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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

HOPLAND BAND OF POMO INDIANS, *et al.*, Plaintiffs, v. KEN SALAZAR, Secretary of the Interior, *et al.*, Defendants.	Case No. 3:12CV556-CRB Hon. Charles R. Breyer Courtroom: 6 Hearing: September 7, 2012, at 10:00 a.m. DEFENDANTS' REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

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I. INTRODUCTION

Defendants' combined cross-motion and opposition, ECF Nos. 32, 33, demonstrated that the Office of Justice Services ("OJS") correctly declined the separate requests of the Hopland Band of Pomo Indians, the Robinson Rancheria of Pomo Indians, and the Coyote Valley Band of Pomo Indians for a contract calling for new funds for direct law enforcement services on each tribe's land pursuant to the Indian Self-Determination and Education Assistance Act of 1975 ("ISDA"), Pub. L. No. 93-638 ("638"), 88 Stat. 2203 (codified as amended at 25 U.S.C. § 450 *et seq.*), because "the amount of funds proposed under [each] contract *is in excess* of the [OJS's applicable funding level] for the contract." *Id.* § 450f(a)(2)(D) (emphasis added). Defendants also showed that each declination complied with the Court's order in *Hopland v. Norton,* 324 F. Supp. 2d 1067 (N.D. Cal. 2004), because the stated reason was one of the bases set out in 25 U.S.C. § 450f(a)(2) under which OJS may decline a contract. *See id.* at 1077.

Defendant's opening brief further demonstrated that OJS's allocation of law enforcement funds among federally-recognized tribes does not violate the equal protection component of the Fifth Amendment; showed that plaintiffs failed to identify a specific trust obligation that requires OJS to allocate funds to plaintiffs; and explained that plaintiffs are not entitled to monetary damages under the ISDA. Plaintiffs' opposition and reply contests none of this. *See* Pls.' Opp'n & Reply, ECF No. 34. In failing to respond to any of these arguments, plaintiffs concede them, and this Court should grant summary judgment to defendants on these claims.

Plaintiffs instead devote the bulk of their opposition and reply to the erroneous claim that the declaration of Darren Cruzan, Deputy Director of OJS, *see* ECF Nos. 32-1, 33-1, asserts allegedly new reasons for the agency's decisions that conflict with the record below, includes new information that was not part of the record and is impermissibly before this Court, and otherwise does not clarify the record. Plaintiffs also erroneously claim that the Cruzan Declaration does not comply with Fed. R. Civ. P. 56(c)(4). A review of the record makes clear, however, that all the reasons concerning defendants' declinations that were advanced in defendants' opening brief and set out in the Cruzan declaration are also contained in the record below; that the declaration otherwise provides helpful and permissible background information, and clarifies otherwise seem-

ingly conflicting statements in the record. The declaration also satisfies the personal knowledge requirement of the Federal Rules. Accordingly, plaintiffs offer no reasonable basis for striking or otherwise ignoring the Cruzan Declaration.

Plaintiffs also fail to demonstrate that the Redding Rancheria and the Rincon Band of Luiseno Mission Indians of the Rincon Reservation have standing to maintain their challenges under the ISDA, the Administrative Procedure Act ("APA"), 5 U.S.C. § 701 *et seq.*, the Fifth Amendment, or the Indian Trust Doctrine. Plaintiffs cannot satisfy the injury-in fact requirement necessary to maintain Article III standing merely by asserting their belief that it would be futile for them to apply for 638 contracts for law enforcement services.

Moreover, in conceding the applicability of *Lincoln v. Vigil*, 508 U.S. 182 (1993), to OJS's allocation of law enforcement funds among federally-recognized tribes, plaintiffs fail to identify a waiver of sovereign immunity under the APA that would even give this Court jurisdiction to review their claim that OJS has a judicially reviewable duty to develop a rational, publicly-noticed, formula for allocating law enforcement funds. *Lincoln*, moreover, entirely undermines plaintiffs' reliance on *Morton v. Ruiz,* , 415 U.S. 199 (1974), and *Rincon Band of Mission Indians v. Califano*, 464 F. Supp. 934 (N.D. Cal. 1979), *aff'd on other grounds sub nom. Rincon Band of Mission Indians v. Harris*, 618 F.2d 569 (9th Cir. 1980), and plaintiffs fail to respond to, and thus concede, any of defendants' arguments thoroughly distinguishing *Ramah Navajo Sch. Bd. v. Babbit*, 87 F.3d 1338 (D.C. Cir. 1996). Plaintiffs similarly fail to respond to defendants' arguments that 25 U.S.C. § 450k does not require the agency to develop a rational publicly-noticed formula, and thus concede the applicability of that statute as well.

Finally, contrary to plaintiffs' contention, defendants did not offer a new reason for declining Hopland's proposal for an unfunded 638 contract. Plaintiffs fail to show, moreover, that Hopland's proposed contract could be lawfully carried out by the tribe pursuant to 25 U.S.C. § 450f(a)(2)(E).

Accordingly, this Court should grant summary judgment to defendants on the remainder of plaintiffs' claims.

II. ARGUMENT

A. By Failing to Respond to Defendants' Arguments in Their Cross Motion and Opposition, Plaintiffs Have Conceded Them As A Matter Of Law

