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IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MONTANA, MISSOULA DIVISION

FAWN CAIN, TANYA ARCHER, and SANDI OVITT, Relators and Plaintiffs, -vs- SALISH KOOTENAI COLLEGE, INC., AND SALISH KOOTENAI COLLEGE FOUNDATION, ROBERT FOUTY, JIM DURGLO, RENE PEIRRE, ELLEN SWANEY, LINDEN PLANT, TOME ACEVEDO, ZANE KELLY, ERNEST MORAN, Salish Kootenai College Board of Directors, and DOES 1-10, Defendants.	CV 12-181-M-DLC **BRIEF IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS**

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Defendants Salish Kootenai College, Inc. ("the College"), Salish Kootenai College Foundation ("the Foundation"), and eight members of the College's Board of Directors, Defendants Robert Fouty, Jim Durglo, Rene Peirre, Ellen Swaney, Linden Plant, Tome Acevedo, Zane Kelly and Ernest Moran ("the Individual Defendants") (collectively, "Defendants"), respectfully submit this Brief in support of their Motion to Dismiss the Complaint in this matter pursuant to Rules 12(b)(1) and (6) of the Federal Rules of Civil Procedure.

PLAINTIFFS' CLAIMS

Plaintiffs have alleged six causes of action against all Defendants, including three claims arising under the False Claims Act, 31 U.S.C. § 3729 *et seq.*, and three state law claims—blacklisting, breach of the implied covenant of good faith and fair dealing in an employment contract, and defamation. As discussed below, the College and Foundation are entities of the Confederated Salish and Kootenai Tribes ("CSKT" or "the Tribes"), and the Individual Defendants were the members of the College's Board of Directors in 2011-2012 and are also each tribal members. The Tribes have not waived and Plaintiffs have not alleged they have waived their sovereign immunity.

STANDARD OF REVIEW

A motion to dismiss under Federal Rule of Civil Procedure 12(b)(1) addresses the Court's subject matter jurisdiction while a motion to dismiss under Rule 12(b)(6) "tests the legal sufficiency of a claim." *Navarro v. Block,* 250 F.3d 729, 732 (9th Cir. 2001). In resolving either type of motion, the Court takes the allegations in the complaint as true and draws all reasonable inferences in the plaintiff's favor. *Wolfe v. Strankman*, 392 F.3d 358, 362 (9th Cir. 2004).

Dismissal is required if the court lacks subject matter jurisdiction or if there is a "lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory." *Balistreri v. Pacifica Police Dept.,* 901 F.2d 696, 699 (9th Cir. 1990). Conclusory allegations and unwarranted inferences are insufficient to survive a motion to dismiss. *Johnson v. Lucent Techs. Inc.,* 653 F.3d 1000, 1010 (9th Cir. 2011). A plaintiff must set forth "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell A. Corp. v. Twombly*, 550 U.S. 544, 555 (2007).

In addition to the above, a heightened pleading requirement must be met when a claim falls under Rule 9(b) of the Federal Rules of Civil Procedure. The False Claims Act makes liable any "person" who "knowingly makes, uses, or causes to be made or used, a false record or statement" that is material to a "false

claim for payment or approval" by the United States government. 31 U.S.C. § 3729 (a)(1). The essential elements of an FCA claim are (1) a false statement or fraudulent course of conduct, (2) made with requisite scienter, (3) that was material, (4) and caused the government to pay out money or forfeit monies due. *United States v. Corinthian Colleges*, 655 F.3d 984, 992 (9th Cir. 2011). "Because they involve allegations of fraud, qui tam actions under the [False Claims Act] must meet not only the requirement of Rule 8, but also the particularity requirements of Rule 9." *Id.* at 991-92. "In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake." Fed. R. Civ. P. 9(b).

