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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

CLIFFORD M. LEWIS, et al.,

Plaintiffs,

vs.

KEN SALAZAR, et al.,

Defendants.

CASE NO. 1:10-CV-01281-OWW-DLB

REPLY BRIEF SUPPORTING TRIBAL DEFENDANTS' MOTION TO DISMISS SECOND AMENDED COMPLAINT FOR LACK OF SUBJECT MATTER JURISDICTION, OR IN THE ALTERNATIVE, FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED

Date: August 1, 2011
Time: 10:00 a.m.
Courtroom: 3

Judge: Hon. Oliver W. Wanger

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I. INTRODUCTION

In three complaints, two opposition briefs, and one law and motion hearing before this Court, Plaintiffs still have articulated no cognizable claim under federal or California law. The Court generously gave Plaintiffs "one more chance" to amend, despite the lack of a theory entitling them to relief. (Transcript of Hearing, April 4, 2011 (Doc. 45), 36:11-12)). Enough is enough.

In this latest effort to avoid dismissal, Plaintiffs have completely disavowed old theories in favor of new ones. With the Court's rejection of Plaintiffs' effort to find federal rights in a 1983 settlement restoring the federal recognition of Table Mountain Rancheria, Plaintiffs now turn to vague new theories alleging other purported sources of rights, none of which operate to their benefit. In truth, neither California nor federal law creates any rights, let alone a private right of action, in these circumstances. Persons managing land on behalf of an Indian tribe, or on behalf of the government of an improperly terminated Indian tribe, simply have no duties of any kind to persons with no contractual, statutory, or other rights to that land. Indeed, Plaintiffs do not dispute that Tribal Defendants, and not Plaintiffs, were the "administratively selected users of the land," and thereby appropriately listed in the distribution plan when the United States was purporting to terminate Table Mountain Rancheria's status and assets. Nor did Plaintiffs challenge this determination through the only express remedy the Rancheria Act provided. Indeed, Plaintiffs now concede they were "not parties to the *Watt* action," not "in privity with the *Watt* plaintiffs," and not beneficiaries of the *Watt* Stipulation. (Plaintiff's Opposition To Defendant Ken Salazar's Motion To Dismiss (Doc. 54), filed July 11, 2011 ("Opp. to Salazar Mot."), at 12:6-18.)

Make no mistake, even if Plaintiffs had identified a basis for these phantom rights, they would still face insurmountable barriers. The immunity of Table Mountain Band of Indians ("Tribe") and the Table Mountain Association ("Association") (under which the Tribe operated following its illegal termination and before its federal restoration in *Watt*) would preclude relief even if Plaintiffs had a cognizable right. Moreover, Plaintiffs' allegations confirm they were aware of Defendants' alleged wrongdoing twenty-eight years ago, leaving them no plausible theory as to why they could wait decades to sue. In trying to contravene this allegation, Plaintiffs seal their fate by admitting their claims accrued by 2005, rendering each of their claims stale under their own theory and thus time barred under the applicable statute of limitations.

In short, having twice failed to enunciate a viable claim, Plaintiffs do not deserve "one more chance" to amend. Such would be unfair the Court and Defendants, wasting the resources of both. Defendants already have incurred great expense deciphering and responding to Plaintiffs' incoherent, and internally inconsistent pleadings, which work to bend reality (if not rewrite history) to avoid insurmountable barriers to relief. Tribal Defendants respectfully urge the Court to dismiss the Second Amended Complaint, once and for all, with prejudice.

II. ARGUMENT

A. Plaintiffs Cannot Identify Any Federal Right Tribal Defendants Violated.

Plaintiffs vaguely invoke "judgments, stipulations, statutes and treaties" as sources of federal rights enabling them to sue under 42 U.S.C. section 1983 and *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971) ("*Bivens*"). (Opp.. at 4:1-6.) None help Plaintiffs.