By failing to respond to the majority of the arguments advanced in defendants' cross motion and opposition, plaintiffs concede them. *See Jenkins v. Cnty. of Riverside*, 398 F.3d 1093, 1095 n.4 (9th Cir. 2005) (appellant concedes argument to which she fails to respond); *PQ Labs, Inc. v. Yang Qi*, No. 12-450, 2012 WL 2061527, *7 (N.D. Cal. June 7, 2012) ("[P]laintiff does not respond to [defendant's] argument and, therefore concedes it."); *Cortez v. New Century Mortg. Corp.*, No. 11-1019, 2012 WL 368647, *4 n.3 (N.D. Cal. Feb. 3. 2012) ("Plaintiff does not respond to this argument in her opposition and, therefore, must concede" defendant's theory); *Gravelle v. Health Net Life Ins. Co.*, No. 08-4653, 2009 WL 210450, *5 (N.D. Cal. Jan. 26, 2009) ("Plaintiff chose not to respond to defendant's detailed argument on this issue and therefore conceded the point."); *FTC v. Silueta Distributors, Inc.*, No. 93-4141, 1995 WL 215313, *8 n.5 (N.D. Cal. Feb. 24, 1995) (non-movant concedes the portion of a motion to which she fails to respond). *See also So. Nev. Shell Dealers Ass'n v. Shell Oil Co.*, 725 F. Supp. 1104, 1109 (D. Nev. 1989) (same). As courts time and again have explained, "[i]t is not the obligation of this court to research and construct the legal arguments open to parties, especially when they are represented by counsel." *Sanchez v. Miller*, 792 F.2d 694, 703 (7th Cir. 1986). Because, "[j]udges are not expected to be mindreaders," moreover, the "litigant has an obligation to spell out its arguments squarely and distinctly, or else forever hold its peace." *Rivera-Gomex v. de Castro*, 843 F.2d 631, 635 (1st Cir. 1988) (internal quotations omitted). Indeed, "[w]here the district court relies on the absence of a response as a basis for treating the motion as conceded," a reviewing court will "honor its enforcement of the rule." *Twelve John Does v. Dist. of Columbia*, 117 F.3d 571, 577 (D.C. Cir. 1997). This Court should treat plaintiffs' failure to respond to the majority of the arguments defendants' advanced in their cross motion and opposition as concessions, and should grant summary judgment to defendants on these claims.

1. Plaintiffs Concede That OJS Correctly Denied Plaintiffs' Requests for New Funding

Defendants' cross motion and opposition advanced detailed arguments demonstrating

that OJS correctly denied the separate proposals of Hopland, Robinson Rancheria, and Coyote Valley for new funds to operate law enforcement programs on their tribal lands pursuant to 25 U.S.C. § 450f(a)(2)(D). *See* Defs.' Cross Mot. for Sum. J. & Opp'n at 17-21. Defendants demonstrated that the ISDA only governs the transfer of direct services, which are already being provided by the BIA for the benefit of the tribe or its members, to the tribe or tribal contractor to administer those very same services, with the corresponding transfer of funding, known as the secretarial amount, also transferred to the tribe or tribal contractor. *See id*. at 17 (citing 25 U.S.C. § 450f(a)(1)(B)). Defendants further explained that nothing in the ISDA requires the BIA to create and fund new federal programs for a tribe out of whole cloth, and that the ISDA expressly allows the BIA to decline a contract proposal that seeks more funds than the agency is currently providing to perform the service to be contracted. *See id.* at 18 (citing 25 U.S.C. §§ 450f(a)(2)(D), (4)(B)). Defendants thus showed that OJS correctly denied each tribe's proposal for a 638 contract because each sought more funds than OJS had allocated to each tribe. *See id.* Additionally, defendants demonstrated that OJS's declination complied with this Court's order in *Hopland v. Norton*, 324 F. Supp. 2d 1067 (N.D. Cal. 2004). *See* Defs.' Cross Mot. for Sum. J. & Opp'n at 18-21. By contrast, plaintiffs advanced no arguments about the applicability of 25 U.S.C. § 450f(a)(2)(D) to their proposals in either their motion for summary judgment or their opposition to defendants' cross motion. *See* Pls.' Mot. for Sum. J. *passim*; Pls.' Opp'n & Reply *passim*. As a result, this Court need not research and construct the legal arguments for plaintiffs but should instead treat these points as conceded. It should therefore grant defendants' motion for summary judgment on plaintiffs' ISDA claims for funded 638 contracts. *See Sanchez*, 792 F.2d at 703. *See also Jenkins*, 398 F.3d at 1095 n.4; *PQ Labs, supra.*

2. Plaintiffs Concede That OJS's Allocation of Law Enforcement Funds Among the Tribes Does Not Violate the Fifth Amendment

Defendants' cross motion and opposition also advanced detailed arguments that OJS's allocation of law enforcement funds among certain federally-recognized tribes but not to other tribes does not violate the equal protection component of the Fifth Amendment. *See* Defs.' Cross Mot. for Sum. J. & Opp'n at 32-36. Defendants explained that plaintiffs' equal protection chal-

lenge is subject to rational basis scrutiny, which provides a "highly deferential" standard of review, and a "strong presumption of constitutionality," that must be sustained even if on nothing more than "rational speculation unsupported by evidence or empirical data." *See id.* at 33 (citing *United States v. Hancock*, 231 F.3d 557, 566 (9th Cir. 2000); *Mathews v. De Castro*, 429 U.S. 181, 185 (1976); *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 315 (1993)). Under that standard, defendants demonstrated that plaintiffs failed to establish that they are similarly situated to other tribes to whom OJS allocates funds for law enforcement, regardless of whether they are located in non-P.L. 280 states, optional P.L. 280 states, or mandatory P.L. 280 states, *see id.* 34-36, and that even if plaintiffs could make such a showing that they are similarly situated to any of these tribes, OJS nonetheless had many conceivable rational bases for the alleged differential treatment. *See id.* at 34-36. Plaintiffs choose not to respond to any of these detailed arguments; nor did they advance any equal protection arguments in their summary judgment motion. *See* Pls.' Mot. for Sum. J. *passim*; Pls.' Opp'n & Reply *passim*.[1] Accordingly, this Court should grant defendants' motion for summary judgment on plaintiffs' equal protection claims. *See Jenkins*, 398 F.3d at 1095 n.4; *PQ Labs, supra.*

3. Plaintiffs Concede That There Is No Specific Trust Relationship With Their Tribes

Defendants' cross motion and opposition advanced detailed arguments that plaintiffs failed to identify a specific trust relationship that obligates OJS to approve their contract proposals. *See* Defs.' Cross Mot. for Sum. J. & Opp'n at 36-37. Defendants demonstrated that the Snyder Act imposes no specific trust obligation on the United States to provide law enforcement services to plaintiffs. *See id.* at 37 (citing *McNabb v. Bowen*, 829 F.2d 787, 792 (9th Cir. 1987); *Quechan Tribe of the Ft. Yuma Indian Reservation v. United States*, No. 10-2251, 2011 WL 1211574, at *2 (D. Ariz. March 31, 2011), *appeal docketed*, No. 11-16334 (9th Cir.)). Defendants further showed that the ISDA does impose fiduciary duties on the United States specifically owed to plaintiffs. *See id.* (citing *Navajo Nation*, 537 U.S. at 508; McNabb, 829 F.2d at 792).

