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IN THE UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

CINDY ALEGRE, *et al.*,

Plaintiffs,

v.

UNITED STATES OF AMERICA, *et al.*,

Defendants.

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

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

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF INDIVIDUAL DEFENDANTS' MOTION TO DISMISS SECOND AMENDED COMPLAINT

[FRCP 8(a), 12(b)(6), 41(b)]

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

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Defendants AMY DUTSCHKE and JAVIN MOORE respectfully submit the following memorandum of points and authorities in support of their motion to dismiss the Second Amended Complaint ("SAC").

I. INTRODUCTION

In this action arising out of Plaintiffs' efforts to enroll as members of the San Pasqual Band of Mission Indians (the "Band"), Plaintiffs seek to hold two federal employees—Amy Dutschke and Javin Moore—personally liable. The nature of Plaintiffs' claims against these individuals is unclear based on the allegations of the SAC, which continues to suffer from numerous Rule 8 defects. However, in their brief filed in opposition to the United States' separate motion to dismiss, Plaintiffs endeavor to clarify that their personal liability claims against Defendant Dutschke and Moore are based on the Administrative Procedures Act ("APA") and *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). *See* Opposition [Doc. #48], 10:23-3, 20:9-13, 22:1-6.

By this motion, Defendants Dutschke and Moore request dismissal of the personal liability claims of the SAC on the grounds that (1) the SAC violates Rule 8; (2) the APA does not authorize a claim of personal liability; (3) there is no basis for implying a new *Bivens* action in the context of this case; and, in any event, (4) the *Bivens* claims suffer from other substantive defects; and (5) the doctrine of qualified immunity provides a complete defense. Because Plaintiffs cannot cure these pleading deficiencies and an amendment would be futile, Defendants Dutschke and Moore request that the Court dismiss the personal liability claims of the SAC with prejudice.

II. FACTUAL AND PROCEDURAL BACKGROUND

Plaintiffs initiated this action in September 2016 by filing a complaint against five federal employees in their official capacities. Plaintiffs alleged in their original complaint that these individuals failed to appropriately process Plaintiffs' applications for enrollment with the San Pasqual Band of Mission Indians (the "Band"). *See* Complaint [Doc. #1].

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In April 2017, Plaintiffs filed a First Amended Complaint ("FAC") that added the United States, the Department of the Interior ("DOI") and the Bureau of Indian Affairs ("BIA") as defendants. *See* FAC [Doc. #13]. After the Court dismissed the FAC due to numerous Rule 8 defects, Plaintiffs filed their SAC. Unlike the prior complaints, the SAC asserts claims against Defendants Dutschke and Moore in their official *and* individual capacities. *See* SAC [Doc. #44], ¶¶ 22-23.

On October 6, 2017, the United States (along with the DOI, BIA and federal employees named in their official capacities) filed a motion to dismiss the SAC on the basis that Plaintiffs have failed to cure their Rule 8 defects, and that motion remains pending. *See* Motion [Doc. #46]. By this motion, Defendants Dutschke and Moore move to dismiss the SAC against them individually.

A. <u>The "Gravamen" of the SAC: an APA Claim</u>.

At its core, the SAC seeks relief under the APA to resolve Plaintiffs' membership claims. The Band's Constitution provides that membership is to be governed by the provisions of former federal regulations previously codified at 25 C.F.R. §§ 48.1-48.15 ("the 1960 Regulations").[1] SAC ¶¶ 40-41, 48; Ex. "4" to SAC, Constitution, Art. III, Membership. The 1960 Regulations authorize the enrollment of individuals who can, subject to BIA review, establish that they are "1/8 or more degree Indian blood of the Band." Ex. "5" to SAC, Text of former 25 C.F.R. §§ 48.5-48.11.

Plaintiffs allege that they possess 1/8 degree blood of the Band and qualify for membership because they are the lineal descendants of a full blood degree San Pasqual Indian, Modesta Contreras ("Modesta"). SAC ¶¶ 8, 14-15. Because the Band's membership roll lists Modesta as only a 3/4 degree San Pasqual Indian, however, Plaintiffs allegation is predicated on the contention that the membership roll must be corrected to reflect census data that allegedly establishes Modesta's full blood degree. *Id.* ¶¶ 52-53.

