IN THE UNITED STATE DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

(1) THE ESTATE OF JAMES DYLAN GONZALEZ, by and through Personal Representative Dolly Gonzales, and (2) DOLLY GONZALES, individually,	)	
Plaintiffs,	)	
vs.	)	Case No. 12-CV-495-JED-PJC
(3) CALVIN BROWN, individually and in his official capacity; (4) THE CITY OF PAWNEE, OKLAHOMA; (5) HERB ADSON, Chief of Police for the City of Pawnee, individually and in his official capacity; (6) LARRY MILLER, individually and in his official capacity; (7) MIKE WATERS, Sheriff of Pawnee County, in his official capacity; (8) PAT LEADING FOX, individually and in his official capacity; and (9) DAVID KANUHO, Chief/Director of Police of the Pawnee Nation Police Department, individually and in his official capacity,	)	
Defendants.	)	

DEFENDANT LEADING FOX'S MOTION TO DISMISS PLAINTIFFS' SECOND AMENDED COMPLAINT AND BRIEF IN SUPPORT

Defendant Patrick Leading Fox, individually and in his official capacity by and through counsel, Alyssa D. Campbell of Legal Advocates for Indian Country,

LLP, files this Motion to Dismiss all claims against him as set forth in Plaintiffs' Second Amended Complaint (Doc. 25) pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure for failure to state a claim upon which relief can be granted; and because soveriegn immunity prevents suit against Defendant Leading Fox. In Support of this Motion, Defendant Leading Fox submits the following Brief in Support.

BRIEF IN SUPPORT

STANDARD OF REVIEW

In considering a 12(b)(6) motion, the truth of a plaintiff's well-pled factual allegations must be viewed in the light most favorable to the plaintiff. *Beedle v. Wilson*, 422 F.3d 1059, 1063 (10th Cir. 2005). A plaintiff must allege "enough facts to state a claim to relief that is plausible on its face." *Bell Atlantic Corp v. Twombly*, 550 U.S. 544, 127 S. Ct. 1955, 1974, 167 L. Ed. 2d 929 (2007)(abrogating *Conley v. Gibson*, 355 U.S. 41(1957)). Further, a plaintiff's "[f]actual allegations must be enough to raise a right to reief above the speculative level." Twombly, 127 S.Ct. at 1965. It is the plaintiff's duty to furnish factual "allegations plausibly suggesting (not merely consistent with)" an entitlement to relief. *Id*. at 1966.

A "[p]laintiff's obligation to provide the 'grounds' of their entitlement to relief requires more than labels and conclusions or a formulaic recitation of the elements of a cause of action." *League of United Latin American Citizens v. Bredesen*, 500 F.3d 523, 527 (6th Cir. 2007) (citing Twombly 127 S.Ct. at 1964-1965).

The rule in *Twombly* has been applied by the Tenth Circuit. See *Ton Services, Inc. v. Qwest Corporation*, 493 F.3d 1225, 1236 (10th Cir. 2007) (noting that *Twombly* "articluated a new 'plausibility' standard under which a complaint must include 'enough facts to state a claim to relief that is plausible on its face.").

PROPOSITION I:

Plaintiffs' Claims Against Defendant Leading Fox are Barred by the Applicable Statutes of Limitations.

Plaintiffs assert claims against Defendant Leading Fox under 42 U.S.C. § 1983 for alleged violations of the Decedent's civil rights guaranteed by the Fourth, Fifth, and Fourteenth Amendments to the U.S. Constitution. (See Doc. 25, Count I, p. 12, ¶46 - p. 13, ¶48; Count II, p. 14, ¶54 - p. 15, ¶56; Count III, p. 16, ¶61 – p. 17 62.) However, Plaintiffs' claims against Defendant Leading Fox are barred by the applicable statute of limitations.