[1] Indeed, nowhere in any of plaintiffs' briefing do they ever acknowledge the complexity OJS faces in balancing law enforcement needs among tribes that have differing degrees of state jurisdiction over crimes committed by Indians on tribal lands or the difficulty of doing so with anything less than unlimited funds.

Plaintiffs chose not to respond to any of these detailed arguments; nor did they identify a specific trust obligation in their summary judgment motion that the United States owes to plaintiffs. Accordingly, this Court should grant defendants' summary judgment motion on plaintiffs' trust claim. *See Jenkins,* 398 F.3d at 1095 n.4; *PQ Labs, supra.*

4. Plaintiffs Concede That They Are Not Entitled To Money Damages

Defendants' cross motion and opposition advanced detailed arguments that under the ISDA, plaintiffs are not entitled to monetary damages for a declination action. *See* Defs.' Cross Mot. for Sum. J. & Opp'n at 37-39. Defendants demonstrated that the limited waiver of sovereign immunity in 25 U.S.C. § 450m-1 must be "strictly construed . . . in favor of the sovereign" and "not enlarged . . . beyond what the language requires." *Id.* at 38 (quoting *Lane v. Peña,* 518 U.S. at 192, *U.S. Dep't of Energy v. Ohio,* 503 U.S. at 615). Defendants further showed that the remedy under § 450m-1 for a wrongful declination is injunctive relief and that this Court does not have jurisdiction to provide damages sought by a tribe for the failure to carry out a duty under the ISDA. *See id.* at 38-39 (citing *Samish Indian Nation,* 419 F.3d at 1365). Because plaintiffs chose not to respond to these detailed arguments, *see* Pls.' Opp'n & Reply *passim*, this Court should grant defendants' motion for summary judgment on plaintiffs' claim for monetary damages. *See Jenkins,* 398 F.3d at 1095 n.4; *PQ Labs, supra.*[2]

B. The Cruzan Declaration is Admissible to Clarify the Administrative Record

Contrary to plaintiffs' claims, *see* Pls. Opp'n & Reply at 1-8, 16-17, 18-22, the declaration of Darren Cruzan submitted in support of defendants' combined motion for summary judgment and opposition to plaintiffs' motion for summary judgment does not conflict with the record, nor does it offer post hoc rationalizations for the agency's decisions. As a result, plaintiffs offer no basis for striking or otherwise ignoring the Cruzan declaration or those portions of defendants' cross motion and opposition that cite or rely on the declaration for background and clarifying purposes.

As defendants demonstrated in their opening brief, an agency may offer declarations or

[2] As is discussed in greater detail herein, plaintiffs also failed to respond to many other detailed arguments advanced in defendants' cross motion and opposition. This Court should also treat the absence of a response to these arguments as concessions as well. *See Jenkins,* 398 F.3d at 1095 n.4; *PQ Labs, supra*.

affidavits in a record review case to provide background information or clarify or "illuminate" subject matter in the original record. *See* Defs.' Cross Mot. for Sum. J. & Opp'n at 15 n. 14 (citing *Yale-New Haven Hosp. v. Leavitt*, 470 F.3d 71, 82 (2d Cir. 2006); *Bunker Hill Co. v. EPA*, 572 F.2d 1286, 1292 (9th Cir. 1977); *Empresa-Cubana Exportadora De Alimentos y Productos Varios v. Dep't of Treasury*, 606 F. Supp. 2d 59, 68 (D.D.C. 2009)). Like the extra-record background declarations offered by plaintiffs in this case, *see* Decl. of Tracey Avila, ECF No. 21-1; Decl. of Jason Hart, ECF No. 21-2; Decl. of John Irwin, ECF No. 21-5; Decl. of Shawn Padi, ECF No. 21-14; and Decl. of Louie Torres, ECF No. 21-17, the Cruzan declaration clearly serves these legitimate purposes.

First, the Cruzan declaration does not change the agency's explanation for the denial of the tribes' requests for 638 contracts for law enforcement services, but rather clarifies it. The administrative record makes clear that OJS declined each tribe's proposal for a 638 contracts for law enforcement pursuant to 25 U.S.C. § 450f(a)(2)(D) because the amount of funds sought by each tribe exceeded the amount of funds that OJS had allocated to each tribe for law enforcement programs. *See* AR 35 ("In this case, the Band's proposal to be provided $270,347.00 for law enforcement services is being declined on the basis of 25 U.S.C. § 450f(a)(2)(D)"); 307 (same); 334 (same). The Cruzan declaration makes no contrary statement. *See* Cruzan Decl. *passim*. Plaintiffs nonetheless claim that the Cruzan declaration conflicts with the record because Deputy Director Cruzan stated that "'OJS does not have a policy prohibiting the allocation of funds to tribes in mandatory P.L. 280 states.'" Pls.' Opp'n & Reply at 5 (quoting Cruzan Decl. ¶ 15). *See also* Pls.' Opp'n & Reply at 18-19 (same). Deputy Director Cruzan's statement, however, is supported by the record. OJS stated in the record that, as of 2009, for example, it had allocated funds for law enforcement to a number of the tribes in P.L. 280 states, including, for example, the Lac Du Flambeau, Red Cliff, Stockbridge Munsee, and Pokagon Band tribes located in Wisconsin, a mandatory-P.L. 280 state. *See* AR 37. OJS also stated in the record that it had allocated funds to the Colorado River, Ft. Apache, and Quechan tribes, all of which are located in California, which is a mandatory-P.L. 280 state, and Arizona, which is not. *See* AR 38. Additionally, OJS stated in the record that "[i]n individual cases, a tribe [located in a mandatory-P.L. 280 state] has reallo-

cated [funds] from [its] base funding, what we call TPA, and maybe self-governance compact tribes, to reallocate certain portions of the money for BIA services devoted to law enforcement. And that's fairly rare, but there a number of instances in which that has been done." AR 68:20-23. *See also* AR 70:16-17. Finally, contrary to the position now advanced by plaintiffs, plaintiffs' counsel himself asked OJS representatives at the informal conference below whether OJS had allocated funds for enforcement to some tribes in mandatory P.L. 280 states, and the agency representatives agreed with plaintiffs' counsel that it had. *See* AR 71:15-18; AR 80:8-17. All of this demonstrates that Deputy Director Cruzan's statement that OJS does not have a policy prohibiting the allocation of funds to tribes in mandatory P.L. 280 states is consistent with OJS's and plaintiffs' statements in the record below.