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[1] "The 1960 Regulations have since been removed from the Code of Federal Regulations, but the reference to them remains in the Tribe's Constitution." *Alto v. Black*, 738 F.3d 1111, 1116 (9th Cir. 2013).

In 2005, a majority of the Plaintiffs, called the "Group A Plaintiffs," submitted membership applications to the Band's Enrollment Committee, and the Committee subsequently forwarded the applications to the BIA along with a request to correct Modesta's blood degree. *Id*. ¶¶ 52-55. Shortly thereafter, individuals allegedly adverse to Plaintiffs' interests assumed power within the Band and formed a new "illegal" Enrollment Committee. *Id*. ¶ 65. In 2006, after the BIA determined that the evidence did not sufficiently demonstrate Modesta's full blood degree, the BIA returned the membership applications to the "illegal" Enrollment Committee, allegedly without providing notice to the Plaintiffs as required by the 1960 Regulations. *Id*. ¶¶ 54-62.[2]

Plaintiffs contend that they "have been trying, without success, to get the Defendants to comport with the APA and adjudicate their applications pursuant to the mandatory requirements of [the 1960 Regulations]." *Id*. ¶ 153. Plaintiffs place much of their blame on Defendant Dutschke, the BIA's Pacific Regional Director, who they allege "unilaterally decided to deny the Enrollment Committee's request to correct Modesta Martinez' blood level from 3/4 to 4/4 and confirm the enrollment of descendant Plaintiffs," "unilaterally failed to give Plaintiffs the required statutory notice," and "unilaterally returned Group A Plaintiffs' applications to the illegal Enrollment Committee." *Id*. ¶ 22; *see also* Opposition [Doc. #48], 1:17-25 (admitting the allegations regarding Defendant Dutschke "state" the "Gravamen of Plaintiffs' SAC . . . under the APA").

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[2] By stating facts alleged by Plaintiffs, Defendants do not mean to indicate that they agree that the alleged facts are accurate. Defendants, for example, dispute the contention that the BIA had an obligation to send any notice to Plaintiffs pursuant to the 1960 Regulations. The former regulation previously codified at 25 C.F.R. § 48.9 provides that notice shall be given to an applicant in writing *if* the BIA "determines that an applicant is not eligible for enrollment." In 2006, the BIA made no decision regarding Plaintiffs' enrollment applications before returning them to the Band. Instead, as explained in the BIA's letter of April 7, 2006 to the Band, *see* Ex. "13" to SAC [Doc. #44-16], the BIA determined that Modesta's blood degree was 3/4 and returned the original enrollment applications to Modesta's descendants for the Band's review, since the determination not to increase Modesta's blood degree could affect the Band's analysis of those applications. *See* Dutschke Decl. [Doc. #20-3], ¶ 4.

B. Summary of the SAC's Personal Liability Claim.

On its face, the SAC includes only one cause of action expressly pled against Defendants Dutschke and Moore in their individual capacities. Specifically, the First Cause of Action, captioned "Violation of Civil Rights: Due Process," is brought by the "Group A Plaintiffs Against Amy Dutschke and Javin Moore in their official capacities and as individuals." SAC, 42:16-10.

In support of the First Cause of Action, Plaintiffs repeat their allegations regarding their status as descendants of Modesta; their submission of enrollment applications to the BIA along with a request to correct Modesta's blood degree; Defendant Dutschke's alleged failure to adjudicate the applications and correct Modesta's blood degree; and Defendant Dutschke's alleged transmittal of the applications to the "illegal" Enrollment Committee without notice to Plaintiffs. *Id*. ¶¶ 87-100. Plaintiffs then conclude that "Dutschke's actions violated Plaintiffs' civil rights in that she denied them their right to due process and a fair adjudication of their applications." *Id*. ¶ 101.

