

1 ALANA W. ROBINSON  
Acting United States Attorney  
2 GEORGE V. MANAHAN (SBN 239130)  
GLEN F. DORGAN (SBN 160502)  
3 Assistant United States Attorneys  
Office of the U.S. Attorney  
4 880 Front Street, Room 6293  
San Diego, California 92101  
5 Tel: (619) 546-7665 Fax: (619) 546-7751  
Email: [glen.dorgan@usdoj.gov](mailto:glen.dorgan@usdoj.gov)  
6

7 Attorneys for the UNITED STATES OF AMERICA  
8

9 IN THE UNITED STATES DISTRICT COURT  
10 SOUTHERN DISTRICT OF CALIFORNIA  
11

12 CINDY ALEGRE, *et al.*,  
13 Plaintiffs,  
14 v.  
15 UNITED STATES OF AMERICA, *et*  
*al.*,  
16 Defendants.  
17

CASE NO.: 3:16-cv-02442-AJB-KSC

CASE NO.: 3:17-cv-01149-AJB-KSC

**REPLY BRIEF IN SUPPORT OF  
UNITED STATES’ MOTION TO  
DISMISS SECOND AMENDED  
COMPLAINT**

**[FRCP 8(a), 41(b)]**

DATE: January 11, 2018  
TIME: 2:00 p.m.  
CTRM: 4A  
JUDGE: Hon. Anthony J. Battaglia

18  
19  
20  
21  
22 **I.**

23 **THE SAC VIOLATES RULES 8(a) and 41(b)**

24 To ensure compliance with Rule 8, the Court ordered Plaintiffs to amend their First  
25 Amended Complaint to plead the specific basis for the alleged waiver of sovereign  
26 immunity “as to each cause of action,” “delineate each Defendant’s role in the [alleged]  
27 wrongs perpetuated,” and “succinctly” plead the facts. Order [Doc. #43], 13:6-10. In their  
28 Opposition to Defendants’ Motion to Dismiss, as discussed below, Plaintiffs essentially

1 concede that their Second Amended Complaint (“SAC”) fails to comply with the Court’s  
2 Order and Rule 8. Therefore, the Court should grant Defendants’ motion to dismiss.

3 **A. Failure to Address Sovereign Immunity as to Each Claim.**

4 By their own admission, Plaintiffs’ discussion of subject matter jurisdiction in the  
5 SAC is limited to paragraphs 1 through 8 and 83. Opposition [Doc. #48], 9:24-26. Yet, as  
6 noted in Defendants’ motion, these paragraphs merely list several statutes and  
7 constitutional provisions without any reference to the specific causes of action or any  
8 discussion of how these provisions relate to sovereign immunity. Motion [Doc. #46-1],  
9 4:10-5:2.<sup>1</sup> Accordingly, Defendants must speculate whether, for example, Plaintiffs’  
10 theory of waiver of sovereign immunity for the Seventh Cause of Action, captioned  
11 “Violation of Administrative Procedures Act,” is in fact based on the Administrative  
12 Procedures Act (“APA”), notwithstanding Plaintiffs’ improper demand for money  
13 damages. *See* SAC, 64:24-70:6, 100:4-21; *see* Order 11:17-23 (noting this “confusion”).

14 In their Opposition, Plaintiffs finally endeavor to identify their theory of waiver of  
15 sovereign immunity as to each cause of action, and their effort demonstrates that the bulk  
16 of the provisions cited in introductory paragraphs 1 through 8 and 83 are immaterial. As  
17 to the First through Seventh and Tenth Causes of Action, Plaintiffs now assert that the APA  
18 alone governs the scope of any waiver of sovereign immunity. *See* Opposition, 10:23-  
19 14:27 (First, Third, and Seventh Causes of Action); 15:1-2, 17:10-16 (Tenth Cause of  
20 Action),<sup>2</sup> 18:21-26 (Second Cause of Action), 20:9-24 (Fourth Cause of Action), 21:1-7  
21 (Fifth Cause of Action), 21:8-17 (Sixth Cause of Action). As to the Eighth Cause of  
22 Action, Plaintiffs now contend that only the Federal Tort Claims Act (“FTCA”) applies.

