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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

MARIA DEL SOCORRO QUINTERO
PEREZ, BRIANDA ARACELY
YANEZ QUINTERO, CAMELIA
ITZAYANA YANEZ QUINTERO,
and J.Y., a Minor,

CASE NO. 13cv1417-WQH-BGS
ORDER

Plaintiffs,

vs.

DORIAN DIAZ, *et al*,

Defendants.

HAYES, Judge:

The matters before the Court are the Motion to Dismiss filed by Defendants Dorian Diaz and Michael J. Fisher (ECF No. 169) and the Motion to Dismiss filed by Defendant United States of America (ECF No. 170).

I. Background

On June 17, 2013, Plaintiffs commenced this action by filing a Complaint in this Court. (ECF No. 1). Plaintiffs alleged their claims were authorized by *Bivens v. Six Unknown Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971). *Id.* at 9-10. On December 18, 2013, the Court granted the parties' joint motion for leave to amend the Complaint. (ECF No. 24). On January 2, 2014, Plaintiffs filed a First Amended Complaint. (ECF No. 25).

1 On November 19, 2014, the Court granted Plaintiffs' motion for leave to file a
2 Second Amended Complaint. (ECF No. 60). On November 25, 2014, Plaintiffs filed
3 their Second Amended Complaint. (ECF No. 61). On May 1, 2015, the Court issued
4 an order granting in part and denying in part Defendants' motion to dismiss. (ECF No.
5 77).

6 On December 9, 2015, the parties filed a joint motion requesting permission to
7 join the third minor child of Plaintiff Del Socorro Quintero Perez to this action. (ECF
8 No. 104). On December 10, 2015, the Court granted the joint motion to allow the minor
9 child to be added into this litigation. (ECF No. 107). On December 22, 2015, Plaintiffs
10 filed a Third Amended Complaint. (ECF No. 115). On March 22, 2016, the Court
11 issued an order granting in part and denying in part Defendants' motion to dismiss
12 and/or strike portions of Plaintiffs' Third Amended Complaint. (ECF No. 138)

13 On June 30, 2016, Plaintiffs filed the Motion for Leave to File a Fourth Amended
14 Complaint. (ECF No. 159). On September 21, 2016, the Court granted Plaintiffs'
15 Motion for Leave to File a Fourth Amended Complaint. (ECF No. 164). On September
16 22, 2016, Plaintiffs filed the Fourth Amended Complaint. (ECF No. 165).

17 On October 20, 2016, Defendants Dorian Diaz and Michael J. Fisher filed a
18 Motion to Dismiss Plaintiffs' Fifth Amendment claims alleged in the Fourth Amended
19 Complaint. (ECF No. 169). On October 20, 2016, Defendant United States of America
20 filed a Motion to Dismiss Plaintiffs' Federal Tort Claims Act ("FTCA") claims alleged
21 in the Fourth Amended Complaint. (ECF No. 170). On November 14, 2016, Plaintiffs
22 filed a response in opposition to both Motions to Dismiss. (ECF No. 171). On
23 November 21, 2016, Defendant United States of America filed a reply (ECF No. 172)
24 relating only to the Motion to Dismiss Plaintiffs' FTCA claims filed by Defendant
25 United States of America.

26 **II. Allegations of the Fourth Amended Complaint (ECF No. 165)**

27 "At dusk on June 21, 2011," Jesus Alfredo Yañez Reyes ("Yañez") "and Jose
28 Ibarra-Murietta ("Murietta") crossed the border from Mexico to the United States

1 together . . . through a small hole in the primary border fence[.]” (ECF No. 165 at ¶ 27).
2 After going through the hole in the primary fence, Yañez and Murietta allegedly
3 encountered Border Patrol Agents Nelson and Diaz. *Id.* at ¶ 28-33. Agent Nelson
4 allegedly got into a physical altercation with Murietta. *Id.* at ¶ 34-37. While “Agent
5 Nelson and Murietta were grappling in the road[.]” Yañez allegedly climbed into a
6 nearby tree “that leaned against the southern side of the primary fence[.]” *Id.* at ¶ 37.

7 Plaintiffs allege that Agent Diaz shot Yañez in the head as he sat in the tree
8 overlooking the primary fence. *Id.* at ¶ 41. Plaintiffs allege that just prior to the
9 shooting, Yañez allegedly threw one or two rocks and a “nail-studded board” at Agent
10 Nelson while sitting in the tree. *Id.* at ¶ 38-39. Plaintiffs allege that prior to the
11 shooting, Yañez also shouted “that he was going to use his cellphone to take video and
12 pictures of the beating” of Murietta. *Id.* at ¶ 52.

