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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

Cindy Alegre, et. al., Plaintiffs, v. UNITED STATES OF AMERICA, et. al., Defendants.	Case No. 16-cv-2442-AJB-KSC Consolidated with Case No. 17-cv-1149-AJB-KSC PLAINTIFFS RESPONSE AND OPPOSITION TO INDIVIDUAL DEFENDANTS MOTION TO DISMISS PLAINTIFFS SECOND AMENDED COMPLAINT Date: January 11, 2018 Time: 2 p.m. Court Room 4A

PLAINTIFFS RESPONSE AND OPPOSITION TO INDIVIDUAL DEFENDANTS MOTION TO DISMISS PLAINTIFFS SECOND AMENDED COMPLAINT

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I

INTRODUCTION

Plaintiffs have based their claims as alleged in their Second Amended Complaint (SAC) on the following federally protected interests: Article III of the San Pasqual Constitution,[1] [Exhibit "A"]; Fifth Amendment to the United States Constitution,[2] 25 C.F.R. §48,[3] [Exhibit "B"]; Civil Rights Statutes as applied to

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[1]Section 1. Membership shall consist of those living persons whose names appear on the approved Roll of October 5, 1966, according to Title 25, Code of Federal Regulations, Part 48.1 through 48.15.

Sec.2. All membership in the band shall be approved according to the Code of Federal Regulations, Title 25, Part 48.1 through 48.15 and an enrollment ordinance which shall be approved by the Secretary of the Interior.

[2]No person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation. (The Fifth Amendment has an explicit requirement that the Federal Government not deprive individuals of "life, liberty, or property," without due process of the law and an implicit guarantee that each person receive equal protection of the laws.)

[3]48.7 - Review of applications by Enrollment Committee.
The Field Representative **shall** refer duly filed applications for enrollment to the Enrollment Committee. The Enrollment Committee **shall** review each such application and may require an applicant to furnish additional information . . . The Enrollment Committee **shall** file with the Director through the Field Representative, those applications which it approves and with those applications not approved **shall** submit a separate report stating reasons for disapproval. **The applications whether approved or disapproved shall be filed with the Director within thirty (30) days from receipt of the applications by the Committee.** [Emphasis added].

48.8 - Determination of eligibility and enrollment by Director.
The Director **shall** review the report and recommendations of the Enrollment

individual Federal Employees such as DUTSCHKE and MOORE through *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971). [SAC §83]

Plaintiffs have sued Defendants DUTSCHKE and MOORE in both their official capacity and as individuals. Specifically, Plaintiffs have sued DUTSHCKE and MOORE as individuals: First Claim, [Group A Plaintiffs] Violation of Civil Rights (Due Process); Third Claim, [All Plaintiffs] Violation of Civil Rights (Equal Protection); Fourth Claim, [Group A Plaintiffs] Violation of Civil Rights - (Property Rights). As pled in Plaintiffs' SAC the defendants are government agents acting within the scope of alleged delegated authority and each of the defendants is responsible for the acts and/or omissions of the other Defendants; DUTSCHKE and MOORE have the alleged statutory power, and it is within that

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Committee and **shall** determine the applicants who are eligible for enrollment in accordance with the provisions of 48.5. The Director **shall** transmit for review to the Commissioner and for final determination by the Secretary, the report and recommendations of the Enrollment Committee relating to applicants who have been determined by the Director to be eligible for enrollment against the report and recommendations of the Enrollment Committee, and the report and recommendations of the Enrollment Committee relative to applicants who have been determined by the Director not to be eligible for enrollment against the reports and recommendations of the Enrollment Committee, with a statement of the reasons for his determination. [Emphasis added].

48.9 - Appeals.

If the Director determines that an applicant is not eligible for enrollment in accordance with the provisions of §48.5 he **shall** notify the applicant in writing of his determination and the reasons therefor. Such applicant **shall** then have thirty (30) days from the date of the mailing of the notice to him to file with the Director an appeal from the rejection of his application, together with any supporting evidence not previously furnished. The Director **shall** forward to the Commissioner the appeal, supporting data, and his recommendation thereon, and the report and recommendation of the Enrollment Committee on the application. [Emphasis added].

power, to adjudicate Group A Plaintiffs' applications, and review erroneous enrollments of non-San Pasqual individuals. Yet, they refuse to act pursuant to statutory mandates and fulfill their fiduciary duty to Group A and Group B Plaintiffs. [SAC §§24,25].

II

STATEMENT OF FACTS

A. FACTS RELATING TO DUTSCHKE AND MOORE[4]

The facts that are relevant to this response are stated in Plaintiffs' SAC and can be found in the following paragraphs: 22; 23; 52 - 63; 67 - 71; 79 - 81; 87 - 103; 112- 116; 129 - 13.

