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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA
FRESNO DIVISION

RONALD NAPOLES, LAURINE NAPOLES, RICK NAPOLES, MARK NAPOLES, JAMES NAPOLES, DEBRA WILLIAMS, and WADE WILLIAMS,

Petitioners

vs.

DESTON ROGERS, JEFF ROMERO, BRIAN PONCHO, EARLEEN WILLIAMS, WILLIAM "BILL" VEGA, IN THEIR INDIVIDUAL AND OFFICIAL CAPACITIES AS REPRESENTATIVES OF THE BISHOP PAIUTE TRIBAL COUNCIL; BISHOP PAIUTE TRIBAL COUNCIL; TRIBAL COURT JUDGE BILL KOCKENMEISTER IN HIS INDIVIDUAL OFFICIAL CAPACITY

Respondents.

CASE NO. 1:16-cv-01933-DAD-JLT

REPLY TO OPPOSITION TO MOTION TO DISMISS PURSUANT TO RULE 12(b)(1) AND (6) OF THE FEDERAL RULES OF CIVIL PROCEDURE; RESPONSE TO PETITIONERS' MOTION TO STRIKE DECLARATIONS OF ANNA KIMBER AND VALERIE SPOONHUNTER

Date: June 20, 2017
Time: 9:30 a.m.
Judge: Dale Drozd
Courtroom: 5

Action Filed: December 29, 2016

Trial Date: TBD

Despite the voluminous Opposition and related Motion to Strike the declarations filed in support of Respondents' Motion to Dismiss, Petitioners have failed to refute Respondents' argument that the court lacks jurisdiction to hear the alleged violations of the Indian Civil Rights Act, 25 U.S.C. Sections 1301-1303 ("ICRA"), as argued in Petitioners' First Amended Petition (FAP"). As such, the FAP should be dismissed pursuant to Federal Rule of Civil Procedure 12(b)(1) and (6).

At the onset, at page 1, Petitioners attempt to broaden the scope of the court's jurisdiction

beyond habeas relief pursuant to 15 U.S.C. Section 1303. Citing to *Howlett v. Salish & Kootenai Tribes of Flathead Reservation*, 529 F.2d 233, 236 (9th Cir. 1976), Petitioners assert Respondents' Motion to Dismiss should be rejected "because [sic] this under 28 U.S.C. Section 1331 and 1343(4) to determine its authority under Section 1303 of the Indian Civil Rights Act based upon the facts and law set forth below." (Opposition, 1: 2-9.) Aside from being confusing and in conflict with Petitioners' assertion of jurisdiction in the FAP, it is also an incorrect statement of law. In *Howett*, the basis of federal court jurisdiction, 28 U.S.C. Section 1343(4), was to address violations of Section 1302(8) of the Indian Civil Rights Act, not Section 1303. (*See* FAP p. 5, ¶ 4.) Furthermore, *Howett* has been impliedly overruled by *Santa Clara Pueblo v. Martinez*. *See Ordinance 59 Ass'n v. Babbit*, 970 F. Supp. 914, 926 (D. Wyo. 1997), *aff'd sub nom. Ordinance 59 Ass'n v. U.S. Dep't of Interior Sec'y*, 163 F.3d 1150 (10th Cir. 1998). ("Similarly, the court in *Ramey Construction* acknowledged that neither §§ 1334(a)(4) nor 1331 provided jurisdiction over claims for damages or for injunctive relief pursuant to the ICRA. In *Santa Clara* ..., the Supreme Court clarified the meaning and effect of § 1302 of the ICRA. The Court made clear that, aside from authorizing a writ of habeas corpus actions as provided in § 1303, the ICRA leaves tribal sovereignty immunity intact.")).

Petitioners, citing to Sections 1302(1), (5) and (8) of the ICRA ("right to confront witnesses," "due process," "equal protection," "freedom of speech and assembly," etc.) assert that "it is these rights that Petitioners seek to enforce in this habeas action." (Opposition, pp. 7-8.) Yet the courts have clearly stated the sovereign immunity of the tribes was not waived by Congress to allow for federal jurisdiction to enforce provisions of Section 1302 of the ICRA. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978).