13 Plaintiffs allege that the Agents used “excessive, lethal force against Yañez”
14 pursuant to “a Rocking Policy that has the imprimatur of the highest-ranking
15 [Department of Homeland Security] and [Customs and Border Protection] officials.”
16 *Id.* at ¶ 62. Plaintiffs allege that “[p]ursuant to this unlawful Rocking Policy, Border
17 Patrol agents along the southern border regularly use excessive, lethal force against
18 persons of perceived Hispanic descent and Mexican nationality.” *Id.* at ¶ 63.

19 Plaintiffs Maria Del Socorro Quintero Perez, the widow of Yañez; Camelia
20 Itzayana Yañez Quintero and Brianda Aracely Yanez Quintero, the daughters of Yañez;
21 and JY, the minor child of Yañez, bring the following four claims for relief in the
22 Fourth Amended Complaint: (1) Fourth Amendment unreasonable seizure or Fifth
23 Amendment due process against Defendant Fisher, “Chief of the Border Patrol from
24 May 2010 to November 2015”; (2) Fourth Amendment unreasonable seizure or Fifth
25 Amendment due process against Defendant Agent Diaz; (3) negligence pursuant to the
26 FTCA, 28 U.S.C. § 1346(b), Cal. Civ. Pro. sections 377.30 *et. seq.*, and 377.60 *et. seq.*
27 against Defendant United States of America; and (4) Negligent Training and
28 Supervision pursuant to the FTCA, 28 U.S.C. § 1346(b), Cal. Civ. Pro. sections 377.30

1 *et. seq.*, and 377.60 *et. seq.* against Defendant United States of America. *Id.* at ¶¶ 1-4,
2 7, 23, 138-63.

3 **III. Plaintiffs' Fifth Amendment Claims**

4 Defendants Diaz and Fisher contend that Plaintiffs' Fifth Amendment claims
5 against them in the Fourth Amended Complaint should be dismissed based on the law
6 of the case doctrine. (ECF No. 169-1 at 2). Defendants Diaz and Fisher contend that
7 this Court has previously dismissed the Fifth Amendment claims that Plaintiffs have re-
8 included in the Fourth Amended Complaint.

9 Plaintiffs contend that the Court previously dismissed Plaintiffs' Fifth
10 Amendment claims without prejudice, and the Court of Appeals "requires that Plaintiffs
11 re-plead claims dismissed without prejudice in order to preserve those claims'
12 dismissals on appeal." (ECF No. 171 at 25). Plaintiffs contend they added the Fifth
13 Amendment claims in the Fourth Amended Complaint "only for the purpose of
14 appellate preservation and that the amendment is not intended to overcome previous
15 orders of dismissal." *Id.*

16 On September 3, 2014, the Court granted in part and denied in part Defendants'
17 motion to dismiss Plaintiffs' First Amended Complaint. (ECF No. 46). The Court
18 ordered that "Plaintiffs have failed to state a viable Due Process Claim as to any
19 defendant" based on the Fifth Amendment due process claims Plaintiffs included in the
20 First Amended Complaint, the Court and dismissed those claims – including claims
21 brought by Defendants Diaz and Fisher – without prejudice. (ECF No. 46 at 23-24, 26).

22 On January 19, 2016, Defendants moved the Court to dismiss and/or strike
23 portions of the Plaintiffs' Third Amended Complaint that the Court had previously
24 dismissed without prejudice, including Fifth Amendment claims against Defendants
25 Diaz and Fisher. (ECF No. 125-1 at 7). On March 22, 2016, the Court granted in part
26 and denied in part Plaintiffs' motion and held that "[t]he claims in the Second Amended
27 Complaint that were dismissed without prejudice remain dismissed without prejudice
28 in the Third Amended Complaint." (ECF No. 138 at 3).

1 Plaintiffs' Fourth Amended Complaint contains Fifth Amendment due process
2 claims against Defendants Diaz and Fisher. (ECF No. 165). The claims in the original
3 Complaint, the First Amended Complaint, the Second Amended Complaint, and the
4 Third Amended Complaint previously dismissed without prejudice that are "re-plead
5 without amendment" in the Fourth Amended Complaint are dismissed without prejudice
6 in the Fourth Amended Complaint. *See* ECF No. 138 at 3.