Notably, Defendant Moore is never mentioned in the First Cause of Action. *Id*. ¶ 86-103. Indeed, the only references to Defendant Moore in the SAC are allegations that he became Superintendent of the Southern California Agency of the BIA in or about 2016, advised Plaintiffs that the BIA no longer had their original applications to adjudicate, and subsequently met with Plaintiffs to discuss the issue. *Id*. ¶¶ 23, 68-69, 71

C. Plaintiffs' Recent Clarification of Their Claims.

In opposition to the United States' pending motion to dismiss, Plaintiffs have endeavored to clarify the nature and scope of their claims. Among other clarifications, Plaintiffs make three arguments that define the scope of their personal liability claims against Defendants Dutschke and Moore. First, Plaintiffs contend that, in addition to the First Cause of Action, the Fourth, Seventh and Eleventh Causes of Action of the SAC should also be read to assert personal liability claims against Defendants Dutschke and

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Moore. Opposition [Doc. #48], 2:9-3:16.[3] Second, they contend that the First, Fourth and Seventh Causes of Action are all predicated on the APA, while "[t]his Court should consider Plaintiffs' Eleventh Cause of Action to be brought pursuant to *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971)." *Id*., 10:23-3, 20:9-13, 22:1-6. Finally, Plaintiffs contend that Defendant Dutschke's individual liability is based on her personal involvement with the enrollment process in 2005 and 2006, whereas Defendant Moore's personal liability arises out of his supervisory status. *Id*., 1:17-25 ("Moore has failed to either order Dutschke to follow statutory requirements or to act in her stead").[4]

As pled in the SAC, the Fourth Cause of Action is a claim for "Violation of Civil Rights: Denial of Property Rights" and is asserted by the Group A Plaintiffs "against all Defendants in their Official Capacity." SAC 59:24-60:1. In support of this claim, Plaintiffs do not allege any specific conduct on the part of either Defendant Dutschke or Defendant Moore; instead, Plaintiffs assert only that the Group A Plaintiffs have been denied property rights (e.g., "per capita payments") as a result of the BIA's failure to recognize their enrollment status. *Id*. ¶¶ 128-131.

The Seventh Cause of Action is captioned as a claim for "Violation of [the] Administrative Procedures Act" and is asserted by both the Group A and Group B Plaintiffs[5] "against all Defendants." *Id*. 64:24-27. In the context of this claim, Plaintiffs repeat their allegation that Defendant Dutschke mismanaged their enrollment applications

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[3] According to Plaintiffs' Opposition, the Eleventh Cause of Action also asserts personal liability claims against Defendants Zinke, Black and Loudermilk. Opposition [Doc. #48], 3:14-16, 22:1-6. A plain reading of the SAC does not support that contention. *See* Complaint [Doc. #1], ¶¶ 19-21. Regardless, these defendants have yet to be served with process and are not parties to this motion.

[4] Plaintiffs do not endeavor to reconcile their theory of supervisory liability with their allegations that Defendant Moore became Superintendent of the Southern California Agency of the BIA approximately 10 years after Defendant Dutschke allegedly reviewed and returned the enrollment applications. *See* SAC ¶¶ 23, 54-62.

[5] The "Group B Plaintiffs," unlike the Group A Plaintiffs, "are federally recognized enrolled members of the [Band]." SAC ¶ 17.

in 2005 and 2006. *Id*. ¶¶ 155-158. Yet, the claim remains silent as to Defendant Moore. *See id*. ¶¶ 146-166.

Finally, the Eleventh Cause of Action is brought by all Plaintiffs and is captioned as a claim for "Conspiracy to Interfere with Civil Rights." SAC 88:11-14. Like the Fourth Cause of Action, the Eleventh Cause of Action is devoid of any allegations of specific conduct on the part of Defendants Dutschke and Moore. Instead, it begins with a discussion of events that took place in the 1950s (well before the individual defendants became federal employees), *see id*. ¶¶ 226-230, proceeds to broadly incorporate the allegations of the prior causes of action, *see id*. ¶¶ 231-236, and concludes with a general allegation that all Defendants engaged in unspecified "conspiratorial actions," *see id.* ¶¶ 237-242.