Federal courts are courts of limited jurisdiction, possessing only that power authorized by the Constitution and statute, and are not to be expanded by judicial decree. When a matter is presented to the federal courts, "it is to be presumed that a cause lies outside this limited jurisdiction, . . . and the burden of establishing the contrary rests upon the party asserting jurisdiction." *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994).

The only means by which the federal court has jurisdiction over violations of the ICRA is

pursuant to Section 1303, not Section 1302, and a writ can be issued only if Petitioners have met two jurisdictional prongs: 1. that all tribal remedies have been exhausted; and 2. Petitioners have been "detained." The FAP, on its face, fails to prove that either jurisdictional prong has been met, and the Opposition provides no clarity on this issue.

Motion to Strike Declarations Pursuant to Rule 12(f) is Nothing more than Additional Arguments to Petitioners' Opposition to Respondents' Motion to Dismiss Pursuant to Rule 12(b)(1) and (6)

Petitioners' Motion to Strike the declaration of Anna Kimber assert the documents should be stricken as "redundant" since they are referenced in the FAP. (Motion to Strike, pp. 3, 5.) It is more than appropriate for the Court to consider these documents, not only because many are referenced in the FAC, but all are the proper subject of judicial notice.[1] "A court may consider certain materials, such as documents attached to, or incorporated by reference in, a complaint, or matters that are the proper subject of judicial notice without converting the motion to dismiss into a motion for summary judgment." *United States v. Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003); *Hardin v. Wal-Mart Stores, Inc.*, 813 F. Supp. 2d 1167, 1172 (E.D. Cal. 2011), aff'd in part, 604 F. App'x 545 (9th Cir. 2015). "The defendant may offer such a document, and the district court may treat such a document as part of the complaint, and thus may assume that its contents are true for purposes of a motion to dismiss under Rule 12(b)(6)." *United States v. Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003).

To be clear, Petitioners do not dispute the validity of the documents presented by Respondents' declarations in support of their Motion to Dismiss. Valerie Spoonhunter, the Land Assignment Clerk and Secretary for the Tribal Council, is the custodian of record with respect to the Bishop Paiute Tribal Council governmental records, as well as governmental records associated with land assignments within the Bishop Paiute Tribe.[2] As governmental records, they are the

[1] Providing excerpts of the Federal Register to the court to confirm the Bishop Paiute Tribe is federally recognized is the proper subject of judicial notice. *See Res. For Indian Student Educ., Inc. v. Cedarville Rancheria of N. Paiute Indians*, 2015 WL 631473, at 2 (E.D. Cal. Feb. 13, 2015). Motions to Dismiss pursuant to Rule 12(b)(1) for lack of subject matter jurisdiction require establishing a tribe is federally recognized.

[2] Referring to Federal Rule of Evidence 702, and citing to various cases outside this court's jurisdiction (Motion to Strike, pp. 8-9), Respondents characterize the declarations submitted by Respondents to be "opinions or statements alleged to be facts." But Valerie Spoonhunter is not a "percipient witness" pursuant to FRE 702. She is the custodian of record, and pursuant to Federal Rule of Evidence 201, her declaration establishes the

proper subject of judicial notice pursuant to Rule 201 of the Federal Rules of Evidence. *Hall v. Live Nation Worldwide, Inc.*, 146 F. Supp. 3d 1187, 1192 (C.D. Cal. 2015).

All documents presented in both declarations are public records, the validity of which Petitioners do not dispute, but instead object to as "irrelevant," or "redundant." While the general rule is to not reference evidence outside the four corners of the complaint as part of a Rule 12(b)(6) motion to dismiss, the exception arises when Petitioners "reference and relies on a particular document as part of the moving allegations of the complaint. In such cases, the court is justified in looking outside the four corners of the complaint, to the document itself if offered." *In re Bare Escentuals, Inc. Sec. Litg.*, 745 F. Supp. 2d 1052, 1066-67 (N.D. Cal. 2010). Presenting to the court copies of court orders Petitioners reference in the FAP is appropriate by and through the Declaration of Anna Kimber.