7 **IV. Plaintiffs' FTCA Claims**

8 Under 28 U.S.C. § 2401(b), "[a] tort claim against the United States shall be
9 forever barred . . . unless action is begun within six months after the date of mailing, by
10 certified or registered mail, of notice of final denial of the claim by the agency to which
11 it was presented." 28 U.S.C. § 2401(b). In this case, United States Customs and Border
12 Protection delivered the letter denying Plaintiffs' administrative claim against the
13 United States on May 10, 2012. (ECF No. 30 at 2; Flood Decl. at ¶ 6). Plaintiffs
14 therefore had until November 10, 2012 to timely file an action asserting their FTCA
15 claims under 28 U.S.C. § 2401(b). Plaintiffs filed the original Complaint in this action
16 on June 17, 2013, and Plaintiffs did not include any FTCA claims; *see* ECF No. 1.
17 Therefore, the statute of limitations bars Plaintiffs' newly-asserted FTCA claims in the
18 Fourth Amended Complaint filed on September 22, 2016.

19 **i. Equitable Tolling**

20 **1. Contentions of the Parties**

21 Plaintiffs contend they are entitled to equitable tolling of the FTCA's statute of
22 limitations. Plaintiffs contend that they exercised "reasonable diligence" in not filing
23 their FTCA claims in the original Complaint. (ECF No. 171 at 15). Plaintiffs contend
24 that this case presents "extraordinary circumstances" warranting equitable tolling
25 because "Ninth Circuit law . . . made it irrational for Plaintiffs to pursue FTCA claims"
26 at the time they filed the original Complaint. *Id.* at 16-17. Plaintiffs contend that the
27 Court of Appeals' decision in *Pesnell v. Arsenault*, 543 F.3d 1038 (9th Cir. 2008)
28 would have required the Court to dismiss Plaintiffs' "*Bivens* claims based on the same

1 underlying facts” as their FTCA claims if the Court dismissed Plaintiffs’ FTCA claims
2 based on an FTCA exception, “such as under the foreign country exception[.]” *Id.* at
3 19, 23-24. Plaintiffs contend that extraordinary circumstances prevented them from
4 bringing their FTCA claims until June 2016, when the Supreme Court issued its
5 decision in *Simmons v. Himmelreich*, 136 S. Ct. 1843 (2016) holding that an FTCA
6 dismissal based on an exception listed in 28 U.S.C. § 2680 does not qualify as a
7 “judgment” under the FTCA’s judgment bar provision, 28 U.S.C. § 2676. *Id.* at 6-7.

8 Defendant contends that controlling case law at the time Plaintiffs filed the
9 original Complaint did not prevent Plaintiffs from filing their FTCA claims in 2013.
10 (ECF No. 170-1 at 12). Defendant contends that the decision of the Court of Appeals
11 for the Ninth Circuit in *Kreines v. United States*, 959 F.2d 834 (9th Cir. 1992) has
12 always permitted Plaintiffs to file their FTCA and *Bivens* claims in one action without
13 risk of dismissal under the judgment bar. *Id.* at 8-9, 11-12. Defendant contends that
14 *Kreines* involved FTCA and *Bivens* claims asserted in the same action – and the
15 decision would have only required dismissal of Plaintiffs’ *Bivens* claims to prevent dual
16 recovery. Defendant contends that the Supreme Court’s decision in *Simmons* did not
17 affect the application of *Kreines* to this action. Defendant contends that the FTCA’s
18 statute of limitations should not be equitably tolled to permit Plaintiffs to now assert
19 their FTCA claims.

20 **2. Applicable Law**

21 The party seeking equitable tolling “bears a heavy burden to show that [they are]
22 entitled to equitable tolling, ‘lest the exceptions swallow the rule[.]’” *Rudin v. Myles*,
23 781 F.3d 1043, 1055 (9th Cir. 2014) (quoting *Bills v. Clark*, 628 F.3d 1092, 1097 (9th
24 Cir. 2010)). The Supreme Court has held that the equitable tolling doctrine is “to be
25 applied sparingly.” *Nat’l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 113 (2002).

26 A “litigant is entitled to equitable tolling of a statute of limitations only if the
27 litigant establishes two elements: (1) that he has been pursuing his rights diligently, and
28 (2) that some extraordinary circumstance stood in his way and prevented timely filing.”