To be sure, the record itself contains a number of statements that, when taken out of context by plaintiffs, may appear to support plaintiffs' claim that they are inconsistent with the Cruzan declaration. *Compare, e.g.*, AR 35 (stating that the amount of funds that OJS "spends in California for law enforcement services is zero"); 68A:6-8 (stating that "across the board, [OJS] has never made funding available to law enforcement funding for 280-type jurisdictions")[3] *with* AR 37-38 (showing that OJS had, in fact, allocated funds to tribes in P.L. 280 states to fund 638 contracts for law enforcement services); 68A:3-6 (stating that OJS "has in the past approved of tribes [in P.L. 280 states] taking from their TPA . . . and has reallocated out of the sum, a certain portion towards law enforcement and the BIA has contracted with the tribe"). *See also* AR 68:20-23; AR 70:16-17. But that is not unusual in administrative record review cases. In *Bunker Hill Co. v. EPA*, 572 F.2d 1286 (9th Cir. 1977), the Ninth Circuit allowed augmenting materials to clarify a dispute that it felt was "less than clear from the original record." *Id.* at 1292. *See also Idaho Conservation League v. Mumma*, 956 F.2d 1508, 1520 n. 22 (9th Cir. 1992); *NW Coal. for Alt. to Pesticides v. U.S. E.P.A.*, No. 10-1919, 2012 WL 2343279, *5 (W.D. Wash. 2012). The fact that the Cruzan declaration seemingly conflicts with some of these statements, when they are

[3] Contrary to plaintiffs' contention, the failure to include this page of the transcript in the administrative record was an accidental omission. Defendants have submitted the page in a supplement to the administrative record, filed herewith.

taken out of context,[4] but is entirely consistent with others, is not a basis for striking it. To the contrary, it demonstrates that the Cruzan declaration explains and clarifies how OJS allocates funds among the tribes (little of which was explained as clearly as it could have been in the proceedings below). This is an entirely permissible basis for a declaration under the established case law. *See Bunker Hill Co.*, 572 F.2d at 1292 ("the augmenting materials clarified a dispute that we felt was less than clear from the original record and were clearly admissible."). *See also, e.g., Clifford v. Peña*, 77 F.3d 1414, 1418 (D.C. Cir. 1996) ("[T]here is nothing improper in receiving declarations that 'merely illuminate reasons obscured but implicit in the administrative record.'").

Second, plaintiffs fail to show that the Cruzan declaration's explanation of how OJS allocates funds for law enforcement services among the 566 federally-recognized tribes conflicts with the record. Plaintiffs' emphasis on one OJS employee's statement in an internal email that OJS has "'no formula,'" for allocating funds among the tribes, but instead uses "'historical base funding,'" *see* Pls. Opp'n & Reply at 5 (quoting extra record evidence attached to plaintiffs' complaint) is not inconsistent with Deputy Director Cruzan's statements about how the Tribal Priority Allocation process works, *see* Cruzan Decl. ¶ 3-6, and about how OJS's allocation of funds for 151 of the 187 law enforcement programs it operates is controlled by the ISDA, which requires OJS to indefinitely renew all 638 contracts (and associated funding), so long as they remain substantially the same. *See id.* ¶ 11. *Accord* 25 U.S.C. §§ 450j(c) & 450j-1(b)(2).[5] Nor does plaintiff demonstrate any relevant inconsistency between the Cruzan declaration and other extra record evidence concerning how OJS allocates new funds appropriated by Congress to tribes that are experiencing high crime rates or demonstrating a high-priority need. *Compare* Cruzan Decl. ¶ 12 *with* Pls.' Opp'n & Reply at 5 (citing extra record evidence).[6]

[4] The Cruzan declaration clarifies, for example, that while OJS does not currently have the resources to provide direct law enforcement services to tribes in California, *see* Cruzan Decl. ¶¶ 14-15, for a variety of reasons it contracts for the provision of law enforcement services to certain California tribes under 638 contracts and self-governance agreements, and allocates funds for those activities accordingly. *See id.* ¶¶ 16-19.

[5] Contrary to plaintiffs' suggestion, moreover, *see* Pls. Opp'n & Reply at 5, the ISDA prohibits an ISDA contract for one tribe from requiring the Secretary to reduce funding to another tribe. 25 U.S.C. § 450j-1(b).

[6] Plaintiffs' erroneous suggestion that the Cruzan declaration claimed that there is never any new funding which plaintiffs could compete for, *see* Pls.' Opp'n & Reply at 5, is rebutted by

Third, plaintiffs fail to demonstrate that the Cruzan declaration is irrelevant. *See* Pls.' Opp'n & Reply at 19-20. Plaintiffs claim that the Cruzan declaration's explanation of how certain other tribes located in mandatory P.L. 280 states obtained 638 contracts for law enforcement services or have a self-governance agreement with a line item for law enforcement is irrelevant because, after 1999, plaintiffs themselves could no longer take advantage of the circumstances that allowed the other tribes to obtain such funding. *See id.* However, the 2008 example of the reallocation of BIA funds by the Pokagon tribe located in Wisconsin, a mandatory-P.L. 280 state, from its Consolidated Tribal Government Program to law enforcement, *see* AR 37; Cruzan Decl. ¶ 4, entirely rebuts plaintiffs' assertion. Similarly, the situation of the Manzanita tribe, located in California, and that of other self-governance tribes located in mandatory P.L. 280 states, *see id.* ¶ 17, rebuts plaintiffs' assertion that it would be futile for the Redding Rancheria to seek to include a line item in its self-governance agreement for law enforcement.[7] And the situation of the Snoqualmie tribe, *see id.* ¶ 13, rebuts plaintiffs' unsupported assertion, *see* Pls. Opp'n & Reply at 21, that tribes without existing 638 contracts for law enforcement services cannot successfully compete for new funds allocated for law enforcement to fund new 638 contracts for law enforcement services.