Notwithstanding Plaintiffs' deceptive—or naive—attempts to alter Section 1983 authorities to imply they extend to *Bivens* claims (Opp. at 3:22-26), *Bivens* only provides a cause of action for violation of constitutional rights, not statutory or treaty rights. *Boney v. Valline*, 597 F. Supp. 2d 1167, 1172 (D. Nev. 2009); *see Bothke v. Fluor Eng'rs & Constructors, Inc.*, 834 F.2d 804, 814 (9th Cir. 1987) (Beezer, J., concurring). Section 1983 does provide a vehicle to vindicate violations of statutory rights under color of state law. *Cal. State Foster Parent Ass'n v. Wagne*r, 624 F.3d 974, 978-79 (9th Cir. 2010). A statute only supports a Section 1983 claim, however, where "Congress's intent to benefit the plaintiff [is] 'unambiguous'" and "Congress *intended to create a federal right*." *Id.*

This Court has already held that it lacks jurisdiction over claims for violation of the *Watt* Stipulation. (Memorandum Decision (Doc. 38), filed April 20, 2011 ("Order"), at 7:20-8:19, 10:3-5.) Perhaps in recognition of that fact, and unable to identify any provision in the *Watt* Stipulation that grants them any rights, it appears Plaintiffs have abandoned their claim that Tribal Defendants violated duties *Watt* supposedly imposed. Specifically, in an attempt to avoid Secretary Salazar's argument that *Watt* precludes their claims, they concede they were "not parties to the *Watt* action," and disavow any suggestion that they are "in privity with the *Watt* plaintiffs" or otherwise benefit from the *Watt* Stipulation. (Opp. to Salazar Mot., at 12:6-18.) Revealing of the intellectual dishonesty and desperation of their claims against the Tribal Defendants, this is a new and contradictory argument for Plaintiffs.

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Compare Opposition to Tribal Defendants' Motion to Dismiss First Amended Complaint (Doc. 25), filed Dec. 31, 2010, at 2:12-18 (arguing Plaintiffs were "Distributees" owed duties under *Watt*).

Likewise, Plaintiffs have repeatedly failed to identify any provision of the Rancheria Act that helps them. Indeed, at best, the Rancheria Act only benefited the "administratively selected users of the land." (85 S. Rep. No. 1874, at 3 (1958) (RFJN, Ex. B).) Even if Plaintiffs believe the United States erred in failing to administratively select them to receive the land, their sole recourse was an administrative appeal to the Bureau of Indian Affairs within 30 days of the plan's approval, and no right of action existed thereafter. CRA, §§ 2(a), 10(a) (RFJN, Ex. C); *see also* 25 CFR § 242.5, 24 Fed. Reg. 4653 (June 9, 1959) (RFJN, Ex. E). Plaintiffs nowhere contend they invoked this exclusive remedy, which would not lie against the Tribal Defendants in any event.

In their opposition brief, Plaintiffs suggest for the first time that an unidentified statute they refer to as "the Act of 1916" creates federal rights in Plaintiffs. (Opp. at 4:1-3.) Plaintiffs apparently refer to the appropriations act authorizing the United States to purchase Rancherias (such as Table Mountain Rancheria) in the first place. (See Second Amended Complaint ("SAC"), ¶ 11; Supp. RFJN, Ex. A (Act of May 18, 1916).) This act created no private rights whatsoever, and merely permitted the Secretary of the Interior to "purchase lands for the homeless Indians in California" pursuant to whatever "regulations and conditions as the Secretary of the Interior may prescribe." (Supp. RFJN, Ex. A, at 132.)

Nor can Plaintiffs identify any vested interest—or any cognizable interest of any kind—in the Tribe's or Association's land protected by the Fifth Amendment. Plaintiffs do not dispute that any rights in the Tribe's land (whether held directly for the Tribe or owned by the Association) were vested solely in the Tribe. *Whitefoot v. United States*, 155 Ct. Cl. 127, 134 & n.7 (Ct. Cl. 1961) (citing *Johnson v. M'Intosh*, 21 U.S. 543 (1823)); *Cohen's Handbook*, § 15.02 Tribal Property 966 (2005). Nor do Plaintiffs allege they were members of the Tribe or Association or that they had any basis to assert an interest in the Tribe's or Association's land holdings. At best Plaintiffs aver they had "full use and enjoyment of Trust land," and that they were "residents of [sic] Rancheria" (SAC, ¶¶ 58, 62, 70, 84.) However, simply residing on or using tribal lands does not create a Fifth Amendment right. *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272, 277-78 (1955).

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B. Plaintiffs Cannot Allege Tribal Defendants Acted Under Color Of Federal Or State Law.