DUTSCHKE is and has been an employee of the Defendants DOI and BIA since 2000. She served as the acting Pacific Regional Director (Sacramento), Department of Indian Affairs since 2006 and was named Director in 2010. She has been serving as the Office's Deputy Regional Director of Trust Services since June of 2000. Plaintiffs have alleged that it was DUSCHKE [with MOORE's tacit approval] who unilaterally decided to deny the Enrollment Committee's request to correct Modesta Martinez's blood quantum from 3/4 to 4/4 and confirm the enrollment of Jose Juan descendants Group A Plaintiffs. It was DUTCHKE [with MOORE's tacit approval] who unilaterally failed to give Group A Plaintiffs the required statutory notice of actions. It was DUTSCHKE [with MOORE's tacit approval] who unilaterally returned Group A Plaintiffs' applications to the illegal Enrollment Committee without adjudicating their applications in violation of 25 C.F.R. §§ 48.8 and 48.9.

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[4]In the SAC, the name MOORE can be substituted for the word "Superintendent" in order to make clear MOORE's responsibilities.

B. PLAINTIFFS' RESPONSE TO DEFENDANTS' STATEMENT OF FACTS.

Plaintiffs object to Defendants "factual summary" because it is not accurate and is argumentative:

1) Pg 1, ln 12: Defendants' misstate Plaintiffs' APA claims which were brought against all defendants in their official capacity;

2) Pg 1, ln 25: DUTSCHKE, with MOORE's tacit approval, intentionally disregarded statutory mandate to adjudicate Group A Plaintiffs' applications pursuant to 25 C.F.R. 48.5(b) and 48.8, and to give them the statutory notice required in 25 C.F.R. §§48.7, 48.8, and 48.9 of her decision regarding Group A Plaintiffs' ancestor Modesta Martinez Contreras; 3) Pg 3, ln 1-4: In 2005, Group A Plaintiffs submitted their applications for federal recognition to the Constitutionally validly elected Enrollment Committee which unanimously voted that Group A Plaintiffs had sustained their burden of proof establishing they were qualified for enrollment. (SAC ¶52). The Enrollment Committee took its determination to the Tribe's General Council which unanimously agreed with the Enrollment Committee on April 10, 2005. (SAC ¶53). On September 12, 2005 the Tribe's Business Committee wrote to James Fletcher [MOORE's predecessor (SAC ¶23] stating it concurred with the Enrollment Committee and General Council for the enrollment of Group A Plaintiffs. (SAC ¶¶23, 54). **Ten days later**, on September 25, 2005, the Enrollment Committee submitted a letter to Fletcher [MOORE's predecessor] requesting the BIA correct Modesta's blood degree from 3/4 to 4/4 and enroll Group A Plaintiffs;

3) Pg 5, Ln 20, Ft nt No 2: The Defendants conveniently ignore the statutory requirement that DUTSCHKE was required to adjudicate Group A Plaintiffs' applications pursuant to 25 C.F.R. §48.8, and not return them to

the subsequently illegally formed Enrollment Committee. By intentionally ignoring this statutory mandate, DUTSCHKE, with MOORE's acquiescence, denied Group A Plaintiffs their due process right to appeal pursuant to 25 C.F.R. §48.9. By failing to send Group A Plaintiffs the required statutory notice under 25 C.F.R. §48.8 that she denied the Enrollment Committee's request to adjust Modesta's blood quantum from 3/4 to 4/4, she denied them the right to appeal her negative finding regarding Modesta. Defendant MOORE has been aware of this situation since at least May 2016 (SAC 23) and has done nothing to rectify the statutory violations.[5]

4) Pg 4, ln 16 - 18 is factually incorrect. Plaintiffs, in their complaint at Paragraph 23 clearly identify MOORE as the successor to James Fletcher in 2016. Certainly, this has given MOORE more than adequate time to correct the constitutional and statutory violations that have occurred in this case. Furthermore, Group A Plaintiffs specifically pled in paragraph 24 "Each of the Defendants herein is responsible for the acts and/or omissions [or the other Defendants] as herein alleged. Since DUTSCHKE was and is MOORE's supervisor she had a duty and responsibility to assure that her subordinates followed statutory mandates.

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[5]Because Group A Plaintiffs are not federally recognized and enrolled in the San Pasqual Band of Mission Indians they have no standing to seek a remedy in tribal court. DUTSCHKE and MOORE's actions and/or inactions have left Group A Plaintiffs without any remedy except to come into Federal Court.

III

LEGAL STANDARD FOR MOTION TO DISMISS

A. MOTION TO DISMISS PURSUANT TO RULE 12(b)(6)

In evaluating Defendants' Motion to Dismiss, the Court must "treat the complaint's factual allegations as true . . . and must grant plaintiff the benefit of all inferences that can be derived from the facts alleged." *Sparrow v. United Air Lines*, Inc., 216 F.3d 1111, 1113 (D.C.Cir. 2000) (quoting S*chuler v. United States*, 617 F.2d 605, 608 (D.C.Cir.1979); see also *Jerome Steen Pharms., Inc. v. FDA,* 402 F.3d 1249, 1253 (D.C.Cir.2005). This standard governs the Court's considerations of Defendants' contentions under Fed.R.Civ.P.12(b)(6) [and 12(b)(1)].[6] See *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974). ("[I]n passing on a motion to dismiss, whether on the ground of lack of jurisdiction over the subject matter or for failure to state a cause of action, the allegations of the complaint should be construed favorably to the pleader."); *Walker v. Jones*, 733 F.2d 923, 925-26 (D.C.Cir. (1984)(same).

