney was not made under penalty of perjury and was therefore not evidence of his authority or of Johns's authority.

Against the weight of these cases, Johns is adamant that a "letter of representation [was] sufficient to establish Attorney Nelson's authority to submit the claim." Dkt. 28, at 6-7. But Johns's own cited decision show otherwise. For example, she points to *Puetz v. United States*, which granted the United States' motion to dismiss an FTCA action because a cover email from the claimant's lawyer was not evidence of the lawyer's authority to sign and present an administrative claim. 2023 U.S. Dist. LEXIS 109379, at *26 (D. Minn. June 26, 2023), *aff'd*, 2024 U.S. App. LEXIS 9729 (8th Cir. Apr. 23, 2024) (per curiam). The *Puetz* court ***rejected*** the argument Johns now advances; namely, that a lawyer's written

representations are evidence of authority just by virtue of the general duty of candor that attorneys have. *Id.* at *24-25. Furthermore, Johns overlooks the similarities between her attorney's cover letter in this case and the cover email at issue in *Puetz* (excerpted below):

From: Michael D.J. Eisenberg
To: Stacey Jeffrey; DVA Evidence Intake Center (EIC - GA); 12024956307@efaxsend.com; OGC 021B
Cc: Lohnes Jennifer Lea; Puetz John
Subject: [EXTERNAL] FTCA claim for John T. Puetz
Date: Monday, January 3, 2022 10:55:22 PM
Attachments: 2022.01.03, SF-95, Puetz, J. (FTCA).pdf
Document, GF Statement, Puetz, J. (VA).pdf
2021.12.15, Second Letter in Support from Penderson, K., Puetz, J. (VAFTCA).pdf
2021.12.17, Expert letter, Puetz, J. (VAFTCA).pdf

Dear VA,

Ms. Lohnes (identified by the VA has Mr. Puetz's representative) and myself file the following FTCA claim. Enclosed/following, please find Mr. Puetz's SF-95, Expert Letter in Support, and two Supporting Letters from Ms. Penderson.

Please confirm receipt.

Thank you.

Have a Happy Holiday Season and a Happy New Year!

Sincerely,

Michael Eisenberg

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No. 22-cv-02870-SRN/DTS, ECF No. 9-1 (filed March 13, 2023).

There is no substantive difference between the email from Mr. Puetz's lawyer and the cover letter that Johns's attorney sent to the DOI in this case. *See* Dkt. 23-1, at 1-2. Both communications came directly from attorneys, both purported to represent the claimants, and both attached SF-95s signed by the attorneys rather than by the claimants. Neither submission included something signed by the claimant and authorizing an attorney

to act on the claimant's behalf.[1] That led the *Puetz* court to conclude that it "need not split hairs about the sufficiency of the evidence of authority because Mr. Puetz submitted no evidence at all." 2023 U.S. Dist. LEXIS 109379, at *26. The Eighth Circuit agreed on appeal and denied Mr. Puetz's request for en banc review. 2024 U.S. App. LEXIS 15268 (8th Cir. June 24, 2024).

Johns also relies on *Rollo-Carlson*, which is detrimental to her argument that a letter of representation qualifies as proof of authority. The document to which this Court referred in *Rollo-Carlson* was a letter ***signed by the claimants***. No. 18-cv-2842-ECT-ECW, ECF No. 10-2 (D. Minn. filed Dec. 4, 2018). The letter memorialized that the claimants had hired the lawyer's firm and authorized the lawyer to sign and present an SF-95 on their behalf. *Id.* This Court therefore explained that the letter was the evidence "verifying that [the lawyer] was retained to prosecute Mr. & Mrs. Douglas Carlson's claim for the wrongful death of their son." *Rollo-Carlson v. United States*, 2019 U.S. Dist. LEXIS 43796, at *9 (D. Minn. Mar. 18, 2019), *aff'd*, 971 F.3d 768 (8th Cir. 2020). The United States agrees with Johns that *Rollo-Carlson* as instructive: the letter of representation in that case is exactly the kind of evidence that Johns's attorney needed to provide to the DOI to establish his authority to sign and present an administrative claim on John's behalf. The absence of any such letter is what requires dismissal of Counts I and II.

[1] The email in *Puetz* came closer to providing proof of authority because the lawyer at least copied the claimant on his communication. Here, in contrast, there is no indication that Johns reviewed or received the cover letter and SF-95. *See* Dkt. 23-1.

That leaves *Mader*. As discussed above, Johns overlooks the procedural and factual background that led the district court to dismiss the FTCA claims in that case. Moreover, Johns's attempt to distinguish the Eighth Circuit's en banc decision is not persuasive because she misreads the opinion in two respects.