Congress did not provide a statute of limitations period in §1983 actions; therefore, the courts have adopted the most analogous limitations period

provided by state law. *Hardin v. Straub*, 490 U.S. 536, 538, 109 S.Ct. 1998, 104 L.Ed.2d 582 (1989); *Abbitt v. Franklin*, 731 F.2d 661, 663 (10th Cir. 1984). The statute of limitations for civil rights actions is the same as for personal injury actions under state law. *See Owens v. Okure*, 488 U.S. 235, 109 S.Ct. 573, 102 L.Ed.2d 594. In *Garcia v. Wilson*, 731 F.2d 640 (10th Cir. 1984), ***aff'd*** 471 U.S. 261 (1985), the Tenth Circuit concluded as a matter of law that all such §1983 claims should be considered personal injury claims. The appropriate statute of limitations for civil rights claims in Oklahoma is, therefore, Oklahoma's two year limitation. *See Watson v. Unipress,* 733 F.2d 1386 (10th Cir. 1984); Title 12 O.S. § 95(3).

"Generally, a statute of limitations begins to run when a cause of action accrues, and a cause of action accrues at the time when a litigant first could have maintained his action to a successful conclusion." *Sherwood Forest No. 2 Corp. v. City of Norman*, 632 P.2d 368, 370 (Okla. 1980). *See also Cowart v. Piper Aircraft Corp.*, 665 P.2d 315, 318 (Okla. 1983) ("As a general rule, the accrual of a cause of action means the right to institute and maintain a suit, and whenever one person may sue another a cause of action has accrued, and the statute of limitations begins to run.").

Though the two-year limitations period governing Plaintiffs' §1983 claims is a creature of state law, *see Abbitt v. Franklin*, 731 F.2d 661, 663 (10th Cir.1 984)

(*en banc*), federal law governs the question of accrual of federal causes of action, and thus, dictates when the statute of limitations begins to run for purposes of §1983. *See* Fratus v. Deland, 49 F.3d 673, 675 (10th Cir.1995); Baker v. Board of Regents, 991 F.2d 628, 632 (10th Cir. 1993). "A civil rights action accrues when the plaintiff knows or has reason to know of the injury which is the basis of the action." Baker, 991 F.2d at 632; *see* Hunt v. Bennett, 17 F.3d 1263, 1266 (10th Cir.) (*quoting* Johnson v. Johnson County Comm'n Bd., 925 F.2d 1299, 1301 (10th Cir.1991)), *cert. denied*, 513 U.S. 832, 115 S.Ct. 107, 130 L.Ed.2d 55 (1994). Since the injury in a §1983 case is the violation of a constitutional right, *see* Garcia v. Wilson, 731 F.2d 640, 650 (10th Cir.1984), *aff'd* 471 U.S. 261, 105 S.Ct. 1938, 85 L.Ed.2d 254 (1985), such claims accrue "when the plaintiff knows or should know that his or her constitutional rights have been violated." Lawshe v. Simpson, 16 F.3d 1475, 1478 (7th Cir.1994). This requires the court "to identify the constitutional violation and locate it in time." *Id.*

Here, the face of Plaintiffs' Second Amended Complaint shows that Plaintiffs' claims against Defendant Leading Fox accrued on May 1, 2010. (Doc. 25, p. 4, ¶17 - p. 7, ¶30). However, Plaintiffs did not assert their claims against Defendant Leading Fox until the filing of the Second Amended Complaint on March 22, 2013 – well outside of the two-year statute of limitations. Accordingly, Plaintiffs' claims

against Defendant Leading Fox are time-barred and should be dismissed with prejudice.

In their Unopposed Motion for Leave to File Second Amended Complaint and for Joinder of Parties, Plaintiffs refer to Fed.R.Civ.P. 15 and suggest that their amendment will relate back to their original pleading. (Doc. 23, p.3). Rule 15 simply does not allow an amendment adding additional legal claims against additional party defendants to relate back to the date of filing of the original complaint. Rather, the Rule states in relevant part:

> (c) Relation Back of Amendments.
>
> (1) *When an Amendment Relates Back.* An amendment relates back to the date of the original pleading when:
>
> ****
>
> (C) **the amendment changes the party or the naming of the party against whom a claim is asserted**, if Rule 1 5(c)(1)(B) is satisfied and if, within the period provided by Rule 4(m) for serving the summons and complaint, the party to be brought in by amendment:
>
> (I) received such notice of the action that it will not be prejudiced in defending on the merits; and
>
> (ii) knew or should have known that the action would have been brought against it, but for a **mistake concerning the proper party's identity**.
>
> (Emphasis added).