Finally, plaintiffs fail to demonstrate that the Cruzan declaration is inadmissible under Fed. R. Civ. P. 56(c)(4). *See* Pls.' Opp'n & Reply at 8. It is well established in this Circuit that the information an employee is "expected to know" as a result of his position constitutes personal knowledge under Fed. R. Civ. P. 56(c)(4) (formerly Fed. R. Civ. P. 56(e)). *See, e.g., Self-Realization Fellowship Church v. Anadan Church of Self-Realization,* 206 F.3d 1322, 1330 (9th Cir. 2000); *Sheet Metal Workers' Int'l Ass'n Union No. 359 v. Madison Indus., Inc.,* 84 F.3d 1186, 1193 (9th Cir. 1996). *See also Laborers' Int'l Union of North Am. v. United States Dep't of Justice,* 578 F. Supp. 52, 56 (D.D.C. 1983) (allowing Rule 56(e) affidavit where agency offi-

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the declaration's explanation that in 2009, the Snoqualmie Indian Tribe located in Washington State received a base funding amount of $18,500 through a new 638 contract for law enforcement services under OJS's methodology for allocating new law enforcement funds. *See* Cruzan Decl. ¶ 13.

[7] Additionally, the situation of the California tribes identified in ¶¶ 18 and 19 of the Cruzan declaration rebuts plaintiffs' assertion that OJS has a categorical prohibition against allocating funds to tribes in California.

cial's observations were based on "review of [an agency report] and upon [affiant's] general familiarity with" agency operations such as that addressed in the affidavit). Additionally, Rule 56(c)(4) also allows a supervisor to declare "his own observations upon review of . . . documents, . . . procedural history . . . [and] the agency's procedures." *Londrigan v. FBI*, 670 F.2d 1164, 1174 (D.C. Cir. 1981).[8]

In this case, the Cruzan Declaration easily meets the personal knowledge requirement of Fed. R. Civ. P. 56(c)(4). Mr. Cruzan is the Deputy Director of OJS. Cruzan Decl. ¶ 1. He has responsibility for BIA's law enforcement program and reports to the BIA Director. *See id.* In that capacity, his responsibility for all BIA law enforcement programs, his general familiarity with agency operations, and his review of agency records allows Mr. Cruzan to declare "his own observations upon review of . . . documents, . . . procedural history . . . [and] the agency's procedures," *Londrigan*, 670 F.2d at 1174, and demonstrates that he is "knowledgeable" about the issues to which he is testifying. *Ramo*, 487 F. Supp. at 130.

Accordingly, plaintiffs provide no basis for striking or otherwise ignoring the Cruzan Declaration.[9]

C. Redding Rancheria and Rincon Band Have Failed to Demonstrate They Have Standing

Plaintiffs claim that Redding Rancheria and Rincon Band have standing to maintain this action because they meet two out of the three requirements necessary for any plaintiff to establish Article III standing. *See* Pls.' Opp'n & Reply at 9. Standing cannot be satisfied by meeting

[8] *See also, e.g., Wash. Cent. RR Co. v. Nat'l Mediation Bd.*, 830 F. Supp. 1343, 1353 (E.D. Wash. 1993) ("Personal knowledge is not strictly limited to activities in which the declarant has personally participated[, but] . . . can come from review of the contents of files and records[,] . . . including requests or statements by third persons made to someone other than the declarant."); *Rossi v. United States*, 755 F. Supp. 314, 316 n.1 (D. Or. 1990) (understanding 56(e) personal knowledge standard "to require that the affiant actually did the act in question" is to "too strictly construe the meaning of the phrase"), *aff'd*, 983 F.2d 1077 (9th Cir. 1993) (unpublished); *Vote v. United States*, 753 F. Supp. 866, 868 (D. Nev. 1990) (Rule 56(e) "personal knowledge" requirement met when affidavit is based on affiant's review of records and files), *aff'd*, 930 F.2d 31 (9th Cir. 1991) (unpublished); *Ramo v. Dep't of Navy*, 487 F. Supp. 127, 130 (N.D. Cal. 1979) ("The affidavit or testimony of an agency official, who is knowledgeable [about the issue to which he testifies] . . . complies with this [personal knowledge] standard."), *aff'd*, 692 F.2d 765 (9th Cir. 1982).

[9] If this Court were to hold that the Cruzan Declaration could not be considered and was unable to grant defendants' summary judgment motion on the basis of the administrative record, the correct remedy would be for this Court to remand this case to the agency. *See Ctr. for Bio. Diversity v. Nat'l Hwy. Traffic Safety Admin.*, 538 F.3d 1171, 1179 (9th Cir. 2008).

two out of three requirements. *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560 (1992). In the absence of a concrete injury, this Court lacks subject matter jurisdiction over the claims of Redding Rancheria and Rincon Band. *Braunstein v. Ariz. Dep't of Transp.*, 683 F.3d 1177, 1184-85 (9th Cir. 2012) (plaintiff lacks standing to challenge government policy in the absence of concrete injury).

Instead of demonstrating injury, plaintiffs claim that the burden on Redding Rancheria and Rincon Band to demonstrate an injury-in-fact is excused because it would be futile for them to submit proposals for 638 contracts for law enforcement services. *See* Pls.' Opp'n & Reply at 10-11. Plaintiffs' proposed reading of the futility doctrine is far too broad. The futility exception to the requirement that a plaintiff must exhaust administrative remedies before proceeding to court does not simply excuse a plaintiff from demonstrating injury; additionally, it requires a plaintiff to demonstrate futility, not simply assert it. *See Madsen v. Boise State Univ.*, 976 F.2d 1219, 1222 (9th Cir. 1992) (questioning "whether futility can, by itself, establish standing where it does not otherwise exist"); *id.* (holding that plaintiff had not alleged sufficient facts to support his futility claim.). The doctrine merely excuses, in certain circumstances, a plaintiff that has suffered a concrete injury in-fact from having to exhaust administrative remedies before heading to court. *Desert Outdoor Adver., Inc. v. City of Moreno Valley,* 103 F.3d 814, 817-18 (9th Cir.1996) (finding that it would be futile to require plaintiff file a permit application because "the City actually brought an enforcement action" against plaintiff). *See also Taniguchi v. Schultz,* 303 F.3d 950, 957 (9th Cir. 2002) (finding that it would be futile to require plaintiff to apply for a waiver because the challenge statute "flatly prohibit[s]" issuing the waiver in that case). However, the doctrine does not allow a plaintiff to simply declare that it would be futile to apply for a government permit or benefit. *Herson v. City of Reno,* 806 F. Supp. 2d 1141, 1147-48 (D. Nev. 2011) (futility doctrine does not excuse plaintiff's lack of standing to challenge sign ordinance in the absence of government action against plaintiff that causes injury to plaintiff); *Coulter v. Bronster,* 57 F. Supp. 2d 1028, 1036 (D. Haw. 1999) (futility doctrine does not excuse plaintiff from applying for permit to enable the defendant to determine whether those activities would be prohibited. "While Plaintiff may believe that doing so would be futile, such a belief is not sufficient,

by itself, to confer standing upon Plaintiff.").