ANALYSIS

I. The Complaint must be dismissed for lack of subject matter jurisdiction.

"Indian tribes are 'domestic dependent nations' that exercise inherent sovereign authority over their members and territories." *Oklahoma Tax Commn. v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505, 509 (1991) (quoting *Cherokee Nation v. Georgia*, 30 U.S. 1, 17 (1831)). "[A]bsent a clear waiver by the tribe or congressional abrogation," an Indian tribe is immune from suit in federal court. *Potawatomi*, 498 U.S. at 509; *see also Kiowa Tribe v. Mfg.*

Technologies, Inc., 523 U.S. 751, 754 (1998). Both congressional abrogation and tribal waiver must be clearly expressed. *Pan Am. Co. v. Sycuan Band of Mission Indians*, 884 F.2d 416, 418 (9th Cir. 1989) (citation omitted); *Donovan v. Coeur d'Alene Tribal Farm*, 751 F.2d 1113, 1117 (9th Cir. 1985).

Tribal sovereignty is broader than the sovereignty of the individual states, as it is "a means of protecting tribal political autonomy and recognizing their tribal sovereignty which substantially predates our Constitution." *Pan Am. Co.*, 884 F.2d at 418. Because Indian tribes were not at the Constitutional Convention, they were not "parties to the mutuality of concession that makes the States' surrender of immunity from suit by sister States plausible." *Kiowa Tribe*, 523 U.S. at 756 (internal quotation marks, ellipsis, and citation omitted). Thus tribal sovereign immunity "is not subject to diminution by the States." *Id.* (citing cases).

The Ninth Circuit has also found that sovereign immunity extends to subordinate entities of a tribe when the entity exists to perform "acts as an arm of the tribe." *Allen v. Gold Country Casino*, 464 F.3d 1044, 1046 (9th Cir.2006); *Hagen v. Sisseton-Wahpeton Community College,* 205 F.3d 1040, 1043 (8th Cir. 2000). Moreover, tribal sovereign immunity is not limited to a tribe's governmental activities—it extends to a tribe's business activities as well. *Kiowa Tribe*, 523 U.S. at 754; *Allen*, 464 F.3d at 1046 (holding that a tribe's sovereign

immunity extends to a casino); *Marceau v. Blackfeet Hous. Auth.*, 455 F.3d 974, 978 (9th Cir. 2006) (holding that the tribe's sovereign immunity extends to Blackfeet Housing Authority); *Kendall v. Chief Leschi Sch., Inc.*, C07-5220 RBL, 2008 WL 4104021 (W.D. Wash. 2008) (holding that schools are arms of the tribe). Tribal immunity also extends to tribal officials acting in their representative capacity and within the scope of their authority. *Hardin v. White Mountain Apache Tribe*, 779 F.2d 476, 479–80 (9th Cir. 1985).

A. Both the College and the Foundation are tribal entities functioning as arms of the Tribe.

The status of the College as a "tribal entity" and therefore a "tribal member" of the Confederated Salish and Kootenai Tribes ("CSKT" or "the Tribes"), was thoroughly analyzed by the Ninth Circuit in *Smith v. Salish Kootenai College*, 434 F.3d 1127 (9th Cir. 2006). As explained in *Smith*, the College was established by the Confederated Salish and Kootenai Tribes, and the College bylaws stipulate that each of its directors must be enrolled CSKT Tribal members. Directors are appointed by the CSKT Tribal Council and may be removed by the Council. In addition to being incorporated under Montana law, the College is also incorporated under CSKT Tribal law. The Articles of Incorporation[1] for the College provide,