However, adding additional legal claims against additional party defendants is not a change of party or the naming of a party, nor is it a "mistake concerning the proper party's identity" as contemplated by Rule 15(c). *See* *Garrett v. Fleming*, 362 F.3d 692, 696 (10th Cir. 2004) ("[A] plaintiff's lack of knowledge of the intended defendant's identity is not a 'mistake concerning the identity of the proper party' within the meaning of [Rule 15]..."). "As a general rule, an amendment pursuant to Rule 15, Federal Rules of Civil Procedure, relates back only to the matters relating to the original parties of the complaint, or to correct a misnomer or a misdescription of defendant, and not to add or substitute a new party defendant." *Graves v. Gen. Ins. Corp.*, 412 F.2d 583, 585 (10th Cir. 1969).

Furthermore, Plaintiffs have produced no evidence (or even asserted any allegations) demonstrating that Defendant Leading Fox received any notice of this action within the time period for the service of summons and complaint as required by Rule 15(c)(1)(C)(I). Rather, in their Unopposed Motion for Leave to File Second Amended Complaint and for Joinder of Parties, Plaintiffs assert that the Defendants "had notice of the events giving rise to this suit..." (Doc. 23, p. 3, ¶7). However, it is notice of the suit, not knowledge of the underlying events, which Rule 15(c)(1)(C)(I) requires. Defendant Leading Fox would clearly be prejudiced in defending claims of which he had no notice and which were first asserted against him three years after the incident which gave

raise to the filing of Plaintiff's original complaint. Thus, Plaintiffs' unreasonable delay in seeking to add Defendant Leading Fox to this suit clearly works prejudice against Defendant Leading Fox in defending this case on the merits. Evidence regarding Plaintiffs' claims against Defendant Leading Fox may have been lost, witnesses may have moved on, and witnesses' memories regarding these claims have lapsed or faded in the interim.

Accordingly, because they cannot meet the requirements of Rule 15(c), Plaintiffs' Second Amended Complaint does not relate back to the date of filing of their original complaint with regard to the addition Defendant Leading Fox to this suit.

Moreover, Plaintiffs are not entitled to equitable tolling. Oklahoma recognizes the doctrine of equitable tolling in two circumstances: 1) where the plaintiff was under a "legal disability" which prevented him from timely prosecuting his claims; and 2) where the defendant has engaged in "false, fraudulent, misleading conduct calculated to lull plaintiffs into sitting on their rights..." *Alexander v. Oklahoma*, 382 F.3d 1206, 1217 (10th Cir. 2004) (citations and internal quotation marks omitted).

Here, Plaintiffs were obviously not under any "legal disability" which would have prevented them from timely prosecuting their claims against Defendant Leading Fox They have timely pursued those same claims against other party defendants since May 1, 2012. (See Doc. 2-1). Nor is there any indication

whatsoever that Defendant Leading Fox took any action to conceal his involvement in the underlying event, or that he engaged in any other false, fraudulent, or misleading conduct calculated to forestall Plaintiffs from pursuing a legal claim against him. Rather, the delay in adding Defendant Leading Fox as a party to this action appears to be wholly the result of Plaintiffs' own failure to exercise due diligence in discovery. (See Doc. 23, pp. 1-2, ¶3). Regardless, whatever the claimed reasons for the Plaintiffs' delay in adding Defendant Leading Fox as a party to this suit, that delay is not attributed to any act of Defendant Leading Fox himself and, therefore, provides no basis for the application of equitable tolling. Accordingly, Plaintiffs' claims against Defendant Leading Fox are time-barred and should be dismissed with prejudice.