Putting aside the lack of a federal right, Plaintiffs fail to allege any actionable connection between the United States (or the State of California) and the Tribal Defendants to trigger *Bivens* or Section 1983 relief. Plaintiffs' only purported basis for Section 1983 liability is their allegation that Tribal Defendants breached state law fiduciary duties to Plaintiffs. However, to act "under color of" state law under Section 1983 requires that the defendant be an officer of the State or that "he is a willful participant in joint action with the State or its agents." *Dietrich v. John Ascuaga's Nugget*, 548 F.3d 892, 900 (9th Cir. 2008) (citations omitted). Indeed, violations of state law are not even actionable under Section 1983, at all. *Ybarra v. Bastian*, 647 F.2d 891, 892 (9th Cir. 1981).

Plaintiffs' *Bivens* claims fare no better. Their opposition simply ignores the authorities presented in the Tribal Defendants' opening brief, not to mention the explanation of why Plaintiffs cannot make the showing required for a private person to be deemed a federal actor or to have conspired with a federal actor. (Tribal Mot. at 16:17-17:18, 19:14-21:11.) Plaintiffs also ignore the significant requirements to allege that an entity allegedly "created by federal law" acts under color of federal law.[1] (*Id*. at 17:19-18:15.) Instead, Plaintiffs rely solely on the same "conclusory conspiracy theory" this Court has already ruled is legally insufficient. (Order 10:6-17.) This is not surprising, as Plaintiffs surely acknowledge the abject implausibility the United States conspired with officials of a sovereign Indian tribe (or of an Association governed by an illegally terminated sovereign tribe) to manipulate venue and conceal public court proceedings unwinding wrongful termination in order to somehow disenfranchise persons who claim rights, here Plaintiffs. (*See* Tribal Mot. at 20:14-22:2.) The suggestion is even more nonsensical given that Plaintiffs never enjoyed any vested right to that land in the first place. *See supra* II.A.

C. Plaintiffs Cannot Allege Any Law Or Agreement Creating A Fiduciary Duty.

Plaintiffs pretend that they may predicate a California breach of fiduciary duty claim on a duty other than those "imposed by law and those undertaken by agreement." *Gab Bus. Servs. v. Lindsey &*

[1] In any event, the Rancheria Act did not create the Association and entities like it, but rather merely permitted the Secretary to distribute land to a "legal entity *organized by such Indians*." CRA, § 5(a) (RFJN, Ex. C) (emphasis added).

Newsom Claim Servs., 83 Cal. App. 4th 409, 416 (2000). Not so. Apparently discouraged that California law does not impose fiduciary duties on unincorporated associations or Indian tribes (Tribal Mot. at 23:11-24:2), Plaintiffs cite out-of-state cases which in no way purport to address California fiduciary duty law. *Terrydale Liquidating Trust v. Barnes*, 611 F. Supp. 2006, 1016-1018 (S.D.N.Y 1984) (interpreting under Missouri law effect of trust instrument language explicitly imposing a fiduciary duty on a real estate investment trustee); *Association Casualty Insurance Co. v. Allstate Insurance Co.*, 2008 U.S. Dist. LEXIS 80637, *35 (S.D. Miss. July 29, 2008) (in denying a class certification motion, reciting plaintiffs' argument relying on fiduciary duties under Illinois law).

Plaintiffs apparently concede *Watt* imposed no fiduciary duties vis-à-vis Plaintiffs. (Opp. to Salazar Mot. at 12:6-18 (Asserting "Defendant does not explain how or why or how these Plaintiffs are in privity with the Watt plaintiffs.").) In any event, despite the Court's admonition that they "identify the operative language of the Watt Judgment" creating a duty to them (Order at 11:17-18), Plaintiffs have failed to do so. (*See* Tribal Mot. at 24:21-25:11.) Having repeatedly failed to identify any duties Tribal Defendants owe them under California law, federal law, the *Watt* Stipulation, or any agreement whatsoever, Plaintiffs' breach of fiduciary claim should be dismissed with prejudice.

D. Conduct Governing The Tribe And Association Is Immune.

Plaintiffs confirm they are not suing the Tribe. (Opp. to Tribal Mot. 2:8-9.) This concession alone is fatal to any claims accruing after 1984, when the Tribe took sole control of the relevant trust land and the revenues generated from them.