[1] The Court may take judicial notice of matters of public record outside the pleadings, Fed. R. Evid. 201(b); *MGIC Indem. Corp. v. Weisman,* 803 F.2d 500, 504 (9th Cir. 1986), without

among other things, that the College was formed to "... provide post-secondary educational opportunities for residents of the Flathead Indian Reservation." The Articles also provide that the College may sue and be sued in Tribal Court. (Exhibit A). The mission statement for the College includes providing "educational opportunities for Native Americans" and to "... serve the needs of Native American People." (See Mission Statement at Exhibit B). The College is located on tribal land in Pablo, Montana, and more than 3/4 of its students are affiliated with the CSKT Tribe. *Smith*, 434 F.3d 1129. As the Ninth Circuit found, "[the College] is a tribal entity and, for purposes of civil tribal jurisdiction, may be treated as if it were a tribal member." *Smith*, 434 F.3d 1135. The Montana Supreme Court has also recognizes the College as a "tribal governmental agency." *Bartell v. Am. Home Assurance Co.*, 2002 MT 145, ¶ 6, 310 Mont. 276, 49 P.3d 623.

The Foundation is a tribal entity for similar reasons. It is located at the College, functions exclusively to serve the College, and is subject to the oversight of the College. (Exhibits C and D). The Foundation's purpose is to administer the endowments and grants for the benefit of the College and the students, to award scholarships to the College's students, and to make grants that advance the higher

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converting a motion to dismiss to one for summary judgment. *In re Fresh and Process Potatoes Antitrust Litig.*, 834 F. Supp. 2d 1141, 1165 (D. Idaho 2011).

educational objectives of the College. Articles of Incorporation, (Exhibit C), Article II, ¶¶ 1-6. The Operating Agreement provides that the Foundation is to act exclusively for the benefit of the College and subject to the College's oversight and approval, managing funds and making expenditures for the College and conducting its fundraising operation in a manner that is consistent with the mission and priorities of the College. (Exhibit D), ¶¶ 1.A-I. The Foundation is required to submit all its financial statements, officer and Trustee lists, priorities, and plans of operation to the College President or the College Board of Directors, and the Foundation's audited financial statements and officer and Trustee lists are then submitted to the Tribal Council. *Id.* All of the Foundation's actions are for the benefit of, and with the supervision of, the College, its President, and the Tribal Council. It is thus "sufficiently identified with the tribe that [it] may be considered to be "tribal." *Smith*, 434 F.3d at 1133. Like the College, the Foundation is a tribal entity that functions as an arm of the Tribes.

B. The Individual Defendants are also covered by tribal immunity.

"[W]hen tribal officials act in their official capacity and within the scope of their authority, they are immune." *Imperial Granite Co. v. Pala Band of Mission Indians*, 940 F.2d 1269, 1271 (9th Cir. 1991) (citations omitted); *Hardin*, 779 F.2d at 479–80. As the Ninth Circuit has explained:

> The general bar against official-capacity claims ... does not mean that tribal officials are immunized from individual-capacity suits *arising out of* actions they took in their official capacities. . . . Rather, it means that tribal officials are immunized from suits brought against them *because of* their official capacities—that is, because the powers they possess in those capacities enable them to grant the plaintiffs relief on behalf of the tribe.

Maxwell v. County of San Diego, 708 F.3d 1075, 1088 (9th Cir. 2013) (internal quotation marks and citations omitted) (internal quotation marks and citation omitted) (emphasis in original). Where a plaintiff sues individual defendants *because of* their official capacity, as opposed to their actions, the suit is fundamentally against the tribe and the individual is protected by sovereign immunity. *Id.*

In *Imperial Granite Co.* the Ninth Circuit dismissed claims against individual defendants who were sued because they were voting members of a tribal governing body who had voted to allow the action the plaintiff claimed was unlawful:

> As far as we are informed in argument, the only action taken by those officials was to vote as members of the Band's governing body against permitting Imperial to use the road. Without more, it is difficult to view the suit against the officials as anything other than a suit against the Band. The votes individually have no legal effect; it is the official action of the Band, following the votes, that caused Imperial's alleged injury.

940 F.2d at 1271. *See also Juliano v. Fed. Asset Disposition Assn.*, 736 F. Supp.

348, 353 (D.D.C. 1990) aff'd sub nom. 959 F.2d 1101 (D.C. Cir. 1992).