PROPOSITION II:

Plaintiffs' Claims Against Defendant Leading Fox are Barred by Sovereign Immunity

The doctrine of sovereign immunity is well established. It has long been held that the common law doctrine of sovereign immunity applies to Indian Tribes as it applies to other sovereigns. Turner v. United States, 348 U.S. 354, 358 (1919).

The doctrine of sovereign immunity also applies to tribal officials, like *the President of the Pawnee Nation.* Tribal sovereign immunity extends to tribal

officials when acting in their official capacity and within the scope of their authority. Linneen v. Gila River Indian Community, 276 F.3d 489, 492 (9th Cir. 2002). When the President of the Pawnee Nation signed the Deputation Agreement (Doc. 25-1), he was acting in his official capacity and within the scope of his authority as authorized by Tribal Resolution. The sovereign entity is the real, substantial party in interest and is entitled to invoke its sovereign immunity from suit even though individual officials are nominal defendants. Regents of the University of California v. Doe, 519 U.S. 425, 429 (1997). In applying this principle to tribal rather than state immunity, courts have held that a plaintiff cannot circumvent tribal immunity by the simple expedient of naming an officer of the Tribe as a defendant, rather than the sovereign entity. Snow v. Quinault Indian Nation, 709 F.2d 1319, 1322 (9th Cir. 1983). Tribal officials, like state officials, are protected by sovereign immunity. *See* Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 148 (1982).

Even if *Defendant Leading Fox* is not considered a tribal official, courts have held that a tribal employee need not be an officer in order for sovereign immunity to apply. The principles that motivate the immunizing of tribal officials from suit—protecting an Indian tribe's treasury and preventing a plaintiff from bypassing tribal immunity merely by naming a tribal official—apply just as much to tribal employees when they are sued in their official capacity. Cook v. Avi

Casino Enterprises, 548 F.3d 718 (9th Cir. 2008). Plaintiff cannot circumvent tribal immunity through a mere pleading device. Will v. Michigan Dept. of State Police, 491 U.S. 58, 70-71, (1989). *See also* Chayoon v. Chao, 355 F.3d 141, 143 (2d Cir. 2004).

Defendant Leading Fox was acting within the scope of his employment as a Pawnee Nation Police Officer at all times relevant to this cause of action. As such, Defendant Leading Fox is entitled to dismissal of this cause of action under the doctrine of sovereign immunity.

Defendant Leading Fox, as an individual, is exempt from personal liability. Individual members or employees have no more individual liability for the contracts or torts of the Tribe than citizens of a state have individual liability for the acts of the state's government. Flores v. California Board of Equalization, No. 98R-0910, Case No. 89002462360, 2001-SBE-004.

The Deputation Agreement (Doc. 25-1) does not contain a waiver of sovereign immunity. A waiver of the tribe's sovereign immunity cannot be implied but must be unequivocally expressed. Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978). Unless a tribe has clearly waived its immunity or Congress expressly abrogated that immunity by authorizing suit, a suit against an Indian tribe is barred. *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 509 (1991) (recognizing tribal immunity from suit over taxation of

cigarette sales); *Ordinance 59 Ass'n v. Babbitt*, 970 F. Supp. 914 (D. Wyo. 1997) (same).

Furthermore, the Deputation Agreement goes further to state "Nothing in this Agreement shall be construed as a waiver of any government's sovereign immunity, not otherwise expressly waived by legislative act." (see Doc. 25-1, p. 13, ¶8(D).)

WHEREFORE, premises considered, the Defendant David Leading Fox in his individual and official capacity, respectfully requests the Court to dismiss Plaintiffs' claims against him as set forth in the Second Amended Complaint (Doc. 25) with prejudice to the refiling thereof pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure for failure to state a claim upon which relief can be granted and pursuant to Rule 12(6) and because Plaintiffs' claims were barred by sovereign immunity.

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CERTIFICATE OF SERVICE

This is to certify that on the date of filing, a true and correct copy of the above and foregoing *Defendant Leading Fox's Motion to Dismiss Plaintiffs' Second Amended Complaint and Brief in Support* was electronically transmitted to the Clerk of Court using the ECF system for filing and transmittal of a Notice of Electronic Filing to the Following ECF registrants:

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