B. MOTION TO DISMISS PURSUANT TO RULE 8(a)

Defendants quote Rule 8(a) which states, in pertinent part: "a short and plain statement of the claim showing the pleader is entitled to relief." Defendants ignore the fact that this is the minimal requirement for pleading. There are no rules that state that a Plaintiff can not give a full factual basis for their claims in their complaint, which avoids motions, for example, for a more definite statement, and other motions to dismiss. This issue was discussed by the Court in *Davis v. Passman*, 442 U.S. 228 (1979) wherein the Court stated: ". . . the authors of the

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[6]A motion brought pursuant to 12(b)(1) requires the Plaintiff to prove that the Court has subject-matter jurisdiction to hear his claims. Defendants' have brought their Motion to Dismiss under 12(b)(6) thereby conceding that this Court has subject matter jurisdiction over their claims.

Federal Rules of Civil procedure eschewed it [i.e. "cause of action"] altogether, requiring only that a compliant contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed.Rule Civ.Pro 8(a)." *Id.* at 238. Clearly, a detailed factual statement such as is contained in Plaintiffs SAC is **not prohibited**. In fact, dismissal of Plaintiffs SAC would run contrary to many of the values underlying the federal rules. See, Arthur Miller, "*From Conley to Twombly to Iqbal: A Double Play on the Federal Rules of Civil Procedure*," Duke Law Journal, Vol 60, No. 1, Oct. 2010.

Plaintiffs responded to Defendants Rule 8(a) Motion to Dismiss Plaintiffs' SAC that has been previously filed and set for hearing on the same day as this motion is set. Plaintiffs discussed at length each of the cases cited by the Defendants stating: "Plaintiffs' complaint is not excessive, verbose, or repetitive." Plaintiffs then analyzed the cases cited by the Defendants: *Cal. Coal. For Families & Children v. San Diego Cnty. Bar Assn.*, 657 Fed.Appx.675, 677-78 (9th Cir. 2016 (unpublished) and *Polk v. Beard*, 692 F. App'x 938 (9th Cir. 2017 (unpublished); *Mc Henry v. Renne,* 84 F.3d 1172 (9th Cir. 1996); *Gottschalk v. City and County of San Francisco*, 964 F.Supp.2d 1147, 1154-55 (N.D. Cal. 2013); *Bank of America v. Knight*, 725 F.3d 815 (2013). [See Exhibit C]. Plaintiffs' hereby incorporate that argument as if fully set forth herein.

In *Jefferson v. Harris*, 170 F.Supp.3d 194 (2016) the Court referred to the fact that it had to arrange the facts as stated in Jefferson's complaint into chronological order "as best as it can –no small feat given the Amended Complaint's Faulknerian sense of time and consistent failure to assign even approximate dates to critical facts." In spite of these defects, the Court did not dismiss Jefferson's complaint. In fact, the court later stated: "Before proceeding to the analysis, the Court notes that to the extent this count names individuals, it

presumes they are being sued in their official capacity, particularly since Plaintiff's *Bivens* action in Count III is asserted against the same individuals and relies on the same legal theory. It will, accordingly, treat Count II as if it were brought only against the agencies and entities themselves." Furthermore, the Court stated: "That he improperly seeks money damages in addition to injunctive relief does not bar his claim." This is true of Plaintiffs' SAC, *assuming arguendo*, they have improperly sought money damages. [Under *Bivens*, Plaintiffs are entitled to seek punitive damages]. This Court should follow the *Jefferson* Court's example and not dismiss any claims that could be interpreted to be improperly seeking money damages. In addition, instead of dismissing Jefferson's complaint, the Court stated: "[T]he remedy mandated by the Due Process Clause . . . is 'an opportunity to refute the charge.'" In the case at bar, the Plaintiffs have been denied any opportunity to refute the erroneous findings made by DUTSHKE and affirmed by MOORE.

C. MOTION TO DISMISS PURSUANT TO RULE 41(b)

Defendants keep insisting that Plaintiffs have violated a court order and move to dismiss their complaint for this violation. Plaintiffs contend that they have not violated this court's order because the facts as pled are necessary in order to support Plaintiffs' claims of civil conspiracy and to show motive for Defendants' intentional actions that have violated Plaintiffs' civil rights.

IV

BASIS FOR DEFENDANTS' MOTION TO DISMISS

Individual Defendants DUTESCHKE and MOORE have brought their Motion to Dismiss Plaintiffs' Second Amended Complaint based on the following legal theories: 1) They have qualified immunity and therefore cannot be sued as individuals under *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388

(1971); 2) Plaintiffs' SAC fails the test for a new *Bivens* Claim; 3) Plaintiffs' Bivens Claims suffer from additional defects; 4) Plaintiffs' SAC fails to state a claim for personal liability under the APA; 5) Plaintiffs' SAC violates Rules 8(a) and 41(b). Defendant's contentions are without merit.