Again, although not disputing the validity of said documents, Petitioners nonetheless erroneously state "a court may not rely on affidavits or declarations that go to the truth or falsity of the allegations in the complaint when deciding a 12(b)(6) motion."[3] (Motion to Strike, p. 7:15-18.) To the contrary, the court is not obligated to accept as true allegations within a petition that contradict facts which may be judicially noticed. *See United States v. S. California Edison Co.*, 300 F. Supp. 2d 964, 970 (E.D. Cal. 2004) ("conclusions of law, conculsory allegations, unreasonable inferences, or unwarranted deductions of fact need not be accepted.").

Petitioners are obligated to provide the basis for the Court's jurisdiction and their entitlement to relief. On motions to dismiss pursuant to Rule 12(b)(6), the court is not bound to accept as true a legal conclusion couched as a factual allegation. "Factual allegations must be enough to raise a right to relief above the speculative level." *Bell Atl. Corp. v. Twombly*, 550 U.S. 555 (2007), citing 5 C. *Wright & A. Miller, Federal Practice and Procedure* § 1216, pp. 235–236 (3d ed. 2004). Petitioners are obligated to provide grounds of their entitlement to relief.

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foundation for the court to consider documents that are a matter of public record.

[3] The Declaration of Valerie Spoonhunter was submitted in support of Respondents' Motion to Dismiss pursuant to Rule 12(b)(1), not 12(b)(6). However, it is appropriate for the court to consider Ms. Spoonhunter's declaration and attached exhibits with respect to either argument presented by Respondent, since they are the proper subject of judicial notice.

"Formulaic recitation of the elements of a cause of action will not do." *Id.*

Petitioners' FAP and Opposition Failed to Support the Argument they have Exhausted Tribal Remedies

Principles of federalism must temper the federal court's assertion of its authority pursuant to writ proceedings beyond its historic purpose. *See Lehman v. Lycoming Cty. Children's Servs. Agency*, 458 U.S. 502, 512–13 (1982). Furthermore, principles of federalism and respect for tribal sovereignty calls for judicial restraint. *See Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978); *Tavares v. Whitehouse*, 2017 WL 1093294 (9th Cir. March 14, 2017).

Principles of exhaustion are premised upon the recognition by Congress and the court that tribal forums should have the opportunity to review the claim and provide any relief that may be available. *See Williams v. Taylor*, 529 U.S. 420, 436–37 (2000). As stated in Respondents' Motion to Dismiss, if Petitioners miscalculated that their request for a continuance of the trespass proceedings would also result in an extension of the conditions of the Temporary Protect Order, their duty was to request the Tribal Court to reconsider, and not rush to the federal courts, falsely alleging they have exhausted all tribal remedies, and arguing they have been unlawfully detained. *Id.* ("Federal courts sitting in habeas are not an alternative forum for trying facts and issues which a prisoner made insufficient effort to pursue in state proceedings.")

Petitioners' premise the exhaustion of tribal remedies argument upon their assertion the Appellate Court had been disbanded, and "no plan is in place for the appointment of said judges." (FAP 3:17-18.)

Yet the FAP, on its face, clearly indicates the empanelment of the Appellate Court was pending. (FAP 4:5 [reference to Judge Kockenmeister's 12/19/2016 order continuing the matter "pending the empanelment of the Appellate Court"]; see also FAP at ¶¶ 106, 111, 112.) In spite of the fact the court records referenced in the Petitioners' FAP confirm the Appellate Court was to be empanelled, ten days after Judge Kockenmeister granted Petitioners' request for a continuance, they rushed to the federal court, inaccurately claiming they had exhausted all tribal remedies. The Tribal Appellate Court has since been impaneled, and was ready to proceed in hearing Petitioners'

appeal and pending writ petition.[4] However, Petitioners have since withdrawn both the pending writ petition and appeal. (Respondents' Objection to Request for Stay, Docket #28-1.[5])

Petitioners assert they only learned of the reconstitution of the Tribal Appellate Court "at a discovery planning conference held on March 8, 2017." (Motion to Strike, 2:21-26.) Petitioners were apprised by opposing counsel the Appellate Court was to be reconstituted on at least four (4) occasions over the course of these proceedings. On the first occasion, via correspondence dated January 5, 2017 (attached to this Reply, identified as Exhibit 1), Respondents' legal counsel was apprised that the statement at page 3 of the FAP, that "no plan is in place for the appointment of said judges," was absolutely false.[6] In other words, Respondents have yet again demonstrably misrepresented to this Court the procedural history of the Tribal Court and Tribal Appellate Court.