23  
24 <sup>1</sup> Contrary to Plaintiffs’ contention, Defendants have not “ignored” these introductory  
25 allegations. *See* Opposition, 4:26-27. Instead, Defendants highlight these allegations in  
26 their Motion to demonstrate how Plaintiffs have failed to comply with the Court’s Order.  
27 *See* Motion, 4:10-5:2.

28 <sup>2</sup> Plaintiffs’ passing citation to the Declaratory Judgment Act, 28 U.S.C. § 2201, as a  
jurisdictional basis for the Tenth Cause of Action, *see* Opposition, 15:24-16:2, is  
misplaced. The Declaratory Judgment Act does not waive sovereign immunity.  
*Brownwell v. Ketcham Wire & Mfg.*, 211 F.2d 121, 128 (9th Cir. 1954).

1 *Id.*, 18:1-19. As to the Ninth Cause of Action for fraud (which the Court identified in the  
 2 Order as defective), Plaintiffs offer no argument, apparently electing to abandon this claim.  
 3 Similarly, Plaintiffs apparently abandon their Eleventh Cause of Action as against the  
 4 United States, conceding that there is no basis for a waiver of sovereign immunity. *Id.*,  
 5 22:7-9 (“Plaintiffs realize that the Government does not waive sovereign immunity under  
 6 42 U.S.C. 1981, 19854, 1986 . . .”).

7 Under Rule 8 and the Court’s Order, Defendants should not be forced to guess the  
 8 basis for Plaintiffs’ theory that sovereign immunity is waived. Nor should Plaintiffs be  
 9 permitted to reveal their waiver theories for the first time in their Opposition brief—  
 10 theories that expose other bases for dismissal.<sup>3</sup> Accordingly, dismissal is warranted for  
 11 Plaintiffs’ failure to comply with Rule 8 and the Court’s Order.

12 **B. Failure to Delineate Each Defendant’s Role**

13 Plaintiffs concede that their SAC “probably should have been more specific” in  
 14 identifying each Defendant named under each cause of action. *Id.*, 22:4-5. They also admit  
 15 that the individual Defendants—with the exception of Defendant Dutschke—played no  
 16 active role in any alleged wrongdoing. Instead, they now seek to hold Defendants Zinke,  
 17 Black, Loudermilk and Moore liable based only on their supervisory status. *See id.*, 1:24-  
 18 25, 18:24-26, 20:3-7. Even if Plaintiffs had pled such a theory in their SAC (which they  
 19 did not), it would be improper. *See Ashcroft v. Iqbal*, 556 U.S. 662, 676 (2009) (“A public  
 20 officer or agent is not responsible for the misfeasances or positive wrongs, or for the . . .  
 21 omissions of duty, of the subagents or servants or other persons properly employed by or  
 22 under him, in the discharge of his official duties”) (internal quotes and citation omitted).  
 23 Regardless, as it stands, the SAC violates the Court’s Order and Rule 8.

24 \_\_\_\_\_  
 25 <sup>3</sup> For example, having now asserted that the First through Seventh and Tenth Causes of  
 26 Action are all based on the APA, Plaintiffs’ money damages claims are subject to dismissal.  
 27 *See Order*, 11:19-23, citing *Alto v. Black*, 738 F.3d 1111, 1127 (9th Cir. 2013). Additionally,  
 28 having now asserted that the FTCA governs the Eighth Cause of Action, which alleges  
 breach of fiduciary duty based on a “history of over 160 years,” SAC, 73:4-23, Plaintiffs’  
 claim is time-barred and subject to dismissal. *See 28 U.S.C. § 2401(b)* (establishing a two-  
 year limitations period for FTCA claims).

1           **C.     Failure to Plead Succinctly**

2           Plaintiffs concede that the 103-page SAC still contains redundant and immaterial  
3 allegations. By their own admission, approximately 20 pages of introductory allegations  
4 in the SAC are unnecessary and immaterial. *See id.*, 2:21-25 (proposing to “eliminate . . .  
5 SAC ¶¶ 27-50, eliminate Pages 38-41, [and] redact SAC ¶¶ 51-73, in addition to other  
6 redacting changes”). Because Plaintiffs also admit that the First through Seventh and Tenth  
7 Causes of Action all plead the same APA-based claim, and because Plaintiffs have  
8 effectively abandoned the Ninth and Eleventh Causes of Action, it follows that roughly 40  
9 of the 50 pages of the SAC devoted to these causes of action are also unnecessary and  
10 immaterial.