V

NEITHER DUTSCHKE NOR MOORE HAVE QUALIFIED IMMUNITY

The issue of Qualified Immunity has been discussed by the Courts for decades. Defendants cite several cases to support their baseless claim that DUTSHCKE and MOORE are protected by Qualified Immunity: *Mitchell v. Forsyth*, 471 U.S. 511 (1985); *Anderson v. Creighton*, 483 U.S. 635 (1987); *Hunter v. Bryant*, 502 U.S. 224; *Saucier v. Katz*, 533 U.S. 194 (2001); *Pearson et.al. v. Callahan*, 129 S.Ct. 808 (2009); *Acosta v. City of Costa Mesa*, 694 F.3d 960 (9th Cir. 2012). As discussed below, these cases are distinguishable and do not support Defendants' claim that they are entitled to Qualified Immunity. In fact, they support Plaintiffs' claims that Defendants' DUTSCHKE and MOORE are not entitled to qualified immunity.

A. ***Mitchell v. Forsyth*, 471 U.S. 511 (1985)**

In 1970 Attorney General John Mitchell authorized warrantless wiretaps for the purpose of gathering intelligence that was needed for national security. At the time the wiretaps were conducted the law on wireless wiretaps was uncertain. The Court held that Mitchell was entitled to qualified immunity from suit for his authorization of the wiretap notwithstanding his actions violated the Fourth Amendment. "Under *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), petitioner is immune unless his actions violated clearly established law. In 1970, when the wiretap took place, well over a year before *Keith* [*United State v. United States District Court*, 407 U.S. 297 (1972) (*Keith*)] was decided, it was not clearly

established that such a wiretap was unconstitutional." *Mitchell, supra* at 530-535.

Meanwhile, the Court in *Harlow v.Fitzgerald*, 457 U.S. 800 (1982) purged the qualified immunity doctrine of its subjective components and held that "government officials performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."[7] Applying this standard to the case at bar it is clear that neither DUTSCHKE nor MOORE are entitled to absolute or qualified immunity. The facts of this case, as pled in Plaintiffs' SAC, clearly show the following: 1) DUTSCHKE and MOORE's actions violated "clearly established statutory or constitutional rights of which a reasonable person would have known." Plaintiffs' statutory claims are based on 25 C.F.R. §48 [Exhibit A]; the San Pasqual Constitution [Exhibit B], and the Due Process Clause of the United States Constitution. 2) The act was not discretionary, but was mandated by 25 CFR §§48.7, 48.8, and 48.9 as pled throughout Plaintiffs SAC. Therefore, pursuant to *Harlow* and *Mitchell,* DUTSCHKE and MOORE are not entitled to have Plaintiffs SAC dismissed based on qualified immunity. In the case at bar, the legal norms violated by the Defendants were clearly established at the time of the challenged action.

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[7]The Court concluded that the Attorney General is not absolutely immune from suit for damages arising out of his "allegedly unconstitutional conduct in performing his national security functions." Only judges, prosecutors, witnesses, and officials performing "quasijudicial" functions have absolute immunity similar to that afforded the president.

B. *Anderson v. Creighton*, 483 U.S. 635 (1987)

The Court in *Anderson* citing *Harlow v. Fitzgerald*, 457 U.S.800 stated: "Whether an official protected by qualified immunity may be held personally liable for an allegedly unlawful official action generally turns on the 'objective legal reasonableness' of the action, assessed in light of the legal rules that were "clearly established" at the time the action was taken. *Id.* In order to conclude that the right which the official allegedly violated is "clearly established," the contours of the rights must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. *Anderson* at 636. Qualified immunity only protects reasonable official actions. The actions taken by DUTSHKE and MOORE violated "clearly established" statutory and constitutional rules. Therefore, their actions were not reasonable official actions as pled in Plaintiffs' SAC.

Again citing *Harlow*, the *Anderson* Court stated: "When government officials abuse their offices, "action[s] for damages may offer the only realistic avenue for vindication of constitutional guarantees" *Harlow* at 814. "Our cases have accommodated these conflicting concerns by generally providing government officials performing **discretionary** functions with a qualified immunity, shielding them from civil damages liability as long as their actions could reasonably have been thought consistent with the rights they are alleged to have violated. See, e.g., *Malaley v. Briggs*, 475 U.S. 335, 341 (1986) (qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law"). *Id.* at 475 U.S. 344-345. Take your pick, Defendants were either plainly incompetent or knowingly violated the mandates of 25 CFR §§48.7, 48.8, 48.9, the Due Process clause contained in the U.S. Constitution, and the San Pasqual Constitution.

"The right to due process of law is quite clearly established by the Due process Clause, and thus there is a sense in which any action that violates that Clause (no mater how unclear it may be that the particular action is a violation) violates clearly established rights. Much the same could be said of any other constitutional or statutory violation. *Anderson* at 640. The law is clearly on Plaintiffs' side: Neither DUTSCHKE nor MOORE are entitled to qualified immunity. The unlawfulness of the Defendants' actions as pled in Plaintiffs' SAC is clearly apparent in this case. See *Malley, supra*, at 475 U.S. 344-345; *Mitchell, supra* at 472 U.S. 528; *Davis, supra*, at 468 U.S. 191, 195.