Petitioners have failed to exhaust tribal remedies. Since the underlying trespass citations and related Temporary Protection Orders ("TPOs") have been dismissed, the heart of Petitioners' claim of violations of the ICRA has been rendered moot. Given the federal courts have no authority to render opinions upon moot questions if events occur while the case is pending that makes it impossible for the court to grant effectual relief to the prevailing party, the case must be dismissed. *See Church of Scientology of California v. United States*, 506 U.S. 9, 12 (1992).

Petitioners' FAP and Opposition Fails to Support Their Argument they have been Detained

Petitioners' cite to multiple cases that involve criminal proceedings in support of their argument they have been detained by the Tribal Court trespass proceedings (*Dry Creek v. CFR Court of Indian Offense for Choctaw Nation* [Opposition, pp. 1, 12]; *Cavaras v. Lavalee* [Opposition, 3:14]; *Dow v. Court of the First Circuit Through Huddy* [Opposition, p. 12]; *Hensley v. Municipal Court* [Opposition, p. 12]).

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[4] Contrary to Petitioners' assertion that they "have not applied for this Writ in any other Court," (FAP 6, ¶ 8), Petitioners have filed multiple writs in the Bishop Paiute Tribe Court, with allegations virtually identical to those outlined in the FAP here. (Kimber Dec., Docket #19-2 Ex. 7.)

[5] Notably, Petitioners have not replied to Docket #28, or filed an objection or explanation of Docket #28-1.

[6] Respondents have documented three (3) other occasions prior to the March 8, 2017 conversation whereby Petitioners' legal counsel was advised of the impending reconstitution of the Appellate Court, which shall be submitted as part of Respondent Tribal Council's Motion for Rule 11 Sanctions, based in part upon Petitioners' multiple misrepresentations of fact to the Court.

The Trespass Ordinance clearly identifies the proceedings and penalties to be "civil," and not "criminal." Respondents agree with Petitioners that "incarceration" is not required. But the cases Petitioners cite, and the circumstances here, do not support a finding that Petitioners have been "detained."

At pages 12-13 of the Opposition, Petitioners' citation to *Hensley* (another criminal proceeding) does not support the argument Petitioners have suffered "several actual or potential restraint." Upon a closer look at *Hensley,* the Supreme Court noted Petitioner:

> is subject to restraints 'not shared by the public generally . . . that is, the obligation to appear at all times and places as ordered by any court or magistrate of competent jurisdiction . . . He cannot come and go as he pleases. His freedom of movement rests in the hands of state judicial officers, who may demand his presence at any time and without a moment's notice. Disobedience is itself a criminal offense. The restraint on his liberty is surely no less severe than the conditions imposed on the unattached reserve officer whom we held to 'in custody' in *Strait v. Laird, supra*.

Hensley v. Mun. Court, San Jose Milpitas Judicial Dist., Santa Clara Cty., California, 411 U.S. 345, 351 (1973) (internal citations omitted).

Petitioners have not been severely restrained by the issuance of civil trespass citations, or the decisions of the Tribal Court indicating Petitioners have violated the Trespass Ordinance. Without reasonable dispute, Petitioners are free to come and go as they please. All they are prohibited from doing is trespassing on to property which is off limits to all. *See Jeffredo v. Maracco*, 599 F. 3d 913, 918-21 (9th Cir. 2010) (Permanent exclusion from certain tribal facilities was insufficient to confer federal court jurisdiction).

Furthermore, the TPOs Petitioners conflate as constituting a significant restraint have since been vacated, and the underlying trespass cases involving Petitioners have been dismissed. (Petitioners' Request for Judicial Notice Docket #18-1, Ex. 2 [March 23, 2017 Tribal Court Order to Dismiss trespass citations]; Respondents' Request for Judicial Notice, Docket #19-2 Ex. 6.)

In order for the court to have jurisdiction, "Section 1303 [of the ICRA] does require a 'several actual or potential restraint on liberty.'" *Jeffredo v. Macarro, supra* 599 F.3d at 919, citing *Poodry v. Tonawanda Band of Seneca Indians*, 85 F.3d 874, 880 (2d Cir. 1996). But Petitioners' freedom of movement was not so severely restrained to justify this Court's intervention into

matters that are purely intra-tribal, and the FAP should be dismissed.