III. ARGUMENT

A. Relevant Legal Standards.

1. Standard on Rule 12(b)(6) Motion.

A motion to dismiss for failure to state a claim may be brought by a defendant pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. "Dismissal is proper when the complaint does not make out a cognizable legal theory or does not allege sufficient facts to support a cognizable legal theory." *Chubb Custom Ins. Co. v. Space Systems/Loral, Inc.*, 710 F.3d 946, 956 (9th Cir. 2013). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). A claim is facially plausible "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* The plausibility standard requires more than the sheer possibility or conceivability that a defendant has acted unlawfully, rather, factual allegations must be enough to raise a right to relief above the speculative level. *See id.* at 678–79, *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) ("'[E]ntitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.").

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A motion to dismiss may be made and granted to dismiss either the whole complaint or part of the complaint. *See Tatum v. Board of Supe'rs for University of Louisiana System*, 9 F. Supp. 3d 652, 655 (E.D. La. 2014); *Miceli v. Ansell, Inc.*, 23 F. Supp. 2d 929, 931 (N.D. Ind. 1998); *Brocksopp Engineering, Inc. v. Bach-Simpson Ltd.*, 136 F.R.D. 485, 486 (E.D. Wis. 1991).

Although allegations of fact are normally taken as true and construed in the light most favorable to the nonmoving party, the Court need not accept as true allegations that are merely conclusory, unwarranted deductions of fact, unreasonable inferences that are contradicted by matters properly subject to judicial notice or by exhibit referred to or incorporated by reference into the complaint, or that are legal conclusions that cannot reasonably be drawn from the facts alleged. *See Iqbal*, 556 U.S. at 678-79; *Gonzalez v. Planned Parenthood of Los Angeles*, 759 F.3d 1112, 1115 (9th Cir. 2014); *Wilson v. Hewlett-Packard Co.*, 668 F.3d 1136, 1145 n.4 (9th Cir. 2012); *Cholla Ready Mix, Inc. v. Civish*, 382 F.3d 969, 973 (9th Cir. 2004). Furthermore, although leave to amend should be given freely, *Doe v. United States*, 58 F.3d 494, 497 (9th Cir.1995), a district court may dismiss without leave where a plaintiff's proposed amendments would fail to cure the pleading deficiencies and amendment would be futile. *See Cook, Perkiss & Liehe, Inc. v. N. Cal. Collection Serv. Inc.*, 911 F.2d 242, 247 (9th Cir. 1990) (per curiam).

2. <u>Standard on Rule 8(a) and Rule 41(b) Motion</u>.

Rule 8(a) of the Federal Rules of Civil Procedure requires a complaint to contain "a short and plain statement of the claim showing the pleader is entitled to relief." A complaint violates Rule 8 and is subject to dismissal if it is argumentative, prolix, replete with redundancy, largely irrelevant, verbose, confusing, and/or largely conclusory. *See Cal. Coal. For Families & Children v. San Diego Cnty. Bar Assn.*, 657 Fed. Appx. 675, 677-78 (9th Cir. 2016) (unpublished) citing *McHenry v. Renne*, 84 F.3d 1172, 1177, 1180 (9th Cir. 1996), and *Nevijel v. North Coast Life Ins. Co.*, 651 F.2d 671, 674 (9th Cir. 1981). When a complaint is "prolix in evidentiary detail, yet without simplicity, conciseness and

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clarity as to whom plaintiffs are suing for what wrongs, [it] fails to perform the essential functions of a complaint." *McHenry*, 84 F.3d at 1180.