C. *Hunter v. Bryant*, 502 U.S. 224 (1991)

In *Hunter* the Court held that the officers were entitled to qualified immunity because a "reasonable officer could have believed the arrest to be lawful in light of clearly established law and the information the agents possessed. . . . because their decision was reasonable." *Id.* Neither DUTSCHKE's nor MOORE's decisions as pled in plaintiffs' SAC were reasonable.

D. *Saucier v. Katz*, 533 U.S. 194 (2001)

Saucier v. Katz is another criminal case cited by the Defendants for the proposition that they are entitled to qualified immunity. These cases are not instructive for the issues in the case at bar for numerous reasons: 1) they are criminal cases dealing with warrentless searches and seizures; 2) they are criminal cases dealing with excessive force issues; 3) They deal with Fourth Amendment rights and not Fifth Amendment rights; and 4) the "two part" qualified immunity inquiry designed by the Ninth Circuit does not fit the facts of this case because 25 C.F.R. §§48.7,48.8, and 48.9 contain a clear statutory and constitutional mandate requiring Defendants DUTSCHKE and MOORE to do specific acts which they did not do and have not done.

E. *Pearson et.al. v. Callahan*, 129 S.Ct. 808 (2009)

Pearson is another search and seizure case. Here the Court applied the *Saucier* procedure; a two-step sequence for resolving government official's qualified immunity claims: "A court must decide (1) whether the facts alleged or shown by the plaintiff make out a violation of a constitutional right, and (2) if so, whether that right was "clearly established' at the time of the defendants' alleged misconduct. Qualified immunity applies unless the official's conduct violated such a rights." [*Saucier v. Katz*, 533 U.S. 194 (2001); *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)]. Both DUTSCHKE's and MOORE's conduct violated Plaintiffs statutory and constitutional rights which were clearly established at the time. Even more telling is the fact that the Defendants have failed to state any relevant facts showing that their actions did not and do not violate clearly established law.

The *Pearson* Court stated: "When qualified immunity is asserted at the pleading stage, the answer to whether there was a violation may depend on a kaleidoscope of facts not yet fully developed." *Id.* This Court should deny Defendants' motion to dismiss so that Plaintiffs can conduct their discovery in order to develop other unknown facts.

F. *Acosta v. City of Costa Mesa*, 694 F.3d 960 (9th Cir. 2012)

The Ninth Circuit in *Acosta* found that Acosta had alternative adequate remedies that were readily available to him under both California Civil procedure Code Section 1085 and the Ralph Brown Act, Government Code Section 54960. The Plaintiffs in the case at bar do not have any alternative adequate remedies available to them except to bring their claims to this Court.

VI

BIVENS ACTION

***Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971)**

A THE COURTS HAVE ALREADY EXPANDED BIVENS CLAIMS TO VIOLATION OF CONSTITUTIONAL GUARANTEES OF DUE PROCESS OF LAW UNDER THE FIFTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

The U.S. Supreme Court in *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971) held that violation of the command stated in the Fourth Amendment[8] by a federal agent acting under color of his authority gives rise to a cause of action for damages consequent upon his unconstitutional conduct. The Fourth Amendment guarantees to citizens of the United States the absolute right to be free from unreasonable and unlawful actions carried out by virtue of federal authority. "[W]here federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief." *Bivens* at 393 citing *Bell v. Hood*, 327 U.S. at 327, 684; *Bemis Bros. Bag Co. v. United States*, 289 U.S. 28, 36 (1933); *The Western Maid*, 257 U.S. 419, 433 (1922). "Historically, damages have been regarded as the ordinary remedy for an invasion of personal interests in liberty." *Bivens* at 396 citing *Nixon v. Condon*, 286 U.S. 73 (1932).

Because there is no explicit congressional declaration that persons injured by a federal officer's violation of the Fourth Amendment may not recover money damages from the agents, but instead be remitted to another remedy, the *Bevins* Court stated that if an injured party can demonstrate an injury "consequent upon the violation by federal agents of his Fourth Amendment rights, he is entitled to redress his injury through the federal court" because, as stated by Judge Waterman, "I am of the opinion that **federal courts do have the power to award damages for violation of "constitutionally protected interests**, . . .and I agree

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[8]"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . ."

with the Court that a traditional judicial remedy such as damages is appropriate to the vindication of the personal interests protected by the Fourth Amendment." *Bevins* at 400. [Emphasis added].

Analogous to the interest which Bivens claimed, Plaintiffs' claims involve personal interests that are protected by the Fifth Amendment: to be free from official conduct in contravention of the Fifth Amendment is clearly a federally protected interest. "In suits for damages based on violations of federal statutes lacking any express authorization of a damage remedy, the Supreme Court has authorized relief where, in its view, damages are necessary to effectuate the congressional policy underpinning the substantive provisions of the statute." *Bivens* at 403 (citations omitted). Subsequently, the Supreme Court expanded *Bivens* to include claims based directly on the Due Process Clause of the Fifth Amendment. See, *Davis v. Passman*, 442 U.S. 228 (1979). In *Davis v. Passman*, the Court concluded that a cause of action and a damages remedy can be implied directly under the Constitution when the Due Process Clause of the Fifth Amendment is violated. *Id.* at 231. Furthermore, in this case, there is no "explicit congressional declaration" against Plaintiffs' recovering damages based on their Fifth Amendment constitutional claims.[9] In numerous decisions the Supreme