Nor is there any "potential" restraint of Petitioners' liberty. The potential restraint referenced in *Poodry*, as outlined in *Jones v. Cunningham*, is inapplicable here:

> And in fact, as well as in theory, the custody and control of the Parole Board involves significant restraints on petitioner's liberty because of his conviction and sentence, which are in addition to those imposed by the State upon the public generally. Petitioner is confined by the parole order to a particular community, house, and job at the sufferance of his parole officer. He cannot drive a car without permission. He must periodically report to his parole officer, permit the officer to visit his home and job at any time, and follow the officer's advice. He is admonished to keep good company and good hours, work regularly, keep away from undesirable places, and live a clean, honest, and temperate life. Petitioner must not only faithfully obey these restrictions and conditions but he must live in constant fear that a single deviation, however slight, might be enough to result in his being returned to prison to serve out the very sentence he claims was imposed upon him in violation of the United States Constitution. He can be rearrested at any time the Board or parole officer believes he has violated a term or condition of his parole, and he might be thrown back in jail to finish serving the allegedly invalid sentence with few, if any, of the procedural safeguards that normally must be and are provided to those charged with crime. It is not relevant that conditions and restrictions such as these may be desirable and important parts of the rehabilitative process; what matters is that they significantly restrain petitioner's liberty to do those things which in this country free men are entitled to do.

Jones v. Cunningham, 371 U.S. 236, 242–43 (1963).

At pages 14 and 15 (footnote 5) of the Opposition, Petitioners misrepresent the nature of the May 23, 2017 Bishop Paiute Court order (attached and identified as Exhibit 2), asserting Judge Kockenmeister is "once again violating Petitioners' right to due process and equal protection under ICRA." Nothing could be further from the truth. On May 16, 2017 Judge Kockenmeister allowed Petitioners, who appeared without legal representation,[7] the opportunity to return to court to provide evidence they possessed a Grant to Standard Land Assignment.

Petitioners fail to dispute – and thus concede – the fact that Section 103 of the Trespass Ordinance expressly requires any individual who claims to have a right to occupy land which they have been cited as trespassing upon to present to the Tribal Court "a Grant of Standard Assignment

[7] On May 16, 2017, Judge Kockenmeister asked Petitioner Ron Napoles if Andrea Seielstad, their legal counsel of record, was still representing Petitioners. They replied in the affirmative, but she did not appear.

of Tribal Land executed by the Owens Valley Board of Trustees in accordance with the 1962 Land Assignment Ordinance, and in effect." (FAP, Appx. S.)

Petitioners' Opposition confirms they do not possess a Grant of Standard Land Assignment issued by the Owens Valley Board of Trustees for Block 3, Lots 4, 5, 6 and 7. Petitioners' theory they have been "detained" rests solely on the argument they have inherited a permanent right to use and occupy the Lots. Petitioners allege, that upon the death of a tribal member, land that was part of the tribal member's assignment "remains family land unless and until such time as another family member applies and is assigned a specific assignment within that land." (Opposition, 30:20-21.)

Under Petitioners' legal theory, family members of an original assignee would forever be permitted to use and occupy any land associated with the original assignment, and would never have to apply for an assignment. This theory is legally unsupported, and in fact is contrary to the express terms of the 1962 Land Assignment Ordinance, which states assignments are "not subject to inheritance." Furthermore, Petitioners' legal conclusions couched in factual allegations, that the Lots in dispute are held in trust by the United States "for the benefit of individual members and families of the Bishop Paiute community" (Opposition, 29: 1-2.) is contradicted at page 27 by their citation to *Paiute-Shoshone Indians of Bishop Cmty. of Bishop Colony, Cal. v. City of Los Angeles*, 637 F.3d 993, 996 (9th Cir. 2011). Petitioners also fail to refute, and therefore concede, to the Respondents' recitations of tribal law experts Justice William Canby and Felix Cohen which address the parameters of land use rights pursuant to assignments. (Motion to Dismiss, at pp. 13-14.)