1 *Menominee Indian Tribe of Wis. v. United States*, 136 S. Ct. 750, 755 (2016) (citation
2 omitted). The two components required to establish equitable tolling are “‘elements,’
3 not merely factors of indeterminate or commensurable weight.” *Id.* at 756. “[W]e have
4 treated the two requirements as distinct elements in practice, too, rejecting requests for
5 equitable tolling where a litigant failed to satisfy one without addressing whether he
6 satisfied the other.” *Id.*

7 Equitable tolling of a statute of limitations “is available in suits against the
8 Government.” *United States v. Kwai Fun Wong*, 135 S. Ct. 1625, 1633 (2015). The
9 Supreme Court has held that the FTCA’s six-month statute of limitations, 28 U.S.C. §
10 2401(b), is “nonjurisdictional and subject to equitable tolling.” *Id.* at 1638. “The time
11 limits in the FTCA are just time limits, nothing more. Even though they govern
12 litigation against the Government, a court can toll them on equitable grounds.” *Id.* at
13 1633.

14 The first “diligence prong . . . covers those affairs within the litigant’s control[.]”
15 *Menominee Indian Tribe*, 136 S. Ct. at 756. The diligence element applies to prevent
16 equitable tolling “when a litigant was responsible for its *own* delay.” *Id.* “The standard
17 for reasonable diligence does not require an overzealous or extreme pursuit of any and
18 every avenue of relief. It requires the effort that a reasonable person might be expected
19 to deliver under his or her particular circumstances.” *Doe v. Busby*, 661 F.3d 1001,
20 1015 (9th Cir. 2011). The Court of Appeals has held that “[c]entral to the analysis is
21 whether the plaintiff was ‘without any fault’ in pursuing his claim.” *Kwai Fun Wong*
22 *v. Beebe*, 732 F.3d 1030, 1052 (9th Cir. 2013), *aff’d*, *Kwai Fun Wong*, 135 S. Ct. at
23 1630 (citation omitted).

24 The second prong requires the party seeking equitable tolling to establish “that
25 some extraordinary circumstance stood in [their] way and prevented timely filing” of
26 their claims. *Menominee Indian Tribe*, 136 S. Ct. at 755 (citation omitted). This
27 element “is meant to cover matters outside” of the litigant’s “control.” *Id.* at 756. The
28 extraordinary circumstances prong may be satisfied by demonstrating “[t]he Supreme

1 Court’s subsequent overruling of . . . controlling precedent” that a litigant relied on in
2 delaying the filing of an action in federal court. *Harris v. Carter*, 515 F.3d 1051, 1057
3 (9th Cir. 2008).

4 **3. Reasonable Diligence**

5 In the original Complaint, Plaintiffs alleged a claim for declaratory relief
6 requesting the Court to declare that “in the event of a judgment on Plaintiffs’ potential
7 claims under the FTCA . . . the terms of 28 U.S.C. § 2676 will not bar Plaintiffs’ *Bivens*
8 claims.” (ECF No. 1 at ¶ 158). Plaintiffs alleged that they “have no ability to test the
9 adverse and erroneous judgment-bar case law without risking the barring of their *Bivens*
10 claims[,]” and “[b]ut for the adverse and erroneous case law under 28 U.S.C. § 2676,
11 Plaintiffs would include” FTCA claims “in this Complaint[.]” *Id.* at ¶ 155.

12 In *Kwai Fun Wong*, the plaintiff “inform[ed] the parties and the court of her
13 desire to file an FTCA claim well before the filing deadline” and before filing the claim
14 in the same action. 732 F.3d at 1053. The plaintiff filed a motion seeking leave to
15 amend her complaint to add an FTCA claim less than three weeks before the federal
16 agency denied her claim. *Id.* at 1033-34. The Magistrate Judge issued a Findings and
17 Recommendations recommending that the court grant the plaintiff’s motion to add the
18 FTCA claim to the complaint – but the District Judge adopted the Magistrate Judge’s
19 Findings and Recommendations over three weeks *after* the plaintiff’s six-month
20 window to file FTCA claims had elapsed. *Id.* at 1034. Pursuant to the District Judge’s
21 order, the plaintiff subsequently filed her FTCA claim in an amended complaint two
22 months after the FTCA deadline had elapsed. *Id.* Despite the plaintiff’s late filing, the
23 Court of Appeals equitably tolled the statute of limitations because the plaintiff “put
24 forth the ‘effort that a reasonable person might be expected to deliver under . . . her
25 particular circumstances.’” *Id.* at 1053 (citing *Busby*, 661 F.3d at 1015). The Court of
26 Appeals found that the plaintiff “took special care in exercising due diligence” by filing
27 a pleading, which included a request to file her FTCA claims in the case, prior to the
28 expiration of the six-month window set forth by 28 U.S.C. § 2401(b). *Id.* at 1052-53.