In this case, plaintiffs erroneously claim that they need not make a factual record below because there was nothing individualized about OJS's declinations of the proposals of Hopland, Robinson Rancheria, and Coyote Valley. Pls.' Opp'n & Reply at 11. They further claim that Redding Rancheria and Rincon Band have standing under the ISDA itself for "judicial review of denials of those contracts." *Id.* at 9. But in the absence of any attempt by these tribes to even request a 638 contract, there is no declination for them to challenge, *see* 25 U.S.C. § 450m-1, and they have not even alleged, let alone demonstrated (as they now must do at the summary judgment stage) sufficient facts to show futility. It is unclear, for example, whether Redding Rancheria might submit an amendment to its self-governance agreement to reallocate a portion of its BIA existing funds to law enforcement and how defendants would respond to such a proposal. *Cf.* Cruzan Decl. ¶ 17 (noting that Manzanita tribe in California reprogrammed funds in its self-governance agreement to create a law enforcement program). Similarly, it is unclear whether Rincon Band might submit a proposal to reallocate some of its other BIA funds to law enforcement, propose an ISDA contract based on the amount of the proposed reallocation, and how defendants would respond to that proposal. *Cf. id.* ¶¶ 4 (noting that in 2008 the Pokagon tribe located in Wisconsin, a mandatory-P.L 280 state, reallocated funds from other BIA programs to create a law enforcement program); 16 (noting that tribes in mandatory P.L. 280 states reallocated funds from other BIA programs to create law enforcement programs and then enter into a 638 contract for law enforcement services). Nor is it certain whether Redding Rancheria or Rincon Band might submit a proposal to compete for new funds that OJS may allocate for law enforcement in the upcoming fiscal year. *Cf. id.* ¶ 13 (noting that in 2009 the Snoqualmie tribe received a base funding amount of $18,500 from new funds OJS allocated to law enforcement through a new 638 contract). Indeed, the tribes do not even allege that they seek the exact same contract as Hopland, Robinson Rancheria and Coyote Valley. Compl. *passim*. Thus, in absence of demonstrating that it would be futile to even propose to amend or otherwise apply for a 638 contract, Redding Rancheria and Rincon Band have not established an injury in-fact sufficient to maintain constitutional standing.

Contrary to plaintiffs' claim, moreover, *see* Pls.' Opp'n & Reply at 11, it is irrelevant for purposes of maintaining standing to bring a challenge under the ISDA whether or not the Bureau provides (or in this case, has declined to provide) law enforcement services to other tribes in California. *Accord Valley Forge Christian Coll. v. Am. United for Separation of Church & State, Inc.*, 454 U.S. 464, 489 n. 26 (1982) (rejecting the notion that every citizen has standing to challenge government policy). Rather, the relevant inquiry under the ISDA is whether OJS is currently providing direct law enforcement services for the benefit of the plaintiff tribe; if so, that tribe has a right under the ISDA to enter into a contract to take over the administration of those direct law enforcement services. *See* 25 U.S.C. § 450f(1)(a). The record is clear in this case that OJS declined the proposals for the Hopland, Robinson Rancheria, and Coyote Valley tribes because the amount of funds each of those tribes requested exceeded the amount of funds that OJS has allocated to each of those tribes. AR 34, 307, 334 (denying each proposal pursuant to 25 U.S.C. § 450f(a)(2)(D)). But in the absence of contract proposals from Redding Rancheria and Rincon Band, this Court cannot evaluate whether the agency's responses to those proposals might accord with the requirements of the ISDA.

Nor, to be clear, do Redding Rancheria and Rincon Band have standing to maintain the remainder of their challenges brought under the APA, 25 U.S.C. § 450k, the Fifth Amendment, or the Indian Trust Doctrine. *Accord, e.g., Braunstein*, 683 F.3d at 1185 ("The rule that a plaintiff must assert a particularized injury, rather than a generalized grievance, 'applies with as much force in the equal protection context as in any other.'") (quoting *United States v. Hays*, 515 U.S. 737, 743 (1995)). Accordingly, in the absence of demonstrating any concrete injury to themselves, Redding Rancheria and Rincon Band cannot "ride the [other plaintiff tribes'] coattails" to maintain any part of their action against defendants. *Indian Oasis-Baboquivari Unified Sch. Dist. No. 40 v. Kirk*, 91 F.3d 1240, 1245 (9th Cir. 1996).

D. Neither Plaintiffs' Claims Under the APA Nor 25 U.S.C. § 450k Have Merit

Contrary to plaintiffs' claims, there is no statute or case law that requires OJS to establish a "rational, publicly noticed, funding policy." Pls.' Opp'n & Reply at 14. *See also id.* at 19 (criticizing OJS's alleged lack of "uniform methodology of criteria used to distribute funds to meet

the need for law enforcement services on Indian reservations.").

In *Lincoln v. Vigil,* a unanimous Supreme Court held that an agency's discretionary allocations from an unrestricted lump-sum appropriation constitute a general statement of policy, not subject to judicial review and not subject to the APA's notice and comment requirement. *See* 508 U.S. 182, 192, 197 (1993). Plaintiffs claim not to dispute this point, *see* Pls.' Opp'n & Reply at 13, but their contention that the agency must establish a rational, publicly noticed funding formula is the other side of the same coin. Most problematic for plaintiffs is that, in conceding the applicability of *Lincoln's* holding that the APA does not provide a waiver of sovereign immunity to challenge an agency's allocation of funds under a lump sum appropriation, plaintiffs fail to explain how this Court has subject matter jurisdiction to review their claim that this allocation must take the form of a rational, publicly noticed, funding policy. *See id.* In this absence of subject matter jurisdiction to consider such a claim, of course, this Court must dismiss plaintiffs' challenge. *Lincoln*, 508 U.S. at 194.