Plaintiffs contend the Ninth Circuit's holding in *Imperial Granite v. Pala Band of Indians*, 940 F.2d 1269 (9th Cir. 1991), does not bar their claims against Tribal Defendants while governing the Tribe, asserting it is distinguishable because, in that case, the plaintiff sued the tribe along with individuals, and because here Plaintiffs "do not name any member of the Tribe as a defendant in their [sic] official capacity." (Opp. at 4:9-15.) The *Imperial Granite* court, however, said nothing to confine its holding to circumstances in which the tribe itself is also named as a defendant. 940 F.2d at 1271. Plaintiffs cite no authority holding tribal officials or employees lose their immunity where their tribe is not sued, and such authority would contradict the law of this Circuit. *See Cook v. Avi*, 548 F.3d 718, 727 (9th Cir. 2008) (where tribe not named as a defendant, tribal bartender and bar manager enjoyed sovereign immunity).

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A tribal official's or employee's entitlement to immunity depends on whether the conduct upon which liability is predicated occurred "in their official capacity and within the scope of their authority." *Imperial Granite*, 940 F. 2d at 1271; *Cook v. Avi*, 548 F.3d 718, 727. Of course, the focus is on the conduct the plaintiff alleges, not whether the plaintiff chooses to label its claim an "individual capacity" suit. *See Imperial Granite*, 940 F.2d at 1271 (individual tribal members were immune because plaintiff "failed to allege any viable claim that the tribal officials acted outside their authority, so as to subject them to suit"); *Cook v. Avi*, 548 F.3d at 727 (immunity determination focuses on whether defendants were "*acting* in their official capacity and within the scope of their authority" (emphasis added)).

Here, as in *Imperial Granite*, all of Plaintiffs' alleged injuries result from necessarily official acts of the Tribe's government, either acting directly through its Tribal Council or through the Association—which Plaintiffs admit "operate[d] as the governing body for the Table Mountain Band of Indians" after termination and before restoration. (SAC, ¶¶ 7(c), 67.) As even Plaintiffs must and do concede, only these entities controlled the land in question and the revenue therefrom. (Second Amended Complaint, ¶¶ 57, 62, 71, 75, 85, 89.)

In addition, as detailed in Tribal Defendants' Motion to Dismiss, the Tribe's government never lost its sovereign status, even while functioning through the Association after its purported termination. As such, any alleged acts by the Tribal Defendants while governing the Association were necessarily actions of the sovereign tribal government and thus protected by immunity.[2] (Tribal Mot. 5:13-18, 9:11-10:10.) Furthermore, even if Plaintiffs could somehow contradict judicially noticeable historical documents—not to mention their own allegations (*see* SAC at ¶¶ 7(c), 68)—and thereby assert the Association is separate and distinct from the Tribe, the Association is nonetheless immune from suit as an "arm of the tribe." *Allen v. Gold Country Casino*, 464 F.3d 1044, 1046 (9th Cir. 2006) (holding that when the tribe establishes an entity to conduct certain activities, the entity is immune if it functions as an arm of the tribe); *Cook*, 548 F.3d at 725.

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[2] Plaintiffs' suggestion that the Association could have—but apparently did not—admit new members (Opp. at 5:3-10) does nothing to controvert the historical documents, and Plaintiffs' own allegation, that the Association continuously functioned as the governing body of the sovereign Tribe. Indeed, the power to adopt new members is consistent with an Indian tribe's inherent sovereign prerogative to define and control its own membership. *See Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978).

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Because claims against Tribal Defendants are barred by the Tribe's immunity—whether or not Tribal Defendants were acting as officials of the Association or of the Tribal Council—Plaintiffs' efforts to circumvent the Tribe's immunity by attacking the Association's transfer of land to the United States are unavailing. As Plaintiffs concede, the Tribe has controlled the relevant land and revenues therefrom since 1984. (SAC, ¶¶ 35, 36 ("None of the revenues or income has been distributed to the Association . . . .").) Whether or not Plaintiffs' far-fetched attack on Tribe's acquisition of those lands has merit, Plaintiffs' sole recourse is therefore against the Tribe and/or its officials acting in their official capacity, all of which are absolutely immune to suit.