In this case, there is no allegation that this is a suit against the Individual Defendants in anything other than their official capacity as members of the governing body of the College. The Complaint caption lists their names followed by "Salish Kootenai College Board of Directors" as an identifier, and the only paragraph describing them states:

> Defendants Salish Kootenai College Board of Directors are Montana Residents retained by Salish Kootenai College to plan, develop, and implement goals and policies consistent with U.S. Department of Education Guidelines. This includes the planning for and utilization of costs, fees, and monies received by Defendants for its [sic] nursing program.

(Complaint, doc. 1, ¶ 7.) The Complaint never identifies the Individual Defendants individually outside of the caption and makes no allegations of any individual actions by any Individual Defendant. Each allegation states the "Defendants" acted wrongly or the "Defendants, by and through their agents" acted wrongly.

Similarly, the summonses filed for four Individual Defendants[2] list the College's address even though Rule 4 of both the Federal and Montana Rules of Civil Procedure require that individuals be served at their place of residence in order to be sued in their individual capacities. Fed. R. Civ. P. 4; Mont. R. Civ. P.

[2] Summonses have not been filed for Thomas Acevedo, Renee Pierre, Zane Kelly, or Ernest Moran. Additionally, no proof of service has been filed for the Foundation or the Individual Defendants. Only the College has been properly served.

4(d)-(e); *Daly-Murphy v. Winston*, 837 F.2d 348, 355 (9th Cir. 1987); *Sink v. Squire*, 236 Mont. 269, 769 P.2d 706 (Mont. 1989); *Lopez v. United States*, 129 F. Supp. 2d 1284, 1294 (D.N.M. 2000) (citing cases). Service at the College may be sufficient to establish jurisdiction over the Individual Defendants in their official capacities, but it "does not suffice to establish jurisdiction over them as individuals." *Daly-Murphy*, 837 F.3d at 355.

Finally, as in *Imperial Granite Co.*, the Individual Defendants' votes as board members—if there were such votes (none are specifically alleged)—individually, have no legal effect. The allegations establish that Plaintiffs have only sued the Individual Defendants *because of* their status as board members of the College. Accordingly, they have been sued in their official capacity and are protected by the Tribes' sovereign immunity.

C. The Tribes' sovereign immunity divests the Court of jurisdiction.

The Tribes cannot be sued in federal court unless the suit is brought by the United States, the Tribes have waived their immunity, or Congress specifically abrogated sovereign immunity. None of these exceptions apply here. The Complaint was brought by individuals, not the United States, and the United States declined to intervene in the case. There is no allegation that the Tribe has waived its immunity, and there is no "clear expression of congressional intent" that

Congress intended to abrogate tribal immunity under the False Claims Act or the supplemental jurisdiction statute, 28 U.S.C. § 1367; *see Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765, 779 (2000) (holding the Act has not waived a sovereign's immunity). Because none of the exceptions is met, sovereign immunity shields both the tribal entities and tribal officials from suit in federal court.

Although many courts discussing federal court jurisdiction over qui tam claims have applied a narrower sovereign immunity analysis by analogy to state sovereign immunity, discussed below, it is critical to note that the Tribes' sovereign immunity is broader than the states' and is not subject to diminution by the states. *Kiowa Tribe*, 523 U.S. at 756. Based on both a broad and narrow analysis of the Tribes' immunity, the federal and supplemental state claims must be dismissed because the Court lacks subject matter jurisdiction. *See e.g. Kendall v. Chief Leschi Sch., Inc.*, C07-5220 RBL, 2008 WL 4104021 (W.D. Wash. 2008) (applying broader sovereign immunity analysis and noting that no amount of discovery would change the conclusion that the court lacked jurisdiction over tribal entities under the False Claims Act).

D. Tribal entities and officials sued in their official capacity are not "persons" under the Act so are not subject to suit.

