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. (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.	) Case No. 12-CV-495-JED-PJC

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

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

LLP, files this Reply to Plaintiff's Response to Pat Leading Fox's Motion to Dismiss Plaintiff's Second Amended (Doc. 74). In Support of this Reply, Defendant Leading Fox states the following:

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, ¶45 - p. 13, ¶51; Count II, p. 14, ¶53 - p. 15, ¶59; 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.").

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. Plaintiffs allege that the statute of limitations should not toll or bar the

joinder of Defendant Leading Fox because Plaintiffs did not obtain the OSBI report until after the expiration of the Statute of Limitations and further that without that report, Plaintiffs were in a mistaken position regarding the facts. However, Plaintiffs are required to avail themselves to accessible information. Plaintiff's had two years from the date the cause of action arose to acquire reports and information. The Plaintiffs filed this action on the last date before the Statute of Limitations tolled without having done acceptable discovery. After this case was filed, the parties entered into a Scheduling Order (Doc. 13) on November 28, 2012, which set a discovery deadline of February 28, 2013. Plaintiffs assert that they did not acquire the OSBI report until after that deadline. Additionally, the Scheduling Order (Doc. 13) set a date for dispositive motions by March 14, 2013. On March 11, 2013, the Plaintiffs sought to strike the dispositive motion deadline and add additional parties which was granted by the Court on March 13, 2013. Plaintiffs had three months in which is conduct discovery under the scheduling order and had ten months in which to conduct discovery from the date of filing the original Petition.

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:
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> ****
>
> (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).

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 o to this suit clearly works prejudice against Defendant Leading Fox in defending this case on the merits.

Moreover, Plaintiffs are not entitled to equitable tolling. Accordingly, Plaintiffs' claims against Defendant Leading Fox are time-barred and should be dismissed with prejudice. Plaintiffs are required to perform due diligence in obtaining facts and evidence and to only attempt to collect that information after the Statute of Limitations has tolled does not allow them to allege mistake when they did not take the proper actions to investigate their own claims.

PROPOSITION II:

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

The doctrine of sovereign immunity 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). Plaintiff asserts that tribal officials are not immune from individual capacity suits arising out of actions that they took in their official capacities. While that may be true, in his individual capacity while acting in his official capacity, Officer Leading Fox may be entitled to other defenses and qualified immunity for acting appropriately during the acts that gave rise to this litigation, but first Plaintiff bears the burden of proving that this Court has jurisdiction to hear this matter against Defendant Leading Fox. Based on the

pleadings and arguments asserted by Plaintiff in their Response, Plaintiffs do not provide any basis that sovereign immunity does not apply but rather Plaintiffs only allege that if there is not express waiver of sovereign immunity then the Cross Deputation Agreement must be unconstitutional.

Plaintiffs' further assert that the exhibit A to their response dictates some authority, however Exhibit A has absolutely no application in this matter. Exhibit A is the BIA's Internal Law Enfocement Services Policies which applies to BIA officers and officers with special law enforcement commissions that were granted by the BIA to individual officers. Neither Defendant Kanuho nor Defendant Leading Fox were BIA officers or SLEC commissioned officers for the BIA duriing the acts that Plaintiff's allege gave rise to the above numbered cause of action.

WHEREFORE, premises considered, the Defendant Pat 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 and the statute of limitations had tolled. Further that

Defendant Leading Fox's Motion to Dismiss Plaintiffs' Second Amended Complaint (Document 55) be sustained.

s/ Alyssa D. Campbell
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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 Kanuho'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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