Furthermore, Plaintiffs' assertion that the transfer was illegal is groundless. First, Plaintiffs are just flat wrong in asserting that "Congress did not authorize the Government to accept any land to be held in trust for an Indian tribe." (Opp. at 7:10-11) Congress has given the Secretary of the Interior broad authority to take land into trust for Indians. 25 U.S.C. § 465. The Secretary exercised that authority in *Watt*, when agreeing to take the land back into trust to be held for the Tribe and willing individual Indians in the class. In any event, and also contrary to Plaintiffs' assertions (SAC, ¶¶ 32-33; Opp. at 5:24-6:1, 7:7-10), the Association, a private entity capable of owning and disposing property, does not need a court order or special Congressional authorization to authorize it to convey to the United States land it lawfully owned. Cal. Corp. Code § 18105. California law expressly provides that the president and secretary of an unincorporated association possess the power to transfer association property. Cal. Corp. Code § 18115. Here, the Association's president and secretary did precisely that, and executed the Grant Deed. (RFJN, Ex. I. (Grant Deed).) To be sure, the *Watt* Stipulation's reference to the "plaintiff Band" where the Association not the Tribe was the named plaintiff (*Watt* Stipulation (RFJN, Ex. F), at 1:13, 3:15), does not indicate the Association lacked power, as Plaintiffs suggest, but rather confirms that the Association constituted the sovereign government of the Tribe. (*See* Tribal Mot. at 9:22-10:10.)

Of course, no one timely challenged the United States' acquisition of the land for the Tribe. 28 U.S.C. § 2409a(a), (g) (12 year statute of limitations on actions "to adjudicate a disputed title to real property in which the United States claims an interest" accruing when plaintiff "knew or should have known of the claim of the United States"); *Peterson v. Morton*, 465 F. Supp. 986, 990-91 (D. Nev. 1979) (holding claim under 28 U.S.C. § 2409a(g) accrues when deed showing United States' interest is

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recorded); *see* Cal Civ Code § 1213. Additionally, the United States' sovereign immunity bars any challenges to its title where it "has a colorable claim" that it holds the land in trust for an Indian tribe. *Robinson v. United States*, 586 F.3d 683, 685-86 (9th Cir. 2009). Moreover, Plaintiffs, as outsiders to the transaction, would lack standing to challenge the Association's transfer of the land or the United States' decision to take it into trust. *O'Flaherty v. Belgum*, 115 Cal. App. 4th 1044, 1094 (2004) ("[E]very action must be prosecuted in the name of the real party in interest . . . . who owns or holds title to the claim or property involved, as opposed to others who may be interested or benefited by the litigation."); *Tribal Council of Nevada, Inc. v. Hodel*, 856 F.2d 1344, 1349-50 (9th Cir. 1988) (consortium of Indian tribes lacked standing to challenge Secretary of the Interior's conveyance of land where consortium was not the beneficial owner of the land and the land was not held in trust for the consortium).

In sum, Plaintiffs' admissions and judicially noticeable facts confirm their claims all attack official actions of the Tribe's government, whether through the actions of the Tribal Council or Association, making sovereign immunity a separate basis to dismiss Plaintiffs' claims with prejudice.

E. Plaintiffs' Allegations Time-Bar Their Claims.

The Court should dismiss this action because each of Plaintiffs' own allegations in their Second Amended Complaint confirm they had actual and constructive notice of the facts supporting each claim for decades. Plaintiffs filed this lawsuit on July 16, 2010, so any state law claims accruing before July 16, 2006, and any federal law claims accruing before July 16, 2008, are time barred. (Mot. to Dismiss at 11:12-12:2.) Rather than disputing these principles, Plaintiffs admit they have had notice of the alleged deprivation of their rights for twenty-eight years. (SAC at ¶ 37.) This allegation alone forecloses Plaintiffs claims in this or any future complaint. *Ellingson v. Burlington Northern, Inc.*, 653 F.2d 1327, 1329-30 (9th Cir. 1981). Indeed, Plaintiffs' briefs, attempting to undo this admission, instead confirm they knew of the *Watt* Stipulation, at the latest, in 2005, a date which necessarily places all of their claims beyond the relevant statutes of limitations. (Opp. to Salazar Mot. 10:6-7.)

Plaintiffs urge this Court to ignore these admissions (and, presumably, applicable law) on the basis that they did not know the *Watt* Stipulation "was unlawful and harmful to them . . . until present counsel obtained, reviewed and understood the documents in the context of the relevant statutes and treaties." (Opp. to Salazar Mot. at 8:18-23; *see also* Opp. to Tribal Mot. at 8:4-8 & n.6 (arguing that

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even if Plaintiffs were aware of the *Watt* Stipulation outside the limitations period, they "did not know of the *violations* until approximately 2010" (emphasis added)).) A claim accrues, however, when a plaintiff has the necessary facts underlying his claims, not when he becomes aware of the legal implications of those facts. *United States v. Kubrick*, 444 U.S. 111, 122 (1979). By Plaintiffs' own allegations, they have known the facts underlying their alleged injuries for decades. (SAC at ¶¶ 36-37.) Their professed "ignorance of [their] legal rights" does not toll the limitations period. *Kubrick*, 444 U.S. at 122.