Pursuant to Rule 41(b) of the Federal Rules of Civil Procedure, courts may dismiss an action for a plaintiff's failure to comply with a court order. For example, where a plaintiff fails to comply with an order to amend a complaint in a manner that satisfies Rule 8, dismissal pursuant to Rule 41(b) may be appropriate. *See McHenry*, 84 F.3d at 1177-80 (9th Cir. 1996); *Polk v. Beard*, 692 F. App'x 938 (9th Cir. 2017) (unpublished); *Gottschalk v. City and County of San Francisco*, 964 F.Supp.2d 1147, 1154-55 (N.D. Cal. 2013).

B. <u>The SAC Violates Rules 8(a) and 41(b)</u>.

As set out more fully in the United States' separate motion to dismiss [Doc. #46], the SAC fails to comply with the Court's prior Order, which directed Plaintiffs to succinctly plead their claims, delineate each Defendant's role in the wrongs allegedly perpetuated, and state the basis for the Court's subject matter jurisdiction. *See* Order [Doc. #43], 13:6-11. Defendants Dutschke and Moore should not be forced resort to the representations made by Plaintiffs in their opposition brief to evaluate the nature and scope of the claims against them. *See Arbitraje Casa de Cambio, S.A. de C.V. v. U.S. Postal Serv.*, 297 F. Supp. 2d 165, 170 (D.D.C. 2003) ("It is axiomatic that a complaint may not be amended by the briefs in opposition to a motion to dismiss"). Because the SAC fails to clearly identify which causes of action are pled against the individual defendants and is entirely devoid of allegations regarding Defendant Moore's role in the alleged wrongdoing, the SAC must be dismissed pursuant to Rule 8(a) and Rule 41(b). Moreover, for the reasons explained below, dismissal should be with prejudice, because the additional substantive defects underlying Plaintiffs' claims cannot be cured.

C. <u>The SAC Fails to State a Claim for Personal Liability Under the APA</u>.

The APA provides a means to obtain non-monetary relief against the United States, a federal agency, or a federal officer *acting in an official capacity*. 5 U.S.C. §§ 702-703; *see Lane v. Pena*, 518 U.S. 187, 196 (1996); *cf. Kentucky v. Graham*, 473 U.S. 159, 165 (1985) (noting that official capacity claims against federal officer are merely another way

of pleading an action against the United States). Because the APA does not provide for individual-capacity claims or money damages, the Court should dismiss the APA claims (the First, Fourth and Seventh Causes of Action) against Defendants Dutschke and Moore with prejudice. *See Jefferson v. Harris*, 170 F. Supp. 3d 194, 217 (D.D.C. 2016) (held the APA "does not provide for individual-capacity claims") (citation and internal quotation marks omitted); *Rogers v. U.S. Parole Comm'n*, No. CIV. 10-1179-TC, 2011 WL 4544633, at *2 (D. Or. Aug. 11, 2011), report and recommendation adopted, No. CIV. 10-1179-TC, 2011 WL 4547957 (D. Or. Sept. 29, 2011) (APA claim against defendants in individual capacity should be dismissed for lack of jurisdiction and failure to state a claim).

D. The SAC Fails the Test for a New *Bivens* Claim.

Because no federal statute creates a private right of action for an alleged violation of a constitutional right, a plaintiff seeking redress against a government official for an alleged constitutional violation must ask the court to "imply" a private right of action under the line of cases that began with *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971). In *Bivens*, the Supreme Court allowed an implied cause of action under the Fourth Amendment for a plaintiff who was handcuffed during a warrantless search of his home. *Id*. at 389-97. Since *Bivens*, the Supreme Court has recognized an implied cause of action under the Constitution on only two other occasions. In 1979, the Court recognized an implied cause of action under the Fifth Amendment in a suit for gender discrimination brought by the former secretary of a United States Congressman, *see Davis v. Passman*, 442 U.S. 228 (1979), and in 1980, the Court recognized an implied cause of action under the Eighth Amendment after an inmate sued his federal jailers for failing to treat his asthma, *see Carlson v. Green*, 446 U.S. 14 (1980). "These three cases—*Bivens*, *Davis*, and *Carlson*—represent the only instances in which the Court has approved of an implied damages remedy under the Constitution itself." *Ziglar v. Abbasi*, 137 S.Ct. 1843, 1855 (2017).