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[9]Five Courts of Appeals have implied causes of action directly under the Fifth Amendment. See, *Apton v. Wilson,* 165 U.S.App.D.C. 22, 506 F.3d 83 (1974); *Sullivan v. Murphy*. 156 U.S.App.D.C.28, 468 F.2d 938 (1973); *United States e rel. Moore v. Koelzer*, 457 F.2d 892 (3rd Cir. 1972); *Loe v. Armistead,* 582 F.2d 1291 (4th Cir. 1978) *cert. Pending sub nom. Moffit v. Loe*, No. 78-1260; *States Marine Lines Inc. v. Shultz*, 498 F.2d 1146 (4th Cir. 1974); *Green v.*

Court "has held that the Due Process Clause of the Fifth Amendment forbids the Federal Government to deny equal protection of laws.[10] See, *Bell v. Hood*, 327 U.S. 678, 684 (1946), *Bolling v. Sharpe*, 347 U.S. 497 (1954). DUTSCHKE denied Plaintiffs equal protection of the law when she adjudicated Plaintiffs' cousins' applications and granted them federal recognition, but returned Plaintiffs' applications to the illegally formed enrollment committee in violation of Plaintiffs' statutory rights, constitutional rights under the San Pasqual Constitution, and due process rights. MOORE, by failing to correct this intentional violation of

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Carlson, 581 F.2d 669 (7th Cir. 1978) *cert.pending*, No. 78-1261; *Jacobson v. Tahoe Regional Planning Agency*, 566 F.2d 1353 (9th Cir. 1977), *reversed in part and affirmed in part on other grounds sub nom. Lake Country Estates Inc. v. Tahoe Regional Planning Agency,* 440 U.S. 391 (1979); *Bennett v. Campbell*, 564 F.2d 329 (9th Cir. 1977) [Cited by the Court in *Davis v. Passman*, 442 U.S. 228, ftnt 22]. In *Carlson v. Green*, 446 U.S. 14 (1980) the Supreme Court held that a *Bivens* remedy was available to respondent's Eighth Amendment claims even though the allegations could have also supported a suit against the United States under the Federal Tort Claims Act (FTCA). [See, *Carlson v. Green*, 446 U.S. 18-23.

[10]The Fifth Amendment provides that "[n]o person shall be . . . deprived of life, liberty, or property, without due process of law . . ." *Passman* at 235 (citations omitted).

Plaintiffs Fifth Amendment Rights, tactically approved DUTSCHKE's unconstitutional actions, when brought to his attention in May 2006.

The Court in *Davis v. Passman*, 442 U.S. 228, 245 (1979) held that a *Bivens* remedy could also be inferred from the Due Process Clause of the Fifth Amendment. *Davis* also established two conditions wherein a Plaintiff's *Bivens* claim could be defeated: First, when defendants demonstrate "special factors counseling hesitation in the absence of affirmative action by congress." [citations omitted]; "the second is when defendants show that Congress has provided an alternative remedy which it explicitly declared to be a substitute for recovery directly under the Constitution and viewed as equally effective [citations omitted]. *Id.* at 245-247. It is clear that neither situation is present in the case at bar. Furthermore, when Congress amended the FTCA[11] in 1974 to create a cause of action against the United States for intentional torts committed by federal law enforcement officers, [28 U.S.C. 2680(h)] the congressional comments accompanying that amendment made it crystal clear that Congress views FTCA and *Biven* as parallel, complementary causes of action. *Carlson* at 20.

This Court derives its power directly from the Constitution to enjoin invasion of constitutionally protected interests. "[A] court of law vested with jurisdiction over the subject matter of a suit has the power –and therefore the duty – to make principled choices among traditional judicial remedies." *Bevins*, ftnt 2/8 at 412. The Court in *Butz v. Economou*, 438 U.S. 478, 504 (1978) stated: "Our system of jurisprudence rests on the assumption that all individuals, whatever their position in government, are subject to federal law." The Defendants in this case have treated Plaintiffs in such a manner that they hold themselves out to be immune from federal law. They have clearly abused their position in the

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[11]The FTCA provides for a waiver of sovereign immunity.

government. "No man in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All officers of the government, from the highest to the lowest, are creatures of the law, and are bound to obey it." *United States v. Lee*, 106 U.S. 196, 220 (1882). This Court has the jurisdiction and the power to bind the Defendants in this case to the letter of the law.

The Defendants cited *Correctional Services Corporation v. Malesko*, 534 U.S. 61 (2001) in support of their motion to dismiss. *Malesko* is simply not applicable in this case because Plaintiffs are not seeking to extend a *Bivens* action. The Respondent Malesko was seeking to extend *Bivens* to a corporation acting as a private individual. The Court stated: "[A] *Bivens* action may only be maintained against an individual, and was not available against a corporate entity" that did not engage in federal action. As stated above, the Courts have already recognized a *Bevins* action for Fifth Amendment violations by government actors.