Plaintiffs fail to allege facts sufficient to support fraudulent concealment, let alone allege them with "specificity." *Community Cause v. Boatwright*, 124 Cal. App. 3d 888, 901 (1981). Their conclusory suggestion that Defendants hid the facts underlying Plaintiffs' claims ignores Tribal Defendants' detailed explanation of the considerable pleading requirements for fraudulent concealment and explanation why Plaintiffs do not and cannot satisfy them. (Tribal. Mot. at 13:16-15:18.) More fundamentally, the doctrine of fraudulent concealment "does not come into play, whatever the lengths to which a defendant has gone to conceal the wrongs, if a plaintiff is on notice of a potential claim." *Rita M. v. Roman Catholic Archbishop*, 187 Cal.App.3d 1453, 1460-61 (1986)). Plaintiffs have alleged their awareness of the facts giving rise to their claim (SAC at ¶ 37), and have not so much as suggested how they might allege fraudulent concealment. Moreover, Plaintiffs have failed allege with specificity how a public lawsuit, public court filings, and publicly recorded property transfer could somehow constitute concealment. (SAC, ¶¶27-28; *see* RFJN, Ex. L at 4 (*Watt* Order Certifying Class); RFJN, Ex. I. (Grant Deed).) Nor could they amend to allege concealment without contradicting their current allegations establishing their awareness of facts putting them on inquiry of the alleged fraud. (SAC ¶¶ 22, 36-37.)

To the extent Plaintiffs try to argue the limitations period is tolled by the "continuing violations doctrine," this argument also fails. Even assuming the doctrine exists and applies in the tribal trust land context, it only applies where at least some of the alleged continuing acts occurred during the limitations period. *Committee Concerning Community Improvement v. City of Modesto*, 583 F.3d 690, 701 (9th Cir. 2009). Plaintiffs do not, and cannot, allege any actionable "acts [of Tribal Defendants] that occurred during the limitations period." *See id.* The Ninth Circuit "has repeatedly held that a mere continuing *impact* from past violations is not actionable." *Knox v. Davis*, 260 F.3d 1009, 1013 (9th Cir. 2001) (Ninth Circuit's emphasis; internal citations and quotations omitted). Moreover, this Court has ruled that

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"Plaintiffs' conclusory invocation of the continuing violations doctrine [in the First Amended Complaint] based on 'an ongoing pattern or practice'" was of no merit since they did "not allege sufficient facts to support such a theory." (Order 9:1-4.) As Plaintiffs have alleged no additional facts in their Second Amended Complaint supporting this theory, this argument necessarily fails.[3]

Having pled facts showing their claims are time barred, Plaintiffs have repeatedly failed meet their resulting burden to allege "facts that suggest a right to relief that is beyond the 'speculative level.'" *In re march FIRST Inc.*, 589 F.3d 901, 905 (7th Cir. 2009) (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 561-62 (2007)). Accordingly, Plaintiffs claims must be dismissed with prejudice.

III. CONCLUSION

Having received "one more chance" to state a viable claim, Plaintiffs have failed and indeed cannot do so. The Tribe respectfully asks this Court to bring this case to an end, and dismiss Plaintiffs' Second Amended Complaint with prejudice, without further leave to amend.

Dated: July 25, 2011

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[3] Equitable tolling through other litigation does not salvage Plaintiffs' claims. This doctrine requires the facts of the two claims be "identical or at least . . . similar." *Daviton v. Columbia/HCA Healthcare Corp.*, 241 F.3d 1131, 1138 (9th Cir. 2001). As Plaintiffs argued, *Lewis v. Norton* and *Alvarado v. Table Mountain* are "not related to the case at bar and [have] no application to this action," as they involved "a membership issue" and "those issues are not issues in the SAC." (Opp. to Salazar Mot. 3:4-17.) But even if those cases tolled the statute, it still ran before and after. *Lantzy v. Centex Homes*, 31 Cal. 4th 363, 370 (2003). Thus, the four-year period these actions were pending cannot save decades-stale claims. (RFJN, Ex. J (*Lewis v. Norton* filed July 11, 2003); *Alvarado v. Table Mountain*, 509 F.3d 1008 (9th Cir. 2007) (order affirming dismissal filed November 27, 2007).)