Indeed, in the 30-plus years since *Carlson* was decided, the Supreme Court has "adopted a far more cautious course" in deferring to Congress to confer statutory remedies

rather than implying the existence of a Constitutional remedy. *Id*. at 1855-56; *see also Correctional Services Corp. v. Malesko*, 534 U.S. 61, 75 (2001) ("*Bivens* is a relic of the heady days in which this Court assumed common-law powers to create causes of action") (Scalia, J., concurring). Under the Supreme Court's current analytical framework, judicial efforts to expand the *Bivens* remedy are now "'disfavored.'" *Abbasi*, 137 S.Ct. at 1856-57, quoting *Iqbal*, 556 U.S. at 675.

Here, Plaintiffs do not allege unlawful searches and seizures, gender discrimination, or punitive confinement, nor do Plaintiffs direct their claims against federal law enforcement officers. Instead, Plaintiffs seek to hold civil servants personally liable for their administrative role in handling tribal enrollment applications. As such, Plaintiffs seek to extend *Bivens* remedies into a new context. *See Abbasi*, 137 S.Ct. at 1859 (the "proper test for determining whether a case presents a new *Bivens* context" is straightforward: "If the case is different in a meaningful way from previous *Bivens* cases decided by this Court, then the context is new"); *see id*., at 1864 ("even a modest extension is still an extension").

Where, as here, a plaintiff pleads a *Bivens* claim in a new context, the court must apply a two-step test to evaluate whether implication of the proposed remedy is appropriate. *Id*., at 1857-58; *Wilkie v. Robbins*, 551 U.S. 537, 550-62 (2007). As a first step, a court must determine whether there is "any alternative, existing process for protecting" a plaintiff's interest. *Wilkie*, 551 U.S. at 550. Such an alternative remedy would infer that Congress "expected the Judiciary to stay its *Bivens* hand." *Id*.

As a second step, and in the absence of an alternative remedy, a court must ask whether there are "special factors counseling hesitation" before devising an implied right of action. *Abbasi*, 137 S.Ct. at 1857-58. This "inquiry" must concentrate on whether the judiciary is well suited, absent congressional action or instruction, to consider and weigh the costs and benefits of allowing a damages action to proceed." *Id*. at 1858. And when the special factors analysis requires balancing a "host of considerations," separation of powers principles require that, most often, Congress should decide. *Id*. at 1857 (posing the

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questions of "who should decide" whether to provide a new damages remedy, and responding that "the answer most often will be Congress").

Here, Plaintiffs' purported *Bivens* claims fail to survive the first step of this test, because the claims are based on the same allegations of agency action or inaction upon which they bring their APA claims. The Ninth Circuit has held that the APA is the correct vehicle for a plaintiff to bring suit challenging agency action or inaction, "leav[ing] no room" for a *Bivens* claim based on such action or inaction. *See Western Radio Servs. Co. v. U.S. Forest Service*, 578 F.3d 1116, 1122-23 (9th Cir. 2009) ("[W]e conclude that Western cannot maintain its *Bivens* claims against the individual defendants for causing the Forest Service's alleged actions and inactions"). In accordance with *Western Radio*, therefore, Plaintiffs' purported *Bivens* claims must be dismissed with prejudice. *See id*. at 1123; *see also Winnemem Wintu Tribe v. U.S. Dept. of Interior*, 725 F. Supp. 2d 1119, 1147-48 (E.D. Cal. 2010) (held plaintiffs' claim for *Bivens* remedies based on allegations that, *inter alia*, USFS employees "engag[ed] in '[d]isparate treatment of Plaintiffs' tribal interests'" was barred because of the "potential availability" of APA remedies).