1 The Court of Appeals found the plaintiff’s FTCA “claim was rendered untimely
2 because of external circumstances beyond her control.” *Id.* at 1053.

3 In this case, unlike the plaintiff in *Kwai Fun Wong*, Plaintiffs did not “inform[]
4 the parties and the court of [their] desire to file an FTCA claim well before the filing
5 deadline and request[] leave to do so[.]” *Id.* In the original Complaint, Plaintiffs stated
6 they “have no ability to test the adverse and erroneous case law without risking the
7 barring of their *Bivens* claims” because of then-existing Court of Appeals precedent.
8 (ECF No. 1 at ¶ 153, 155). However, the original Complaint was filed after the
9 FTCA’s statute of limitations had already expired,¹ and Plaintiffs did not include or
10 move to include the FTCA claims in this action until over three years after filing the
11 original Complaint. (ECF No. 165). *See Pace v. DiGuglielmo*, 544 U.S. 408, 419
12 (2005) (finding that the “petitioner’s lack of diligence precludes equity’s operation”
13 because the “petitioner s[at] on his rights for years before he filed his” claim in federal
14 court). Plaintiffs have failed to demonstrate they exercised reasonable diligence in
15 failing to include their FTCA claims in this action until June 2016. The Court
16 concludes that Plaintiffs have not met their “heavy burden to show that [they are]
17 entitled to equitable tolling” by “pursuing [their] rights diligently[.]” *Rudin*, 781 F.3d
18 at 1054-55.

19 4. Extraordinary Circumstances

20 Courts have found extraordinary circumstances sufficient to warrant equitable
21 tolling of a federal statute of limitations when a litigant delays filing a claim in federal
22 court because of “rel[iance] on *actually binding* precedent that is subsequently
23 reversed.” *Menominee Indian Tribe*, 136 S. Ct. at 754, 757. In *Harris v. Carter*, the

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25 ¹ The original Complaint was filed on June 17, 2013 – after the statute of limitations had
26 elapsed on their FTCA claims. (ECF No. 1). The FTCA required Plaintiffs to file their FTCA
27 claims in federal court by November 10, 2012, or six months after United States Customs and
28 Border delivered to Plaintiffs the denial of their administrative claims. 28 U.S.C. § 2401(b);
see also ECF No. 171 at 6 (Plaintiffs contend that “[t]he government denied the[ir
administrative] claim in May 2012, which triggered the running of a six-month deadline for
Plaintiffs to file their FTCA claims in court.”).

1 Court of Appeals held that a plaintiff who “relied in good faith on then-binding circuit
2 precedent in making his tactical decision to delay filing a federal” action was entitled
3 to equitable tolling of the statute of limitations. 515 F.3d at 1055. The plaintiff in
4 *Harris*, a 28 U.S.C. § 2254 habeas petitioner, had waited to file his federal habeas
5 petition because of “then-existing” Court of Appeals precedent in *Dictado v. Ducharme*,
6 244 F.3d 724 (9th Cir. 2001) that “tolled the statute of limitations” of his habeas
7 petition. *Id.* at 1053, 1055-56. The Court of Appeals identified that the Supreme Court
8 subsequently “overrul[ed] . . . the *Dictado* rule” in *Pace v. DiGuglielmo*, and concluded
9 that the *Pace* decision “made it impossible for [the petitioner] to file a timely petition.”
10 *Id.* at 1056; 544 U.S. at 408. The Court of Appeals found that the petitioner was
11 entitled to equitable tolling because his “failure to file a timely petition [wa]s not the
12 result of oversight, miscalculation or negligence on his part, all of which would
13 preclude the application of equitable tolling.” *Id.* at 1055. Rather, the Court of Appeals
14 held, the plaintiff “relied on controlling circuit precedent, rather than an ambiguity in
15 the law, in making his strategic decision to delay his federal petition while pursuing
16 relief in the state courts.” *Id.* at 1057.