First, Johns acknowledges that the court was concerned about problems arising from attorneys presenting administrative claims on behalf of clients who had not authorized them to do so. Dkt. 28, at 12. But according to Johns, her case is different because her attorney "provided a clear and explicit letter of representation that unequivocally established his authority to act on behalf of Ms. Johns." *Id.* That is incorrect. A "letter of representation"—like the one this Court had in mind in *Rollo-Carlson* and *Puetz*—is a letter signed by the claimant and expressly authorizing her lawyer to present an administrative claim. Johns's attorney did not provide the DOI with a letter of representation or any evidence of Johns's express authorization for him to act on her behalf. He merely wrote in a letter (without providing any supporting documentation) that he represented Johns and that Johns had been appointed as a trustee. *See* Dkt. 23-1, at 1. *Mader* appropriately recognized the danger of forcing agencies to blindly accept these kinds of statements, which is why the Eighth Circuit requires claimants and their attorneys to provide ***evidence*** of authority to act. 654 F.3d at 803.

Johns's second point is that her attorney submitted materials identifying her by name and accurately summarizing the claim. Dkt. 28, at 12. That observation does not distinguish Johns's case from *Mader*. The Eighth Circuit insisted on proof of authority even though the lawyers who attempted to present duplicative claims on behalf of the same

claimants following Hurricane Katrina were presumably able to name those claimants and summarize their claims. *Mader*, 654 F.3d at 803.

* * *

The case law analyzing the proof-of-authority requirement is overwhelming and forecloses Johns's theory that unsworn and unsupported statements from her attorney were enough to satisfy the requirement. Because Johns's entire opposition starts from this faulty premise, the Court should reject her arguments and dismiss Counts I and II as barred by sovereign immunity.

II. Johns's Other Arguments

Johns raises two other arguments against dismissal. Neither has merit, and neither matters for purposes of the United States' motion to dismiss if the Court agrees that written statements from Johns's attorney are not evidence of authority required under *Mader* and 28 C.F.R. § 14.2(a). For the sake of completeness, the United States will address these arguments below.

A. Disclosure of Johns's Status

Johns says that she disclosed her status as a court-appointed trustee to the DOI. Dkt. 28, at 7-9. But the "disclosure" to which Johns refers was a single sentence, buried in a demand letter addressed to someone else, that pre-dated the administrative claim by almost two months. *See* Dkt. 23-1, at 7. Johns has not cited any cases holding that such a vague and isolated sentence satisfies an FTCA claimant's obligation to disclose her status and provide evidence of her authority to pursue a wrongful death claim under Minnesota

law. Thus, even if theoretically possible for an attorney's written statements to satisfy the proof-of-authority requirement, the sentence on which Johns relies falls short.

The cover letter from Johns's attorney did not highlight the supposed disclosure, stating only that about 60 pages of exhibits comprising "the demand package sent to the Liability Adjustor, Tribal First" were enclosed. *Id.* at 1. The sentence was in a different letter, addressed to a claims adjuster for Tribal First. *Id.* at 7-10. That letter discussed a claim under the Red Lake Nation's insurance policy, not an administrative tort claim under the FTCA. *Id.* The SF-95 that Johns's attorney sent to the DOI two months later did not refer to the sentence from the demand letter sent to Tribal First, nor did the form give the DOI any indication that Johns had been appointed as a wrongful death trustee. Quite the opposite: the form identified Johns only as the "Mother of Deceased Joseph Fairbanks." *Id.* at 3. In other words, Johns is wrong that she "clearly disclos[ed] her role as trustee." Dkt. 28, at 8.

Conspicuousness issues aside, the sentence on which Johns relies was hardly adequate to prove her authority to settle the wrongful death claim at issue in this case. Her attorney wrote that "Johns has been appointed as trustee in a potential wrongful death case against the Red Lake Tribe referenced above." Dkt. 23-1, at 7. The demand letter did not enclose any appointment order, list the date of Johns's appointment, provide a case number for the appointment proceedings, or identify the appointing court. Those omissions were problematic for several reasons. For instance, the Red Lake Nation has its own tribal court system that "provides both criminal and civil services for the band members." *See* https://www.redlakenation.org/courts/. Those services include adjudicating guardianship

petitions and probate issues, in addition to resolving standard civil suits. *Id.* The sentence in the demand letter was not evidence that Johns had been appointed by a *Minnesota* court under Minnesota Statutes § 573.02, rather than appointed by a tribal court to some similar status. The explicit mention of a claim "against the Red Lake Tribe" certainly did not indicate that Johns was pursuing a wrongful death claim against the United States under the FTCA, let alone that Johns had the legal authority to do so. Likewise, Minnesota law differentiates between wrongful death trustees and personal representatives in probate proceedings; the two are often mixed-up. *See, e.g.*, *Mattingly v. Am. Family Ins.*, 6 N.W.3d 787, 791 (Minn. Ct. App. 2024). Although Johns's attorney used the word "trustee," he did not refer to an appointment by a Minnesota court or mention Minnesota Statutes § 573.02. Dkt. 23-1, at 7. Coupled with the SF-95's reference to Johns only in her capacity as the "Mother of the Deceased," those omissions left the DOI without evidence proving that Johns had been appointed to pursue a wrongful death claim under Minnesota law.