Courts have specifically held that Indian tribes cannot be sued under the False Claims Act because they are not "persons" under the Act, using the analogy of state sovereignty. In *Vermont Agency of Nat. Resources*, the United States Supreme Court analyzed this issue in the context of a state agency. The Court held:

> The relevant provision of the [False Claims Act], 31 U.S.C. § 3729(a), subjects to liability "[a]ny person" who, inter alia, "knowingly presents, or causes to be presented, to an officer or employee of the United States Government ... a false or fraudulent claim for payment or approval." We must apply to this text our longstanding interpretive presumption that "person" does not include the sovereign.

Id. at 780 (citations omitted). Because the "sovereign" is not a "person," it cannot be sued under the Act. "[A] private individual has standing to bring suit in federal court on behalf of the United States under the False Claims Act, 31 U.S.C. §§ 3729–3733, but [] the False Claims Act does not subject a State (or state agency) to liability in such actions." *Id.* at 787–88.

This same analysis has been applied to Indian tribes. *United States v. Menominee Tribal Enterprises*, 601 F. Supp. 2d 1061, 1068 (E.D. Wis. 2009); *United States ex rel. Howard v. Shoshone Paiute Tribes*, 2012 WL 6725682 (D. Nev. 2012). Like states and state agencies, tribes and tribal entities are not

"persons" under the Act and thus cannot be sued in qui tam cases. Likewise, tribal officials sued in their official capacity are immune from suit because such a suit would, in effect, be against the tribe. *Stoner v. Santa Clara County Office of Educ.*, 502 F.3d 1116, 1123 (9th Cir. 2007). Thus, the Tribes and its entities and officials acting in their official capacity are free from suit under the Act.

II. The qui tam claims must be dismissed because the Complaint fails to comply with Rule 9.

"Rule 9(b) does not allow a complaint to merely lump multiple defendants together but requires plaintiffs to differentiate their allegations when suing more than one defendant and inform each defendant separately of the allegations surrounding his alleged participation in the fraud." *Corinthian College*, 655 F.3d at 997–98 (quoting *Swartz v. KPMG LLP*, 476 F.3d 756, 764–65 (9th Cir. 2007)). "In the context of a fraud suit involving multiple defendants, a plaintiff must, at a minimum identify the role of each defendant in the alleged fraudulent scheme." *Swartz*, 476 F.3d at 764–65.

The Complaint does not differentiate between the defendants in any of its allegations. All the defendants are lumped together in allegations that "Defendants" engaged in wrongful acts or "Defendants" violated various laws. The Complaint "provides no additional detail as to the nature of [any of the defendants'

particular] involvement in the fraudulent acts, but simply attributes wholesale all of the allegations" to all Defendants. *Corinthian College*, 655 F.3d at 998.

Such allegations are not "specific enough to give [D]efendants notice of the particular misconduct . . . so that they can defend against the charge and not just deny that they have done anything wrong." *Vess v. Ciba–Geigy Corp. USA*, 317 F.3d 1097, 1106 (9th Cir. 2003) (citation and internal quotations omitted). It is impossible to tell from the Complaint what role Plaintiffs allege that any of the defendants might have played. "Rule 9(b) undoubtedly requires more." *Corinthian College*, 655 F.3d at 998.

III. Regardless of whether the False Claims Act claims are dismissed against all Defendants, the Court should decline supplemental jurisdiction over the state law claims as a matter of comity.

A federal district court may decline to exercise supplemental jurisdiction over a state law claim if:

> (1) the claim raises a novel or complex issue of State law,
> (2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction,
> (3) the district court has dismissed all claims over which it has original jurisdiction, or
> (4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.