11           Moreover, as noted above, Plaintiffs cannot justify their repeated references to  
12 demands for money damages in the context of their APA claim, given the Court’s prior  
13 ruling that the APA does not afford monetary relief. *See Order*, 11:19-23. Plaintiffs seek  
14 to minimize their breach of the Court’s Order by suggesting that they only pled claims for  
15 damages “as allowed by law.” *Opposition*, 11:25-26. Plaintiffs’ explanation, however,  
16 only serves to highlight their Rule 8 violations.

17           **D.     Dismissal is Warranted Without Leave to Amend**

18           Plaintiffs offer no explanation for the SAC’s numerous defects. Instead, they  
19 attempt to confuse the issues before the Court, *see, e.g.*, *Opposition*, 2:2-3 (improperly  
20 asserting at this pleading stage that “Defendants . . . have never challenged the factual basis  
21 for Plaintiffs’ complaints”), and they are dismissive of the Court’s Order itself, *see id.*, 9:8-  
22 12 (characterizing the Court’s instructions as “dicta”).<sup>4</sup> Defendants respectfully submit  
23

24           <sup>4</sup> In addition to arguing that they were somehow free to disregard the Court’s instructions,  
25 Plaintiffs challenge the Court’s citation of legal authorities in the Order. *See Opposition*,  
26 4:12-9:6 (dismissing as “factually distinguishable,” *inter alia*, *McHenry v. Renne*, 84 F.3d  
27 1172 (9th Cir. 1996) and *Nevijel v. N. Coast Life Ins. Co.*, 651 F.2d 671 (9th Cir. 1981));  
28 *Order*, 8:16-27 (citing *McHenry* and *Nevijel*). While Plaintiffs identify these cases as  
authority “that Defendants cite in support of their motion,” it is clear that their true focus is  
on Order itself. For example, one of the cases addressed by Plaintiffs in their *Opposition*—  
*Schmidt v Herrmann*, 614 F.2d 1221 (9th Cir. 1980)—is only cited by the Court, not by  
Defendants. *See Opposition*, 6:21-7:7; *Order*, 8:22-27.

1 that the numerous defects of the SAC, coupled with Plaintiffs’ direct defiance of the  
2 Court’s Order, warrant dismissal of the Complaint in its entirety without leave to amend.  
3 *See* Order, 13:10-11 (placing Plaintiffs on notice that failure to comply with the Court’s  
4 instructions “may result in dismissal with prejudice under Rule 41(b)”).

5 Alternatively, should the Court grant Plaintiffs’ request for “one last opportunity” to  
6 amend their complaint, *see* Opposition, 5:25-6:2, Defendants respectfully submit that the  
7 Court should limit any third amended complaint by eliminating the immaterial allegations  
8 identified above, and allowing Plaintiffs to assert, in a manner that complies with Rule 8,  
9 only the Seventh and Eighth Causes of Action from the SAC, identifying the APA and the  
10 FTCA as the bases for waiver of sovereign immunity. Dismissal with prejudice is  
11 warranted as to the remaining claims that cannot be cured, to include: (1) all claims against  
12 Defendants Zinke, Black, Loudermilk and Moore; (2) the abandoned Ninth Cause of  
13 Action for fraud; (3) the First through Sixth and Tenth Causes of Action, which are  
14 redundant in light of the Seventh Cause of Action (the only claim expressly pled as an  
15 APA-based claim); and (4) the abandoned Eleventh Cause of Action.

16 **II.**

17 **CONCLUSION**

18 For the foregoing reasons, Defendants respectfully request that the Court grant this  
19 motion and dismiss Plaintiffs’ Complaint pursuant to Rule 8(a) and Rule 41(b) of the  
20 Federal Rules of Civil Procedure.

21 Date: October 27, 2017

Respectfully submitted,  
ALANA W. ROBINSON  
Acting United States Attorney

22  
23 By /s/ Glen F. Dorgan  
24 GLEN F. DORGAN  
Assistant United States Attorney  
25  
26  
27  
28