B PLAINTIFFS' BIVENS CLAIM IS PROPERLY BEFORE THIS COURT AND DOES NOT SUFFER FROM DEFECTS AS ALLEGED BY DEFENDANTS

The Court in *Jefferson v. Harris*, 170 F.Supp.3d 194 (2016) sustained Jefferson's due process claim against his employer, the federal government, but dismissed his Third Count of action which was a *Bivens* action against individuals because the Court found that there was a comprehensive remedial scheme that existed which was Jefferson's exclusive remedy. There are no such comprehensive remedial schemes available to Plaintiffs in this case. Therefore, *Jefferson* is not applicable to the case at bar.

In *Wilkie v. Robbins*, 551 U.S.537 (2007), Robbins claimed that the Defendants violated his Fourth and Fifth Amendment rights when the United

States tried to force him to give the government an easement over his land. The Court declined to extend *Bivens* to these set of facts because Robbins had alternative, existing processes for protecting his interest. The Supreme Court after *Ex parte Young*, 209 U.S. 123 (1908), repeatedly recognized a comparable power on the part of federal district courts to enjoin federal executive officers from unconstitutional actions despite the absence of a statute specifically authorizing such relief. See, e.g., *Stark v. Wickard*, 321 U.S.288, 290 (1944); *Shields v. Utah Idaho Cent. R.R.Co.*, 305 U.S. 177, 183-84 (1938).

In conclusion, although the Supreme Court has never squarely suggested that *Bivens* remedies are constitutionally compelled, it has also never held that they are not. The Supreme Court has never declined to recognize a *Bivens* remedy in a case where, as in the case at bar, the absence of such relief left the plaintiff with no legal remedy whatsoever.

VII

DEFENDANTS HAVE MISINTERPRETED PLAINTIFFS CLAIMS UNDER THE APA

Plaintiffs have, in detail, responded to Defendant's arguments in support of their previous Motion to Dismiss Plaintiffs' SAC which is calendared for the same date and time as this motion. Defendants state that Plaintiffs can not bring a private cause of action against Defendants DUTSCHKE and MOORE under the APA. Plaintiffs' SAC does not allege a private cause of action against DUTSCHKE and/or MOORE as individuals. Plaintiffs have sought judicial review pursuant to the specific provisions of 25 C.F.R.§48, the United States Constitution, *Bivens*, and the San Pasqual Constitution each giving this Court specific authorization from the substantive statute, in addition to the general

review provisions of the Administrative Procedures Act [APA]. Section 702[12] of the APA "waives sovereign immunity for actions against federal government agencies, seeking non-monetary relief,[13] if the agency conduct is otherwise subject to judicial review." *Sheeran v. Army & Air Force Exch. Serv.*, 619 F.2d 1132, 1139 (5th Cir. 1980), rev'd on other grounds, 456 U.S. 728 (1982) see also

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[12]Section 702 contains two separate requirements for establishing a waiver of sovereign immunity. *Lujan v. Nat'l Wildlife Fed*, 497 U.S. 871 (1990). First, plaintiff must identify some "agency action" affecting him in a specific way, which is the basis for his entitlement for judicial review, id., This "agency action" for the purposes of 702 is set forth by 5 U.S.C. 551(13) and is defined as "the whole or part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act." 5 U.S.C. 551(13). Second, the plaintiff must show that he has "suffered legal wrong because of the challenged agency action or is adversely affected or aggrieved by that action within the meaning of a relevant statute." *Lujan*, 497 U.S. at 883. These requirements apply to any waiver of sovereign immunity pursuant to 702. Plaintiffs have satisfied these pleading requirements in their SAC.

[13]The Prayer in Plaintiffs' SAC specifically states: "damages as allowed by law." [See: Pgs 96:16; 97:14; 98:7; 99:3,22;100:3,21.].

Armendariz-Mata v. U.S. Dep't of Justice, 52 F.3d 679, 682 (5th Cir. 1996). "Congress intended to broaden the avenues for judicial review of agency action by eliminating the defense of sovereign immunity in cases covered by 702 . . ." [5 USC 702]. [See, *Jaffee v. United States*, 592 F.2d 718-719 (3rd Cir.), *cert. denied*, 443 U.S. 961 (1979) for illumination of 702' s legislative history. These standards were discussed in the cases cited by Defendants: *Hughes v. United States*, 953 F.2d 531 (9th Cir. 1992) [a tax case] wherein the Court found that the Secretary of State failed to properly delegate his authority and the Anti-Injunction Act , 26 USC 7421, was a bar to waiver of sovereign immunity under 5 USC 702].

Section 702 also waives immunity for claims where a person is "adversely affected or aggrieved by agency action within the meaning of a relevant statute." 5 USC 702. This type of waiver applies when judicial review is sought pursuant to a statutory or non-statutory cause of action that arises completely apart from the general provisions of the APA. *Sheehan v. Army and Air Force Exchange Service*, 619 F.2d 1132, 1139 (5th Cir.1980). **There is no requirement of 'finality' for this type of waiver to apply.** [The requirement of "finality" comes from 704 and has been read into 702 in cases where review is sought pursuant only to the general provisions of the APA. *Sierra Club v. Peterson*, 228 F.3d 559, 565 (5th Cir. 2000); *Amer. Airlines, Inc. v. Herman*, 176 F.3d 283, 287 (5th Cir. 1999).]. Pursuant to this case law, this Court has jurisdiction to adjudicate Plaintiffs' claims based on statutory violations and the APA.