Plaintiffs' assertion of the availability of such a claim arising under *Morton v. Ruiz*, 415 U.S. 199 (1974); *Rincon Band of Mission Indians v. Califano*, 464 F. Supp. 934 (N.D. Cal. 1979), *aff'd on other grounds sub nom. Rincon Band of Mission Indians v. Harris*, 618 F.2d 569 (9th Cir. 1980); or *Ramah Navajo Sch. Bd. v. Babbitt*, 87 F.3d 1338 (D.C. Cir. 1996), lacks merit. In declining to find a requirement that the BIA must publish its funding allocations for notice and comment, for example, the *Lincoln* Court went out of its way to note that the APA's notice and comment requirements were not even at issue in *Morton v. Ruiz*. *See Lincoln*, 508 U.S. at 199. Rather, as defendants demonstrated in their opening brief, the *Lincoln* Court found that *Morton v. Ruiz* concerned a challenge to a provision, contained in a BIA manual, which restricted eligibility for Indian assistance. *See id.* It was only because the Bureau's own regulations required it to publish the provision in the Federal Register, and because the agency failed to do so, *Morton*, 415 U.S. at 233-234, that the provision was invalid. *Id.* at 236.

In this case, however, just as the Court found in *Lincoln*, there are no "[n]o such circumstances" that would render *Morton v. Ruiz* applicable to evaluate whether an agency allocation of resources from an unrestricted lump-sum appropriation is reasonable. *Lincoln*, 508 U.S. at 199.

Indeed, the only statutory provision plaintiffs point to, 25 U.S.C. § 2802(c)(16)(D), does not require OJS to "establish and implement a rational funding formula," *see* Pls.' Opp'n & Reply at 15, but simply requires OJS to submit to "appropriate committees of Congress" a detailed spending report regarding tribal public safety and justice that includes, among other things, "the formula, priority list, or other methodology" used to determine the method of disbursement of funds for public safety and justice programs administered by OJS. *See* 25 U.S.C. § 2802(c)(16)(D). Because § 2802(c)(16)(D) is a congressional reporting requirement, moreover, it gives no rights to plaintiffs, and this Court lacks jurisdiction to enforce it. *Greenpeace USA v. Stone*, 748 F. Supp. 749, 765-66 (D. Haw. 1990). As the D.C. Circuit has explained in addressing a similar congressional reporting requirement, such a measure "embodies a requirement that by its nature seems singularly committed to *congressional* discretion in measuring the fidelity of the Executive Branch actor to legislatively mandated requirements." *Nat. Res. Def. Council v. Hodel*, 865 F.2d 288, 318 (D.C. Cir. 1988) (emphasis in original). "If the Secretary's response has indeed been deemed inadequate . . . by its recipient," moreover, "then it is most logically for the recipient of the report to make that judgment and take what it deems to be the appropriate action." *Id.* at 318-19. As a result, the issue of whether defendants have complied with § 2802(c)(16)(D) is "quintessentially within the province of the political branches to resolve as part of their ongoing relationships," *id.*, and give no judicially enforceable rights to plaintiffs. *Greenpeace USA*, 748 F. Supp. at 765-66. But in any event, as defendants established in their opening brief, OJS satisfies this requirement by including in Interior's budget justification its ongoing funding obligations and has developed a methodology for distributing new funds, which it submits to Congress on an annual basis. Cruzan Decl. ¶¶ 4, 11-12.

Nor, as defendants established in their opening brief, does *Rincon Band of Mission Indians* provide plaintiffs with a right to a "rational, publicly noticed, funding formula." *Rincon* found that the Snyder Act required the Indian Health Service to provide health care in a rational manner, 618 F.2d at 573, but in *Lincoln*, the Supreme Court unanimously found that the IHS's decision about how to allocate resources among the 566 federally recognized tribes on a nationwide basis under the Snyder Act clearly falls within the agency's statutory mandate and is judi-

cially unreviewable. *See Lincoln*, 508 U.S. at 194. *See also Scholder v. United States*, 428 F.2d 1123, 1128 (9th Cir. 1970).

Even if *Rincon* were still good law, moreover, it would not apply here. In this case, OJS provides, or contracts for the provision of, law enforcement services for 187 out of 566-federally recognized tribes. Cruzan Decl. ¶ 11. 151 of those are contracted under the ISDA, indefinitely renewable, and thus not even subject to re-allocation. *Id. See* 25 U.S.C. § 450j(c) & 450j-1(b)(2). In determining this allocation of resources, moreover, OJS must balance the multifaceted issue of tribal, state and federal jurisdiction on tribal lands, Cruzan Decl. ¶¶ 7-9, and the fact the tribes themselves can choose how to allocate BIA funds to various BIA programs. *See id.* ¶ 6. The Indian Health Service, by contrast, does not have to contend with varying degrees of state criminal jurisdiction or tribal reallocation among Indian programs under the TPA process. In light of incredible complexity facing OJS, plaintiffs entirely fail to demonstrate how this Court could evaluate, under the Snyder Act, either the reasonableness of OJS's decision to allocate funds to those 26 tribes to whom it provides direct services but not the 379 tribes to whom it provides no services, let alone determine the "reasonableness," under the Snyder Act, of OJS's "formula" for allocating its limited funds among the tribes. These are precisely the kinds of agency judgments that, under *Lincoln*, are not subject to judicial review.

Additionally, plaintiffs make no effort to rebut defendants' showing in their opening brief that the contract support cost provisions at issue in *Ramah*, 87 F.3d at 1344, have no application to the ISDA provisions at issue in this case. *See* Pls.' Opp'n & Reply at 12-16. Unlike the provisions at issue in *Ramah*, the provisions at issue here govern the transfer of direct services, currently being provided by the BIA for the benefit of a tribe, to the administration of those very same services by the tribe itself, with the corresponding funding (the secretarial amount), transferring as well. *See* 25 U.S.C. § 450f(a)(1)(B). None of these provisions provide this Court with any relevant "law to apply," *Webster v. Doe*, 486 U.S. at 600, concerning the allocation of funds for law enforcement among federally-recognized tribes, especially those tribes like plaintiffs that do not currently have ISDA contracts.[10] Thus, nothing in the ISDA can be read to require OJS to

[10] Indeed, although plaintiffs desire a "uniform methodology" for distributing law enforcement funds among the tribes, *see* Pls. Opp'n & Reply at 19, it is the ISDA and other Acts of

provide a rational, publicly-noticed funding policy.[11]

Finally, plaintiffs make no effort to rebut defendants' showing that nothing in 25 U.S.C. § 450k can reasonably be read to require OJS to provide a rational, publicly-noticed funding policy. *See* Pls.' Opp'n & Reply at 12-16. Neither § 450k's prohibition against imposing regulatory or non-regulatory requirements relating to the approval, award, or declination of 638 contracts outside of 16 delineated topics, nor its requirement to publish regulations about those 16 topics pursuant to the APA's notice-and-comment requirements, requires the agency to publish a rational funding policy, and plaintiffs make no showing to the contrary. Indeed it would be absurd to read the ISDA as imposing requirements on the agency that have nothing to do with 638 contracts. Section 450k cannot be reasonably read to apply to the agency's otherwise unreviewable allocations from its lump-sum appropriations.