The sentence regarding John's appointment was not factually accurate, either. By its terms, the order to which Johns says her attorney was referring made her appointment contingent "upon the filing of oath pursuant to [Minnesota Statutes §] 358.06." Dkt. 23-3, at 3. The docket sheet that Johns provided to this Court with her opposition shows that no oath had been filed as of the date of the demand letter or the date on which Johns's attorney sent the administrative claim to the DOI. Dkt. 29-1, at 3. In fact, Johns still has not filed the oath to this day. True, Johns correctly observes that the oath is not a jurisdictional prerequisite to filing a wrongful death action in state court. *See Ariola v. City of Stillwater*,

889 N.W.2d 340, 353 (Minn. Ct. App. 2017).[2] But this is not state court, and Johns was not filing a wrongful death action. She was presenting an administrative claim to a federal agency, and Johns needed to prove that she had the authority to settle the claim. *See Mader*, 654 F.3d at 801. The order appointing Johns and giving her the required authority did not take effect until she filed an oath, and the demand letter incorrectly stated otherwise to the DOI.

This Court should not lose sight of how easy it would have been for Johns to provide proof of her authority, rather than rely after-the-fact on an obscure sentence in a demand letter that was not even addressed to the DOI. The presentment and proof-of-authority requirements are "certainly not a trap for the unwary [and] the risk that a lawyer will be unable to understand the exhaustion requirement is virtually nonexistent." *McNeil*, 508 U.S. at 113. As the Eighth Circuit has rightly observed, "the presentation of such evidence is far from burdensome." *Mader*, 654 F.3d at 804. Here, Johns was represented by an attorney, and she apparently had in-hand a state court order appointing her as a wrongful death trustee. Johns simply failed to follow the rules requiring her to provide that order to the DOI, which means her current FTCA claims must be dismissed. While the result may seem harsh, the Supreme Court has long held that "in the long run, experience teaches that strict adherence to the procedural requirements specified by the legislature is the best guarantee of evenhanded administration of the law." *McNeil*, 508 U.S. at 113 (citations and internal quotation marks omitted).

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[2] Johns's opposition has the wrong citation for *Ariola*. Dkt. 28, at 9. The decision is reported at 889 N.W.2d 340.

B. Reliance on the DOI to Find Proof of Authority

Johns also argues that it was the DOI's job find proof of her authority and proof of her attorney's authority. According to Johns, that meant the DOI had to: (1) sift through publicly available court dockets; (2) affirmatively ask for more information from Johns and her attorney; and (3) avoid communicating with Johns's attorney until verifying his authority to act on her behalf. But all of this would flip the law regarding presentment on its head, and Johns tellingly does not have any authority that supports doing so. Indeed, courts consistently reject these sorts of attempts to blame a federal agency for the claimant's own failure to properly present an administrative claim. This Court should follow suit.

It is disingenuous to suggest that the DOI could have consulted public dockets to confirm Johns's authority and her attorney's authority. Johns never provided the DOI with a case number for her appointment proceedings, and she never identified the court that had appointed her as a wrongful death trustee. The first time she gave that information to the DOI was in a letter sent to the agency three months after Johns filed this case, at which point her administrative claim had long since been denied.[3] Dkt. 23, ¶¶ 5-9; Dkt. 23-3. In any event, it does not matter whether the agency could have somehow found the order on its own. The Eighth Circuit does not recognize any sort of "actual notice" exception to the requirement that a claimant herself must provide proof of her authority and her lawyer's

[3] Johns tries to downplay the letter, claiming it was "simply to supplement the record." Dkt. 28, at 10. Yet her own attorney recognized at the time that providing the state court's appointment order was necessary to "complete" Johns's FTCA documentation. Dkt. 23-3, at 1.

authority. *See Rollo-Carlson*, 971 F.3d at 771 ("To the extent she argues that she is excused from her obligation to show she was the appointed trustee because the VA had evidence indicating she had authority to act on Jeremiah's behalf in another capacity and in other contexts, the presentment requirement contains no such exception.").