Because Plaintiffs' purported *Bivens* claims fall short on the first prong of the test, this Court need go no further to evaluate whether "special factors counseling hesitation" exist. To be sure, however, there are numerous factors counseling hesitation in this case. As an example, creating a new *Bivens* remedy in the context of tribal enrollment would necessarily expand the role of the judiciary into matters that are "generally beyond judicial scrutiny." *Cf. Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55 (1978) (Indian tribes are "distinct, independent political communities, retaining their original natural rights" in matters of local self-government, including matters of membership, and are unconstrained by constitutional provisions limiting federal or state authority, including the Fifth Amendment); *Alto*, 738 F.3d at 1115, 1122-25 ("In view of the importance of tribal membership decisions and as part of the federal policy favoring tribal self-government, matters of tribal enrollment are generally beyond federal judicial scrutiny"). Furthermore, "the unique and delicate nature of the relationship between the sovereignty of the United

States and that of Indian tribes is a special factor counseling against extension of *Bivens*" to the context Plaintiffs attempt to do so in this suit. *Cf. Boney v. Valline*, 597 F. Supp. 2d 1167, 1186 (D. Nev. 2009) (refusing to create *Bivens* action against tribal police officer for alleged violation of plaintiff's First and Fourth Amendment rights during her arrest). Certainly Congress is better suited to consider and weigh the costs and benefits of allowing a damages action to proceed in this context. Therefore, even if the Court concluded there was no alternative process for Plaintiffs to bring their claims, the Court should conclude that special factors counsel against it creating a new *Bivens* claim in the context sought by Plaintiffs.

E. Plaintiffs' *Bivens* Claims Suffer From Additional Defects.

Even assuming the Court is inclined to imply a *Bivens* action in this novel setting, Plaintiffs' claims remain defective. To state a *Bivens* claim, Plaintiffs are required to plead facts demonstrating that "each Government-official defendant, through the official's own individual actions, has violated the Constitution." *Iqbal*, 556 U.S. at 676 (held "vicarious liability is inapplicable to *Bivens*"); *see Pellegrino v. United States*, 73 F.3d 934, 936 (9th Cir. 1996) (*Bivens* liability is premised on proof of direct personal responsibility); *Ivey v. Bd. of Regents of the University of Alaska*, 673 F.2d 266, 268 (9th Cir. 1982). Here, Plaintiffs' criticism of Defendant Moore is based solely on his supervisory status, not any allegations of his direct involvement in violating Plaintiffs' constitutional rights. The *Bivens* claims against Defendant Moore, therefore, should be dismissed with prejudice.

Moreover, because Plaintiffs have only pled facts regarding Defendant Dutschke's individual involvement in the alleged wrongdoing, it follows that the Eleventh Cause of Action for "conspiracy" should be dismissed. To state a claim for conspiracy to violate an individual's civil rights, a plaintiff must plead sufficient facts or circumstantial evidence for a fact-finder to infer "the existence of an agreement or meeting of the minds to violate constitutional rights." *Mendocino Environmental Center v. Mendocino County*, 192 F.3d 1283, 1301 (9th Cir. 1999) (citations and internal quotation marks omitted). Because Plaintiffs have not pled facts showing the existence of any agreement between Defendants

Dutschke and Moore (or any other individuals for that matter) they cannot proceed with a conspiracy claim. Indeed, given their allegation that Defendant Dutschke acted "unilaterally," SAC ¶ 22, any proposed amendment of the conspiracy claim would be futile.

F. Defendants Dutschke and Moore Have Qualified Immunity.

"Qualified immunity is 'an immunity from suit rather than a mere defense to liability.'" *Pearson v. Callahan*, 129 S.Ct. 808, 815 (2009), citing *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985). Thus, the Supreme Court "repeatedly [has] stressed the importance of resolving immunity questions at the earliest possible stage in the litigation." *Id*., citing *Hunter v. Bryant*, 502 U.S. 224, 227 (1991). In analyzing qualified immunity, courts must consider: (1) whether the facts alleged show that the officer's conduct violated a constitutional right; and (2) if so, whether the constitutional right at issue was clearly established at the time of the defendant's alleged misconduct. *See Pearson*, 129 S.Ct. at 816, citing *Saucier v. Katz*, 533 U.S. 194, 201 (2001); *Acosta v. City of Costa Mesa*, 694 F.3d 960, 981 (9th Cir. 2012).