E. OJS Correctly Denied Hopland's Request for an Unfunded 638 Contract

Contrary to plaintiffs' claims, *see* Pls.' Opp'n & Reply at 16-18, defendants' cross motion and opposition does not assert a new reason for denying Hopland's request for an unfunded

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Congress, *see, e.g.*, P.L. 280, rather than agency policy, that stands in their way. Because the ISDA requires the indefinite renewal of 638 contracts so long as they remain substantially similar, *see* 25 U.S.C. §§ 450j(c) & 450j-1(b)(2), OJS must continue to allocate funds to tribes with existing 638 contracts on an annual basis. Additionally, because the ISDA does not require the agency to reduce funding to other tribes in order to fund the request of a particular tribe, *see id.* § 450j-1(b), plaintiffs cannot request a 638 contract for law enforcement funds that would require OJS to do exactly that. In light of these ISDA provisions and P.L. 280, moreover, this Court is not even in a position to order defendants to create such a funding policy. *See Nat'l Wrestling Coaches Ass'n v. Dep't of Educ.*, 366 F.3d 930, 939-940 (D.C. Cir. 2004) ("Even if appellants prevailed on the merits, [the statute] and [the r]egulations would still be in place. . . . As a consequence, nothing but speculation suggests that [those who are allegedly causing the injury] would act any differently than they do with the [disputed practice] in place."). But even if the ISDA did not contain these provisions, plaintiffs cannot seriously suggest that this Court should strip funds allocated for the benefit of other tribes to fund plaintiffs' desired programs.

[11] Plaintiffs also cite to the U.S. Government Accountability Office ("GAO"), Principles of Federal Appropriations Law (the "Red Book") (3d ed. Jan. 2004), for the proposition that "agencies are required to establish a rational funding formula." Pls.' Opp'n & Reply at 15-16 (citing 1 GAO, Red Book 6-5 – 6-26; 2 GAO, Red Book 3-49 – 3-52). The Red Book, however, does not advance plaintiffs' case; rather, the Red Book notes that an agency may voluntarily enact regulations that limit its own discretion, I GAO, Red Book, at 3-47, and when it does so they are judicially reviewable to determine whether they are rational and consistent. *See id.* at 3-49 – 3-50 (quoting *Morton v. Ruiz, supra*). In the absence of such regulations, however, the Red Book expressly embraces *Lincoln's* holding that an agency's allocation of funds from a lump-sum appropriation is committed to agency discretion, and notes that this holding accords with the GAO's own position as well. *See* 2 GAO, Red Book, at 6-18 (quoting *Lincoln, supra,* and citing GAO opinions). Thus, the Red Book supports defendants' - rather than plaintiffs'- position in this case.

638 contract. *See* AR 276-81. The record makes clear that OJS denied Hopland's second contract proposal under two separate provisions of the ISDA, 25 U.S.C. § 450f(a)(2)(C) and (E), *see* AR 278, one of which it is defending in this Court. Contrary to plaintiffs' assertion, OJS's declination explained that the agency was declining Hopland's proposal pursuant to subsection (E) because the "Secretary cannot award a contract to perform programs or services that the Secretary would not be authorized to perform himself." AR 280. OJS further explained that "BIA law enforcement officers exercise more limited law enforcement authority than Hopland requests its officers to have." *Id.* It explained that, contrary to Hopland's proposal, "BIA law enforcement officers do not 'enforce . . . all tribal laws, and all state laws that federal officers are authorized by state law to enforce under [Cal. Penal Code §] 830.8(a).'" AR 280 (quoting Hopland's proposal). OJS thus concluded that Hopland's request for authority to enforce laws other than those that BIA law enforcement officers enforce is declined because the proposal 'includes activities that cannot be lawfully carried out by the contractor.'" *Id.* at 280-81 (quoting 25 U.S.C. § 450f(a)(2)(E)). This is exactly the same argument defendants advanced in their cross motion and opposition. *See* Defs.' Mot. for Sum. J. & Opp'n at 21-23. Thus, plaintiffs' claim that OJS is improperly advancing a new reason in its opening brief is entirely meritless.

Nor do plaintiffs succeed in establishing that Hopland's proposed revisions to its existing deputation agreement are limited to the powers that can be exercised by BIA's law enforcement officers. *See* Pls.' Opp'n & Reply at 17-18. Contrary to plaintiffs' assertion that Hopland's suggested amendments would properly limit the power of its commissioned officers, the proposal not only improperly sought to give Hopland's officers broader powers to enforce state law than BIA's law enforcement officers have, AR 264-65, but also improperly sought to allow Hopland's commissioned officers broader powers to travel and conduct activities outside of Indian country, AR 265-67, a point to which plaintiffs do not even respond. *See* Pls.' Opp'n & Reply at 16-18.[12] As a result, plaintiffs cannot show that Hopland's second proposal would allow the contractor to lawfully carry out the program. It was correctly denied pursuant to 25 U.S.C. § 450f(a)(2)(E).

[12] We note that, despite these defects, OJS offered to enter to an amended deputation agreement, subject to significant revisions. *See* AR 276-77. Hopland has not responded to this offer.

III. CONCLUSION

For the foregoing reasons, this Court should deny plaintiffs' motion for summary judgment, grant defendants' cross motion for summary judgment, and should enter judgment for defendants.

Respectfully Submitted,

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Dated: August 24, 2012

CERTIFICATE OF SERVICE

I, James D. Todd, Jr., hereby certify that a copy of the foregoing document was this date served upon all counsel of record by electronically filing the foregoing with the Clerk of the U.S. District Court for the Northern District of California, using its ECF system, which automatically provides electronic notification to the following:

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