Johns does not fare any better by complaining that the DOI never asked her for more information or indicated that her evidence was not "satisfactory to the Government."[4] Time and again, courts have rejected this exact excuse. Take *Hennager*, where the plaintiff tried to avoid dismissal "because the United States did not request proof of his authority to bring the claim." 2020 U.S. Dist. LEXIS 224047, at *14 (D.N.D. Nov. 4, 2020), *adopted by*, 2020 U.S. Dist. LEXIS 223334 (D.N.D. Nov. 30, 2020). The court made short work of that argument, pointedly concluding that "it is not the agency's burden to solicit evidence of a representative's authority to bring a claim." *Id.* Another example is *Pretends Eagle*, in which the court dismissed an FTCA action after holding that it did not matter whether the federal agency requested proof of authority from the claimants. 692 F. Supp. 3d at 878 ("The failure of the Tort Practice Branch to request proof of authority from Wilcox and Red Elk does not waive the requirement or preclude the United States from now arguing that Plaintiffs failed to meet their burden."). These decisions correctly applied the Eighth Circuit's instruction that "strict compliance with § 2675(a) is a jurisdictional prerequisite

[4] Johns makes much ado over the phrase "satisfactory to the Government," which appears in the instructions of the SF-95. That language does not come from § 14.2(a) and is not part of the proof-of-authority requirement that *Mader* holds to be jurisdictional. Instructions on a form cannot modify the terms and conditions of a waiver of the United States' sovereign immunity, which must be "strictly construed, in terms of its scope, in favor of the sovereign." *Lane v. Pena*, 518 U.S. 187, 192 (1996).

to suit under the FTCA." *Mader*, 654 F.3d at 805; *see also Puetz*, 2023 U.S. Dist. LEXIS 109379, at *27 ("[T]he Eighth Circuit has time and again emphasized that the FTCA presentment conditions are construed narrowly and can only be satisfied with 'strict compliance.'" (citations omitted)).

Finally, Johns contends that the DOI implicitly accepted her attorney's written statements as adequate proof of authority by responding to her administrative claim and denying it on the merits. That is basically a waiver argument: Johns believes that the DOI could (and did) waive parts of the presentment requirement. As an initial matter, the DOI's response to Johns's administrative claim said nothing about proof of authority. Dkt. 23-2. The DOI never told Johns that she had submitted adequate proof—or any proof, for that matter—of her authority and her attorney's authority. Johns nevertheless places great significance on the subject line and opening paragraph of the DOI's response, both of which referred to "Your Client the Estate of Joseph Fairbanks." Dkt. 28, at 13. But that language only highlights the problem. The "estate of Joseph Fairbanks" is not the same as "Nicole Johns;" the "estate of Joseph Fairbanks" cannot be appointed as a wrongful death trustee under Minnesota Statutes § 573.02; the "estate of Joseph Fairbanks" was not the claimant listed on the SF-95; and "the estate of Joseph Fairbanks" is not who Johns's attorney claimed to represent in his cover letter. In short, Johns is wrong that the DOI's response to her administrative claim acknowledged proof of her authority or her attorney's authority.

No matter what the letter said or implied, Johns misunderstands a few fundamental principles that foreclose her argument. Presentment of a proper administrative claim is a

condition of the United States' waiver of sovereign immunity. *See* 28 U.S.C. § 2675(a); *McNeil*, 508 U.S. at 112. In the Eighth Circuit, presentment of a proper administrative claim requires providing proof of authority. *See Mader*, 654 F.3d at 803-04. The DOI and its employees cannot change these requirements, relax them, or outright excuse a claimant from complying with them. That power belongs only to Congress, and "[i]t has long been settled that officers of the United States possess no power through their actions to waive an immunity of the United States or to confer jurisdiction on a court in the absence of some express provision by Congress." *United States v. N. Y. Rayon Importing Co.*, 329 U.S. 654, 660 (1947). This explains why courts do not excuse an FTCA claimant's failure to provide proof of authority even if a federal agency adjudicates her administrative claim on the merits and sends a determination letter to her or her lawyer. *See, e.g.*, *Rollo-Carlson*, 971 F.3d at 771; *Ellis v. United States*, 2021 U.S. Dist. LEXIS 95710, at *4-5 (D. Neb. May 20, 2021); *Runs After*, 2012 U.S. Dist. LEXIS 100265, at *27. Johns cannot rely on the DOI's denial letter to overcome the fact that she failed to comply with the proof-of-authority requirements.

CONCLUSION

Johns did not present a proper administrative claim before filing suit because she never provided evidence of her authority to pursue a wrongful death claim and because her attorney never provided evidence of his authority to act on Johns's behalf. Either proof-of-authority deficiency independently forecloses Counts I and II. Because Johns has failed to carry her burden to prove compliance with a waiver of sovereign immunity, this Court should grant the United States' motion to dismiss Johns's FTCA claims for lack of subject

matter jurisdiction. And because those are the only claims that remain against the United States, the Court should enter judgment and dismiss the federal government as a party to this case.

Respectfully submitted,

Dated: September 4, 2024

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s/ Trevor Brown

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