28 U.S.C. § 1367 (c). The Court's decision should be guided by "the values of economy, convenience, fairness, and comity." *Carnegie–Mellon Univ. v. Cohill*,

484 U.S. 343, 351 (1988).

For the reasons discussed above, Plaintiffs have failed to state a claim for which relief may be granted under federal statute. "[I]n the usual case in which all federal-law claims are eliminated before trial, the balance of factors . . . will point toward declining to exercise jurisdiction over the remaining state-law claims." *Acri v. Varian Assocs., Inc.*, 114 F.3d 999, 1001 (9th Cir. 1997) (en banc). Accordingly, if the federal-law claims are dismissed, there is no reason for the Court to retain jurisdiction over the state law claims in this matter.

Even if the False Claims Act claims were to survive, the judicial policy of encouraging tribal self-government favors abstention despite the supplemental jurisdiction available under § 1367 and is a "compelling reason" to decline to exercise supplemental jurisdiction. 28 U.S.C. § 1367(c).

> *Regardless of the basis for jurisdiction*, the federal policy supporting tribal self-government directs a federal court to stay its hand in order to give the tribal court 'a full opportunity to determine its own jurisdiction.' ... In diversity cases, as well as federal-question cases, unconditional access to the federal forum would place it in direct competition with the tribal courts, thereby impairing the latter's authority over reservation affairs.

United States v. Plainbull, 957 F.2d 724, 728 (9th Cir. 1992) (emphasis added) (quoting *Iowa Mut. Ins. Co. v. LaPlante,* 480 U.S. 9, 14 (1987)).

The exercise of federal jurisdiction over activities taking place on tribal

lands undermines the ability of tribes to govern themselves. *Id.*; *Williams v. Lee*, 358 U.S. 217, 223 (1959) (recognizing the interest in guarding "the authority of Indian governments over their reservations" by permitting tribal courts to decide tribal matters). Although § 1367 gives the federal court concurrent jurisdiction over state law claims where there is also a federal question at issue, the interest in protecting tribal sovereignty outweighs any competing considerations.

> The deference that both state and federal courts must afford tribal courts concerning activities occurring on reservation land is deeply rooted in Supreme Court precedent. The Court has recognized that tribal courts are appropriate forums for the exclusive adjudication of disputes over transactions taking place within the boundaries of a reservation.

Plainbull, 957 F.2d at 727.

Absent supplemental jurisdiction, tribal jurisdiction over the state law claims would be exclusive. In civil cases arising between Indians or against Indian defendants based on actions in Indian country, tribal jurisdiction is usually exclusive. *See generally Williams*, 358 U.S. at 223; *Fisher v. Dist. Ct. of Sixteenth Jud. Dist. of Mont.*, 424 U.S. 382, 389 (1976); *Siemion v. Stewert*, CV-11-120-BLG-RFC, 2012 WL 5932996 (D. Mont. 2012). Moreover, the Confederated Salish and Kootenai Tribes have asserted exclusive jurisdiction over state tort claims like those alleged. As set forth in Mont. Code Ann. §§ 2-1-302 to 2-1-306,

Montana established a consent procedure in which the tribes may authorize the extent to which the state may exercise jurisdiction over civil matters, subject to approval by the governor. Mont. Code Ann. § 2-1-302 (2013); *see also* Ch. 81, Laws of Montana (1963). The Tribes agreed to cede limited criminal and civil jurisdiction to the State of Montana under certain terms and conditions explained in "Tribal Ordinance 40-A," which was consented to by the governor and is now codified in the Laws of the Confederated Salish Kootenai Tribe Codified ("CSKT Laws"). However, tribal court jurisdiction of civil cases is *exclusive* unless the case type is described in one of the subsections of CSKT Laws Codified § 1-2-105. Because this case does not fall within CSKT Laws § 1-2-105, the Tribes have not ceded jurisdiction over the state law claims.