Petitioners have failed to prove they have exhausted tribal remedies, much less shown they have been unlawfully detained. The two jurisdictional prerequisites to support habeas relief pursuant to Section 1303 of the ICRA have not been satisfied, and the court must dismiss the FAP pursuant to Federal Rule of Civil Procedure 12(b)(6).

Because Petitioners Fail to Address Respondents' Motion to Dismiss Pursuant to Rule 12(b)(1), Dismissal is Warranted

Petitioners complain Respondents "go to great lengths . . . to extol the virtues of

sovereignty [sic] immunity as a general principle of law that exists to protect tribes from civil suits." (Opposition, 8:14-17.) But at pages 7 and 8 of the Opposition, Petitioners concede they are alleging violations of Sections 1302(1), (5) and (8) of the ICRA, but attempting seek a remedy in the form of habeas relief pursuant to Section 1303 of the ICRA.

Tribal sovereign immunity was not waived by Congress to allow for federal jurisdiction to enforce provisions of Section 1302 of the ICRA. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978). Sovereign immunity serves as a separate jurisdictional bar as outlined in Respondents' Motion to Dismiss pursuant to 12(b)(1).

Petitioners concede Respondent Tribal Council members and Tribal Court Judge Kockenmeister were at all times acting in their official capacity. (Opposition, 10: 23.) Thus, the FAP, which incorrectly asserts the Respondents are being sued in their individual capacity is not accurate. As a result, Tribal Council members and Tribal Court Judge Kockenmeister, acting in their official capacity are protected with the sovereign immunity of the Tribe. Because Petitioners' failed to address Respondents' 12(b)(1) Motion, the FAP should be dismissed as to all Respondents due to the lack of subject matter jurisdiction.

Contrary to Petitioners' assertion, Respondent Tribal Council did not limit its 12(b)(1) Motion to a facial attack. Case law cited by Respondents supported both facial and factual attacks of a pleading. To the extent Respondent's Motion constituted a factual attack, the court is permitted to "look beyond the complaint to matters of public record without having to convert the motion into one for summary judgment. It need not presume the truthfulness of plaintiffs' allegations." *White v. Lee*, 227 F.3d 1214, 1242 (9th Cir. 2000) (internal citations omitted). In response, it was incumbent upon Petitioners "to present affidavits or any other evidence necessary to satisfy its burden of establishing that the court, in fact, possesses subject matter jurisdiction." *Crisp v. United States*, 966 F. Supp. 973, 974–75 (E.D. Cal. 1997) (internal citations omitted).

Instead of presenting any such evidence in their Opposition and related Motion to Strike,[8] in conclusory fashion Petitioners state the declarations exhibits that are a matter of public record were

[8] The heading of the Spoonhunter Declaration clearly identifies it is submitted in support of Respondents' Motion to Dismiss pursuant 12(b)(1).

"irrelevant" or "redundant." Petitioners have failed to address Respondents' Motion to Dismiss pursuant to 12(b)(1), and as such, the FAP should be dismissed.

In addition to the affidavits and documents that are the proper subject of judicial notice, Respondents request the court review the legal arguments presented at pages 10 through 14 of the Motion to Dismiss, which support a motion to dismiss due the lack of subject matter jurisdiction. Furthermore, Respondents request the court to review the Statement of Facts at pages 2 through 6, which Petitioners do not dispute, which further support Respondents' Motion to Dismiss pursuant to 12(b)(1).

CONCLUSION

Petitioners have failed to refute Respondents' argument that the court lacks jurisdiction to hear Petitioners' allegations that the Bishop Paiute Tribal Council and Bishop Paiute Tribal Court Judge Kockenmeister violated the Indian Civil Rights Act. Dismissal is warranted pursuant to Federal Rule of Civil Procedure 12(b)(1) and (6). Should the court agree, and is inclined to dismiss the FAP, dismissal should be without leave to amend, as Petitioners cannot cure the fatal defects of the FAP with the assertion of any other facts.

Respondents further request that if this Court is inclined to dismiss the FAP, Respondents be given the opportunity to file a Motion for Rule 11 Sanctions prior to the termination of this Court's jurisdiction.

Dated: June 13, 2017

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By: /s/Anna S. Kimber
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