Plaintiffs have described their constitutional right as a "right to due process." *SAC* ¶ 101. "The first inquiry in every due process challenge is whether the plaintiff has been deprived of a protected interest in 'property' or 'liberty.'" *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 59 (1999) ("Only after finding the deprivation of a protected interest do we look to see if the [government's] procedures comport with due process"). Here, Plaintiffs have alleged a deprivation of an interest in "property," not "liberty." *See, e.g.*, SAC ¶¶ 128-131. The question becomes, therefore, whether Plaintiffs' alleged property interests are constitutionally protected.

While the Constitution protects property interests, the Constitution does not create those interests. Instead, the interest must derive from some other independent source, such as state law. *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972). And, "the range of interests protected by procedural due process is not infinite." *Id*. at 570. To have a property interest in a benefit, one must have more than a unilateral expectation of it; one must have "a legitimate claim of entitlement to it." *Id*. at 577.

For example, in *American Manufacturers*, injured employees challenged Pennsylvania's workers' compensation procedures whereby medical payments may be withheld subject to review by a "utilization review organization." The employees alleged that, "in withholding workers' compensation benefits without predeprivation notice and an opportunity to be heard, the state and private defendants, acting 'under color of state law,' deprived them of property in violation of due process." *Am. Mfrs.*, 526 U.S. at 47-48. The Supreme Court concluded that the injured employees did not have a constitutionally protected property interest in their medical benefits unless they could show that the expenses were "reasonable and necessary" as required by the state statute. *Id*. at 60 (noting that the state law required "that disputes over the reasonableness and necessity of particular treatment . . . be resolved *before* an employer's obligation to pay—and an employee's entitlement to benefits—arise") (italics in original). Because the employees had only an expectation of benefits, and had not established their entitlement to the benefits, they had no protected property interest. *Id*. ("While they have indeed established their initial *eligibility* for medical treatment, they have yet to make good on their claim that the particular medical treatment they received was reasonable and necessary").

Here, Plaintiffs allege that they have been deprived of a constitutionally protected property interest in the form of benefits associated with membership in the Band. *See, e.g.*, *SAC* ¶¶ 128-131. Yet to have a protected property interest in tribal benefits, Plaintiffs must show that they possess the requisite minimum blood degree as required by tribal law. As in *American Manufacturers*, Plaintiffs have only an expectation of benefits, not an established entitlement to benefits, until and unless they "make good on their claim" regarding their blood degree. Accordingly, Plaintiffs' alleged "eligibility" for membership does not implicate a property interest subject to due process protection. *Cf. Am. Mfrs*., 526 U.S. at 61 (claimants' "due process claims falter[] for lack of a property interest"). Defendants Dutschke and Moore, therefore, are entitled to qualified immunity.

Even assuming Plaintiffs' claims implicate a constitutional right, Defendant Dutschke and Moore are still entitled to qualified immunity, because any such

constitutional right was not clearly established at the time of the alleged wrongdoing. "A Government official's conduct violates clearly established law when, at the time of the challenged conduct, '[t]he countours of [a] right [are] sufficiently clear" that every "reasonable official would have understood that what he is doing violates that right." *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011), quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). Stated another way, "existing [case law] precedent must have placed the . . . constitutional question beyond debate." *Id*. Here, research reveals no published (or unpublished) case or judicial opinion holding that a federal official's failure to comply with former federal regulations incorporated within tribal law in the context of processing enrollment applications may result in civil rights violations. Accordingly, the Court should dismiss the *Bivens* claims (including the Eleventh Cause of Action of the SAC) with prejudice.

IV. CONCLUSION

For the foregoing reasons, Defendants respectfully move the Court for an order dismissing, with prejudice, the claims of the SAC that seek personally liability against Defendants Dutschke and Moore.

Date: November 20, 2017

Respectfully submitted,

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By */s/ Glen F. Dorgan*
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