17 Plaintiffs contend that at the time the original Complaint was filed, “Ninth Circuit
18 law held that . . . dismissal of FTCA claims under [28 U.S.C.] § 2680, such as under the
19 foreign country exception, also bars *Bivens* claims based on the same underlying
20 facts—even if brought in the same action.” (ECF No. 171 at 23-24). Plaintiffs contend
21 the Court of Appeals’ decision in *Pesnell v. Arsenault*, 543 F.3d 1038 (9th Cir. 2008)
22 prevented Plaintiffs from filing their FTCA claims in this action until *Simmons* was
23 decided. Defendant contends that “[n]othing in the *Pesnell* decision would have
24 precluded Plaintiffs from simultaneously filing both an FTCA and *Bivens* lawsuit in”
25 this action. (ECF No. 170-1 at 14). Defendant contends that “there was no conflict in
26 Supreme Court or Ninth Circuit authority which barred Plaintiffs from pursuing parallel
27 tort and *Bivens* claims” in this action. *Id.* at 20.

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1 In *Kreines v. United States*, issued by the Court of Appeals in 1992, the plaintiff’s
2 complaint contained both FTCA and *Bivens* causes of actions. 959 F.2d at 836. The
3 plaintiff prevailed on the *Bivens* claim, and the United States prevailed on the FTCA
4 claim. *Id.* The individual government defendants argued that the FTCA judgment bar
5 “relieves them of liability for damages on” the *Bivens* claim because the United States
6 prevailed on the FTCA claim. *Id.* at 838. The Court of Appeals disagreed, and held
7 that the judgment bar did not prevent the plaintiff from collecting damages from the
8 individual government defendants on the *Bivens* claim. *Id.* The Court of Appeals noted
9 that “Congress’ primary concern in enacting the [judgment] bar was to prevent multiple
10 lawsuits on the same facts[,]” and “[t]hat concern is absent when suit is brought
11 contemporaneously for FTCA and other relief” – including a *Bivens* claim. *Id.* The
12 Court of Appeals also found the risk of the plaintiff wrongly recovering twice based on
13 the same underlying conduct was absent “because [the plaintiff]” only prevailed on the
14 *Bivens* claim – and “did not prevail on her FTCA claim.” *Id.*

15 In *Pesnell*, the plaintiff filed two separate actions: the first action included claims
16 brought pursuant to the FTCA, and the second action included constitutional *Bivens*
17 claims against individual government employees along with federal and state Racketeer
18 Influenced and Corrupt Organizations Act (“RICO”) claims. 543 F.3d at 1040-41. The
19 district court in the first case dismissed the plaintiff’s FTCA claims pursuant to the
20 misrepresentation exception to the FTCA. *Id.* at 1046 (Clifton, C.J., concurring) (citing
21 28 U.S.C. § 2680(h)). The Court of Appeals affirmed the dismissal on appeal. *Id.* at
22 1040.

23 The district court in the second case granted the individual government
24 employees’ motion to dismiss the plaintiff’s *Bivens* claims pursuant to the FTCA
25 judgment bar. *Id.* at 1041. The Court of Appeals affirmed in part and reversed in part
26 the district court’s order dismissing the second case pursuant to the judgment bar. The
27 Court of Appeals held that the judgment bar provision operates to preclude subsequent
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1 actions “by reason of the *same subject matter*, against the employee of the government
2 whose act or omission gave rise to the claim.” *Pesnell*, 543 F.3d at 1042 (citing 28
3 U.S.C. § 2676). The Court of Appeals concluded that the plaintiff’s FTCA claims in
4 the first action and the second “*Bivens* action” were both “based in part upon alleged
5 misrepresentations by the federal employees.” *Id.* The Court of Appeals found that the
6 judgment bar operated to prevent the plaintiff’s *Bivens* claims based upon “the same
7 subject matter involved in the FTCA judgment.” *Id.* The Court of Appeals ordered that
8 on remand, the plaintiff’s *Bivens* claims could only proceed with “a recognition that the
9 portion of the RICO claims predicated on the same alleged” conduct at issue in the first
10 action “would be barred” by 28 U.S.C. § 2676. *Id.* In a concurrence to the *Pesnell*
11 majority opinion, Circuit Judge Clifton explained that the first district court’s dismissal
12 of the plaintiff’s FTCA claims, pursuant to an FTCA exception in 28 U.S.C. § 2680,
13 “triggers application of the judgment bar against any further litigation targeting the
14 individual agents as defendants based on the agents’ alleged misrepresentations.” *Id.*
15 at 1046 (Clifton, C.J., concurring).