By asserting their right to maintain exclusive jurisdiction, the Tribes have demonstrated that tribal authority over such claims is important to tribal sovereignty. "Principles of comity require federal courts to dismiss or to abstain from deciding claims over which tribal court jurisdiction is 'colorable,' provided that there is no evidence of bad faith or harassment." *Marceau v. Blackfeet Hous. Auth.*, 540 F.3d 916, 920 (9th Cir. 2008). *See also Stock W. Corp. v. Taylor*, 964 F.2d 912, 919–920 (9th Cir. 1992); *Iowa Mut. Ins.*, 480 U.S. at 15–18. ("[C]onsiderations of comity direct that tribal remedies be exhausted before the

question is addressed by the district court.").

Here tribal jurisdiction over the state law claims is more than "colorable" and there are substantial questions concerning tribal sovereignty at issue, permitting the Court to decline jurisdiction under § 1367(c)(1). Defendants are tribal members, tribal officials, and tribal entities, and the alleged acts all took place on the Flathead Reservation, the home of the Tribes. The plaintiffs were employed by a tribal entity, and their state law claims concern activities related to their employment by the tribal entity and alleged treatment by tribal officials on the reservation. The tribal court is the best forum for determining whether the Defendants are immune from these claims based on tribal sovereignty, *Stock W. Corp.*, 964 F.2d at 920, as well as for deciding how the claims should be resolved according to tribal laws and precedent.

Furthermore, the state law claims are not controlled by federal law and are only tangentially related to the False Claims Act claims, so that the interests of economy would not be significantly furthered by maintaining jurisdiction in the federal court. Accordingly, as a matter of comity, the Court should decline to exercise supplemental jurisdiction over the state law claims against any of the defendants, regardless of whether the False Claims Act Claims are dismissed.

IV. Even if they are not dismissed on other grounds, there are additional reasons for dismissing many of the claims.

A. The employment-related claims may be brought only against Plaintiffs' employer.

Neither the Individual Defendants nor the Foundation were Plaintiffs' "employer"; nor were they alleged to be. Thus no claim can be made against them under the retaliation provision of the False Claims Act, 31 U.S.C. § 3730(h), or the employment-related state law claims (breach of the implied covenant of good faith and fair dealing based on the employment contract and blacklisting). Even if these claims survived dismissal on other grounds, they must be dismissed as to the Foundation and the Individual Defendants pursuant to the reasoning discussed in *U.S. ex rel. Parato v. Unadilla Health Care Ctr., Inc.*, 787 F. Supp. 2d 1329, 1341 (M.D. Ga. 2011) and *United States v. Kiewit P. Co.*, 2014 WL 1997151 (N.D. Cal. 2014).

B. The blacklisting and defamation claims are purely conclusory.

Conclusory allegations and unwarranted inferences are insufficient to survive a motion to dismiss. *Johnson v. Lucent Techs. Inc.,* 653 F.3d 1000, 1010 (9th Cir. 2011). A plaintiff must set forth "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell A. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). Moreover, legal conclusions cast in the

form of factual allegations need not be accepted if those conclusions cannot reasonably be drawn from the facts alleged. *Clegg v. Cult Awareness Network,* 18 F.3d 752, 754-55 (9th Cir. 1994) (citing *Papasan v. Allain,* 478 U.S. 265, 286 (1986)).

The state law claims in the Complaint lack factual allegations and merely parrot the elements of the claims, stating summary legal conclusions. Because no facts concerning blacklisting or defamation are included in the Complaint, the claims cannot survive.

CONCLUSION

Pursuant to Federal Rules of Civil Procedure 12(b)(1) and (6), Defendants respectfully ask Court to dismiss all the claims alleged in Plaintiffs' Complaint against all Defendants.

DATED this 27th day of June, 2014.

WORDEN THANE P.C.

/s/ Martin S. King
Martin S. King

CERTIFICATE OF COMPLIANCE

In accordance with U.S. District Court Local Rule 7.1(d)(2), the undersigned certifies that the word count of the above brief, excluding the caption, certificates of service and compliance, table of contents, table of authorities, and exhibit index is 4508.

WORDEN THANE P.C.

/s/ Martin S. King
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