In the APA, Congress granted a private right of action to enforce federal rights against federal agencies. [5 U.S.C. §702] ("a person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial relief thereof."). The APA grants a general waiver of sovereign immunity. Because 5 U.S.C. 702 creates

the right of action expressly, there is no need to look for an implied right of action against the federal government. The APA, then waives the federal government's sovereign immunity over suits "seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under of legal authority," unless another statute "that grants consent to suit expressly or impliedly forbid the relief which is sought."

Plaintiffs have alleged that the agency's findings of fact are arbitrary or capricious, and the agency used improper procedures in its decision making. The Agency's erroneous findings of fact have resulted in an incorrect conclusion of law which triggers review under the APA.

Section 704 limits judicial review to final agency action. But, there is a test for "final agency action". In *Bennett v. Spear*, 520 U.S. 154(1997) the court held that finality required satisfaction of elements: (1) "the action must mark the 'consummation of the agency's decision-making process – it must not be of a merely tentative or interlocutory nature," and (2) "the action must be one by which 'rights or obligations have been determined,' or from which 'legal consequences will flow." *Id.* at 178. In this case the first element is satisfied because the agency offered its "last word" on the subject.[14] [¶¶56, 58, 59, 60] *Army Corps of Engineers v. Hawkes Co.*, 136 S. Ct.1807, 1813, 1814 (2016). The Court in *Massachusetts v. Environmental Protection Agency*, 549 U.S. 497 (2007) suggested that the presumption could be overcome if it were shown that the

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[14]April 7, 2006 letter issued under 25 C.F.R. §48.10, stated it was "Final for the Department. Per the SAC this was never served on Plaintiffs and only discovered through a FOIA. The 'Final for the Department" language was confirmed by MOORE'S letter dated July 24, 2015 [Exhibit D]

agency "has 'consciously and expressly adopted a general policy' that is so extreme as to amount to an abdication of its statutory responsibilities." *Heckler v. Chaney*, 470 U.S. 821, 823-35, 833 n.4 (1985). Where no administrative hearings are permitted, the order becomes final. *Sackett v. Environmental Protection Agency*, 132 S.Ct. 1367, 1372 (2012). Plaintiffs' factual statement alleges that as to the issue regarding Modesta (Martinez) Contreras, the decision was final. [See SAC ¶¶ 56, 58, 59, 60, 68].

Final agency action can include, as 5 U.S.C. 551(13) provides, agency inaction which is the failure to make an agency rule, order, license, sanction, relief,or the equivalent or denial thereof, or failure to act. Plaintiffs have pled these allegations in their SAC at ¶¶62, 70, 93, 94, 95, 99, 101. Title 5 U.S.C. 706(1) requires a reviewing court to compel agency action that is "unlawfully withheld or unreasonably delayed." In *Northern v. Southern Utah Wilderness Alliance*, 542 U.S. 55 (2004), the Court held that an APA inaction claim must challenge an agency's failure to take a legally required and discrete action. Plaintiffs are clearly suing all Defendants in their official capacity under the provisions of the APA.

VIII

LEAVE TO AMEND

Pursuant to the cases cited in this response and Plaintiffs' previous response and above, Plaintiffs request this Court grant them leave to amend their SAC in lieu of dismissing their SAC. There is precedent for granting leave to amend. See, *Penalber-Fosa v. Fortno-Burset*, 631 F.3d 592 (2011). (The plaintiff's factual allegations are ordinarily assumed to be true in passing on the adequacy of the complaint, which need not plead evidence). See, e.g. *Sepulveda-Villarinni v. Dep't Educ*. 628 F.3d 25, 30 (1st Cir. 2010); *Sandler v. E. Airlines, Inc.*, 649 F.2d 19, 20 (1st Cir. 1981) (per curiam). The Court in *Penalber-Fosa* granted leave to amend

even though the allegations had bald assertions, unsupportable conclusions, and speculation. The Court held that the interest of justice "warrants leave to amend complaint against "John Doe" Defendants. . ." See, *Rivera-Gomez v. De Castro,* 843 F.2d 631 (1st Cir. 1988). See also, *Ardalan v. McHugh,* 13-cv-01138-LHK N.D. CA 2013. (Leave to amend was granted).

VIII

CONCLUSION

This Court should deny Defendants' Motion to Dismiss or, in the alternative grant Plaintiffs leave to amend their SAC in lieu of dismissing their SAC. There is precedent for granting leave to amend. See, *Penalber-Fosa v. Fortno-Burset*, 631 Ff.3d 592 (2011); e.g. *Sepulveda-Villarinni v. Dep't Educ*. 628 F.3d 25, 30 (1st Cir. 2010); *Sandler v. E. Airlines, Inc.*, 649 F.2d 19, 20 (1st Cir. 1981 (per curiam).

DATED: December 2, 2017

Respectfully submitted,

/s/ Alexandra R. McIntosh
Alexandra McIntosh

/s/ Carolyn Chapman
Carolyn Chapman