16 On June 6, 2016, the Supreme Court issued its decision in *Simmons*. In *Simmons*,
17 the respondent first filed a suit against the United States under the FTCA alleging that
18 he was beaten in a federal prison as a result of negligence of prison officials. 136 S. Ct.
19 at 1845-46. Before the district court dismissed the respondent’s first suit, the
20 respondent filed a second suit alleging constitutional torts against individual prison
21 employees under the *Bivens* doctrine. *Id.* at 1846. The district court in the first case
22 dismissed the respondent’s FTCA suit based on the discretionary function exception to
23 the FTCA. *Id.*; 28 U.S.C. § 2680(a). Following the district court’s dismissal order in
24 the first case, the district court in the second case dismissed the respondent’s *Bivens*
25 action pursuant to the FTCA judgment bar. 136 S. Ct. at 1846. The Court of Appeals
26 for the Sixth Circuit reversed the district court in the second case, and held that the
27 judgment bar provision did not prevent the respondent’s subsequent *Bivens* action from
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1 proceeding in federal court. *Id.*

2 The Supreme Court affirmed the judgment of the Court of Appeals and held that
3 “[t]he judgment bar provision . . . does not apply to the categories of claims in the
4 ‘Exceptions’ sections of the FTCA.” *Id.* at 1850. The Supreme Court identified *Pesnell*
5 as contributing to “a Circuit split on whether the judgment bar provision applies to suits
6 that, like [the respondent’s], are dismissed as falling within an ‘Exceptio[n]’ to the
7 FTCA.” *Id.* at 1846 n.1. The Supreme Court held that the respondent’s second *Bivens*
8 action was unaffected by the judgment bar and “should be permitted to go forward”
9 because the respondent’s first FTCA action was dismissed pursuant to an FTCA
10 exception and did not qualify as a “judgment” under 28 U.S.C. § 2676. *Id.* at 1848.

11 In this case, Plaintiffs identified *Pesnell* in the original Complaint and alleged
12 that it was “adverse and erroneous case law” in the Court of Appeals for the Ninth
13 Circuit. (ECF No. 1 at ¶ 153, 155). *Pesnell* involved the partial dismissal of *Bivens*
14 claims that shared the same factual allegations as FTCA claims previously dismissed
15 *in a separate action* under the FTCA judgment bar. Plaintiffs in this case proposed to
16 include their FTCA claims along with their *Bivens* claims in the *same action*. See ECF
17 No. 1 at ¶ 155 (Plaintiffs allege that “[b]ut for the adverse and erroneous case law under
18 28 U.S.C. § 2676, Plaintiffs would include” their FTCA claims “*in this Complaint*”)
19 (emphasis added). The Supreme Court’s decision in *Simmons* did not address
20 Plaintiffs’ ability to pursue a *Bivens* claim and an FTCA claim in the same cause of
21 action. Plaintiffs have not identified “*actually binding* precedent that [has been]
22 subsequently reversed” that would have prevented Plaintiffs from alleging *Bivens* and
23 FTCA claims in the same action pursuant to *Kreines* at the time the original Complaint
24 was filed. *Menominee Indian Tribe*, 136 S. Ct. at 757. The Court concludes that
25 Plaintiffs have not met their burden to establish that extraordinary circumstances
26 prevented them from timely filing their FTCA claims in this case. See *id.* (“it is
27 common for a litigant to be confronted with significant costs to litigation, limited
28 financial resources, an uncertain outcome based upon an uncertain legal landscape, and

1 impending deadlines. These circumstances are not ‘extraordinary.’”) (citation omitted).

2 **V. Conclusion**

3 IT IS HEREBY ORDERED that Defendants’ Motion to Dismiss Plaintiffs’ Fifth
4 Amendment claims (ECF No. 169) is granted in part. The claims in the original
5 Complaint, the First Amended Complaint, the Second Amended Complaint, and the
6 Third Amended Complaint that were previously dismissed without prejudice and that
7 are re-plead without amendment in the Fourth Amended Complaint are dismissed
8 without prejudice in the Fourth Amended Complaint.

9 IT IS FURTHER ORDERED that Defendants’ Motion to Dismiss Plaintiffs’
10 FTCA claims (ECF No. 170) is granted with prejudice.

11 DATED: March 6, 2017

12 
13 **WILLIAM Q. HAYES**
14 United States District Judge

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